

## ARTICLES

# The CISG Convention and Thomas Franck's Theory of Legitimacy

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### I. INTRODUCTION

Much recent discourse in the international arena has focused on globalization and interdependence.<sup>1</sup> One international legal instrument that could facilitate the internationalization of markets would be the United Nations Convention on Contracts for the International Sale of Goods,<sup>2</sup> often

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<sup>1</sup> See, e.g., Jerome I. Levinson, *The International Financial System: A Flawed Architecture*, 23 FLETCHER F. WORLD AFF. 1 (1999); Saskia Sassen, *Global Financial Centers*, FOREIGN AFF., Jan./Feb. 1999, at 75; James Gustave Speth, *A New Deal: Development Assistance in a Global Economy*, HARV. INT'L REV., Winter 1998/1999, at 48; Ethan B. Kapstein, *A Global Third Way: Social Justice and the World Economy*, WORLD POL'Y J., Winter 1998/1999, at 23.

<sup>2</sup> Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Official Records, Annex 1, at 178-90, U.N. Doc. A/CONF.97/18 (1980); 1489 U.N.T.S. 3; *English version also printed at* 52 Fed. Reg. 6262, 6264 (1987) and 19 I.L.M.

called the "CISG Convention." Initially signed in 1980 as the culmination of proceedings involving representatives from 62 countries,<sup>3</sup> the CISG Convention originally entered into force in 1988, when it had accumulated the first ten national ratifications<sup>4</sup> required by its terms.<sup>5</sup> At the present time, at least 51 countries have become adherent states, or "Contracting Parties," under the Convention.<sup>6</sup>

The CISG Convention is designed to serve as a sort of global statutory code for sales of goods, when the sales take place between parties located in different countries. As such, the Convention was intended to replace the domestic law of sales in each ratifying jurisdiction, insofar as international transactions are concerned. Readers in the United States can visualize the Convention as a rough counterpart to UCC Article 2, the Article of the Uniform Commercial Code dealing with sales of goods, except that the CISG only applies to transactions that satisfy its criteria of internationality<sup>7</sup> and has a different structure and vocabulary.

Within the United States, the Convention's effect is thus to replace UCC Article 2 for the international transactions to which the Convention applies.<sup>8</sup> Article 2 generally remains in effect for purely domestic transactions, and for transactions with foreign counterparties located in countries not parties to the CISG, when United States domestic law governs these transactions. Accordingly, within the United States there are now two distinct regimes of sales law: Article 2 and the CISG.<sup>9</sup>

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668 (1980); *U.S. text codified at* 15 U.S.C.A. App. at 52 (West Supp. 1997) [hereinafter CISG].

<sup>3</sup> See JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 54 (2d ed. 1991) [hereinafter HONNOLD TREATISE].

<sup>4</sup> See JOHN O. HONNOLD, *DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES* 1, n.1 (1989) [hereinafter DOCUMENTARY HISTORY]. The ninth, tenth and eleventh states to deposit instruments of ratification or accession were Italy, China and the United States. Peter Winship, *Congress and the 1980 International Sales Convention*, 16 GA. J. INT'L & COMP. L. 707, 708 (1986).

<sup>5</sup> CISG art. 99(1).

<sup>6</sup> See CENTER FOR COMPARATIVE AND FOREIGN LAW STUDIES, *UNILEX: INTERNATIONAL CASE LAW & BIBLIOGRAPHY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* ¶ B.1 (1997) [hereinafter UNILEX]. See also, United Nations Treaty Collection (visited Feb. 23, 1999) <<http://www.un.org/Depts/Treaty/>>.

<sup>7</sup> Under the CISG as formally executed in 1980, there are two distinct ways in which the CISG can apply to a transaction: (a) if the parties have places of business in different states, and the states are Contracting States under the Convention, or (b) if the parties have places of business in different states, and conflicts-of-laws rules lead to the application of the law of a Contracting State. CISG art. 1(1). Certain states have excluded the second possibility by express reservation, including the United States. See *infra* note 92, and accompanying text.

<sup>8</sup> See, e.g., HENRY GABRIEL, *PRACTITIONER'S GUIDE TO THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) AND THE UNIFORM COMMERCIAL CODE* 4 (1994) ("The Convention preempts the Uniform Commercial Code.") [hereinafter GABRIEL].

<sup>9</sup> See JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN THE USA* 1 (1995).

The primary goal of the Convention was the unification of international sales law.<sup>10</sup> The general goal of unification has been seen to enhance certainty in international transactions, facilitate the continuing growth of international trade with developing countries, help to adjust for differing bargaining power among commercial actors, and advance a variety of other worthy aims.<sup>11</sup>

It is still, however, uncertain as to whether the CISG Convention will be successful in attaining its goals. To be sure, there are commentators who have reveled in the number of its current signatories and its asserted uniqueness as indicia of its perceived success.<sup>12</sup> However, there are also indications that the Convention may not be headed for the desired degree of acceptance and accomplishment. Commentary is far from uniformly positive on the Convention's present text.<sup>13</sup>

Furthermore, although as noted above, the Convention at present has 51 states as Contracting Parties, several of the world's most significant trading countries appear to evince skepticism and remain non-parties. Examples here would include the United Kingdom<sup>14</sup>, Japan,<sup>15</sup> and all of the OPEC member countries except Iraq.<sup>16</sup>

Most significantly, within individual countries there are indications that the CISG Convention may not be gaining the acceptance of commercial

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<sup>10</sup> See C.M. BIANCA & M.J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 3 (1987) [hereinafter BIANCA & BONELL].

<sup>11</sup> See *id.*

<sup>12</sup> See, e.g., Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT'L L., 1, 3, 6-9 (1996); Kevin Bell, *The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods*, 8 PACE INT'L L. REV. 237, 238, 257-58 (1996).

<sup>13</sup> Among those expressing doubts have been: Richard E. Speidel, *Revision of UCC Article 2 in Light of the United Nations Convention on Contracts for the International Sale of Goods*, 16 NW. J. INT'L L. & BUS. 165 (1995) (suggesting that the CISG should generally *not* be a model for the revision of Article 2); Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L. J. 265 (1984) (arguing against ratification of the CISG prior to the vote by the U.S. Senate); and John E. Murray, Jr., *The Neglect of CISG: A Workable Solution*, 17 J.L. & COM. 365 (1998) (suggesting, *inter alia*, that a safe course for practitioners may be to avoid application of the CISG).

<sup>14</sup> For one scholar's explication of the United Kingdom's failure to accept the Convention, see Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*, 26 BAL. L. REV. 51 (1997).

<sup>15</sup> Indeed, although China is a party to the Convention, see UNILEX ¶ B.1, as well as Singapore, the other states of Southeast Asia known for international commercial activity and influence are all non-parties, including the Republic of Korea, Thailand, Indonesia, and Malaysia. See *id.*

<sup>16</sup> See, e.g., THE STATESMAN'S YEARBOOK 62-63 (Brian Hunter ed., 1997-98) (listing the eleven current OPEC-member states: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates and Venezuela); see also UNILEX, *supra* note 6, ¶ B.1.

actors themselves. One of the most critical features of the Convention is the opportunity it provides to parties entering into sales contracts to “opt out” of the Convention by agreement.<sup>17</sup> This opt-out capability provides commercial actors, of course, with the option of avoiding the Convention’s terms if they would rather be subject to otherwise applicable domestic law. Accordingly, the potential for the subversion of the Convention’s purposes would emerge, at least to some extent, should large numbers of commercial actors, either internationally or in particular countries opt out of the Convention.

With the Convention having entered into force slightly over eleven years ago, it may be too early to determine whether commercial actors around the world, as a general practice, will accept its application or not. However, there do seem to be clear trends developing in some respects. In particular, the rates of application of the Convention in the courts and tribunals of record have varied widely from one country to the next. For example, in Germany there have been over 150 recorded cases involving the CISG since its entry into force,<sup>18</sup> but in most countries party to the Convention the number is much lower.<sup>19</sup> In the United States, of all the cases decided in both federal and state courts since the Convention’s entry into force, only six opinions have contained serious substantive discussion of the CISG,<sup>20</sup> and only one of those cases (accounting for two of the opinions, one at the trial level and the other at the appellate level) reached a decision on the merits based on the terms of the Convention.<sup>21</sup>

Even taking into account the possibility that the number of reported cases in a jurisdiction may not be a complete indicator of the extent to which the Convention is being applied there, discrepancies such as this

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<sup>17</sup> CISG art. 6 (“The parties may exclude the application of this Convention or, . . . derogate from or vary the effect of any of its provisions.”).

<sup>18</sup> See MICHAEL R. WILL, *CISG – THE FIRST 444 OR SO DECISIONS 1988-1997* 13 (6th ed. 1998).

<sup>19</sup> See *id.*

<sup>20</sup> See *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino S.p.A.*, 144 F.3d 1384 (11th Cir. 1998); *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994), *aff’d in part and rev’d in part*, 71 F.3d 1024 (2d Cir. 1995); *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv. AB*, 23 F. Supp. 2d 915 (N.D. Ill. 1998); *Claudia v. Olivieri Footwear Ltd.*, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998); *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992). The *Filanto* district court decision was appealed, but the appellate opinion was decided on other grounds and made no reference to the CISG. See *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 984 F.2d 58 (2d Cir. 1993). For additional comment on these cases, as well as some others, see *infra* note 266.

<sup>21</sup> See *Delchi Carrier S.p.A. v. Rotorex Corp.*, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994), *aff’d in part and rev’d in part*, 71 F.3d 1024 (2d Cir. 1995). For critical commentary that considers the district court’s application of the Convention to be “cursory” see Joanne M. Darkey, *A U.S. Court’s Interpretation of Damage Provisions under the UN Convention on Contracts for the International Sale of Goods: A Preliminary Step towards an International Jurisprudence of CISG or a Missed Opportunity*, 15 J. L. & COM. 139, 151 (1995).

seem potentially significant. Especially in the United States, which is a significant importer and exporter of goods,<sup>22</sup> one might well expect that after eleven years of effectiveness, more than one court in all of the states and throughout the entire federal system might have applied the substantive terms of the Convention.

Of course, it is possible in such cases that the commercial parties and the courts are simply unaware of the Convention's existence. However, with every passing month this explanation seems less plausible. The CISG Convention is one of the most talked-about, and written-about, aspects of international commercial law.<sup>23</sup> The possibility thus arises that as time progresses, it may become evident that significant numbers of commercial actors and significant numbers of courts and other adjudicatory bodies are simply *choosing* not to apply the Convention. In such event, the question as to why there should be such a reluctance to adopt the Convention will present itself.

This Article finds helpful perspective on this question in the work of international legal scholar Thomas Franck. Specifically, guidance is drawn from the theory of international legitimacy developed in Professor Franck's 1990 book, *The Power of Legitimacy Among Nations*,<sup>24</sup> and in his earlier Article, *Legitimacy in the International System*.<sup>25</sup> Under Franck's theory of legitimacy, each rule of international law exerts a greater or lesser "pull to compliance" to the extent the rule is characterized by greater or lesser legitimacy. Legitimacy itself is analyzed in terms of four factors: determinacy, symbolic validation, coherence and adherence.

This theory of legitimacy applies not only for states in the international community, but also for other international actors. This Article asserts that one reason the CISG may not experience more complete success is that the

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<sup>22</sup> According to currently available data for 1997, United States persons exported goods and services valued at over U.S. \$931 billion, and imported goods and services valued at over U.S. \$1,045 billion. See U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS D-51 78 (April 1998). Similarly, in 1997, the United States' share of world exports of goods and services was 13.7%. See INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK 133, Table A (May 1998). Furthermore, according to the World Trade Organization, total United States exports for 1997 amounted to \$688.9 billion (f.o.b.), and total United States imports for that year amounted to \$899.2 billion (c.i.f.). World Trade Organization, *World Trade Growth Accelerated in 1997, Despite Turmoil in Some Asian Financial Markets*, appendices 1 & 2 (March 19, 1998) (last visited Feb. 23, 1999) <<http://www.wto.org/wto/intltrad/internat.htm>>. These totals represented 12.6% and 16.2% of world exports and imports, respectively. *Id.*

<sup>23</sup> The CISG Convention has generated voluminous quantities of commentary and other secondary materials. One helpful catalog of the available information is Claire M. Germain, *CISG: Guide to Research and Literature*, 24 INT'L J. LEG. INF. 48 (1996).

<sup>24</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990) [hereinafter FRANCK].

<sup>25</sup> Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) [hereinafter FRANCK AJIL].

Convention is, in the sense of Professor Franck's theory, substantially illegitimate.

In so doing, this Article compares the CISG Convention with certain other international laws and rules governing other types of business transactions.<sup>26</sup> It will show that every one of these other laws and rules has been more successful than the CISG. This Article then illustrates that these laws and rules have significantly more legitimacy, in Professor Franck's sense, than the CISG. While it cannot at this stage be proven that the greater legitimacy of these international legal rules is the cause of their greater success, the inference is sufficiently strong to warrant serious interest.

Accordingly, the Article concludes that, in order for the CISG Convention to achieve its maximum range of success, certain adjustments in the manner in which it will be enforced and applied may be appropriate to increase international legitimacy.

## II. REVIEW OF MAJOR POINTS REGARDING THE CISG CONVENTION

This Article now reviews certain major points regarding the CISG Convention. The intent is not to provide a comprehensive overview of the Convention in general.<sup>27</sup> Instead, the intent of the following review is to familiarize the reader with certain basic elements of the Convention, emphasizing pertinent aspects that will be instrumental to the analysis in the later portions of the Article.

### A. Precursors to the CISG Convention

The current CISG Convention is the product of a series of earlier efforts. In 1929, at the suggestion of the German legal scholar Ernst Rabel, the International Institute for the Unification of Private Law (UNIDROIT) began preparatory work to develop a uniform law on international sales.<sup>28</sup> The UNIDROIT effort enlisted a prominent group of European scholars to prepare a series of preliminary drafts, several of which were (after a suspension of work during World War II) completed in 1956, 1963 and 1958.<sup>29</sup>

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<sup>26</sup> See INTERNATIONAL CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (International Chamber of Commerce Pub. No. 500, 1993); *International Convention for the Unification of Certain Rules Relating to Bills of Lading*, 2 BEVANS 430, 120 L.N.T.S. 155 (Aug. 25, 1924); *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 2 BEVANS 983, 137 L.N.T.S. 11 (Oct. 29, 1934).

<sup>27</sup> The HONNOLD TREATISE, *supra* note 3, provides an excellent review of the background for the Convention and a commentary on its provisions. Helpful commentary are also provided by BIANCA & BONELL, *supra* note 10, and GABRIEL, *supra* note 8, who provides an express section-by-section concordance with Article 2 of the UCC.

<sup>28</sup> See BIANCA & BONELL, *supra* note 10, at 3.

<sup>29</sup> See HONNOLD TREATISE, *supra* note 3, at 49-50.

An international conference at The Hague was called in 1964 to act on these drafts, and the conference ultimately completed two documents: the Uniform Law for the International Sale of Goods<sup>30</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods.<sup>31</sup> Both of these multilateral treaties became effective in 1972,<sup>32</sup> but when any state becomes a Contracting Party under the CISG, the state is required to denounce either of the 1964 conventions to which it may be party.<sup>33</sup>

These 1964 sales conventions have never been very successful in establishing a working law of international sales.<sup>34</sup> The conventions — sometimes called the “1964 Hague Conventions” — were negotiated, prepared and drafted to reflect primarily Western European legal traditions.<sup>35</sup> Their texts did not sufficiently reflect the background and perspective of legal and commercial experience and traditions from other regions of the world. Accordingly, the 1964 sales conventions never gained wide support in the international community and have attracted a very small number of signatories.

The potential inadequacy of the 1964 Hague Conventions was apparently evident as early as 1968, because it was in that year that they attracted the attention of the UN Commission on International Trade Law (“UNCITRAL”).<sup>36</sup> Two years earlier, the UN General Assembly had created this Commission, and provided it with the mission of encouraging “the progressive harmonization and unification of the law of international trade.”<sup>37</sup> As one of its first projects, UNCITRAL turned to the possible revision of the 1964 Hague Conventions.<sup>38</sup>

UNCITRAL’s charter provides for a membership of 36 states, and requires that the identity of the members be allocated among the various re-

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<sup>30</sup> Convention Relating to a Uniform Law on the International Sale of Goods, 834 U.N.T.S. 107 (July 1, 1964).

<sup>31</sup> Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, 834 U.N.T.S. 169 (July 1, 1964); see generally Elizabeth Hayes Patterson, *United Nations Convention on Contracts for the International Sale of Goods: Unification and the Tension Between Compromise and Domination*, 22 STAN. J. INT’L L. 263, 266-67 (1986); HONNOLD TREATISE, *supra* note 3, at 50.

<sup>32</sup> HONNOLD TREATISE, *supra* note 3, at 50.

<sup>33</sup> The CISG Convention generally requires such denunciation upon ratification, acceptance, approval or accession by a new state to the CISG Convention. CISG art. 99(3)-(6).

<sup>34</sup> See LOOKOFKY, *supra* note 9, at 2; Bell, *supra* note 12, at 241; HONNOLD TREATISE, *supra* note 3, at 50.

<sup>35</sup> See Patterson, *supra* note 31, at 267; HONNOLD TREATISE, *supra* note 3, at 53-54.

<sup>36</sup> HONNOLD TREATISE, *supra* note 3, at 53.

<sup>37</sup> G.A. Res. 2205, U.N. GAOR, 21st Sess., § I (1966), reprinted at 1 UNCITRAL Yearbook 65 (1968), at 65; HONNOLD TREATISE, *supra* note 3, at 50.

<sup>38</sup> See Patterson, *supra* note 31, at 268-70; HONNOLD TREATISE, *supra* note 3, at 53.

gions of the world according to a formula provided in its charter.<sup>39</sup> This formula results in a combined representation of Western Europe, Canada and the United States amounting to slightly less than 25% of the total membership. It accomplishes its work largely through the efforts of "Working Groups," which are said to be fielded principally from universities and government ministries in its member countries.<sup>40</sup>

UNCITRAL decided relatively quickly that the best course would be to totally revise the texts of the 1964 Hague Conventions, producing entirely new documentation. This was seen as preferable to merely amending the earlier texts.<sup>41</sup> Since UNCITRAL has geographically a more broadly dispersed make-up than the bodies that drafted the 1964 Hague Conventions, the same kind of parochialism was not an issue. UNCITRAL established a Working Group to undertake the new sales law project.<sup>42</sup>

The Working Group initially proceeded along the lines of preparing two distinct documents, following the model of the 1964 conventions. Ultimately, however, both sets of rules — one regarding substantive sales law and the other the law of sales contract formation — were combined into a single new convention.<sup>43</sup> UNCITRAL's work on the project was laborious and encompassed many years. A convention under United Nations auspices was finally called in Vienna in the spring of 1980 to review and revise the UNCITRAL draft.<sup>44</sup> The draft as so reviewed and revised was unanimously approved by the conferring states, and the CISG was thus completed and signed on April 11, 1980. It is sometimes also referred to as the "Vienna Convention on International Sales."

## B. The Completed Convention and the NIEO Movement

The completed CISG Convention is an omnibus document consisting of 101 articles of text, covering nearly all of the major issues that customarily arise in the negotiation, formation and performance of sales contracts. Different sub-parts of the Convention are devoted to the requirements for a valid offer,<sup>45</sup> requirements for an effective acceptance,<sup>46</sup> what constitutes an actionable breach,<sup>47</sup> requirements for effective delivery,<sup>48</sup> remedies for

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<sup>39</sup> G.A. Res. 2205, U.N. GAOR, 21st Sess., § II, ¶ 1 (1966), *reprinted at 1 UNCITRAL Yearbook* 65 (1968), at 65-66; G.A. Res. 3108, U.N. GAOR, 26th Sess., ¶ 8 (1973), *reprinted at 5 UNCITRAL Yearbook* 11 (1974); HONNOLD TREATISE, *supra* note 3, at 51 & n.7.

<sup>40</sup> See HONNOLD TREATISE, *supra* note 3, at 51, 53.

<sup>41</sup> See HONNOLD TREATISE, *supra* note 3, at 54.

<sup>42</sup> See Patterson, *supra* note 31, at 271-72; HONNOLD TREATISE, *supra* note 3, at 54.

<sup>43</sup> See Patterson, *supra* note 31, at 272 & n.38.

<sup>44</sup> See DOCUMENTARY HISTORY, *supra* note 4, at 3; HONNOLD TREATISE, *supra* note 3, at 54-55.

<sup>45</sup> CISG art. 14.

<sup>46</sup> CISG art. 18.

<sup>47</sup> See, e.g., CISG art. 25.



breach,<sup>49</sup> and so on. It is drafted in detailed and technical terms, yet retains in most instances relative clarity. Certain issues are excluded from its coverage, such as questions regarding the validity of the contract and seller's liability for death or personal injury caused by the goods.<sup>50</sup>

The entire Convention was designed chiefly, of course, to further "the development of international trade on the basis of equality and mutual benefit,"<sup>51</sup> but at the time of its adoption the Convention was not alone in attempting to reach such goals. Coinciding with the completion of the Convention in 1980 was the ascendancy of an international political endeavor then referred to as the "New International Economic Order" movement (sometimes called the "NIEO").

The NIEO was an intellectual movement of the 1970's and early 1980's<sup>52</sup> that addressed itself broadly to a wide variety of issues concerning the developing countries of the world. Numerous scholars and commentators, working chiefly in the areas of economics and political science and related disciplines, produced substantial scholarly work in connection with the NIEO theories.<sup>53</sup> The NIEO movement received the official support of the United Nations General Assembly when that body passed a set of resolutions endorsing the NIEO in May of 1974.<sup>54</sup>

The precise goals and objectives of the NIEO movement tended to vary at least somewhat from one commentator or activist to the next.<sup>55</sup> However,

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<sup>48</sup> CISG arts. 30-44.

<sup>49</sup> CISG arts. 45-52, 61-65.

<sup>50</sup> CISG arts. 4, 5.

<sup>51</sup> CISG, Preamble (second para.).

<sup>52</sup> It is possible to view the development of the "NIEO ideology" as a "response" to the problems of less developed countries stemming from as early as the adoption of the Bretton Woods system in the late 1940's. See, e.g., CRAIG MURPHY, *THE EMERGENCE OF THE NIEO IDEOLOGY* 3 (1984). However, the movement seems to have reached its peak in the years from 1974 to about 1982.

<sup>53</sup> Among the many scholarly contributions are MURPHY, *supra* note 52, as well as JEFFREY A. HART, *THE NEW INTERNATIONAL ECONOMIC ORDER* (1983); EDWIN P. REUBENS, *THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER* (Edwin P. Reubens ed. 1981); and P. N. AGARWALA, *THE NEW INTERNATIONAL ECONOMIC ORDER: AN OVERVIEW* (1983).

<sup>54</sup> DECLARATION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER, RESOLUTION 3201 (S-IV) (May 1, 1974), *reprinted in* 28 YEARBOOK OF THE UNITED NATIONS 324 (1974) [hereinafter UN ESTABLISHMENT RESOLUTION]; PROGRAMME OF ACTION ON THE ESTABLISHMENT OF A NEW INTERNATIONAL ECONOMIC ORDER, RESOLUTION 3202 (S-VI) (May 1, 1974), *reprinted in* 28 YEARBOOK OF THE UNITED NATIONS 326 (1974) [hereinafter UN PROGRAMME OF ACTION RESOLUTION].

<sup>55</sup> For example, according to Craig Murphy, the five NIEO principles at the time of his writing were: (1) the need for international management of the global economy, (2) the economic rights and duties of states, (3) the equality of individual states, (4) the moral obligation of past and present exploiters to negotiate the reform of existing international economic systems, and (5) the duty of current exploiter states to compensate their victims. MURPHY, *supra* note 52, at 158. On the other hand, Jeffrey Hart discerned eight main issues for devel-

most NIEO commentaries seemed to include as a major element the need to make major changes in the international economic system.<sup>56</sup>

The CISG places substantial importance on the NIEO movement by explicitly referring to the "New International Economic Order" in the Convention's preamble.<sup>57</sup> Furthermore, a high-water mark of the NIEO was a broadly-disseminated and quite influential report entitled *North-South: A Program for Survival*,<sup>58</sup> which was also published in 1980. The *North-South* report was issued by an independently organized commission of scholars, politicians and other prominent public figures,<sup>59</sup> and could be called a manifesto of sorts for the NIEO movement.<sup>60</sup> Because this report was more broadly disseminated, and intended for a wider audience, than most of the academic or ministerial NIEO tracts, it might be thought to be one of the most influential of the NIEO movement documents.

The *North-South* report and the NIEO in general saw the world as being largely, if imperfectly, divisible into two economic regions: the "North," composed of countries that were "rich" and "developed," and the

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oping countries in the NIEO negotiations: (1) sovereignty over their economies and natural resources, (2) increasing their control over the level and nature of foreign investment, (3) maintaining or (preferably) increasing the purchasing power of raw material and commodity exports, (4) increasing access to commercial markets of developed countries, (5) reducing the cost of technology transfers, (6) increasing the flow of official development assistance, (7) alleviating the debt burdens of certain developing countries, and (8) increasing the decision-making power of the developing world in the United Nations and the IMF/World Bank system. HART, *supra* note 53, at 33.

<sup>56</sup> See, e.g., Edwin P. Reubens, *An Overview of the NIEO*, in THE CHALLENGE OF THE NEW INTERNATIONAL ECONOMIC ORDER, *supra* note 53, at 1 (the UN NIEO declarations said to "call for the reconstruction of the existing economic system in the areas of trade, finance, technological transfers and national sovereignty"); AGARWALA, *supra* note 53, at 18 ("A new economic order must be founded on arrangements providing for genuine equality of opportunity and rewards between states . . .").

<sup>57</sup> CISG, Preamble (first para.).

<sup>58</sup> See INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL (1980) [hereinafter NORTH-SOUTH].

<sup>59</sup> The Commission was sometimes referred to as the "Brandt Commission" because Willy Brandt, former Chancellor of what was then West Germany, was its chairman. Reubens, *supra* note 56, at 5. Among its 20 other members were Olaf Palme, former Prime Minister of Sweden; Joe Morris, a Canadian labor leader and former Chairman of the International Labor Organization Governing Body; Katharine Graham, Chairman of the Washington Post Co.; and academics and ministerial figures from numerous developing countries. *Id.*

<sup>60</sup> There were other voices in the NIEO debate apart from the Independent Commission. Some felt that the NIEO proposals, by themselves, did not go far enough in helping those countries most in need, and a "Basic Needs" approach was advanced instead of, or alongside, NIEO. See Johan Galtung, *The New International Economic Order and the Basic Needs Approach*, in THE NORTH/SOUTH DEBATE: TECHNOLOGY, BASIC HUMAN NEEDS AND THE NEW INTERNATIONAL ECONOMIC ORDER (1980).

“South,” composed of countries that were “poor” and “developing.”<sup>61</sup> The prime focus of attention was then this “fundamental inequality of economic strength.”<sup>62</sup> The NIEO activists asserted that the world economy was “functioning so badly that it damages [the] interests of all nations,”<sup>63</sup> and that “prospects for the future are alarming.”<sup>64</sup> The *North-South* report set forth a detailed program designed to redress the power imbalance between rich and poor countries, including such matters as the abolition of hunger, the stabilization of world commodity prices, the reduction of protectionist tariffs imposed by countries of the North, improvements in the extraction practices regarding mineral resources in developing countries, reform of the international monetary system, and major new financial commitments to development in poor countries in general.<sup>65</sup> Implicit in many of these recommendations was the frequently acknowledged need for a “large scale

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<sup>61</sup> See NORTH-SOUTH, *supra* note 58, at 31; see also MURPHY, *supra* note 52, at 127-37 (conceptualizing the discussions about NIEO as the “north-south dialogue”).

<sup>62</sup> See NORTH-SOUTH, *supra* note 58, at 32. See also AGARWALA, *supra* note 53, at 12 (“What is at issue is the blind determination with which policies inherited from a colonial economic context, and perpetuating unjust and untenable inequities are affirmed as immutable principles of law.”); Reubens, *supra* note 56, at 1 (characterizing the UN NIEO resolutions as being geared toward “narrowing disparities between the more developed countries and the LDCs [‘less developed countries’]”).

<sup>63</sup> See NORTH-SOUTH, *supra* note 58, at 267.

<sup>64</sup> See *id.* at 269.

<sup>65</sup> See NORTH-SOUTH, *supra* note 58, at 271-73. Regarding commodity prices, see also MURPHY, *supra* note 52, at 160 (advocating “[v]arious actions designed to keep commodity prices high”); UN ESTABLISHMENT RESOLUTION, *supra* note 54, at ¶ 4(j) (endorsing a “just and equitable relationship between the prices of . . . goods exported by developing countries and the prices of . . . goods and equipment imported by them”). Regarding protectionist tariffs, see also MURPHY, *supra* note 52, at 160 (“tariff preferences [should] continue to be granted to the developing states”); AGARWALA, *supra* note 53, at 24 (“in recent years, protectionist trends have been increasing”). Regarding natural resources, see also HART, *supra* note 53, at 33 (advocating for developing countries the maintenance of their “sovereignty over their economic and natural resources”); UN PROGRAMME OF ACTION RESOLUTION, *supra* note 54, at ¶ I.1(a) (“All efforts should be made: [t]o put an end to all forms of foreign . . . exploitation through exercise of permanent sovereignty over natural resources.”). Regarding the international monetary system, see *id.* at ¶ II.1(e) (“All efforts should be made to reform the international monetary system with [a]dequate and orderly creation of additional liquidity with particular regard to the needs of the developing countries”).

transfer of resources<sup>66</sup> from the rich northern countries to the poorer southern countries.<sup>67</sup>

One of the features of the NIEO movement was the assertion that rich northern countries generally have more bargaining power in negotiating international transactions than poor southern countries.<sup>68</sup> Sometimes this difference in bargaining power was expressed in terms of a perceived general unfairness stemming from the greater power and status of the North,<sup>69</sup> and sometimes it was related to particular situations in specific industries, such as mineral extraction<sup>70</sup> and the sale of agricultural commodities<sup>71</sup>.

Most of the attention of the NIEO activists was focused on chiefly economic and fiscal issues, such as world hunger and poverty, energy, trade in commodities, international monetary structures and developmental financing. The major focus of the NIEO activists was accordingly in these practical spheres rather than explicitly with law. However, in 1978, in response to a request from the UN General Assembly, UNCITRAL asked the UN Secretary-General to prepare a report on the New International Economic Order,<sup>72</sup> detailing possible actions that UNCITRAL could take in the context of the NIEO movement. The Secretary-General's report described numerous actions taken by UN bodies and individual governments that could be seen as furthering the goals of the NIEO. The Secretary-General

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<sup>66</sup> See, e.g., NORTH-SOUTH, *supra* note 58, at 36 (advocating "a large-scale transfer of resources"), and at 67 (referencing "'massive transfers' of funds from North to South"); see also Reubens, *supra* note 56, at 11 ("[T]he NIEO calls upon MDCs ['more developed countries'] for enlarged transfers of capital and technology to LDCs ['less developed countries'] on easier terms"); UN ESTABLISHMENT RESOLUTION, *supra* note 54, at ¶ 4(k) (advocating "[e]xtension of active assistance to developing countries by the world international community"); MURPHY, *supra* note 52, at 158 (identifying, as noted in note 55 *supra*, as a NIEO principle, "the duty of current exploiter states to compensate their victims").

<sup>67</sup> For an interesting explanation of why the NIEO movement ultimately fell short of its goals, see P. Bukman, *Opening Address: Development Policy in Retrospect and Prospect*, in NORTH-SOUTH: CO-OPERATION IN RETROSPECT AND PROSPECT 26-27 (C.J. Jepma ed., 1988).

<sup>68</sup> E.g., NORTH-SOUTH, *supra* note 58, at 42 (describing the need and desire of the South for "the ability to bargain on more equal terms with the richer countries").

<sup>69</sup> See NORTH-SOUTH, *supra* note 58, at 65 ("We are looking for a world based less on power and status, more on justice and contract; less discretionary, more governed by fair and open rules."); see also AGARWALA, *supra* note 53, at 35 ("The position of the developing countries in the technology market is . . . weak . . . It is almost impossible for them to deal on equal terms with TNCs ['transnational corporations'] and international credit institutions.").

<sup>70</sup> See NORTH-SOUTH, *supra* note 58, at 85 (regarding exploitation of mineral resources, "the poorer countries with their weak bargaining power and lack of information about their own resources, are often reluctant to enter into contracts with transnationals.").

<sup>71</sup> See *id.* at 144 ("In the case of many commodities the immediate issue is not that of securing more competitive markets, but action to provide balanced bargaining power.").

<sup>72</sup> See New International Economic Order, *Report of the Secretary-General*, 31st Sess., in ¶¶ 1-3, U.N. Doc. A/CN.9/171 (1979), reprinted in 10 UNCITRAL YEARBOOK 113 (1979) [hereinafter SECRETARY-GENERAL NIEO REPORT].

reviewed the status of the CISG Convention in some detail, noting its goals of harmonizing and unifying international trade law, and presented his discussion in a manner indicating the view that the CISG Convention was consonant with the NIEO movement.<sup>73</sup>

It would be an overstatement to say that the CISG Convention was purely, or even principally, an outgrowth of the NIEO movement, and certainly advocacy for the CISG in 1980 would not necessarily have implied partisanship for the NIEO. Indeed, in the United States, Senate ratification of the CISG admittedly was urged by then-President Ronald Reagan,<sup>74</sup> no doubt not the most ardent supporter of some of the more radical elements of the NIEO. However, the major themes of equalizing bargaining power and providing fair terms of transactions and negotiations were common to both endeavors. Both projects took place in a legal and policy environment emphasizing the need to redesign key structures in international economic relationships, and a policy nexus between the two seems to have been readily apparent, including within the organs of the United Nations and in the text of the CISG itself.

The Convention's connection with the NIEO movement will later be addressed regarding one of the factors of legitimacy discerned by Thomas Franck, "symbolic validation."<sup>75</sup>

### C. Issues of Interpretation

A major focus of the CISG Convention is, as noted above, the promotion of international uniformity. Accordingly, one of the most significant provisions of its introductory "General Provisions" chapter admonishes as follows: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . . ."<sup>76</sup>

A significant number of commentators has attached major importance to this provision, and asserted an overriding need for courts and other dispute resolution bodies to decide issues under the Convention in a manner that promotes international uniformity.<sup>77</sup> However, the Convention estab-

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<sup>73</sup> See SECRETARY-GENERAL NIEO REPORT, *supra* note 72, at 116 ¶¶ 23-28.

<sup>74</sup> See *Message from the President of the United States, Transmitting The United Nations Convention on Contracts for the International Sale of Goods, adopted by a United Nations Conference of Sixty-Two States on April 11, 1980*, S. TREATY DOC. NO. 98-9, 98th Cong., 1st Sess. (1983), reprinted in *THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS* 74-96 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990) [hereinafter *Message from the President*].

<sup>75</sup> See *infra* Part V.B. (discussing "symbolic validation" in the context of the CISG Convention).

<sup>76</sup> CISG art. 7(1).

<sup>77</sup> Among the many commentators expressing views along these lines are Phanesh Koneru, *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 MINN. J. GLOBAL TRADE

lishes no supra-national body for its interpretation or the resolution of disputes under it.<sup>78</sup> Furthermore, of course, no such supra-national body otherwise exists. Accordingly, the CISG's exhortation to uniformity seems to require the courts and other fora in each country to be attentive to the interpretations, analyses and holdings in other countries.<sup>79</sup> The Convention's directive would seem to imply that, in the interests of uniformity, adjudicatory bodies in a particular state should give relevant precedents in foreign jurisdictions at least equal weight against any municipal precedents or doctrines that might differ from the foreign decisions. It has been argued, indeed, that in some cases, conceivably, the foreign cases might even be asserted to take precedence over municipal authority.

This approach is, to say the least, problematic. Firstly, the CISG Convention was executed in six official languages, and the Convention states that each of these six different texts is equally authentic.<sup>80</sup> A court or other dispute resolution body working in one language may naturally experience difficulty in interpreting and applying precedents decided in another. A certain level of error in such cases is all but inevitable. Furthermore, not only do languages vary from one state to the next, but legal cultures and judicial systems vary as well. It can be extremely difficult, if not impossible, to transfer jurisprudential terms and concepts used in managing and resolving disputes from one kind of adjudicatory system to the next.

The Convention, at various points, recognizes the need for parties and courts to refer to municipal laws in interpreting and applying its terms. Perhaps most significantly, the Convention acknowledges that parties and courts may need to refer to municipal law in some cases in which there is a gap in the Convention's literal language:

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of private international law."<sup>81</sup>

Even here, however, as the commentary has noted, the Convention clearly considers resort to municipal law as a relatively disfavored, second-best approach. The first preference is for the obviously elusive "general

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105 (1997); V. Suzanne Cook, *The Need for Uniform Interpretation of the 1980 United Nations Convention on Contracts for the International Sale of Goods*, 50 U. PITT. L. REV. 197 (1988); Amy Kastely, *Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention*, 8 NW. J. INT'L L. & BUS. 574 (1988).

<sup>78</sup> See Louis F. Del Duca & Patrick Del Duca, *Practice under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders*, 27 UCC L. J. 331, 334 (1995).

<sup>79</sup> Sometimes commentators are quite explicit on the need for courts to be guided by foreign jurisdictions. See Koneru, *supra* note 77, at 108, and Cook, *supra* note 77, at 198.

<sup>80</sup> CISG, Testimonium clause.

<sup>81</sup> CISG art. 7(2).

principles on which [the Convention] is based." This arrangement further emphasizes the desires of the drafters for uniform interpretation, problematic though such a goal may prove to be.

These interpretive issues will be material in the later discussion of legitimacy factors pertaining to "determinacy" and "coherence," and their relation to the CISG Convention.<sup>82</sup>

#### D. Self-Executing Character and Requirements for Amendment

At least since ratification of the CISG by the Senate, the CISG has been considered self-executing within the United States.<sup>83</sup> Accordingly, the Convention became effective as a part of the federal law of the United States without Congressional passage of any statute explicitly incorporating it into the federal statute books.<sup>84</sup>

In addition, it seems relatively clear that the Convention cannot be amended in a way that binds all parties to it, except by express consent of all parties.<sup>85</sup> Of course, in most cases one or more states can probably amend the Convention so that such amendment takes place only among themselves,<sup>86</sup> but such arrangement would presumably not advance the uniformity of application that is the Convention's chief purpose.

Similarly, the CISG specifically prohibits states from taking any reservations except those which are expressly authorized in the Convention's text.<sup>87</sup> Generally, international law permits states to make reservations when signing or ratifying a treaty, unless the reservation is incompatible with the object and purpose of the treaty, or the treaty otherwise provides.<sup>88</sup> The CISG, however, only allows five types of reservations: (1) a reservation to the effect that the Contracting State will not be bound either by the Convention's provisions on contract formation, or in the alternative, by the

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<sup>82</sup> See Parts V.A.1. and V.C., *infra* (respectively analyzing the applicability of these factors to the CISG Convention).

<sup>83</sup> *Message from the President, supra* note 74, at 77 (containing a letter of submittal dated August 30, 1983 from Secretary of State George Schultz to President Reagan stating that "[t]he Convention . . . is self-executing and thus requires no federal implementing legislation to come into force throughout the United States").

<sup>84</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) (declaring the binding effect of international agreements of the U.S. on U.S. courts, except for non-self-executing agreements).

<sup>85</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 39-41, 63 A.J.I.L. 875, 887-88 (1969), 8 I.L.M. 679, 694-95 (1969).

<sup>86</sup> See Vienna Convention on the Law of Treaties, *supra* note 85, art. 41, 63 A.J.I.L. at 888; 8 I.L.M. at 695.

<sup>87</sup> CISG art. 98 ("No reservations are permitted except those expressly authorized in this Convention.").

<sup>88</sup> See Vienna Convention on the Law of Treaties, *supra* note 85, art. 19, 63 A.J.I.L. at 881, 8 I.L.M. at 686-87.

Convention's provisions on the sale of goods;<sup>89</sup> (2) a reservation to the effect that a Contracting State with two or more territorial units that have different systems of law may exclude the application of the Convention to one or more such units;<sup>90</sup> (3) a reservation to the effect that two or more Contracting States with closely related legal rules on international sales law may exclude the application of the Convention as between themselves;<sup>91</sup> (4) a reservation to the effect that the Convention will only apply to contracts involving a party whose place of business is in a Contracting State when the other party also has its place of business in another Contracting State;<sup>92</sup> and (5) a reservation to the effect that, notwithstanding the provision of the Convention that effectively eliminates the Statute of Frauds doctrine,<sup>93</sup> allows a Contracting State to, in essence reinstate the requirement of a writing for the effectiveness of the contract.<sup>94</sup>

The self-executing character of the CISG Convention will be discussed later in connection with the Convention's potential problems of "coherence," and the difficulty of its amendment will be material to this Article's ultimate analysis of the Convention's "determinacy."<sup>95</sup>

#### E. The Capacity to "Opt Out" of the Convention

As indicated in the earlier introductory comments,<sup>96</sup> one of the most significant features of the CISG Convention is that it permits commercial actors whose places of business are in Contracting States to "opt out" of the Convention's applicability. In this way, commercial actors whose transac-

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<sup>89</sup> CISG art. 92. This arrangement has the effect of continuing the parallelism with the bifurcated structure inherent in the 1964 Hague Conventions, discussed in text *supra* at notes 30-38. Just as under the Hague Convention regime, a state could choose to become a party either to the Uniform Law on the Formation of Contracts for the International Sale of Goods or the Uniform Law for the International Sale of Goods; the Article 92 arrangement allows states to choose between the CISG version of these two regimes as well, if they so wish.

<sup>90</sup> CISG art. 93.

<sup>91</sup> CISG art. 94. This was intended to benefit primarily the Scandinavian countries, and they have indeed availed themselves of the provision. See UNILEX, *supra* note 6, ¶ B.2 (containing a list of Reservations and Declarations in which Denmark, Finland, Norway and Sweden take the Article 94 exception, and also except out Iceland, pursuant to paragraph (2) of Article 94).

<sup>92</sup> CISG art. 95. This reservation thus excludes the application of the Convention in those situations under CISG Article 1(1)(b) where, although the place of business of one party might not be in a Contracting State, the Convention would otherwise be applicable under applicable conflicts-of-laws rules. Many states have taken this exception, including the United States.

<sup>93</sup> CISG art. 11. ("A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.")

<sup>94</sup> CISG art. 96.

<sup>95</sup> See *infra* Parts V.C. and V.A.2. (respectively analyzing these factors).

<sup>96</sup> See *supra* text at note 17.



tions would otherwise be covered by the Convention can escape its application simply by agreeing between themselves that it will not apply. This arrangement is expressed in Article 6 of the CISG Convention, which provides in its entirety: "The parties may exclude the application of this Convention or, subject to Article 12,<sup>97</sup> derogate from or vary the effect of any of its provisions."

Accordingly, the extent to which private parties are required to comply with the CISG can be viewed as entirely voluntary. This arrangement is similar to the situation said to pertain in international law, and discussed in the next part of this Article, whereby the extent to which states in the international community comply with international law seems in certain respects to be voluntary. It is true that the voluntary choice made by commercial actors under the CISG Convention is the decision whether the body of rules will apply in the first instance, whereas the assertion about the voluntary behavior of states also addresses whether to obey the body of rules once they are said to apply. However, this Article shows later that this apparent distinction is immaterial for our purposes.

It is partly this capacity for private actors to avoid the Convention that makes Thomas Franck's theories especially salient.<sup>98</sup>

### III. THOMAS FRANCK'S THEORY OF LEGITIMACY

One of the classical problems of international law is the question of whether it can be considered law at all. Skeptics have asserted that international law is not really law, either because states in the international community routinely violate purported international law,<sup>99</sup> or because a truly sovereign state cannot be said to be subject to external command,<sup>100</sup> or for other similar reasons.<sup>101</sup>

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<sup>97</sup> Article 12 of the CISG prohibits derogation by the parties to any sales contract from any requirements imposed by a particular state for the sales contract to be in writing.

<sup>98</sup> See *infra* Part III.E. (regarding the applicability of Professor Franck's legitimacy theories to private actors).

<sup>99</sup> See, e.g., FRANCK, *supra* note 24, at 6 (noting that "international laws are thought *not* to be obeyed and the governance of international institutions and their norms *not* to be accepted," and finding fault with such perspectives); *id.* at 7 ("This, after all is *international* law. Disobedience is thought — albeit wrongly — to be the prevalent practice . . .").

<sup>100</sup> See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 177 (1861) ("[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author"). *But cf.* J.L. BRIERLY, *THE LAW OF NATIONS* 55 (1978) ("[S]tates are not persons, however convenient it may often be to personify them . . . . Their subjection to law is as yet imperfect, though it is real as far as it goes . . .").

<sup>101</sup> MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 5 (2d ed. 1993) ("Given the rarity of effective formal international legislative and executive organs, some have said quite simply that international law does not or cannot exist . . .").

International law scholar Thomas Franck has gained significant prominence for his treatment of this issue.<sup>102</sup> He concedes that international law is not law in the same sense as the law operating domestically within states.<sup>103</sup> However, what strikes Professor Franck as remarkable is that in view of the lack of coercive power behind most international law rules, so many rules of international law are so frequently followed by so many states.<sup>104</sup> He determines that there must be something *else* that is responsible for the usual practice of states in obeying international law rules, since such obedience can usually not be traced to coercive power over those states.

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<sup>102</sup> Franck's theories of legitimacy have attracted substantial scholarly attention. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2628-29, 2633, 2643 (1997) (in the context of a review of a later work by Prof. Franck, the author revisits *The Power of Legitimacy Among Nations*, and relates Franck's theories in that work to "a revival of the Kantian philosophical tradition"); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487, 491-93 (1997) (discussing legitimacy as an aspect of the "normative optic" through which international law can be viewed, and citing *The Power of Legitimacy Among Nations* and *Legitimacy in the International System* as leading sources of legitimacy theory); A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 32, 37 (1995) (using Prof. Franck's legitimacy theories to evaluate the practical reality of the *jus cogens* doctrine in a variety of contexts); Rachael E. Schwartz, "And Tomorrow?" - *The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271, 317-29 (1994) (containing a detailed exposition of Prof. Franck's legitimacy theories and applying them to the Torture Victim Protection Act); Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 249-51 (1994) (reviewing Prof. Franck's observations concerning the legitimacy of particular aspects of the operations of the UN Security Council); Anthony Clark Arend, *The United Nations and the New World Order*, 491 GEO. L. J. 491 (1993) (discussing Prof. Franck's views of legitimacy in connection with new world power structures emerging after the Cold War). Of special interest, see John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 162-73 (1996) (applying Prof. Franck's legitimacy theories to the law of treaties and asserting limitations to its validity in that context); Michael Byers, *Taking the Law Out of International Law: A Critique of the "Iterative Perspective"*, 38 HARV. INT'L L.J. 201, 202-03 (1997) (defending Prof. Franck and stating that Setear's criticism of Franck is "unsatisfying").

<sup>103</sup> See FRANCK, *supra* note 24, at 29 ("If international law were *law* like any other, there would be nothing remarkable about states' conformity to legal mandates. . . . [I]nternational 'law' is not like the laws with which citizens of states are familiar . . .").

<sup>104</sup> See FRANCK, *supra* note 24, at 3 ("Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of international community nevertheless elicit much compliance on the part of sovereign states."); FRANCK AJIL, *supra* note 25, at 705 ("The surprising thing about international law is that nations ever obey its strictures . . .").

The factor responsible for this pattern of obedience is "legitimacy," as defined by Professor Franck.<sup>105</sup> To the extent a rule is legitimate, in Professor Franck's sense, it exerts a *pull to compliance* on those to whom it is addressed.<sup>106</sup> Legitimacy, and the "compliance pull" resulting from it, are not absolute, but exist on a sliding scale. That is, some rules are more or less legitimate than others to varying degrees, and thus accordingly exert varying degrees of "compliance pull."<sup>107</sup> As his central thesis, Franck determines that the extent to which a rule has legitimacy, in his sense, depends on the extent to which the rule possesses four distinct properties: determinacy, symbolic validation, coherence and adherence.<sup>108</sup>

This Article ultimately turns to the CISG Convention, and discusses the extent to which the Convention possesses these four characteristics. At this point, however, this Article first describes each of these properties in somewhat more detail, as developed in Professor Franck's theories.

### A. Determinacy

"Determinacy," in Franck's sense, essentially refers to textual clarity.<sup>109</sup> It could be called a "literary" property inhering in the content of the rule's text.<sup>110</sup> The more determinate the rule, the more clearly expressed by its text, the greater its pull to compliance and the greater its legitimacy.<sup>111</sup>

One example that Franck uses to illustrate this concept of determinacy is a hypothetical involving a foreign ambassador's son who has murdered someone in Washington, D.C., and has been apprehended by the local police.<sup>112</sup> The United States Secretary of State demands the release of the jailed assailant, declaring that he has diplomatic immunity and must be repatriated for trial in his home country. Suppose there is widespread outrage and it is left to the State Department to explain to the public why, and how, this diplomatic immunity is in fact required by international law. The Sec-

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<sup>105</sup> See FRANCK, *supra* note 24, at 25 ("Why do nations obey rules? . . . Because they perceive the rule and its institutional penumbra to have a high degree of legitimacy.") (emphasis omitted).

<sup>106</sup> See *id.* at 16 ("[L]egitimacy . . . could be formulated thus: a property . . . which itself exerts a pull towards compliance on those addressed normatively.") (emphasis omitted). See also FRANCK AJIL, *supra* note 25, at 708 ("That some rules *in themselves* seem to exert more pull to compliance than others is the starting point in the search for a theory of legitimacy.")

<sup>107</sup> See FRANCK, *supra* note 24, at 26 ("[S]ince the compliance pull of various rules and institutions varies widely, it follows that . . . legitimacy, too, must be a matter of degree.")

<sup>108</sup> See *id.* at 49; FRANCK AJIL, *supra* note 25, at 712.

<sup>109</sup> See FRANCK, *supra* note 24, at 52 ("[D]eterminacy is more or less synonymous with clarity."); FRANCK AJIL, *supra* note 25, at 713 ("What is meant by this [textual determinacy] is the ability of the text to convey a clear message . . .").

<sup>110</sup> See FRANCK AJIL, *supra* note 25, at 713.

<sup>111</sup> See *id.* at 714.

<sup>112</sup> See *id.* at 716-17. FRANCK, *supra* note 24, at 57-59.

retary of State will naturally say that the rule of diplomatic immunity protects United States nationals abroad as well as foreigners in this country, and that on this basis — if no other — the rule should be respected here.

One factor determining the extent to which this will be persuasive, however, will be the extent to which the purported rule can be shown to be determinate. For example, if it can only be shown that diplomatic immunity as usually applied in the world protects ambassadors themselves, rather than their family members, the textual import of such a rule will be much less clear, less determinate, and exert less of a compliance pull, in this situation. All the more so if it can be shown that such immunity in the world arena sometimes does not apply if a capital crime is involved, or is applied only when the relative is an employee at the embassy. In sum, the extent to which the rule is determinate depends on the clarity and precision with which it is written or expressed.

Franck then develops the idea of determinacy further. Some situations in the real world are susceptible to rules of unimpeachable clarity and precision that will be effective in dealing with the situations they address. For example, a rule requiring a vehicle to stop if the light is red, and allowing it to go forward if the light is green, can be effectively determinate in its total clarity and precision.<sup>113</sup> These relatively straightforward situations, admitting of extreme precision, could be called essentially “binary” situations permitting essentially binary rules.<sup>114</sup>

Not all situations in the world arena are binary situations, however. Indeed, many situations in international affairs are characterized by their extreme complexity, rather than simplicity. In developing rules for these situations, it will not be possible to come up with the same degree of clarity and precision that can be supplied for binary situations. After all, the more complicated a situation is, the greater the risk that rules dealing with it will be subject to ambiguity and errors of interpretation, thereby sacrificing their determinacy and — to that extent — their legitimacy.

This does not mean, however, that complicated situations can not admit of determinate rules. Rather, Professor Franck introduces the concept of “process determinacy” to meet these situations.<sup>115</sup> A rule has process determinacy if ambiguities and other difficulties of interpretation and application can be resolved in a forum or fora that bear the other indicia of le-

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<sup>113</sup> See FRANCK, *supra* note 24, at 84; FRANCK AJIL, *supra* note 25, at 722 (using the example of “red light to port, green light to starboard”).

<sup>114</sup> See FRANCK AJIL, *supra* note 25, at 722 (“A simple, straightforward rule . . . will have a high level of determinacy if the problem to which it is addressed is widely recognized as essentially binary . . .”).

<sup>115</sup> See FRANCK, *supra* note 24, at 85 (noting that for more complex rules, “determinacy and legitimacy . . . depend in significant part on whether there is a process for the rule’s case-by-case application which, itself, is widely accepted as legitimate”).

gitimacy<sup>116</sup> — symbolic validation, coherence and adherence. Such process determinacy does not need to come from formal courts; any institution “seen to be acting legitimately” may be used for this purpose.<sup>117</sup>

However, as rules become increasingly more complex to address an ever greater number of complex situations, it is crucial that there be available some process for resolving ambiguities in their application. In these complex situations, without adequate process determinacy, the rules lack an important measure of legitimacy and exert a correspondingly weakened pull to compliance.<sup>118</sup> Therefore, in Franck’s view, a critical element for the legitimacy of rules in complex factual situations is the degree to which such rules are supported by process determinacy.

This Article will show that, due to the ways in which the CISG Convention emphasizes uniformity in interpretation and application, it creates significant problems in the area of process determinacy.<sup>119</sup> In addition, the relative difficulty of the Convention’s amendment makes continued determinacy in light of future developments more problematic.<sup>120</sup>

## B. Symbolic Validation

The property that Franck calls symbolic validation does not relate to the text of the rule itself, and in that sense it differs from determinacy. Rather, it pertains to the perceived authenticity of the rule as distinct from its content.<sup>121</sup>

Symbolic validation, as perceived by Franck, exists primarily in two forms: ritual and pedigree.<sup>122</sup> Rituals, of course, are seen to be ceremonies, often — but not always — mystical in nature, that provide unspoken basis for compliance pull.<sup>123</sup> Rules promulgated by a presidential administration in the United States, for example, are all supported by the rituals involving

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<sup>116</sup> See FRANCK AJIL, *supra* note 25, at 724 (“Issues that cannot be reduced to simple binary categories invite regulation by more complex rule texts which . . . suffer the costs of elasticity. . . . These costs, however, can be reduced by introducing a forum in which ambiguity can be resolved case by case.”).

<sup>117</sup> See *id.* at 725.

<sup>118</sup> See *id.* (emphasizing the importance of “the availability of a process for resolving ambiguities”); FRANCK, *supra* note 24, at 171 (referring to a particular hypothetical complex fact pattern, “[w]ithout such process determinacy, the rule would lack serious pull to compliance”).

<sup>119</sup> See *infra* Part V.A.1. (addressing “process determinacy” in the context of the CISG Convention).

<sup>120</sup> See *infra* Part V.A.2. (addressing the impact of the difficulty of amending the CISG Convention on continued determinacy).

<sup>121</sup> See FRANCK, *supra* note 24, at 91 (“In this instance, . . . what is to be communicated is not so much the content as validity or *authenticity* . . .”) (emphasis in original).

<sup>122</sup> See *id.* at 91-94; FRANCK AJIL, *supra* note 25, at 725-26.

<sup>123</sup> See FRANCK, *supra* note 24, at 92; FRANCK AJIL, *supra* note 25, at 726.

the oath of office sworn by the President every four years.<sup>124</sup> This Article will not adopt this idea of ritual as a major focus.

The notion of pedigree, on the other hand, will be taken to be quite material. Franck's concept of pedigree is said to pull to compliance by "emphasizing the deep rootedness of the rule or the rule-making authority."<sup>125</sup> The focus here can be on literal pedigree, such as the lineage of persons involved,<sup>126</sup> or it can be a more metaphorical pedigree, involving more general historical origins, or cultural or anthropological background.<sup>127</sup> In more general terms, it could be said that pedigree inheres whenever a person or institution, by virtue of who or what the person or institution is, or the position occupied by the person or institution, "deserves to be obeyed" or "to be taken seriously."<sup>128</sup>

From the arena of international politics, Franck offers the example of the practice of state recognition as illustrating the importance of pedigree.<sup>129</sup> When a newly formed state enters into a bilateral treaty, for example, the legitimacy of the rules thus engendered is much enhanced if the new state has been recognized as a state by a significant number of influential states in the world community. Such legitimacy would also be enhanced if the new state had been admitted to the United Nations. In Franck's sense, these acts of recognition and admission testify to the new state's pedigree.<sup>130</sup>

Another example Franck offers for the concept of pedigree draws on an observation by Professor Oscar Schachter:

Professor Schachter has observed that a body of rules produced by the UN legislative drafting body, the International Law Commission [ILC], will be more readily accepted by the nations 'after [the ILC] has devoted a long period in careful study and consideration of precedent and practice.' Moreover, the authority will be greater if the product is labeled *codification* — that is, the interpolation of rules from deep-rooted evidence of state practice — 'than if it were presented as a "development"' (that is, as new law)' . . . .<sup>131</sup>

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<sup>124</sup> See FRANCK, *supra* note 24, at 94 ("The oath to uphold the federal Constitution of the United States, in a sense, may be seen as America's ultimate secular ritual . . .").

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 95 (referencing the generally stabilizing influence said by some to inhere in hereditary office) (quoting Maurice Cranston, *From Legitimism to Legitimacy*, in *LEGITIMACY/LÉGITIMITÉ* 37 (A. Moulakis ed., 1986)).

<sup>127</sup> See FRANCK *AJIL*, *supra* note 25, at 726.

<sup>128</sup> FRANCK, *supra* note 24, at 95 ("A person is said to deserve to be obeyed [*sic*] — or, in modern usage, to be 'taken seriously' because of his or her lineage.").

<sup>129</sup> See FRANCK *AJIL*, *supra* note 25, at 726 ("An example [of pedigree] is the practice of 'recognition'. When a government recognizes a new regime, or when the United Nations admits a new state to membership, this partly symbolic act has broad significance.").

<sup>130</sup> Franck also offers the sometimes detailed process of diplomatic accreditation as another example of his idea of pedigree. See FRANCK, *supra* note 24, at 105.

<sup>131</sup> FRANCK *AJIL*, *supra* note 25, at 726 (quoting Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 310 (1968)) (emphasis in original).

This example shows that the lineage, or pedigree, of rules promulgated by organizations such as the ILC can depend at least in part on the circumstances of their promulgation — the degree to which the rules were examined by the organization — as well as to perceived content elements of the rules, such as whether they are codification or development.

This Article demonstrates that, due to certain characteristics of the groups responsible for the design and preparation of the CISG Convention, other circumstances contemporaneous with its completion, and certain aspects of its substantive treatment of some questions, there are substantial pedigree issues impairing its voluntary adoption by private parties.<sup>132</sup>

### C. Coherence

For Franck, determinacy and symbolic validation alone are not sufficient to establish the legitimacy of a rule. Even if a rule is textually determinate and supported by appropriate symbolic validation, it will still lack a measure of legitimacy if the rule is so at odds with other applicable rules as to establish cognitive dissonance in the audience to which it is addressed.<sup>133</sup> In other words, the given rule must be seen as being in a certain kind of harmony with the network of related previously existing rules of which it is a part.

Referring to this property as “coherence,” Franck draws on the work of Ronald Dworkin for a definition: “a rule is coherent when like cases are treated alike in application of the rule and when the rule relates in a principled fashion to other rules of the same system.”<sup>134</sup> This element of coherence is similar to the idea of consistency, but Franck perceives a distinction between coherence and consistency. Consistency refers to the treatment of two or more subjects in the same way, whereas coherence admits of differing treatment of the various subjects as long as the differing treatment is connected to “some rational principle of broader application.”<sup>135</sup>

One of the primary examples used in this connection involves a hypothetical repayment scheme for past due sovereign debt.<sup>136</sup> Franck posits a multilateral agreement between debtor nations and creditor nations, pursuant to which exactly one-half of the outstanding debt is to be repaid and one-half forgiven. One possibility would be allowing complete forgiveness for the debts of those states whose names began with the letters A-M, while

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<sup>132</sup> See *infra* Part V.B. (regarding Franck’s idea of “pedigree” as applied to the CISG Convention and other rules of international business law).

<sup>133</sup> See FRANCK, *supra* note 24, at 136.

<sup>134</sup> FRANCK AJIL, *supra* note 25, at 741 (referencing RONALD DWORIN, *LAW’S EMPIRE* 190-92 (1986)); FRANCK, *supra* note 24, at 143 (same).

<sup>135</sup> FRANCK AJIL, *supra* note 25, at 741 (emphasis omitted). See FRANCK, *supra* note 24, at 146 (referring to “some rational principle of broader import”).

<sup>136</sup> See FRANCK, *supra* note 24, at 145-48; FRANCK AJIL, *supra* note 25, at 741-43.

requiring full payment by states whose names began with N-Z.<sup>137</sup> This arrangement might be “fair” in that it splits the difference of the debt down the middle,<sup>138</sup> but it would not be coherent because the manner of the allocation does not relate to some rational underlying general principle.

On the other hand, Franck posits a debt forgiveness scheme whereby the level of forgiveness allotted to each state was a function of its comparative degree of poverty, or was inversely related to its comparative per capita income.<sup>139</sup> Such a scheme would not be *consistent*, in a strict sense of the term, because different states would be allocated different amounts of forgiveness rather than a fixed percentage applicable to each. On the other hand, such a scheme *would be coherent*, Franck asserts, because it would incorporate “principles of distribution which commend themselves rationally.”<sup>140</sup>

Whether one would approve of such a result, and even what a catalog of such “rational principles or broader application” might look like, is not really so much the point for present purposes. The main point in this respect for Franck is that a rule must be coherent, both with other rules in its system and with broader principles at work in its system, in order for the rule to be fully legitimate. Or, as stated directly in the text:

Coherence legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to (1) its own principled purpose, (2) principles previously employed to solve similar problems, and (3) a lattice of principles in use to resolve different problems.<sup>141</sup>

This Article will conclude that as a further consequence of the insistence of the CISG Convention on uniformity, and also as a consequence of its attempted independence from municipal legal systems, the Convention severely compromises the extent to which its terms partake of Franck’s coherence.<sup>142</sup>

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<sup>137</sup> Of course, this would not necessarily result in the repayment of exactly one-half the outstanding amount, if the early-alphabet states had been more profligate borrowers than the later-alphabet states. (Franck’s hypothetical in the original texts does contemplate varying amounts of indebtedness among the states.) However, one can conceive of a repayment scheme based on the first letters of the various states’ names resulting in half the debt being paid and half forgiven, and such an arrangement could be fairly taken as the intendment of the hypothetical.

<sup>138</sup> FRANCK, *supra* note 24, at 146.

<sup>139</sup> *Id.* at 147; FRANCK AJIL, *supra* note 25, at 742.

<sup>140</sup> FRANCK, *supra* note 24, at 147; FRANCK AJIL, *supra* note 25, at 742.

<sup>141</sup> FRANCK, *supra* note 24, at 147-48 (emphasis omitted).

<sup>142</sup> See *infra* Part V.C. (considering this concept of “coherence” in the context of the CISG Convention).



#### D. Adherence

The fourth criterion composing Franck's idea of legitimacy is adherence, or specifically, adherence to a hierarchy of secondary rules. At the top of this hierarchy is an "ultimate rule of recognition,"<sup>143</sup> which in Franck's view basically corresponds to H.L.A. Hart's concept of a "rule of recognition."<sup>144</sup> Beneath the ultimate rule of recognition in Franck's vision is a "pyramid of secondary rules about how rules are made, interpreted and applied: rules, in other words, about rules."<sup>145</sup> Connected to this hierarchy of secondary rules one finds the "primary rules of obligation,"<sup>146</sup> such as "cross on the green, stop on the red,"<sup>147</sup> that are the "workhorse"<sup>148</sup> of this hierarchical system.

This kind of legitimacy, in Franck's view, is illustrated by the governmental structures of those states with written constitutions, such as the United States, France and Germany, in which the constitutions serve as the ultimate rules of recognition.<sup>149</sup> Franck discusses the issue of whether there can be said to be such an ultimate rule of recognition in international law.<sup>150</sup> He determines that one such ultimate rule of recognition would be the doctrine of *pacta sunt servanda*, the doctrine that the obligations of a treaty agreed to by a state must be complied with by that state.<sup>151</sup>

Franck notes that others may assume that the source of the state's obligation to comply with a treaty it has signed is the fact of the state's consent to be bound evidenced by its signature.<sup>152</sup> However, he brands this approach as fallacious, since if a state were really sovereign except to the extent of its consent, it would be free to change its mind as to any treaty obligation and ignore such obligations, when in fact the state no longer con-

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<sup>143</sup> FRANCK AJIL, *supra* note 25, at 752; FRANCK, *supra* note 24, at 186.

<sup>144</sup> FRANCK, *supra* note 24, at 183-84; FRANCK AJIL, *supra* note 25, at 751 (each quoting H.L.A. HART, THE CONCEPT OF LAW 209 (1961)).

<sup>145</sup> FRANCK AJIL, *supra* note 25, at 752; FRANCK, *supra* note 24, at 184 (referencing "a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted and applied").

<sup>146</sup> FRANCK AJIL, *supra* note 25, at 752; FRANCK, *supra* note 24, at 184.

<sup>147</sup> FRANCK AJIL, *supra* note 25, at 752.

<sup>148</sup> FRANCK, *supra* note 24, at 184.

<sup>149</sup> See FRANCK AJIL, *supra* note 25, at 753.

<sup>150</sup> See *id.* at 751-53; FRANCK, *supra* note 24, at 188-91.

<sup>151</sup> FRANCK, *supra* note 24, at 187 (referencing the Latin phrase and discussing the sources of the binding nature of the rule); FRANCK AJIL, *supra* note 25, at 756 (referencing "the notion that when a state signs and ratifies an accord with one or more other states, then it has an obligation, superior to its sovereign will").

<sup>152</sup> See FRANCK, *supra* note 24, at 187 ("Why are treaties binding?" is a question usually answered by the superficial assertion that "treaties are binding because states have agreed to be bound."").

sents.<sup>153</sup> Yet states are not free to ignore treaty obligations on the simple expedient that they decide, for whatever reason, no longer to consent.<sup>154</sup> Accordingly, there must be something other than the state's actual consent that results in the binding nature of treaties.

For Franck, this something is a community norm of the obligation of treaties, an ultimate rule of recognition that declares that states are bound by their treaty obligations. Although referred to in the Vienna Convention on the Law of Treaties as *pacta sunt servanda*,<sup>155</sup> the rule does not define ultimate obligation because of its enshrinement in the Vienna Convention.<sup>156</sup> Rather, in Franck's view, the community of nations regards it as an ultimate rule of recognition.<sup>157</sup> It is binding on each state by virtue of the status of that state as a member of the international community.<sup>158</sup> In this way, Franck observes, a "community . . . is defined by its ultimate rule of recognition."<sup>159</sup>

Thus, the final element of Franck's notion of the legitimacy of a rule can be seen to be directly related to the idea that those to whom the rule is addressed form a community defined by ultimate rules of recognition that cap the system of which the rule is a part. Absent such a community, and such a rule of recognition, this kind of adherence cannot exist and this element of legitimacy cannot be complete.

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<sup>153</sup> See FRANCK AJIL, *supra* note 25, at 755 ("It is quite wrong to think that treaties bind states because they have consented to them. If states were sovereign, the mere act of entering into a treaty could not 'bind' them in any accurate sense."); Franck, *supra* note 24, at 187 (referencing the notion that "the obligation of parties to a treaty [cannot] be explained merely by their mutual consent," and disapproving "the fallacy of this explanation").

<sup>154</sup> Of course, sometimes states do appear to unilaterally decide to violate their treaty obligations. Franck uses the example of Libya's military operations in Chad to assert that when a state violates its treaty obligations, the state almost never admits a decision to violate, but rather maintains that no violation has occurred. See FRANCK, *supra* note 24, at 185-86. In other words, quite apart from actual practice, *the rule* does not provide for free violations.

<sup>155</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 63 A.J.I.L. 875, 884 (1969); 8 I.L.M. 679, 690 (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

<sup>156</sup> FRANCK, *supra* note 24, at 187 ("But the binding force of even that statement [from the Vienna Convention] cannot emanate solely from the agreement of the parties. It must come from some ultimate unwritten rule of recognition . . .").

<sup>157</sup> See FRANCK AJIL, *supra* note 25, at 756 ("[States] believe themselves to be bound — which can only be understood as . . . an ultimate rule of recognition.").

<sup>158</sup> See FRANCK, *supra* note 24, at 190 ("obligation derives not from nations' consent but from their status as members of a community of rules"); FRANCK AJIL, *supra* note 25, at 753 ("Obligation is perceived to be owed to a community of states as a necessary reciprocal incident of membership in the community.").

<sup>159</sup> FRANCK, *supra* note 24, at 190.

This Article will suggest that problems in defining and delineating a cohesive community of those actors addressed by the CISG Convention impair the development of this kind of adherence for its rules.<sup>160</sup>

#### E. Legitimacy and Private Actors

It could be observed that Franck develops his legitimacy theories in the context of international relations among states. Yet, this Article ultimately applies Franck's theories to the commercial decisions of private actors. That is, this Article discusses the legitimacy of the CISG Convention insofar as it affects the decisions of *private* actors to be bound by the Convention, rather than states. However, it is no less valid to apply Franck's legitimacy analysis to private actors deciding whether to adopt the CISG Convention than it would be to apply it to states deciding whether to accept the control of international norms.

It is true that a primary reason for the appeal of legitimacy theory in the context of international relations is that the same kind of coercion backing up domestic law does not exist in the international sphere.<sup>161</sup> Legitimacy theory becomes relevant internationally because there appears to be a voluntary aspect of a state's decision to obey an international rule, and it is felt that this voluntary factor might not exist — at least in the same way — if states were subject to supranational coercion.

However, the decision by private international commercial actors as to whether to submit their transaction to the CISG is also one that has a voluntary aspect; indeed, it is entirely voluntary. As noted earlier, the Convention provides the parties with the ability to opt out of its coverage.<sup>162</sup> To the extent that the voluntary nature of compliance is required for the inquiry into legitimacy to be relevant, the decision of private actors to submit to the CISG is no less voluntary — and may be more voluntary in some cases<sup>163</sup> — than the decision of states to comply with other international law rules.

Furthermore, there is nothing in Franck's theories to suggest that they apply only to state actors. In fact, his theories suggest quite the contrary view: that legitimacy theory can be a cogent tool in the examination of na-

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<sup>160</sup> See *infra* Part V.D. (discussing "adherence" in the context of the CISG Convention and other rules of international business law).

<sup>161</sup> See, e.g., FRANCK, *supra* note 24, at 20 ("Empirically, the Austinian critique of international law as non-law is beyond reproach if one accepts that coercion is a necessary component of law and order. Yet . . . some, indeed *many* international rules of conduct are habitually obeyed by states. . . . Thus, to whatever extent any rules are obeyed in the international system, they *must* be due to some factor, or mix of factors, other than the Austinian one.").

<sup>162</sup> CISG art. 6 ("The parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions."); see *supra* notes 96-98 and accompanying text.

<sup>163</sup> States cannot choose whether to be bound by customary international law or not, whereas private actors potentially subject to the CISG Convention can.

tional rule systems as well. Although he acknowledges differences between the regimes of national and international law, "the line of inquiry . . . is not so different as to justify the alienation of the two branches," such "differences create a tantalizing intellectual symbiosis."<sup>164</sup>

Most importantly, Franck suggests that a major reason for studying international legitimacy theory is its possible applications to domestic legal systems.<sup>165</sup> It is precisely because international law often lacks supranational coercion that the frequent compliance with it by states commands our attention when we consider the mechanics, and the possible betterment, of national legal systems.<sup>166</sup> Franck notes that most contemporary legal philosophers concede that the existence of domestic coercion does not alone explain the adherence by the populace to the national law.<sup>167</sup> Referencing the work of several important modern legal scholars, he notes that these scholars have considered it necessary to explain, beyond mere force of arms, why actors even in domestic societies obey the law.<sup>168</sup> Franck's views on legitimacy are as relevant to this question as the work of any others, and he notes that even the words "legitimacy" and "legitimation" have been used by others, with similar import, in the purely domestic context.<sup>169</sup>

It might similarly be felt that the international context affords states with two stages at which rule compliance is voluntary: the decision whether to adhere to a treaty in the first place, and the decision whether to comply with it when relevant events occur.<sup>170</sup> On the other hand, it might

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<sup>164</sup> FRANCK, *supra* note 24, at 5.

<sup>165</sup> See FRANCK AJIL, *supra* note 25, at 706-07 ("Indeed, international law is the *best* place to study some of the fundamental teleological issues that arise not only in the international, but also in national legal systems.").

<sup>166</sup> See *id.* at 707 ("[I]t is precisely the curious paradox of obligation in the international rule system [that should lead to] jurisprudential inquiry . . . . The answer, if there is one, may also incidentally prove useful in designing more widely obeyed, less coerced, laws for ordering the lives of our cities and states.").

<sup>167</sup> See FRANCK, *supra* note 24, at 15 ("Most contemporary legal philosophers deem coercive power necessary but insufficient to secure habitual social assent to governance."); FRANCK AJIL, *supra* note 25, at 708 ("While most students of national systems . . . agree . . . that governance requires *some* exercise of power by an elite supported by coercive force, few any longer believe the Austinians' claim that this necessary condition is also a sufficient one.").

<sup>168</sup> Particular attention is given to the work of Ronald Dworkin, Jurgen Habermas and Max Weber. See FRANCK, *supra* note 24, at 15-17 (citing RONALD DWORKIN, *LAW'S EMPIRE* (1986); JURGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (T. McCarthy trans., 1979); MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* (G. Roth & C. Wittich eds., 1968)).

<sup>169</sup> See FRANCK at 16; FRANCK AJIL, *supra* note 25, at 709.

<sup>170</sup> Of course, with respect to rules invoked pursuant to customary international law, there would not be a distinct decision to adhere to the rule, since states do not specifically adopt rules of customary international law. However, for the sake of exposition, the integrity of this distinction, between the state's decision to adhere to the rule in the first place, and its decision to comply once relevant events have occurred, will be assumed.

be felt, the opt-out decision of private actors is only involved at the first such stage. On this reasoning, it might be presumed that once the private actors have made the admittedly voluntary decision to accept the Convention, they would not be free to violate its terms. It could then be asserted that Franck concerns himself mainly with the second stage of the voluntary behavior of states, rather than the first stage, and it is at the first stage where CISG adherence is voluntary.

This comparison actually works the other way, however. That is, this comparison re-enforces the connection between Franck's approach and CISG adoption rather than weakens it. The central tenet of Franck's vision of legitimacy is "compliance pull,"<sup>171</sup> a rule is legitimate to the extent it exerts a pull to compliance. Under Franck's view, it is important to know when a rule exerts compliance pull when the rule concededly applies in the first place, as in where a treaty has already been signed. If this is the case, surely it must be even more important, and more valuable, to know when a rule exerts such compliance pull that parties will want to adopt it as an initial matter.

The drafters of the CISG expected commercial parties to adopt its provisions when they are not required to. It thus becomes especially important to examine what it is about a rule such as the CISG that could exert a pull to compliance under such circumstances, possibly inducing the parties to adopt its rules. If anything, the Franck inquiry is more critical at this compliance stage than at the latter.<sup>172</sup>

#### IV. SOME SUCCESSFUL RULES OF INTERNATIONAL BUSINESS LAW

This Article ultimately determines that the CISG Convention, discussed in Part II, when examined against Thomas Franck's criteria discussed in Part III, is substantially illegitimate.<sup>173</sup> The Article, however, seeks to do more than simply evaluate the Convention on the basis of Franck's criteria.

This Article also attempts to establish a practical context for the legitimacy evaluation of the CISG. To do this, a preliminary comparison will first be made. This Article ultimately compares the CISG Convention against Franck's legitimacy standards, but will first compare the CISG Convention with three other significant rules of international business law. This Article asserts that these three sources of international business law

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<sup>171</sup> FRANCK, *supra* note 24, at 16; FRANCK AJIL, *supra* note 25, at 708.

<sup>172</sup> It is also worth noting that even at the compliance stage private actors can moderate their compliance with enunciated rules according to how legitimate the rules appear to be. Franck uses the example of customs regulations and duties applicable to business travelers and tourists, which seem to many to be honored much more in the breach than the observance. See FRANCK AJIL, *supra* note 25, at 708.

<sup>173</sup> See *infra* Part V (discussing the comparative legitimacy of the CISG Convention).

have been successful as efforts to state and enforce controlling rules. It also shows that these three sources satisfy all, or nearly all, the legitimacy criteria developed by Professor Franck. In the final analysis, these three sets of rules — legitimate from the standpoint of theory and successful from the standpoint of practicality — furnish a possible basis for gauging the potential practical success, as well as the current legitimacy, of the CISG Convention.

Before this comparison of practical success can be made, however, it is advisable to state exactly what is meant by “success” for purposes of this discussion.

#### A. An Approach to “Success” in Reviewing International Business Law Rules

Since the discussion up to this point has noted that different rules of international law are obeyed to varying degrees,<sup>174</sup> one concept of the success of an international rule would turn on the extent to which the rule is truly regarded by relevant parties as binding. This is the concept of success on which this Article will focus. Accordingly, when describing a particular rule of international business law, this Article considers the rule “successful” to the extent that actors in international business, including adjudicating courts, consider the rule to be actually the regulating rule in those areas it purports to address. Of course, there can be a variety of reasons for a failure of such a rule to attain such recognition, including a decision of the parties to opt out of such a rule.<sup>175</sup> However, since this Article focuses on the actual influence of laws in international business, it is fair to consider recognition by international business actors in this way, even if such laws envisage a certain level of voluntary abstention.

It should be emphasized that this idea of success does not refer to the success a particular international law rule may have in attaining the policy goal it is designed to accomplish. A treaty, for example, can be scrupulously observed and acknowledged as binding by the parties and yet still not bring about the desired policy result. The reasons for this kind of failure can be as various as the diverse subject matters different treaties may deal with, and in most cases will be related to the substance of the treaties. This Article focuses on the more jurisprudential question of the success of the treaty in attaining the status of an acknowledged regulating rule, rather than the more particularized policy-based idea of success.

This Article considers in turn three sets of international business law rules that have been successful in this sense. Two of these are multilateral

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<sup>174</sup> See text accompanying notes 99-108 (alluding to the variable nature of state practice in obeying international law).

<sup>175</sup> A prominent example here, of course, is Article 6 of the CISG Convention. See *supra* Part II.E. (discussing this provision).

treaties: the International Convention for the Unification of Certain Rules Relating to Bills of Lading<sup>176</sup> (known as the "Brussels Bill of Lading Convention") and the Convention for the Unification of Certain Rules Relating to International Transportation by Air<sup>177</sup> (known as the "Warsaw Air Transport Convention"). The third is not a convention or treaty, but instead a set of promulgated terms incorporated by international business actors within the text of their contracts, and thus most frequently enforced under applicable contract law. This is the Uniform Customs and Practice for Documentary Credits<sup>178</sup> (known as the "UCP"), and will be considered first.<sup>179</sup>

#### B. The Uniform Customs and Practice for Documentary Credits

The Uniform Customs and Practice for Documentary Credits, or "UCP," is the internationally pre-eminent legal regime governing letters of credit. A letter of credit is a written document expressing the enforceable commitment of its issuer (usually a bank) to pay money to its addressee (the "beneficiary") on behalf of a third person (the "account party," usually a customer of the bank).<sup>180</sup> Usually the terms of the letter of credit describe a set of documents required for a draw by the beneficiary against the letter of credit.<sup>181</sup> The presentation of such documents (conforming to the description in the credit) to the bank is a condition precedent to the bank's obligation to pay.<sup>182</sup>

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<sup>176</sup> International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 2 Bevens 430, 120 L.N.T.S. 155 [hereinafter Brussels Bill of Lading Convention].

<sup>177</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Feb. 13, 1933, 2 Bevens 983, 137 L.N.T.S. 11 [hereinafter Warsaw Air Transport Convention].

<sup>178</sup> INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 500, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993) [hereinafter 1994 UCP].

<sup>179</sup> This is not the first time that a comparison of international law rules such as these with the CISG Convention has been suggested by a commentator. See Rosett, *supra* note 13, at 283 (referencing very briefly the Brussels Bill of Lading Convention and the UCP). However, to my knowledge this is the first time the comparison has been considered in detail, and also the first time the comparison has been made with reference to the idea of legitimacy.

<sup>180</sup> This definition has been adapted for purposes of this Article from sources operating in contexts either more general or more particular than the contexts involved here. See, e.g., HENRY HARFIELD, BANK CREDITS AND ACCEPTANCES 31 (5th ed. 1974) ("The basic legal structure of a letter of credit, then, is a legally enforceable commitment by one, the issuer, to pay money to a second, the beneficiary, on behalf of a third, the account party."); BEN BERMAN, THE DICTIONARY OF BUSINESS AND CREDIT TERMS 124 (Nat'l Ass'n Credit Mgmt. 1983) ("A letter, on behalf of a buyer, addressed by a banker to a correspondent bank guaranteeing payment, when evidenced by documents confirming shipment of goods.").

<sup>181</sup> See HARFIELD, *supra* note 180, at 56-69 (describing "Documents Normally Required").

<sup>182</sup> See, e.g., *id.* at 73 ("The beneficiary must strictly comply with the terms of the credit to compel performance by the bank.") (emphasis omitted).

Credit extended by banks is fundamental to modern economies,<sup>183</sup> and nearly an infinite variety of letters of credit and analogous instruments have been proliferating to meet financial needs.<sup>184</sup> Since 1929, the International Chamber of Commerce (“ICC”) has been involved in producing uniform rules governing documentary letters of credit.<sup>185</sup> The ICC has produced, at various intervals over the years since 1929, successive versions of these uniform rules. The most recent is the text of the UCP adopted in 1993, which became effective on January 1, 1994.<sup>186</sup> A breakdown of the various versions of this ICC document in the intervening years is as follows:

<i>Year Issued or Published</i>	<i>Brochure No.</i>
1930	74
1933	82
1951	151
1962	222
1974	290
1983	400
1993	500 <sup>187</sup>

The ICC takes the position that the UCP constitutes “self-regulation by business,” and that it is “devised by experts from the private sector.”<sup>188</sup> The ICC also has stated that these rules demonstrate “the ability of business people in countries with differing legal systems to apply their own practical mechanisms for the conduct of trade.”<sup>189</sup> Although a certain element of these statements can be viewed as promotional in character, it does appear from the roster of the ICC working group on the 1994 UCP that nearly all participants are indeed senior officers of international banks and financial organizations located in a variety of world business capitals.<sup>190</sup>

It is also clear that in the United States, a major influence on the continued development and effectiveness of the UCP for many years has been

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<sup>183</sup> See *id.* at 4.

<sup>184</sup> See *id.* at 28.

<sup>185</sup> See *id.* at 225 (beginning discussion of the work of the ICC regarding letter-of-credit standardization by referring to a 1929 report by an ICC committee to the Amsterdam Congress of the ICC regarding “Uniform Regulations for Commercial Documentary Credits”).

<sup>186</sup> 1994 UCP, *supra* note 178, title page.

<sup>187</sup> Information for this table was derived from HARFIELD, *supra* note 180, at 225-26; JOHN F. DOLAN, THE LAW OF LETTERS OF CREDIT, ¶ 3.05 at 3-20 to 3-23 & n.123 (1999); 1994 UCP, *supra* note 178.

<sup>188</sup> See Jean-Charles Rouher, *Forward*, in 1994 UCP, *supra* note 178, at 3.

<sup>189</sup> See *id.*

<sup>190</sup> See Charles del Busto, *Preface* to 1994 UCP, *supra* note 178, at 6-7 (listing nine working group members, two of which appear to be professors of banking law — one from the United States and the other from Italy — and the remainder of whom appear to be current or former banking executives or ICC officers from France, Germany, Norway or the United Kingdom).



the United States Council on International Banking ("USCIB").<sup>191</sup> The USCIB has been described as a trade association representing over 350 United States banks engaged in international operations. The letters of credit issued by USCIB members make up over 80% of the credits issued by banks in the United States, and the USCIB is the United States representative to the ICC for drafting revisions of the UCP.<sup>192</sup>

Although the UCP addresses itself to a wide variety of issues that can present themselves regarding the issuance and administration of letters of credit, there are some issues that it does not address. For example, when more than one bank is involved in a letter-of-credit transaction — either to help provide prompt payment to beneficiaries, or to provide reimbursement for payments made under another bank's credit,<sup>193</sup> or to serve similar purposes — many aspects of the inter-bank relationship are not covered in detail in the UCP. These issues are now dealt with separately in a different and somewhat less commonly known ICC publication, the "ICC Uniform Rules for Bank-to-Bank Reimbursements."<sup>194</sup>

Also, the UCP does not deal with issues that are basically general contract law and business law questions that can arise in the context of letters of credit. This would include such matters as fraud, duress, and competency of parties.<sup>195</sup> With respect to these and other issues not addressed by the UCP, other sources of applicable law fill in the gaps. In most United States jurisdictions, these additional sources of law on letter-of-credit matters would be Article 5 of the UCC<sup>196</sup> and the relevant jurisdiction's common law regarding letters of credit. There is a non-conforming amendment to UCC Article 5, adopted at various times by four states that may have the effect of excluding the application of Article 5 when the UCP applies to a

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<sup>191</sup> See generally James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 Nw. J. INT'L L. & BUS. 189 (1995) (discussing throughout the influence of the USCIB on the attempted revision of UCC Article 5, dealing with letters of credit for purposes of domestic commercial law); James G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 Nw. J. INT'L L. & BUS. 215 (1995) (commenting on Prof. White's article in the same issue).

<sup>192</sup> The material for this description is taken primarily from White, *supra* note 191, at 190 n.5.

<sup>193</sup> See Dan Taylor, *Preface to INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 525, ICC UNIFORM RULES FOR BANK-TO-BANK REIMBURSEMENTS UNDER DOCUMENTARY CREDITS* at 4 (1995) [hereinafter URR].

<sup>194</sup> See *id.*

<sup>195</sup> See DOLAN, *supra* note 187, at 4-32, ¶ 4.04 ("[T]he Customs leave much unsaid and call for supplemental rules. . .").

<sup>196</sup> See *id.* at 4-33, ¶ 4.05 (suggesting that in United States jurisdictions the UCP and UCC Article 5 have complementary spheres of application, since "in general, both sources treat different questions," and that generally "courts apply freedom-of-contract principles and let the parties' choice of the Uniform Customs prevail over the Code").

letter of credit.<sup>197</sup> However, this version appears now to be applicable only in the state of New York<sup>198</sup> and it has generally not been nationally significant.

The text of the UCP itself does not purport to be, by its own terms, positive law. However, the UCP provides that it applies to all letters of credit that incorporate the UCP into their text.<sup>199</sup> In these cases, the UCP effectively becomes part of the letter-of-credit contract between the bank and its beneficiary, and under prevailing contract law principles the terms of the UCP become enforceable in the courts of most jurisdictions as though they were positive law. Some commentators have even gone so far as to say that the UCP is in effect law in and of itself.<sup>200</sup>

The UCP is probably applicable to the overwhelming majority of letters of credit issued each year throughout the world. Commentators have asserted that the UCP is "incorporated into substantially all cross-border commercial letters of credit,"<sup>201</sup> and that a "large percentage of all letters of credit in the United States and in other countries" incorporate its terms.<sup>202</sup> The ICC, admittedly an interested authority, has declared the acceptance of the rules and definitions of the UCP to be universal.<sup>203</sup> There can be no substantial doubt that the UCP is a successful set of international business law rules, as this Article defines the parameters of success.

### C. The Brussels Bill of Lading Convention

A bill of lading is a document signed by a shipowner or his agent "which states that certain specified goods have been shipped upon a particular ship, and which purports to set out the terms on which such goods have been delivered to and received by the ship."<sup>204</sup> When negotiable, a bill of lading accordingly serves three functions: as a receipt, a contract, and a document of title.<sup>205</sup> Negotiable bills of lading are very commonly used not

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<sup>197</sup> ALA. CODE § 7-5-102(4) (1993); ARIZ. REV. STAT. ANN. § 47-5102[D] (1988); MO. REV. STAT. § 400.5-102(4) (Vernon Supp. 1994); N.Y. U.C.C. § 5-102(4) (McKinney 1995); all cited in DOLAN, *supra* note 187, at 4-32 to 4-33, ¶ 4.05 & nn. 171 & 172.

<sup>198</sup> Of the statutory provisions cited in the immediately preceding note, only that for New York appears to remain in effect. N.Y. U.C.C. § 5-102(4) (McKinney 1995).

<sup>199</sup> 1994 UCP, *supra* note 178, art. 1.

<sup>200</sup> *See, e.g.,* White, *supra* note 191, at 189 ("the UCP are clearly law"), 211 ("The real reason for the power of the UCP is that it is already the American law . . ."); *see also* Barnes, *supra* note 191, at 216 (the UCP is "treated as quasi-law in the many countries that have little or no statutory law governing letters of credit").

<sup>201</sup> Barnes, *supra* note 191, at 216.

<sup>202</sup> White, *supra* note 191, at 189.

<sup>203</sup> *See* Rouher, *supra* note 188, at 3.

<sup>204</sup> ATHANASSIOS N. YIANNPOULOS, NEGLIGENCE CLAUSES IN OCEAN BILLS OF LADING 3, n.3 (1962) (quoting 30 HALSBURY, LAWS OF ENGLAND 372 (1938)).

<sup>205</sup> *See id.* ("The negotiable bill of lading is a receipt for the goods received for shipment, evidences the terms of the contract, and is a document of title . . ."). *See also* BERMAN, *su-*

only in facilitating international shipment of goods, but also as supporting documents for draws under letters of credit covering international shipments.<sup>206</sup>

In view of the multiple functions of a bill of lading, bills of lading have always delineated a complex and multi-faceted relationship between the party sending the goods for transport (the "shipper," sometimes referred to as the "cargo interest") and the party effectuating the transport itself (the "carrier," sometimes referred to as the "shipowners" or "shipping interest"). Most particularly, there is an inherent and basic tension between cargo interests and shipping interests regarding the allocation of risk of loss of the goods shipped during transport.<sup>207</sup>

By the first two decades of this century, commercially prominent countries had begun to enact legislative compromises resolving this tension to greater or lesser degrees, but the approaches thus instituted were diverse and non-uniform.<sup>208</sup> Accordingly, the unification and codification of rules stating the extent of shipowner liability under bills of lading was an early subject for international commercial law reformers.

Specifically, during the late nineteenth century and the early years of the twentieth century, the International Law Association and the Comité Maritime International were substantially involved in the development of such rules.<sup>209</sup> The International Law Association was founded in 1873 in an effort by legal reformers to codify international law, and its early work regarding bills of lading was undertaken by a committee composed of merchants, shipowners, underwriters and maritime lawyers.<sup>210</sup> The Comité Maritime International was founded in 1897 in Belgium, and was initially created by several national associations of maritime law.<sup>211</sup>

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*pra* note 180, at 37 ("A form of agreement by a common carrier identifying the freight and representing both a receipt and a contract for the shipment. . . . A bill of lading in the form of a negotiable instrument is evidence of title to the goods being shipped.").

<sup>206</sup> See HARFIELD, *supra* note 180, at 59-66 (describing bills of lading as "Documents Normally Required" for a draw on a documentary letter of credit, and describing certain issues that can arise in this connection).

<sup>207</sup> See, e.g., Michael F. Sturley, *Historical Introduction*, in 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PRÉPARATOIRES OF THE HAGUE RULES 3 (Michael F. Sturley ed., 1990) (describing the ways in which this risk of loss was generally allocated in shipment contracts beginning with the early nineteenth century).

<sup>208</sup> See *id.* at 8.

<sup>209</sup> See *generally id.* at 4-11 (describing in detail the early efforts of both organizations in this area); see also ALBERT RODRIGUEZ PALACIOS, A COMPARATIVE ANALYSIS OF THE HAGUE/HAGUE-VISBY RULES AND THE HAMBURG RULES 2-7 (The World Peace Through Law Center 1990) (concentrating on the activities of both groups during the latter portion of this period).

<sup>210</sup> See Sturley, *supra* note 207, at 4.

<sup>211</sup> See *id.* at 5.

The work of these organizations in this area extended from 1882 through 1924, and throughout this period both cargo interests and shipowners' interests were significantly vocal, both on the policy issues in general and the work of the organizations in particular.<sup>212</sup> Matters significantly solidified in September 1921, at a conference of the International Law Association and its Maritime Law Committee (containing representatives of carriers, shippers, bankers and underwriters).<sup>213</sup> After four days of debate between cargo interests and carrier interests, the members agreed to "the Hague Rules of 1921," designed for voluntary incorporation by reference in bills of lading when carriers and shippers so agreed.<sup>214</sup>

Initial reception of the Hague Rules was mixed, however; shipowners were generally pleased but cargo interests were less satisfied. The main objection was the voluntary nature of the rules; cargo interests preferred a mandatory approach through legislation.<sup>215</sup> In this context, when the Comité Maritime International next met, in London in 1922, that organization revised the Hague Rules into the form of a binding multilateral convention.<sup>216</sup> Due to a series of procedural complications, the text of this multilateral convention could not be approved immediately, but was ultimately signed by twenty-five countries on August 25, 1924, at a diplomatic conference in Brussels.<sup>217</sup> Thus what became known as the Brussels Bill of Lading Convention was in point of substance generally identical to the 1921 Hague Rules, and for that reason the regulatory scheme embodied in the Brussels Bill of Lading Convention is often interchangeably referred to as the "Hague Rules."

The crux of the Brussels Convention is a basic compromise between cargo interests and shipowners' interests. Under this arrangement, the carrier is bound before and at the beginning of the voyage to use due diligence to make the ship seaworthy, properly man, equip and supply the ship, and make all holds and other storage chambers fit and safe for the goods.<sup>218</sup> Any clause in any bill of lading covered by the Convention that purports to

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<sup>212</sup> See *id.* at 5 (by 1887, "cargo interests became increasingly frustrated with what they viewed as overreaching on the part of the carriers"); *id.* at 9 (the Dominions Royal Commission recommended compromise legislation on bills of lading for the entire British Empire, "after hearing evidence from shippers and ship-owners in Britain and the self-governing dominions"); *Id.* at 11 (detailing lobbying efforts of cargo interests and carriers at the 1921 Hague conference).

<sup>213</sup> See *id.* at 9-10.

<sup>214</sup> See *id.* at 10.

<sup>215</sup> See *id.* at 11-12.

<sup>216</sup> See *id.* at 12; PALACIOS, *supra* note 209, at 3-4.

<sup>217</sup> See PALACIOS, *supra* note 209, at 4.

<sup>218</sup> See Brussels Bill of Lading Convention, *supra* note 176, art. 3(1), 2 Bevens 433, 120 L.N.T.S. 163.

relieve the carrier of this duty is null and void.<sup>219</sup> In exchange for these protections of the shipper, the carrier is exempt from any liability arising from a long list of eventualities such as fire, act of God, war or public enemies, riots, civil commotions, and the like, and the carrier is also exempt from liability arising from any act or neglect in navigation.<sup>220</sup> Furthermore, the liability of the carrier is in any event limited to an aggregate sum equal to a fixed monetary amount (in the United States, \$500) per package or unit.<sup>221</sup>

The Hague Rules, or the Brussels Convention, still remain in force throughout much of the world today. Commentators have concluded that the Hague Rules represent a significant and successful effort in the coordination of international trade law,<sup>222</sup> and that the overwhelming majority of the world's shipping is subject to them.<sup>223</sup>

The subsequent history of the Hague Rules has not, however, been static. In the mid-1950's, pressure began mounting for certain changes in the Hague Rules that would make them, at least assertedly, more responsive to the demands of modern shipping.<sup>224</sup> Ultimately, on February 23, 1968, an amendatory convention was signed in the Swedish city of Visby.<sup>225</sup> The changes worked by the so-called "Hague-Visby Rules" are relatively minor in scope and do not affect most major provisions of the Hague Rules, except that the Visby amendments revised the maximum per package amount for the carrier's liability.<sup>226</sup> The Hague-Visby Rules are not drafted to stand on their own as an independent set of rules, but rather are drafted in the form of an express set of amendments to the Hague Rules themselves. The Hague-Visby Rules are in force for those states that have ratified them, but the original Hague Rules remain in force for those states which are party to

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<sup>219</sup> Brussels Bill of Lading Convention, *supra* note 176, art. 3(8), 2 Bevens 434, 120 L.N.T.S. 165.

<sup>220</sup> Brussels Bill of Lading Convention, *supra* note 176, art. 4(2)(a)-(q), 2 Bevens 435-36, 120 L.N.T.S. 167.

<sup>221</sup> Brussels Bill of Lading Convention, *supra* note 176, art. 4(5), 2 Bevens 436, 120 L.N.T.S. 167. The parties may increase this maximum amount by agreement, but may not decrease it. *Id.*

<sup>222</sup> See Rosett, *supra* note 13, at 283.

<sup>223</sup> See Sturley, *supra* note 207, at 23.

<sup>224</sup> See PALACIOS, *supra* note 209, at 17.

<sup>225</sup> See *id.* at 25.

<sup>226</sup> Originally, the Visby amendments provided that the new per-package limitation would be "10,000 [Poincaré] francs per package or unit or 30 francs per kilo of gross weight . . . , whichever is the higher." Protocol to Amend the International Convention for Bills of Lading, Feb. 23, 1968, Art. 2, *reprinted in* SAUL SORKIN, 7 GOODS IN TRANSIT, at App. M (1997). This amount was itself later revised in a further amendatory protocol, whose sole substantial effect was to replace this figure with an amount generally equal to 666.67 Special Drawing Rights per package or unit, or 2 SDR's per aggregate kilogram, whichever is higher. Protocol Amending the International Convention for Bills of Lading, As Amended, Dec. 21, 1979, Art. II(1), *reprinted in id.* at App. M-1.

them, such as the United States, yet have not ratified the Visby amendments.

At about the same time the Visby amendments were being finalized, developing countries began a concentrated effort to replace the Hague Rules, on the grounds that they — even as revised by the Visby amendments — placed too heavy a burden on the shipper to the benefit of the carrier.<sup>227</sup> An effort was then undertaken, under the auspices of UNCITRAL, to develop a new set of liability rules for bills of lading. Finally, a new convention was signed in March of 1978 in Hamburg, and its text has become known as the “Hamburg Rules.”<sup>228</sup> Under the Hamburg Rules, former concepts such as a duty of “seaworthiness” and “negligent navigation and management” have disappeared<sup>229</sup> in favor of a more comprehensive type of liability for the carrier.<sup>230</sup> Although originally signed by 27 states in 1978, the Hamburg Rules did not become effective until 1992, and of the states that have now ratified the rules, virtually all are developing countries.<sup>231</sup>

The United States did not treat the Hague Rules as self-executing, and instead finally implemented them, after protracted argumentation on behalf of cargo and shipowners’ interests,<sup>232</sup> with the passage of a federal statute in 1936 (known as the “Carriage of Goods By Sea Act,” or “COGSA”).<sup>233</sup> This legislation is not the only United States federal law dealing with bills of lading. The Harter Act, originally passed long before COGSA in 1893,<sup>234</sup> applies a liability allocation somewhat like that in the Hague Rules

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<sup>227</sup> See PALACIOS, *supra* note 209, at 19-20.

<sup>228</sup> See *id.* at 30-31. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, A/Conf. 89/13, 30th March, 1978, reprinted in SORKIN, *supra* note 226, at App. L [hereinafter Hamburg Convention].

<sup>229</sup> See PALACIOS, *supra* note 209, at 31.

<sup>230</sup> See, e.g., Hamburg Convention, *supra* note 228, Art. 5(1); SORKIN, *supra* note 226, at App. L-9 (“The carrier is liable for loss . . . if the occurrence which caused the loss . . . took place while the goods were in his charge . . . , unless the carrier proves that he . . . took all measures that could reasonably be required to avoid the occurrence . . .”).

<sup>231</sup> UNCITRAL, *Status of UNCITRAL Texts*, in 26 UNCITRAL YEARBOOK 229, 231 (1995); see also United Nations Treaty Collection (visited Feb. 23, 1999) <<http://www.un.org/Depts/Treaty>>. Only one member of the European Union has ratified the Hamburg Convention (Austria), and of the countries involved in the NATO constellation, only Hungary and the Czech Republic (relative newcomers) have ratified. *Id.* Furthermore, neither China nor Japan has ratified it.

<sup>232</sup> See Sturley, *supra* note 207, at 15-23.

<sup>233</sup> CARRIAGE OF GOODS BY SEA ACT, ch. 239, 49 Stat. 1207 (1936), codified in 46 U.S.C. App. §§ 1300-1315 (1994). One source of potential confusion in this area is that various other English-speaking states have passed domestic statutes, some derivatives of the Hague Rules, and also called them “Carriage of Goods by Sea Act.” The United Kingdom and Canada are prominent examples.

<sup>234</sup> HARTER ACT, ch. 105, 27 Stat. 445 (1893), codified in 46 U.S.C. App. §§ 190-196 (1994). The compromise between cargo and shipping interests expressed in the HARTER ACT was one of the instigating impulses for the development of the Hague Rules.

to bills of lading for inland transport within the United States. The Pomerene Act<sup>235</sup> (also called the Federal Bill of Lading Act) relates substantially to the federal policy of facilitating the transferability and utility of bills of lading as commercial instruments, in part in the secondary market for commercial paper. Even at the state level, Article 7 of the UCC has residual application to the commercial governance of bills of lading, to the extent not covered by federal laws or treaties.<sup>236</sup>

Although a variety of federal and state laws apply to bills of lading, it is well established in United States law that COGSA and thus, indirectly, the Hague Rules are the governing rules of decision with respect to the issues they cover. Large numbers of federal cases are decided each year applying, or at least referencing, the provisions of COGSA,<sup>237</sup> and the United States Supreme Court in more than one situation has had occasion to examine its terms.<sup>238</sup> Admittedly, there has been critical commentary about the effectiveness of the Hague Rules and COGSA from a policy perspective,<sup>239</sup> and the development and adoption of the Visby amendments and the Hamburg Rules indicate this. However, the criterion of success adopted by this Article is the extent to which international commercial actors actually regard the rules as the applicable governing standard, and there can be little doubt that among the ratifying countries the Hague Rules have met this standard.

#### D. The Warsaw Air Transport Convention

The Warsaw Air Transport Convention was signed in 1929 and was ratified by the United States in 1934.<sup>240</sup> One of its major underlying pur-

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<sup>235</sup> 49 U.S.C. §§ 80101-80116 (1994).

<sup>236</sup> UCC Art. 7 ("Warehouse Receipts, Bills of Lading and Other Documents of Title"); UCC § 7-103 ("To the extent that any treaty or statute of the United States, . . . or tariff, classification or regulation filed or issued pursuant thereto is applicable, the provisions of this Article are subject thereto.").

<sup>237</sup> It would appear from recent searches of electronic databases that over 50 federal cases since January of 1995 have referenced COGSA or the Hague Rules in one context or another.

<sup>238</sup> In the most recent case, and the one treating COGSA in the most detail, the Court held that COGSA's prohibition of any provision of a bill of lading lessening liability other than as provided in COGSA did not preclude the operation of a bill-of-lading arbitration clause. *See Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995). *See also Robert C. Herd & Co., Inc. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959) (interpreting COGSA's limit of liability with respect to its possible application to stevedores or agents). A brief reference is more peripheral in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 604 (1991) (Stevens, J., dissenting).

<sup>239</sup> *See, e.g., Erling Selvig, Unit Limitation and Alternative Types of Limitation of Carrier's Liability*, in *SIX LECTURES ON THE HAGUE RULES* 105, 120-25 (Kurt Grönfors ed., 1967) (expressing dissatisfaction with the mechanism of a per-package liability maximum).

<sup>240</sup> Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, *reprinted in* 49 U.S.C. § 40105 note (1994).

poses was the encouragement and development of the then fledgling international air transportation industry.<sup>241</sup> Accordingly, an overriding theme of the Convention is the establishment of limitations of various kinds on the liability of commercial air carriers in the event of harm suffered by passengers or goods transported.

The Convention declares in general terms that the carrier shall be liable for damage sustained by passengers on board an aircraft or in the course of embarking or disembarking.<sup>242</sup> A similar declaration imposes liability for damage to checked baggage or goods, if the damage took place during the transportation by air.<sup>243</sup> However, these general rules are subject to significant limitations.

First, in general, the carrier is not liable — in spite of the preceding statements of liability — if the carrier proves that the carrier and its agents have taken all necessary measures to avoid the damage, or that it was impossible to take such measures.<sup>244</sup> Furthermore, even in those situations in which the carrier is found to be liable under its terms, the Convention as originally adopted limited the amount of the carrier's liability to 125,000 French francs per passenger.<sup>245</sup> The Convention goes on to withdraw these limitations on the carrier's liability if the damage is caused by the "willful misconduct" of the carrier,<sup>246</sup> and "by special contract" the carrier and the passenger may agree to a higher limit of liability than that specified in the Convention.<sup>247</sup>

There have been several additions and modifications to the Convention's terms over the years. Probably the most significant is the "Montreal Agreement,"<sup>248</sup> which increased the maximum amount of carrier liability (originally 125,000 French francs) to U.S. \$75,000 per passenger.<sup>249</sup> Under the Montreal Agreement, participating carriers also waived the non-negligence defense otherwise afforded in the Convention — that is, the opportunity to show, for example, that the carrier had "taken all necessary

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<sup>241</sup> See, e.g., Katherine A. Staton, *The Warsaw Convention's Facelift: Will It Meet the Needs of 21st Century Air Travel?*, 62 J. AIR L. & COM. 1083, 1085 (1997) (a primary goal of the Convention was to "limit the potential liability of the young air carrier industry in accidents").

<sup>242</sup> Warsaw Air Transport Convention, *supra* note 177, art. 17, 2 Bevens 989.

<sup>243</sup> Warsaw Air Transport Convention, *supra* note 177, art. 18(1), 2 Bevens 989.

<sup>244</sup> Warsaw Air Transport Convention, *supra* note 177, art. 20(1), 2 Bevens 990.

<sup>245</sup> Warsaw Air Transport Convention, *supra* note 177, art. 22(1), 2 Bevens 990.

<sup>246</sup> Warsaw Air Transport Convention, *supra* note 177, art. 25(1), 2 Bevens 991.

<sup>247</sup> Warsaw Air Transport Convention, *supra* note 177, art. 22(1), 2 Bevens 990.

<sup>248</sup> Agreement Relating to Liability Limitations of Warsaw Convention and the Hague Protocol, May 13, 1966, reprinted in LAWRENCE B. GOLDHIRSCH, *THE WARSAW CONVENTION ANNOTATED*, at 317 (1988).

<sup>249</sup> See I.H.P.H. DIEDERIKS-VERSCHOOR, *AN INTRODUCTION TO AIR LAW* 93 (1993); Staton, *supra* note 241, at 1086.



measures” to avoid the damage — up to the \$75,000 maximum.<sup>250</sup> The Montreal Agreement, however, was a private agreement concluded in 1966 between the participating carriers and the Civil Aeronautics Board of the United States.<sup>251</sup> It is effective pursuant to the provisions of the Warsaw Convention allowing carriers and passengers to assent to liability limits higher than those specified in the Convention “by special agreement.”<sup>252</sup> However, the Montreal Agreement, having been developed and negotiated by United States authorities, only applies to international flights for which a point within the United States is an agreed stopping place, point of departure or destination.<sup>253</sup>

In spite of the numerous modifications and alterations to the Warsaw Air Transport Convention over the years,<sup>254</sup> of which this Montreal Agreement is but one example, the weight of authority attests to its success as a fact of international law.<sup>255</sup> Some commentators express frank criticism of some of its substantive policy provisions,<sup>256</sup> but this does not detract from its success as that term is used in this Article — success as an acknowledged source of the applicable law.<sup>257</sup>

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<sup>250</sup> See DIEDERIKS-VERSCHOOR, *supra* note 249, at 93; Staton, *supra* note 241, at 1086.

<sup>251</sup> See DIEDERIKS-VERSCHOOR, *supra* note 249, at 92.

<sup>252</sup> Warsaw Air Transport Convention, *supra* note 177, art. 22(1), 2 Bevans 990.

<sup>253</sup> See DIEDERIKS-VERSCHOOR, *supra* note 249, at 93; Staton, *supra* note 241, at 1085-86.

<sup>254</sup> Examples would include the Hague Protocol of 1955 (increasing the maximum liability amount by means of a multilateral convention rather than private agreement, but to an extent judged insufficient by United States authorities; it became effective in 1963); and the Guadalajara Convention of 1961 (expanding the scope of the Warsaw Convention to deal with the development of aircraft chartering; it entered into force in 1964). See generally DIEDERIKS-VERSCHOOR, *supra* note 249, at 55-56 (describing and citing these agreements in more detail); see also Staton, *supra* note 241, at 1085 (discussing the Hague Protocol).

<sup>255</sup> See DIEDERIKS-VERSCHOOR, *supra* note 249, at 55 (“The rules of the Warsaw Convention are being applied all over the world and have demonstrated their reliability and usefulness.”); “Its attempts to unify and clarify the regulation of international carriage have, in many ways, been successful for many years. . . . The system has provided . . . *predictability* which in itself provides stability and a degree of fairness.” MARK W. ZACHER & BRENT A. SUTTON, GOVERNING GLOBAL NETWORKS: INTERNATIONAL REGIMES FOR TRANSPORTATION AND COMMUNICATIONS 105 (1996) (quoting CAROL BLACKSHAW, AVIATION LAW AND REGULATION 221-22 (1992)) [hereinafter *Global Networks*]; NICOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 383 (1981) (“The application that it has had up until now, has demonstrated its usefulness and relevance.”).

<sup>256</sup> See, e.g., Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1073 (1997) (“As an American, I have never been afraid of denouncing the Warsaw Convention. And I think there are many Americans out there . . . who join me . . . . It will not be a disaster for the United States, and nor will it be a disaster for the world.” The general tenor of this author’s remarks is more positive, however.)

<sup>257</sup> Indeed, the United States briefly denounced the Warsaw Convention in 1965, but withdrew its denunciation later the same year. See, e.g., *U.S. to Continue Adherence to Warsaw Convention*, 5 I.L.M. 767 (1966).

The provisions of the Warsaw Air Transport Convention remain the subject of further evolution and development. The International Air Transport Association ("IATA") in 1995 and 1996 adopted a series of "Intercarrier Agreements" that authorities believe will ultimately have the effect of liberalizing the Convention's regime further, although the new arrangement is not without its impediments to full effectiveness.<sup>258</sup> In addition, the International Civil Aviation Organization ("ICAO"), an agency of the United Nations, is currently developing an international treaty that authorities believe could eliminate maximum carrier liability limits.<sup>259</sup> However, during its life the Warsaw Air Transport Convention has been the governing standard, no matter how much some have disagreed with its policies.

The Warsaw Air Transport Convention, for which only the French text is authoritative,<sup>260</sup> appears to have been regarded by the United States as self-executing, and has not been specifically implemented by federal legislation.<sup>261</sup> However, it has been widely applied and interpreted in United States courts,<sup>262</sup> and on several occasions has been the subject of important and influential cases before the United States Supreme Court.<sup>263</sup> Air travelers all over the world, of course, have cause to be aware of its existence — although probably not its terms — by virtue of the coverage notice printed

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<sup>258</sup> It is said that under the IATA Agreements carriers would waive all maximum-liability limits and waive the non-negligence defense for damages up to 100,000 SDR's. Desmond T. Barry, Jr. & Thomas J. Whalen, *Unlimited Liability: The New Ball Game in International Transportation*, 64 DEF. COUN. J. 381 (July 1997); Staton, *supra* note 241, at 1104-07.

<sup>259</sup> *International Effort to Update 68-Year Old Treaty on Passenger Liability Picks Up Momentum*, AIRLINE FINANCIAL NEWS, Vol. 12, No. 20, May 19, 1997.

<sup>260</sup> Warsaw Air Transport Convention, *supra* note 177, art. 36, 2 Bevans 994 ("This convention is drawn up in French in a single copy").

<sup>261</sup> As noted earlier, the Convention has not been codified within the United States Code, but appears appended to the Code's text as an ancillary law and directive. 49 U.S.C. § 40105 (1994).

<sup>262</sup> Citations and headnotes for cases referencing its provisions in the United States Code Annotated are voluminous, occupying 35 pages in the main volume alone. 49 U.S.C.A. § 40105 note (1998 West).

<sup>263</sup> *E.g.*, *Air France v. Saks*, 470 U.S. 392 (1985) (holding that liability under the Convention can only be occasioned by an "accident" within the meaning of Article 17 of the Convention, that such an accident must be an unexpected or unusual event or happening external to the passenger, and that when an injury results from the passenger's own internal reaction to normal aircraft operations (in this case, hearing loss incurred during descent prior to landing in conditions of usual cabin pressure), injury has not been caused by such an accident); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996) (holding that the Convention imposes liability only for legally cognizable harm, that cognizable harm is to be determined in accordance with applicable domestic law, that in this case (the Soviet shooting of KAL Flight 007 over the Sea of Japan) cognizable harm was to be determined under the U.S. Death on the High Seas Act, and that under that Act plaintiffs could not recover loss-of-society damages).

on the passenger tickets issued by carriers serving the over 120 states<sup>264</sup> that are currently parties.

It should also be noted that the Warsaw Air Transport Convention does not govern all issues pertaining to aircraft and airline operation; for example domestic governmental agencies in virtually all states exercise responsibility in the areas of safety and economic regulation. Even within the area of carrier liability for accidents, the Convention largely leaves some questions; for example, certain issues regarding the nature of the damages cognizable,<sup>265</sup> to be decided under applicable local law. However, within its sphere of coverage it has served as the recognized applicable rule of law — though on occasion unpopular — and has been in that respect a successful rule of international law.

#### V. THE COMPARATIVE LEGITIMACY OF THE CISG CONVENTION AND SUCCESSFUL INTERNATIONAL BUSINESS LAW RULES

The discussion in the Introduction established that it is still uncertain whether the CISG Convention will attain the level of success desired by its partisans. Although an ample number of states have become parties to the CISG, the number of reported decisions applying or even referencing the CISG in the ratifying countries is, in all save a few, quite small. In the United States, reported judicial opinions substantively applying the Convention are extremely few in number.<sup>266</sup> And indeed, in this country at

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<sup>264</sup> See accord, DIEDERIKS-VERSCHOOR, *supra* note 249, at 1 (“When a person boards an aircraft as a passenger and reads the small print on his ticket he suddenly realizes he is bound by the provisions of the Warsaw Convention.”); OFFICE OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, PUB. NO. 9433, TREATIES IN FORCE 329-30 (1997).

<sup>265</sup> See, e.g., *Zicherman*, *supra* note 263 (determining that the federal Death on the High Seas Act, on the facts there involved, determined the extent of legally cognizable harm under the Convention); see also MATTE, *supra* note 255, at 382 (the Convention “has set new bounds on an action in liability, boundary limits, but without regulating the essence itself”) (quoting *Les conflits de lois en matière de droit aérien*, 2 R.C. AC. HAYE 285 (1934)).

<sup>266</sup> As stated earlier, see *supra* note 21 and accompanying text, only one United States case (accounting for two opinions) has reached a decision on the merits based on the terms of the CISG. See *Delchi Carrier S.p.A. v. Rotorex Corp.*, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994), *aff’d in part and rev’d in part*, 71 F.3d 1024 (2d Cir. 1995). Four other opinions have contained substantive discussions regarding the application of the CISG, but only in the context of whether the CISG’s rejection of the parol evidence rule should defeat a petition for or grant of summary judgment; see *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino S.p.A.*, 144 F.3d 1384 (11th Cir. 1998); *Mitchell Aircraft Spares, Inc. v. European Aircraft Serv.* AB, 23 F. Supp. 2d 915 (N.D. Ill. 1998); and *Claudia v. Olivieri Footwear Ltd.*, 1998 WL 164824 (S.D.N.Y. Apr. 7, 1998); or whether the existence of a contract was sufficiently shown under the CISG so as to give effect to an arbitration clause in the purported contract, see *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992). The *Filanto* district court decision was appealed, but the appellate opinion was decided on other grounds and made no reference to the CISG. See *Filanto, S.p.A. v. Chilewich Int’l Corp.*, 984 F.2d 58 (2d Cir. 1993).

least, advice given by commentators to legal practitioners often includes the suggestion that clients opt out of the Convention, either in whole or in part, or at least the observation that this is an advisable course.<sup>267</sup>

With the passage of time, unambiguous evidence of the Convention's success may develop, but that evidence has not yet materialized and in the meantime there are these possible indications to the contrary. If contra-indications of success in this sense continue to be prominent, any perceived explanation for such a lack of success would best be rooted in the voluntary nature of the Convention's applicability to private actors. After all, it would be the decisions of private actors not to adopt the Convention that would be largely responsible for its failure to serve as an acknowledged

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Several other opinions have included brief mentions of the CISG, but these references to the Convention have been cursory, non-substantive or insubstantial. In none of them has the CISG been a basis for the holding or detailed analysis of any kind. See *Attorneys Trust v. Videotape Computer Prod., Inc.*, 94 F.3d 650 (9th Cir. 1996); *Beijing Metals & Minerals Import/Export Corp. v. American Bus. Ctr., Inc.*, 993 F.2d 1178 (5th Cir. 1993); *Huntington Int'l Corp. v. Armstrong World Indus.*, 981 F. Supp. 134 (E.D.N.Y. 1997); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 1997 WL 458785 (S.D.N.Y. Aug. 11, 1997); *Helen Kaminsky Pty. Ltd. v. Marketing Australian Prod., Inc.*, 1997 WL 414137 (S.D.N.Y. July 23, 1997) (CISG held not to apply); *Graves Import Co., Ltd. v. Chilewich Int'l Corp.*, 1994 WL 519996 (S.D.N.Y. Sept. 22, 1994); *S.V. Braun, Inc. v. Alitalia*, 1994 WL 121680 (S.D.N.Y. Apr. 6, 1994); *Interag Co. Ltd. v. Stafford Phase Corp.*, 1990 WL 71478 (S.D.N.Y. May 22, 1990); *Orbisphere Corp. v. U.S.*, 726 F. Supp. 1344 (Ct. Int'l Trade 1989); *Promaulayko v. Amtorg Trading Corp.*, 540 A.2d 893 (N.J. Super. 1988); and *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 894 P.2d 470 (Or. Ct. App. 1995) (dissenting opinion).

All the appellate opinions issued in cases that briefly mentioned the CISG were decided on other grounds, and none of them mentioned the CISG. See *Orbisphere Corp. v. U.S.*, 765 F. Supp. 1087 (Ct. Int'l Trade 1991), *appeal after remand*, 880 F. Supp. 865 (Ct. Int'l Trade 1995); *Promaulayko v. Amtorg Trading Corp.*, 562 A.2d 202 (N.J. 1989); *GPL Treatment, Ltd. v. Louisiana-Pacific Corp.*, 914 P.2d 682 (Or. 1996).

<sup>267</sup> See, e.g., Allen M. Shinn, *Liabilities Under Article 42 of the UN Convention on the International Sale of Goods*, 2 MINN. J. GLOBAL TRADE 115, 118 (1993) ("[P]arties involved with intellectual property issues would be wise to contractually exclude Article 42, and specify in their contracts exactly how such issues will be resolved."); Dennis J. Rhodes, *The United Nations Convention on Contracts for the International Sale of Goods: Encouraging the Use of Uniform International Law*, 5 TRANSNAT'L LAW. 387, 389 (1992) ("[T]he lack of cases interpreting the CISG necessarily makes parties wary of using it."); B. Blair Crawford et al., *New Rules for Contracting in the Global Marketplace: The United Nations Convention on Contracts for the International Sale of Goods ("CISG")*, C395 ALI-ABA 115, 130 (1989) (suggesting that the ability to exclude implied warranties under UCC § 2-316 may be preferable to unknown exclusion doctrines under other municipal laws or under the CISG); Timothy N. Tuggey, *The 1980 United Nations Convention on Contracts for the International Sale of Goods: Will A Homeward Trend Emerge?*, 21 TEX. INT'L L.J. 540, 554 (1986) ("Large multinational corporations and state-owned enterprises . . . will more likely benefit from the advice of well-informed counsel and avoid unpleasant surprises by 'opting-out' of the Convention or by remaining under the CISG in a favorable forum."). See also GABRIEL, *supra* note 8, at 24 ("[The] authority of parties to an international contract to exclude the Convention from a contract that meets the 'international requirement' may lead to avoidance through fear of the unfamiliar.").

source of governing rules. Accordingly, any explanation for lack of success should incorporate an analysis of the voluntary behavior of private parties in this context.

Thomas Franck's theories of legitimacy furnish just such an analysis.<sup>268</sup> Under his views, the pull to compliance of any rule of law is related to its legitimacy.<sup>269</sup> Accordingly, a lack of acceptance of the CISG by private actors behaving voluntarily may properly be viewed as a lack of compliance pull on the part of the Convention that reflects a relative lack of legitimacy. A review of Franck's four factors of legitimacy, as they pertain to the CISG Convention, is therefore in order. This Article undertakes such a review, and delineates substantial indications that the Convention lacks a significant amount of the four characteristics of legitimacy. A lack of legitimacy may thus be inferred as an explanation for any continued lack of the Convention's success.

This conclusion will be strengthened by a comparison with rules of international business law that have experienced significant success. Three such successful rules were examined in Part IV of this Article. Accordingly, these three sources of international business law will also be briefly reviewed, and will be shown to possess substantial legitimacy indicators. Their observed success provides further evidence that any lack of success of the CISG relates to a probable deficiency in its legitimacy.

In keeping with this analysis, this Article takes each of Franck's four legitimacy factors in turn, determining the extent to which the CISG Convention possesses features indicative of each such characteristic. The discussion of each factor also includes a brief review of the successful international business law rules described above, to determine the extent to which they possess such features as well.

#### A. Determinacy

It was noted earlier that Franck's idea of determinacy in its most basic form is related to textual clarity.<sup>270</sup> This Article will not directly question the CISG Convention on the clarity with which it is written. Rather, this Article focuses on two somewhat more sophisticated aspects of determinacy. First, attention will be directed to a special kind of determinacy developed in Franck's discussion: process determinacy. Second, this Article observes that the difficulty inherent in any attempt to generally amend the Convention creates an additional issue of determinacy.

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<sup>268</sup> See *supra* Part III.E. (explaining the application of Franck's legitimacy theory to behavior of private actors).

<sup>269</sup> See *supra* notes 106-07 and accompanying text (discussing the relationship between legitimacy and compliance pull).

<sup>270</sup> See *supra* notes 109-11 and accompanying text.

1. *Process Determinacy.*

Process determinacy requires that if ambiguities and other difficulties of interpretation arise, there be a forum or fora that are able and authorized to resolve these difficulties, and that the fora themselves bear the other indicia of legitimacy.<sup>271</sup>

A problem arises here because of the Convention's insistence on uniformity across jurisdictional lines. From the beginning of the Convention's life, commentators have been wary of the different governments in the different member countries interpreting and enforcing the Convention in divergent ways, thereby potentially defeating the goal of uniformity.<sup>272</sup> The text of the Convention demonstrates that the drafters were aware of this potential problem,<sup>273</sup> and included fairly explicit directions on this point. We have seen that the introductory portion of the Convention explicitly provides that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application . . . ."<sup>274</sup> This could be taken to mean that cases involving specific facts and issues decided under the Convention should be decided consistently with cases involving similar facts and issues in the courts of other countries. Precedent taken from other countries could be urged to control domestic precedent, at least if there is a conflict or tension between the two.

Also as noted earlier,<sup>275</sup> the gap filling provision of the Convention solidifies this inference. We saw earlier that when there are gaps in the coverage of the Convention in areas that are otherwise within its scope, the Convention discourages the filling of such gaps by reference to applicable domestic law. Rather, the Convention indicates that questions are to be settled first "in conformity with the general principles on which [the Convention] is based or, *in the absence of such principles*, in conformity with the law applicable by virtue of the rules of private international law."<sup>276</sup>

Emphasis on uniformity of this kind can have a significant impact on process determinacy. As noted earlier,<sup>277</sup> there is no supranational court to interpret and enforce the CISG Convention.<sup>278</sup> Accordingly, if the com-

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<sup>271</sup> See *supra* notes 115-17 and accompanying text (introducing the concept of "process determinacy").

<sup>272</sup> See, e.g., BIANCA & BONELL, *supra* note 10, at 18 ("[I]t is not sufficient that the single States adopt the Convention. It is equally important that its provisions be interpreted in the same way in various countries").

<sup>273</sup> See *supra* notes 76-80.

<sup>274</sup> CISG art. 7(1).

<sup>275</sup> See *supra* text accompanying note 81.

<sup>276</sup> CISG art. 7(2) (emphasis added).

<sup>277</sup> See *supra* note 78 and accompanying text.

<sup>278</sup> The International Court of Justice, in the Hague, of course, is a supra-national court of sorts with potential jurisdiction over a broad variety of international law issues. However, its statute provides that only states may be parties in actions before it. Statute of the International Court of Justice, June 26, 1945, Art. 34(1), 3 Bevens 1179, 1186. Of course, states in

mentators and the Convention's text are to be taken seriously, domestic courts in each state party to the Convention are called upon to keep abreast of, interpret, follow and apply decisions of foreign jurisdictions.

Apart from difficulties arising from varying languages, legal cultures and judicial systems,<sup>279</sup> a foreign state court simply does not offer substantial legitimacy for the municipal polity within another state. The nationals of a given state normally have no say over the appointment or removal of the judicial or adjudicatory officers of foreign states. Furthermore, the tribunals of a given state largely lack the other legitimacy factors within other states foreign to them. They do not possess or command the same degree of pedigree, coherence and adherence outside their jurisdictions.

But most fundamentally, the proffered type of uniformity deprives the courts of each jurisdiction of the full interpretive authority they would otherwise have to interpret the Convention. By virtue of the necessity of honoring the precedents of foreign states in preference to their own, the courts of a given state can never be certain how long a given domestic decision will have force, even within the jurisdiction from which it originated. A countermanding foreign case, possibly from a higher-level court within the foreign jurisdiction, could be resolved with an opposite result at any time thereafter.

It is true that some commentators have begun to modify the insistence on uniformity that had previously been advanced.<sup>280</sup> These observations are of recent origin, however, and remain a chiefly minority view. Furthermore, they remain at odds with the fairly explicit directives of the Convention's text, if the text is to be taken seriously.

This kind of process determinacy problem does not exist with any of the other international business law rules previously examined. The UCP for letters of credit is not positive law in most jurisdictions,<sup>281</sup> and is only binding because letter-of-credit parties have incorporated it by reference into their letters of credit. As such, the UCP is in essence a set of contractual terms subject to the full scope of review by the courts of each country whose business actors use letters of credit. The UCP therefore imposes no impediment to process determinacy, and no barrier, in this respect, to its legitimacy.

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appropriate circumstances can adopt the causes of their nationals, but this hardly seems a satisfactory means of approaching issues under the CISG Convention.

<sup>279</sup> See, e.g., BIANCA & BONELL, *supra* note 10, at 19-20 (noting the difficulties imposed by the linguistic variations and differing legal systems).

<sup>280</sup> See, e.g., Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?*, 17 J.L. & COM. 245 (1998) (suggesting that there may be limitations on the CISG requirement of autonomous interpretation); Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187 (1998) (noting, for example, that "[t]he Convention does not and cannot mandate absolute uniformity").

<sup>281</sup> See *supra* text accompanying note 199.

The Hague Rules on bills of lading, stated in the Brussels Bill of Lading Convention, have been incorporated into the domestic law of most countries adhering to the Convention.<sup>282</sup> The United States implemented the rules as COGSA.<sup>283</sup> Under this framework, the Hague Rules simply form another aspect of the international business law of each state party to them. Courts in each such state have full authority to interpret the Hague Rules in the context of their domestic law, filling any gaps that may exist in their coverage with concepts from that domestic law, to the extent they see fit. Accordingly, the Brussels Bill of Lading Convention allows for full process determinacy, like the UCP and unlike the CISG Convention.

The Warsaw Air Transport Convention has not been codified in the statute law of all states parties,<sup>284</sup> but as is the case with the Hague Rules, there is no provision of them impairing process determinacy. The courts of each jurisdiction are free to interpret them in the context of their own precedents. Indeed, the broad scope of subject matter left for resolution at the national level has been commented upon and observed. Accordingly, the Convention offers no threat to legitimacy on this basis.

## *2. Indeterminacy Due to Difficulty of Amendment.*

Franck observes that rules operating in a complex environment generally are not binary in character<sup>285</sup> and need to be more complex to adequately address the situations to which they relate. This greater complexity threatens the clarity and precision needed for determinacy; process determinacy is thus required so that adjudicatory proceedings can ultimately help assure such clarity and precision.

This Article asserts that there is another procedural aspect of rules that can affect their continued determinacy: the ease with which such rules can be amended. With the complexity inherent in the situations they address, non-binary rules need to be able to accommodate changing circumstances. Rules in these kinds of instances can be so outmoded or obsolete that they no longer apply to such situations with the necessary degree of clarity and precision. If such rules can be amended with relative facility, this threat to determinacy is minimized.

The successful rules of international business law under consideration here furnish apt examples. The UCP for Documentary Credits, for instance, have been amended and re-issued on average once every ten years since

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<sup>282</sup> See *supra* note 233 (referring to the United Kingdom and Canada as examples, in addition to the United States).

<sup>283</sup> See *supra* note 233 and accompanying text (providing the U.S. session law citation for COGSA).

<sup>284</sup> See, e.g., *supra* notes 260-63 and accompanying text (discussing effectiveness in the United States).

<sup>285</sup> See *supra* notes 113-14 and accompanying text (regarding the distinction between complex and binary rules).



their inception.<sup>286</sup> This has, among other things, enabled the UCP to keep abreast of innovations in technology and financial products over the years. Indeed, the expectation that new revisions of the UCP are relatively regular is one of the most characteristic features of the document.

The Hague Rules, as stated in the Brussels Bill of Lading Convention, have similarly shown themselves amenable to perceived needs for change. The Hague-Visby amendments demonstrated adaptability for those states that thought them necessary by allowing for an adjustment in the calculation of the maximum per package amount of carrier liability. This capacity for adaptability was further demonstrated by the second protocol providing for yet another adjustment on the same point.<sup>287</sup> Finally, the adoption of the Hamburg Rules, substantially restating the law of bill-of-lading liability, also evidences a degree of flexibility for those states adhering to their terms.<sup>288</sup> Of course, not all states have acceded to each of these revisions, but this further demonstrates the flexibility of the Hague Rules regime, which is able to accommodate such variations to address developing needs and yet remain essentially intact.

Finally, the various amendatory protocols and agreements that have been applied to the Warsaw Air Transport Convention over the years, such as the 1966 Montreal Agreement,<sup>289</sup> are also relevant here. However contentious such actions may sometimes have been, they indicate that the liability regime embodied in the Warsaw Air Transport Convention's framework is sufficiently adaptable to avoid this kind of determinacy problem.

Against these examples, prospects for the CISG Convention in this respect are not necessarily bright. Since the Convention contains no mechanism for a less-than-unanimous means of amendment, any change in its terms would need to be agreed to by all Contracting Parties in order to be effective among all of them.<sup>290</sup> Thus no prospect of frequent revision by a monitoring organization exists, as with the UCP. The intricacy of the CISG, combined with its broad scope, may also make the prospect of serial multilateral revision — as has occurred with the Hague Rules and the Warsaw Air Transport Convention — less likely in this context.

Accordingly, the need for unanimous agreement for any generally applicable amendment, combined with the Convention's character as a detailed, intricate and yet broadly ranging set of rules, raises a significant

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<sup>286</sup> See *supra* note 187 and accompanying text (including a chart showing the frequency of the reissuances of the UCP).

<sup>287</sup> See *supra* note 226 (describing these two amendatory protocols in more detail).

<sup>288</sup> See *supra* notes 227-31 and accompanying text.

<sup>289</sup> See *supra* notes 248-53 and accompanying text.

<sup>290</sup> See *supra* notes 85-86 and accompanying text (regarding the general law of treaty amendments).

issue of its ability to adapt to changing circumstances.<sup>291</sup> This in turn would seem to adversely impact its continuing determinacy.

### B. Symbolic Validation

The two forms of symbolic validation, as discerned by Franck, are “ritual” and “pedigree.”<sup>292</sup> Ritual does not present an issue for discussion in this Article, but there is a clear question of pedigree, as that concept is developed by Franck. For Franck, pedigree is not merely a matter of hereditary lineage; it has a broader meaning as well. In a more general sense of the term, a rule can be said to have pedigree to the extent the person or institution promulgating the rule is perceived as “deserv[ing] to be obeyed” or “deserv[ing] to be taken seriously.”<sup>293</sup>

The pedigree issue arises in the context of the circumstances in which the CISG Convention was prepared and adopted. As the earlier discussion demonstrated,<sup>294</sup> the Convention was the result of several stages of international negotiations. Those who undertook and completed these negotiations are to be congratulated for their dedication, determination and analytical competence. The endeavor, however, was undertaken chiefly by diplomats and legal academics.<sup>295</sup> The members of the UNCITRAL working groups are generally not manufacturers of goods sold in international trade and are not brokers and dealers of internationally shipped and sold commodities. Rather, they are for the most part career diplomats with the United Nations and other national or multi-lateral organizations as well as academic authorities on trade law in general.<sup>296</sup>

Furthermore, it is not clear that there was a universally felt compelling need for such action on the part of manufacturers, traders, brokers and dealers in international commerce at the time of the Convention’s adoption. The UNCITRAL working groups and the other academic and ministerial authorities working on the Convention no doubt perceived such a need, and indeed they may have been correct in their perception. But as far as the record shows, the perception was theirs rather than that of the commercial

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<sup>291</sup> On the amendment point, *see generally* Rosett, *supra* note 13, at 296.

<sup>292</sup> *See* note 122 and accompanying text.

<sup>293</sup> *See supra* note 128 and accompanying text.

<sup>294</sup> *See supra* Part II.A. (describing the organizations involved with drafting at the various stages of the CISG’s preparation, including the preparation of its precursors).

<sup>295</sup> *See* HONNOLD TREATISE, *supra* note 3, at 49 (“[UNIDROIT] requested a distinguished group of European scholars to prepare a draft of a uniform law for the international sale of goods.”); *id.* at 51 (“UNCITRAL representatives proved to be a wholesome mix of academic specialists in commercial and comparative law, practicing lawyers, and members of government ministries with years of experience in international lawmaking.”).

<sup>296</sup> *See id.* at 53 (“In the Working Groups, national representatives come together from all parts of the globe . . . All of the representatives have primary, full-time responsibilities in their Universities or Ministries.”).

actors who would be most directly affected by the Convention. In considering the issue of pedigree, it is this perception that is crucial.

The nature of the need perceived by the Convention's drafters is elucidated by reference to the NIEO movement, coeval with the Convention's adoption and alluded to in its terms.<sup>297</sup> Although no claim is made that the NIEO movement was responsible for the Convention, its underlying premises are indicative of dominant intellectual perspectives in international affairs at the time. Some of the values<sup>298</sup> inherent in the NIEO movement informed the preparation of the Convention, and these were values of the academic and political drafters, rather than those of the private business actors who would come under the Convention's jurisdiction.

It must be emphatically stressed at this point that no disrespect or disregard for the negotiators and drafters of the CISG Convention is stated or implied. In particular, there is no intimation that the work as a whole lacks "intellectual pedigree," much less that the individuals involved lacked personal pedigree. The appellation, "pedigree" has a very particularized meaning in this context. It only pertains to the perception of those affected by the completed rule as to their idea of the extent to which the rule and its originators require obedience.<sup>299</sup>

Those responsible for the preparation of the CISG Convention were not taken from the ranks of the commercial actors to be affected, but were rather highly-placed officials and authorities with a broad policy-oriented approach. The negotiators, both at the Working Group stage and at the diplomatic conference, were not necessarily responsible to manufacturers, traders, brokers and dealers of goods in international trade. Instead, it appears that they were most likely responsible to their diplomatic and professional superiors. It is thus fair to state that the CISG can be perceived as being a "from the top-down" endeavor, which affects the perceptions of those addressed, and thus its "pedigree."

The same is not true of the successful international business law rules under consideration. The UCP is published and regularly revised by the ICC, an international trade group.<sup>300</sup> The persons involved with the ICC for the monitoring and revision of the UCP are chiefly bankers and other persons engaged in the issuance and handling of letters of credit.<sup>301</sup> Prominent

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<sup>297</sup> See *supra* Part II.B. (providing background on the NIEO movement).

<sup>298</sup> For example, the preamble to the Convention refers to the goal of developing international trade "on the basis of equality and mutual benefit," and by its terms refers approvingly to the "New International Economic Order." The goals of the NIEO movement, in turn, featured the redressing of the "fundamental inequality of economic strength" between North and South as being among the most important. See *supra* text accompanying note 62 (quoting *North-South*, *supra* note 58, at 32).

<sup>299</sup> See *supra* notes 125-31 (discussing the general concept of "pedigree" as an aspect of "symbolic validation").

<sup>300</sup> See *supra* notes 185-87 and accompanying text.

<sup>301</sup> See *supra* notes 188-92 and accompanying text.

among those advising the ICC on the continuing revisions of the UCP are trade groups such as the United States Council on International Banking, which represents, and is presumably responsible to, hundreds of banks involved in international banking operations.<sup>302</sup>

The Brussels Bill of Lading Convention was entered into after many years of vociferous, energetic and committed argument between cargo interests and shipowners' interests.<sup>303</sup> It was ultimately adopted when the large majority of all business interests concerned realized that uniformity in Bill of Lading liability would be essential for the continuation of the trade affected.<sup>304</sup> Although multi-national political organizations were involved in its preparation, working groups of the International Law Association and the Comité Maritime International were staffed primarily from trade groups and the cargo and shipowners' interests themselves.<sup>305</sup>

The Warsaw Air Transport Convention was adopted with the avowed goal of encouraging the fledgling air transportation industry.<sup>306</sup> Although its substantive provisions are subject to frequent criticism, including by those in the industry, such criticisms go to the content of the Convention, and not to pedigree, in this sense, of its drafting.<sup>307</sup>

As an additional and perhaps somewhat more subtle point, some of the substantive features of the CISG Convention may occasion a problem of symbolic validation. As noted earlier, the pedigree of a multilateral convention depends in part on the extent to which the convention's rules are perceived as "codification," as opposed to the "development" of new law.<sup>308</sup> In some of its more often-discussed provisions, the CISG incorporates terms that are at variance with existing regimes in states with dominant trading positions.<sup>309</sup> A certain number of variations may well have been inevitable when drafting a document such as the CISG. However, the impression may nevertheless remain in some quarters that in areas such as these the Convention is an exercise in development, and not simply codification. To this extent, this may pose another pedigree problem.

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<sup>302</sup> See *supra* notes 191-92 and accompanying text.

<sup>303</sup> See *supra* notes 212-17 and accompanying text.

<sup>304</sup> See *supra* notes 218-23 and accompanying text.

<sup>305</sup> See *supra* notes 209-14 and accompanying text.

<sup>306</sup> See *supra* note 241 and accompanying text.

<sup>307</sup> See *supra* notes 254-56 and accompanying text.

<sup>308</sup> See *supra* text accompanying note 131 (setting forth a quotation by Oscar Schachter regarding the need for such conventions to be considered codifications for greater authoritativeness).

<sup>309</sup> Perhaps the most well-known examples would be the Convention's treatments of the statute of frauds, see CISG art. 11, parol evidence, see CISG art. 8, and the "battle-of-the-forms" problem, see CISG arts. 18 & 19, all of which vary substantially from the rules applicable, for example, under Article 2 of the UCC, see UCC §§ 2-201, 2-202 and 2-207.

### C. Coherence

In order to have coherence, a rule of international law must provide a reasonable connection with specific principles previously employed to solve similar problems and also with general principles (a "lattice of principles") used to solve a variety of different problems.<sup>310</sup> The problem here is that the CISG Convention has been designed to stand entirely on its own as a self-sufficient set of rules for the international sale of goods. In interpreting and applying the CISG, its text actively discourages recourse to principles developed in other circumstances.

In discussing the determinacy of the CISG, it was already shown that two of the Convention's provisions in particular might impair its process determinacy.<sup>311</sup> One was the Convention's directive that courts interpreting the CISG give regard to its international character and the need to promote uniformity.<sup>312</sup> The other was the requirement that coverage gaps be filled first "in conformity with the general principles on which" the Convention is based, and only then to fall back on domestic law.<sup>313</sup> These features of the Convention are quite relevant to the issue of coherence as well.

The designers of the CISG Convention were quite intent that it should stand on its own. If the new Convention had been perceived as being closely linked to any particular legal structure or legal tradition, a problem of insularity or parochialism, such as that which plagued the 1964 Hague Conventions,<sup>314</sup> might have impaired the CISG's acceptability. However, in the effort to disassociate the CISG from particularized national frameworks, the designers created a legal code that is substantially isolated from surrounding context. An isolated set of rules cannot maintain the kind of coherence with other rules that is required for optimal legitimacy.

This is to be contrasted, for example, with the approach under UCC Article 2. Under the UCC framework, provisions of Article 2 are to be supplemented in each jurisdiction by common-law rules, including the general principles of law and equity and rules related to capacity, agency, estoppel, fraud, and similar matters.<sup>315</sup> It is also understood in the UCC regime that each jurisdiction's courts are able to fill gaps in coverage with that jurisdiction's common law rules specifically relating to sales of goods.

Because UCC Article 2 can and should be interpreted to enmesh with each adopting jurisdiction's common law and non-UCC statutory law, it possesses coherence in Professor Franck's sense. The CISG, on the other

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<sup>310</sup> See *supra* text accompanying note 141.

<sup>311</sup> See *supra* Part V.A.1. (addressing process determinacy in the context of the CISG Convention).

<sup>312</sup> See CISG art. 7(1).

<sup>313</sup> CISG art. 7(2).

<sup>314</sup> See *supra* notes 30-35 and accompanying text.

<sup>315</sup> See UCC § 1-103.

hand, explicitly disfavors resort to domestic statutory law and domestic case law, both with regard to general interpretation and gap filling. To that extent, then, the CISG suffers from a deficiency in this kind of coherence.

CISG coherency can also be compared to the analogous circumstances of the other three international business law rules under review. The UCP for letters of credit, which is not positive statutory law in most jurisdictions, is applied by parties and courts as an element of the contract between the parties.<sup>316</sup> As such, its interpretation and application are fully subject to other relevant legal rules, whether statutory or case law in origin, existing in the governing law at issue. Furthermore, the UCP rules are such that they would not normally conflict with other types of rules in related areas, such as liability for negligence and other tort law concepts. For example, in the United States, UCC Article 5 (both former and current versions) provides a substantial source of non-UCP rules that supplement each jurisdiction's letter-of-credit law. Accordingly, there is ample opportunity for the UCP to be perceived as coherent, in Professor Franck's sense, within a "lattice of principles" used to solve relevant problems.

The Hague Rules, embodied in the Brussels Bill of Lading Convention, like the CISG Convention, are a self-contained set of legal rules — in this case dealing with the allocation of liability in connection with goods covered by a bill of lading.<sup>317</sup> However, the self-containment in this context does not work in isolation. The Brussels Convention only goes as far as does liability for goods; many other issues are left for relevant domestic law. In the United States, for example, the Harter Act, the Pomerene Act and UCC Article 7 still have residual, and in some cases, substantial impact on the law relating to bills of lading, as does the case law in each of these areas.<sup>318</sup> This leaves ample context for the application of related principles from similar situations that are unrestricted by the terms of the Hague Rules.

The Warsaw Air Transport Convention also covers a relatively small range of issues, at least in conceptual terms.<sup>319</sup> The structural focus of the Convention is liability for damage resulting from accidents, leaving the numerous other legal issues surrounding the aviation industry — whether for preventive safety, economic regulation, or other governmental goals — for domestic law. Accordingly, the international rules are not isolated as a result of the adoption of the Convention, and there are opportunities to build coherence with related domestic principles.

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<sup>316</sup> See *supra* notes 199 and 281 and accompanying text.

<sup>317</sup> See Sturley, *supra* note 207, at 9 ("Unlike domestic statutes, which were to be read in the context of domestic law, the new rules [*i.e.*, the Hague Rules] were designed to create a self-contained code (at least in the areas it covered) that would not require reference to domestic law.")

<sup>318</sup> See *supra* notes 232-36 and accompanying text.

<sup>319</sup> See *supra* note 265 and accompanying text.

One factor relevant to this type of coherence, at least in the context of the United States, is the characteristic of an international treaty as self-executing or non-self-executing. The nature of the CISG Convention as a self-executing treaty may help to create the conceptual isolation largely responsible for this coherence problem. By contrast, the Brussels Bill of Lading Convention is not self-executing, and the framework of the UCP does not demonstrate the characteristics of a self-executing treaty. The Warsaw Air Transport Convention, however, has been viewed as self-executing, and yet it does not have the same kind of coherence problem. Perhaps self-executing status creates the risk of a coherence problem, but other factors, such as a more narrowly delineated scope of application, help to mitigate this risk.

#### D. Adherence

A rule can be said to have adherence, in Professor Franck's view, if the rule is connected to a hierarchy of rules headed by an ultimate rule of recognition.<sup>320</sup> The obligation to obey the ultimate rule of recognition arises incident to the obligee's status as a member of the community the rule addresses. Indeed, Franck observes that a community "is defined by its ultimate rule of recognition,"<sup>321</sup> as that phrase was developed by H.L.A. Hart.

In the context of the international business community, a rule could be said to have adherence if the people and firms it affects can be described as a community, and if the need to obey the rule springs from, or is at least related to, the status of those persons and firms as members of the community.

The buyers and sellers principally affected by the CISG Convention do not constitute such a community. They are engaged in the manufacture, marketing, purchase and sale of all manner of goods.<sup>322</sup> Their characteristics and operations are too diverse to form a single cohesive community.

This lack of adherence is clear upon comparison with the other three rules of international business law under consideration. The UCP for letters of credit serves a readily observable community of bankers and their import/export clients who rely on letter-of-credit financing. Although there may be many different kinds of goods (and services) covered by letters of credit, all are being financially backed by precisely the same kind of document, which has the same fundamental structure regardless of the type of

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<sup>320</sup> See *supra* notes 143-48 and accompanying text.

<sup>321</sup> FRANCK, *supra* note 24, at 190.

<sup>322</sup> The scope of the "goods" covered by the CISG Convention is extremely broad. The Convention does not explicitly define the term "goods." However, it excludes by its terms only a relatively few categories of property, leaving the strong inference that all other categories of personal property are included. Those items excluded according to inherent property type are: stocks, shares, investment securities, negotiable instruments or money; ships, vessels, hovercraft or aircraft; and electricity. CISG art. 2(d)-(f).

transaction involved. The community, thus defined, is well acknowledged by its members. The United States Council on International Banking, which bears a substantial share of responsibility for the monitoring of the UCP, is an example of the extent to which banks and their officers view themselves as having a commonality of interest in this area.<sup>323</sup> Similarly, although the ICC is an umbrella organization of sorts, its UCP operations are geared specifically to bankers, and specifically those issuing, confirming and servicing letters of credit.<sup>324</sup> These interests constitute a community which in this endeavor is governed by the rule in question, the UCP, and which can be expected to share the characteristics of the type of community Professor Franck describes.

Similarly, the shipping interests and cargo interests addressed by the Hague Rules can readily be seen to define a community. These interests were the primary participants in the development and delineation of the Hague Rules over a period of many years. Although the goods they transport are very diverse, they all are relying on one method of transport (ocean shipping) and one type of documentary instrument (a bill of lading, usually negotiable) to accomplish their purpose. The specific impact on liability occasioned by the bill of lading has established a commonality of interest that defined the community in Franck's sense. Analogous observations present themselves concerning the Warsaw Air Transport Convention and its role in encouraging the community of the early aviation industry.

## VI. CONCLUSION

The current levels of reported adjudication under the CISG Convention in many countries raise the question of the extent to which the Convention is regarded by courts and affected parties as a suitable law of international sales of goods. The withholding of approval by some commercially significant countries and the skepticism of some commentators are additional indications that the Convention may ultimately fall short of its aspirations.

To the extent that the CISG Convention is not being broadly accepted in its intended role, the situation may relate to a lack of a certain kind of legitimacy.

This lack of legitimacy stems *inter alia* from the Convention's insistence that courts interpret it in internationally uniform ways, the difficulty of its amendment, the extremely broad scope of its coverage, the circumstances of its preparation, its determination to stand alone as a self-sufficient law of international sales distinct from other municipal laws, and the large number of parties it affects.

Greater legitimacy for the CISG Convention might be achieved, or at least aided, by modifications to the Convention that decrease its emphasis

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<sup>323</sup> See *supra* notes 191-92 and accompanying text.

<sup>324</sup> See *supra* notes 188-90 and accompanying text.



on internationally uniform interpretation, supply a more workable process of amendment, include a more welcoming stance toward the incorporation of non-Convention law in its application and involve affected business people and business interests in the resolution of such questions.