The Diffusion of Legal Models for Financial Governance: The Case of Secured Finance.

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Abstract

The provision of credit is central to contemporary capitalist economies. Since the early 1990's, developing countries in Eastern Europe, Latin America, and Southeast Asia have been experimenting with legal reforms designed to attract credit providers, and establish a stable flow of credit to their economies. In the process, these countries have been increasingly responsive to the pressures of international institutions and the major developed states to adopt legal regimes for bankruptcy and secured finance modeled primarily on Article 9 of the Uniform Commercial Code, which forms the basis of U.S. law governing secured credit. In this paper, I explore the ways in which the U.S. government, key international institutions (such as the World Bank, the IMF, and European Bank for Reconstruction and Development), and certain private actors have worked to promote the diffusion of this particular model of financial law, and attempt to evaluate the implications of this process for the evolution of the international political economy. My aim is to provide an initial explanation for a emerging international consensus on the importance and structure of secured finance regimes, and to use this case to further our understanding of how legal norms and principles cross national boundaries in the contemporary "global polity." I place particular emphasis on the sphere of private international law-making, an arena of transnational policy-making too long neglected by political scientists and political economists.

Contemporary capitalist economies are centered around the flow of finance in the form of credit. Creditor-debtor relationships are at the heart of the networks of contracts and organizations that link together the major sectors and actors in the economy. As

capitalism has become increasingly transnational, so have the flows of credit; indeed, transnational credit finance is a constitutive element of contemporary capitalism. The emergence of transnational credit finance, however, has posed a variety of challenges for states and their legal orders. The forms that credit takes are the products of legal regulation, and the differences in the ways that legal orders conceptualize and govern credit finance are substantial and deeply rooted. In their attempts to promote and regulate transnational commerce, states, international institutions, financial institutions, and legal professionals are now engaged in multiple arenas to find strategies to overcome these differences. Since the early 1990's, there has been an outburst of significant legal and regulatory conflict, cooperation, and innovation aimed at reforming the governance of transnational credit finance.

In this paper, I focus on one area of credit finance law – the law of secured transactions – and explore the reform movement which aims at the development and adoption of a common set of standards for the promotion and regulation of secured transactions. These efforts proceed at a variety of levels – domestic law reform, state to state legal assistance, the development of model laws and/or legislative guides by regional and multilateral institutions, and the promotion of legal reform as a condition of assistance from regional and multilateral financial institutions. They engage the efforts of a variety of non-state actors as well, including legal academics and professionals, national and international bar associations, financial professionals, and sectoral and broad-based industry associations. The reform movement advances a "modern" and "efficient" approach to secured transactions law, based on the principles embodied in Article 9 of the Uniform Commercial Code (UCC) of the United States. In the analysis that follows, I will discuss the elements and significance of this approach to the regulation of credit finance, explain the origins, strategies, and limitations of secured transactions law reform, and consider the implications of transnational legal reform movements for our understanding of the evolving practices of regulation in the global economy.

The Political Economy of "Private" Commercial Law.

It has long been commonplace for political economists to announce the important role that commercial law plays in constituting and structuring a market economy. The announcement, in turn, is usually followed by the same list of examples, with an emphasis on the law of property and of contract. But this ritual acknowledgement has rarely been followed up with detailed examination of how the intersection of law and the economy shapes and embodies relationships of power and wealth in contemporary capitalism.[1] We can no longer afford to skim the surface of law's impact on political economic life. Developments in a variety of areas – the increasing contestations over the nature of intellectual property, growing activism concerning the rights of consumers in an age of digital production and consumption, sustained movements for market-oriented legal reform throughout the globe, an explosion in transnational commercial law-making, etc. – make it clear that legal rules and institutions are now a central field on which contests are fought over the regulation of global capitalism.[2] It is imperative for students

[1] For an important exception, see Campbell and Lindberg (1990).

[2] The literature on the "legalization" of international relations is the most influential response to these developments. (see Goldstein, et al., 2000) For the most part, the debates spawned by the legalization thesis focus on public international law, the legal framework and institutions that shape state policy-making. While this obviously covers many policy areas beyond economic law, it includes topics such as trade,

of political economy to engage systematically and critically with the dynamics of commercial law.

Many of the rules and institutions through which commercial life is regulated today are generated in the world of private international law. Private international commercial law is constituted by rules that directly shape the activity of businesses involved in international commerce – rules regarding contract practices, dispute settlement, the management of insolvent firms, corporate governance, corporate finance, etc. These regimes have a substantial impact on the regulation of power and property rights in contemporary capitalism, but have been considered too technical or obscure for political analysis. Indeed, the notion that the technical nature of private international law leaves no room for political considerations has long been deeply embedded in the understanding of experts themselves. As one legal scholar summarizes the dominant view, this is an area "…where expertise and technique dominate and political interventions are both rare and unsettling." (Ramsay, 2001: 565) A growing number of social scientists and legal scholars are challenging this view, however, and exploring more critically the role of private commercial law in the constitution of regulatory capitalism. (Appelbaum, et al., 2000, Braithwaite and Drahos, 2000, Cutler, 2003, Dezalay and Garth, 1996, Muir Watt, 2003, Wai, 2002, Weiner, 2000)[3] This essay is an attempt to contribute to and publicize the importance of this literature.

For the most part, the rules of private international commercial law come from national legal systems. In modern legal systems, the sub-discipline of "conflicts of law" works to resolve tensions between these systems by determining which national rule applies to a given case. Over the past three decades, though, many state officials, practicing lawyers, and legal scholars have concluded that transnational commercial problems could no longer be effectively governed by simply finding the appropriate domestic regime. This has led law reformers in private and public positions to activism on two fronts – the reform of domestic legal orders to conform to a common standard (thus reducing conflicts problems) and the creation of international agreements through which states agree to adopt a uniform approach to a legal question. These strategies can be mutually supportive, as evolving international consensus can be used to support national reform efforts, and *vice versa*. Together, both strategies aim at the "harmonization" of private commercial law, though the term is often used more specifically to the pursuit of international agreements.[4]

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environmental protection, intellectual property, and competition policy, and institutions – multilateral, regional, and bilateral – through which states pursue their priorities. For a critique on the legalization thesis, see Fennimore and Toope (2001); a thoughtful reflection on the issues raised by the phenomenon of "legalization" is presented in Fennimore (2000).

[3] There is, of course, no absolute boundary between public and private law. Indeed, in recent years the traditional distinction between public and private international law is widely recognized to be eroding. Nonetheless, the distinction remains relevant for understanding the different political processes and implications of law-making in these fields.

[4] The term "harmonization" has replaced the earlier term of "unification", which is generally understood to be an unrealistic goal in current conditions. Because of the ambiguity of the term, I have minimized its use in this essay.

In addition to its distinctive subject matter, private international law is the product of a unique set of actors and institutions. To be sure, states are central to the world of private commercial law; municipal legal systems articulate and enforce much of the legal framework in which commerce operates. Moreover, key multilateral institutions such as the International Monetary Fund (IMF), World Bank, Organization for Economic Cooperation and Development (OECD), and regional organizations are increasingly active in this field. The development of the principles and rules of private commercial law, however, is heavily shaped – if not dominated – by a network of business associations, professional institutions and associations, and a set of specialized quasi-public institutions – the Hague Conference for Private International Law ("Hague Conference"), the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL).[5] The work of these various bodies is animated by public and private experts on commercial law, and they provide a crucial venue in which legal reform and harmonization initiatives are pursued. As Cutler (2003) emphasizes, the technical and apolitical understanding of private commercial law has long lent itself to an acceptance of law-making by such quasi-public institutions.

In the analysis that follows, I examine the secured transactions law reform movement as a means of shedding light on the political sources and implications of transnational commercial law-making. My account places special emphasis on the role of expert legal and commercial knowledge – and the networks of legal reformers – in building agreement on the principles of a "modern" and "efficient" regime of commercial law. This kind of consensus is generated out of an ongoing "contest of principles," and is rarely unchallenged. When it is powerful enough, however, it provides the basis on which reformers can mobilize or "enroll" public and private agents and institutions to promulgate legal regimes which enhance the flow of capital across national borders by reducing the divergence in the way property rights are defined and enforced. In the case of secured transactions law, as in many other fields, the strategy of reformers is to "internationalize" one national legal regime as the foundation of a global standard of commercial law. This standard, in turn, provides the basis for further legal reform efforts. To the degree that these reform efforts are successful, they sustain and guide regimes for the allocation of power and property, and for the resolution of commercial disputes, throughout the transnational economy. Through these regimes, power and interests are linked to conceptions of legal order, a key part of the constitution of market regulation in global capitalism.[6]

Credit Finance and the Law of Secured Transactions.

[5] These three institutions are at the center of private international law-making. The Hague Conference dates back to the late 19th century, and was established to resolve conflicts of law issues among the civil law systems of continental European states. UNIDROIT was created in 1926 to promote more substantive harmonization of laws among the same legal systems. UNCITRAL was formed in 1966 to provide a forum to address issues of private law harmonization outside the highly polarized venue of the United Nations Conference on Trade and Development (UNCTAD).

[6] This approach to understanding transnational commercial law is heavily indebted to the pioneering work of Braithwaite and Drahos (2000).

The world of commercial finance and the legal framework through which it is governed in advanced capitalist economies is not well understood outside of the community of commercial actors and legal specialists closely involved in its day to day operation. In this section, I provide an introduction to the nature and role of secured finance, review the basics of secured transactions law, and consider the impact of Article 9 of the U.S. UCC on the way specialists think about secured finance and its legal regulation.

Secured Finance and Modern Capitalism.

The flow of credit finance between and among economic agents is, as Keynes emphasized, central in shaping the level and direction of economic activity in modern capitalism. But it is more than that. Relationships of creditors and debtors decisively shape the opportunities and constraints facing businesses as they attempt to use capital to secure market positions. They establish relationships of power and rights that set the field on which economic action takes place. As Carruthers and Halliday put it, "…the balance of power in a corporate network (is) embedded in the nexus of contracts that constitute and surround the firm, as a function of a field of credit relationships that are governed by the distribution of property rights." (1998: 6) Over the past three decades, the freeing up of financial markets domestically and internationally has led to an explosion of innovation and complexity, and has made an understanding of the world of credit finance even more central in explaining the operation of capitalism.

Credit finance is provided to businesses by a variety of actors, particularly banks, commercial finance companies, and suppliers. It comes in two general forms, "unsecured" and "secured". Unsecured credit is provided by a lender on the basis of a close analysis of the creditworthiness of the borrower; the interest rate at which such credit is offered will vary with the lender's assessment of the riskiness of the borrower. Secured credit is credit provided in exchange for some form of collateral; unsecured credit is advanced without any exchange of collateral. When a secured credit agreement is arranged, the borrower agrees to offer some part or aspect of its property as collateral to secure the repayment of the loan; the lender, then, attains what is termed a "security interest" in that property. In recent years, there has been a proliferation in the kinds of property or assets in which a lender can gain a security interest, particularly in the most advanced financial systems. In legal parlance, the law governing a secured credit arrangement is the law of secured transactions.

What are the advantages of financing through secured credit?[7] From the perspective of the creditor, there seem to be three major reasons to arrange security interests, and they are all tied to the ability of lenders to ensure that borrowers repay their loans. First, the taking of a security interest in an asset gives the lender some control over its use, and thus some increased oversight of the borrower's activities. (This is an advantage only in some situations; in other contexts, lenders prefer to avoid the costs of such oversight with unsecured loans.) Second, most modern legal systems allow secured creditors to take possession of the asset in which collateral is given upon default of the debtor. In regular commercial relationships, it is relatively simple matter for creditors –

[7] The following discussion is based on the review in McCormack, 2004, chapter 1.

upon demonstration of default – to attain a court order allowing them to take possession of the asset in question. Third, most modern bankruptcy/insolvency systems grant some "priority" to secured creditors; "…the taking of security maximizes the creditor's prospects of recovery in the event of the debtor's insolvency." (McCormack, 2004: 5)[8] In the case of unsecured loans, creditors have to take their chances with what is usually regarded as the cumbersome and unpredictable process of insolvency law.[9] The fewer obstacles a legal system puts in the way of secured finance, the more secured lenders – especially commercial banks and commercial finance companies – benefit.

Are these specific benefits to creditors balanced with benefits to the public as a whole? In the contemporary literature, the case for the broad benefits of secured credit centers around its "efficiency," understood in two senses. First, as a consensual device developed by market agents free to allocate resources as they choose, secured credit is often swept into the broader argument for the efficiency of markets. Second, and more central to the case, is the argument that the existence of security interests expands the flow – and reduces the cost – of credit in any economy, thereby facilitating higher levels of economic growth. (Fleisig, 1998) In this view, banks and other creditors are reluctant to lend without security to all but the largest and most established businesses. Without the possibility of secured financing, small and medium-sized businesses, and newly-established firms more generally, are likely to be either frozen out of credit markets or charged much higher interests rates for loan capital. By bringing more business into the credit markets and expanding the supply of credit, then, the existence of secured financing leads to higher rates of economic activity, benefiting borrowers specifically and the public more generally. There remains much debate among specialists concerning this argument, but it is widely accepted in recent movements to harmonize secured transactions law.

The Law of Secured Transactions.

The extension of credit directly shapes and reshapes property rights, and is thus deeply embedded in the legal order. The history and scope of law regarding secured transactions is too complex to review *in toto*. Parts of this law can be traced back to the Romans, its development was deeply shaped by the divergence between common and civil law systems, and it has undergone continuous change in response to the ongoing financial innovation of modern capitalism.[10] In this section, I focus on two key themes relevant to the current efforts to develop an international consensus on secured

[8] In the English common law tradition, the term "insolvency" is widely used to refer to a situation in which a person or corporation is unable to pay its debts; the law governing such situations is termed insolvency law. In the U.S., however, the same conditions are usually referred to as "bankruptcy". Although there are some important differences, for the purposes of this essay I will use the term insolvency to refer to this phenomenon broadly.

[9] This is one clear example of the impact of the shadow of insolvency law on the credit markets. It is difficult and unwise to disentangle the content or politics of secured transaction law from that of the legal regime governing insolvency.

[10] There are few attempts of which I am aware to provide a systematic analytic review of this field of commercial law. The best such attempt, on which I rely heavily, is Tajti, 2003.

transactions law – the nature of the assets that can be used as security for loans, and the way the law treats different types of security agreements.

As modern commercial law developed along with capitalism, it was faced with the questions of what sorts of assets could be used as collateral for loans and the closely related issue of ownership of that collateral. "Traditionally, security interests were often limited to the following two types: non-possessory security interests over immovables and possessory security interests over movables." (IMF, 2002: 4) Simply put, if a borrower wanted to offer as collateral for a loan a form of movable property (essentially, not land or fixed buildings), the lender would have to acquire possession of that property until the loan was paid. By the late 19th century, the increasing importance of mobile forms of wealth led creditors to push for a new legal regime. In different ways, the legal systems of the major capitalist economies developed legal forms to accommodate financial transactions based on "non-possessory security interests over movables," such as inventories, goods, and accounts receivable. The result was a proliferation of different types of legal devices to govern different forms of secured transactions, each with its own slightly different implications for how credit was arranged and how the security interests created would be handled in bankruptcy, closely tied to different approaches to the law of property.

By the mid 20th century, national systems of secured credit law displayed great variation in the ways in which security interests could be created and enforced. There remained wide differences in the kinds of assets – especially moveable assets – that could be used to secure a loan, and the circumstances in which this could be done. The level of formality necessary when arranging secured financing, and thus necessary to prove the existence of a security interest, varied widely. In some states, a wide range of secured loans required public registration (often with different registration systems for different devices), while in others no such registration was necessary. The ability of creditors to seize the assets of a debtor in default differed widely. In some jurisdictions (i.e. England), this could be done without any formal legal process in some situations, while in other jurisdictions (especially civil law systems) such forms of "self-help" were usually prohibited. Insolvency law treated secured creditors very differently; while some gave them absolute priority, others tried to balance their claims more evenly with those of unsecured creditors. At the heart of these differences lay contrasting judgments concerning the role and nature of credit, the rights of different kids of creditors, and the ways to protect debtors from predatory creditors. (Wood, 1998) Legal regimes that leaned towards the interests of creditors allowed market actors substantial leeway in creating new security devices and granted creditors substantial freedom to enforce their claims as they say fit. At the other end were legal regimes that were suspicious of non-traditional forms of credit and concerned about the ability of creditors to manipulate debtors into vulnerable situations. These systems embodied more precise limitations on the forms of secured credit agreements and required lengthy formal procedures before secured creditors could seize the assets of defaulting debtors.

As transnational commerce expanded over the past decades, this legal variation emerged as an important limitation on the emergence of international credit markets. At all levels of the global economy, creditors found many obstacles in the way of the enforcement of security agreements outside the jurisdiction in which they were created.

In developing states, the situation was further compounded by continuing resistance to the creation of non-possessory security interests in movables, and by legal systems that made the enforcement of credit agreement difficult and uncertain. (Fleisig, 1996) The emergence of new market economies following the fall of communism added a whole new set of jurisdictions that had little or no developed credit law suitable to modern capitalism. Among specialists and practitioners, the need for widespread reform of secured transactions law became increasingly clear.

Article 9 and the "Revolution" in Secured Transactions Law.

The secured transactions law reform movement derives its inspiration and content from the creation of the UCC, the successful product of an attempt to "modernize" and "systematize" commercial law in the United States. (Rubin, 1997) Article 9 of the UCC amounted to a fundamental reorganization and redefinition of secured transactions law across the U.S. (Bridge, et al., 1997, Scott, 1994, Woodward, 1997) First, it elevated "function" over "form" – all transactions in which a creditor exchanges a loan in return for a claim over some collateral of the debtor is considered essentially the same, regardless of the basic form of the transaction. The claim over collateral, whatever its technical legal form, is now a "security interest," and all security interests would generate the same rights and be subject to the same rules. Second, under Article 9 (almost) all assets – whatever their specific form – could be the subject of a security interest, and the issue of possession or ownership of the asset is not relevant to the rights created by that security interest. Third, the object of the security interest need not be fully specified; future income or goods (such as accounts receivable or inventories) could function as a form of security. Fourth, all security interests must be recorded (a "filing") in a public record, so that all potential lenders could find out which of a potential borrower's assets were already the subject of previous claims. Fifth, secured credit is given a clear position of "priority" over providers of unsecured credit in the event of the borrowers insolvency.[11] Sixth, the process whereby secured creditors can seize the assets of debtors who default on their agreements is made easier, and the law clearly endorses the validity of private enforcement of creditor rights. Finally, upon its adoption by all the states Article 9 would ensure a basic degree of uniformity or harmonization of secured credit law across the whole economy.

Article 9 represents a new and unique approach to the law of secured transactions, one that fundamentally distinguished U.S. law from both its common law cousins and from the civil law tradition. What is the significance of this approach for the way property rights and power are distributed in secured transactions? Article 9's adoption marked the acceptance of a wide range of assets as the basis for security interests, deference to the choices of market agents in setting the terms of secured credit, and simplification of the legal formalities of secured finance arrangements. Although there is much debate surrounding the exact relationship, it has coincided with a major expansion in the market for secured credit in the U.S. There is less controversy regarding the benefits of Article 9 for the financial institutions that provide such credit, in relationship to borrowers and especially unsecured creditors. The growth of the market provides more business for these institutions which, in combination with their expertise in writing

[11] In practice, this priority is often limited by bankruptcy law in the U.S., which is "federal" or national law.

financing contracts, leads to more power for secured creditors over the assets and decisions of borrowers. Combined with the strengthening of the role of private enforcement and the priority rules, Article 9 establishes a clearly creditor-friendly legal framework for commercial finance. Whatever their views on the efficiency impact of secured credit, almost all the commentators agree that this is a legal regime from which secured creditors have gained significantly. (Scott, 1997)

The process by which Article 9, and the UCC generally, was developed and adopted also marked the success of a unique approach to the making of commercial law. The UCC, which is now in force in all fifty states of the U.S, was conceived as a means to adjust commercial law to the needs and practices of business as it was actually conducted, to make the law more "efficient" in promoting economic activity. Begun in 1940 and first published in 1951, it was developed through the combined initiative and work of the National Conference of Commissioners on Uniform State Laws (NCCUSL) – an organization of legal officers of state governments – and the American Law Institute (ALI) – an organization of lawyers and legal academics – and its adoption required the separate approval of each state legislature. While subject to this need for ultimate legislative approval, though, the initiatives and agenda of the law reform process were dominated by what amounts to a semi-private legislature operating at the margins of the public/private institutional divide. To the extent that affected interests were consulted, it was the representatives of private businesses – particularly the financial industry – who were involved. (Pachtel, 1993) It is thus hardly surprising that the resulting body of commercial law – including the law of secured transactions – embodied the values of the freedom of market actors to set the terms of business practice and to resolve conflicts through primarily private mechanisms. The emergence of efforts to reform commercial law at the transnational level, to which I now turn, involves the same close connections between the substance and process of law-making.

Internationalizing the Law of Secured Transactions.

Until the mid-1990's, the world of secured finance law remained one of separate national traditions and rules. It had hardly felt the impact of the movements internationalizing economic law, and few if any experts expected this to change. As one important reformer writes, "In the mid-1990's the accepted wisdom in the field had placed several areas in the 'impossible' list, consigned to the dustbin because of deep differences in legal traditions, the uses of commercial law, and legislative and cultural difficulties in changing long-standing law. Secured finance was near the top of that list." (Burman, 2002-03: 347) Over the past ten years, however, proposals for reform have swept through secured finance law, from the domestic to the transnational level. In this section, I review the different dimensions of ongoing secured finance law reform and explore the dynamics and goals of this movement. I then examine how the reform movement in secured transactions law illustrates some of the central dynamics of the politics of regulatory capitalism.

What is Happening?

The movements for reform and harmonization of secured transactions law are taking place in a variety of institutional settings and are pursued through different

strategies.[12] These include domestically-initiated law reform programs, regional organizations and development banks with law reform programs, the rule of law programs of multilateral aid agencies, and the harmonization agreements of the bodies active in private international law. The strategies include the adoption of new legal frameworks by states, the linking of legal reform to eligibility for development assistance, the development of model laws to be ratified by treaties, and the proclamation of guides and principles for legal reform.

The reconsideration of secured transactions law began in the late 1980's, with domestically-initiated reform efforts in key common law states. Legal reform commissions and initiatives appeared in the United Kingdom, Canada, Australia, and New Zealand, which had the mission of reviewing existing laws on security interests in light of the perceived success of law reform in the U.S. and of ongoing attempts to reconsider insolvency law. (Ziegel, 1997) While strong forces have prevented much change in English and Australian law, in the 1990's most Canadian provinces adopted new Personal Property Security Acts (PPSA) based closely on Article 9 of the UCC, and New Zealand adopted a similar approach at the national level.[13] In these cases, the basic principles of the Article 9 approach were successfully adapted to legal systems more deeply shaped by English law than was the case with pre-UCC commercial law in the U.S. The reformed secured transactions regimes in these two states have proven quite durable, and provide models of a "modern" secured transactions law less directly tied to U.S. law. This has proven useful for reformers working in developing states with common law systems, which are usually still much closer in structure to English law.[14]

But the emergence of a truly international movement to reform secured transactions law was set in motion with the collapse of state socialism and the sudden emergence of a number of East European and Central Asian countries attempting to make the transition to market economies. In both the EU and North America, public and private actors organized programs to help these states develop the legal rules and institutions necessary for a market economy, and particular attention was paid to a legal framework for the mobilization of domestic and international capital investment. The most important product of these efforts was the Model Law on Secured Transactions prepared in 1994 by the European Bank for Reconstruction and Development (EBRD). Developed with the involvement of major Anglo-American and Continental experts and practitioners, this model law attempted to provide a guide to law reformers that combined the key innovations of North American and English law into a format suitable to the civil law traditions of the emerging market economies. This law, and the more general "Core Principles" distilled from it, remains the basis of an active effort by the EBRD to oversee the creation of "modern" credit finance laws and institutions in the states of the former

[12] Buxbaum, 2003 provides the best single overview and assessment of these developments from the perspective of a specialist.

[13] The Canadian reform project actually dates back to the late 1960's, with Ontario adopting the first provincial 'Personal Property Security Act' (PPSA) in 1967. Beginning in the late 1980's, the pace of the adoption of similar legislation by the other provinces picked up, and Quebec reformed its civil law in a similar direction as well. The Canadian reform movement thus started quite soon after the adoption of Article 9 in the U.S., and followed a similar process as well as substance.

[14] Interview with expert active in legal reform efforts in the developing world.

Soviet sphere.[15] By the late 1990's, similar efforts had begun under the authority of the Asian Development Bank (ADB) and the Organization of American States (OAS).[16]

Meanwhile, the issue of secured credit law has increasingly drawn the attention of multilateral institutions. As the World Bank and IMF give more attention to issues of legal reform and institution-building, corporate governance, and the "financial architecture," the issue of secured finance has been the focus of more study and policy-making. For these institutions, secured credit law is (along with other key financial market issues) at the intersection of the concerns for facilitating access to capital and thus ultimately development in emerging economies. In the wake of the financial market crises of 1997-98, moreover, secured credit reform came to be seen as a piece of any approach to stabilize global and developing country financial markets. In practice, both institutions have responded by – in some situations – including standards for secured transaction law reform as part of the package of legal and institutional reform required of states receiving financial assistance. While not as prominent elements of "conditionality" as other dimensions legal and infrastructure reform, secured transactions law is on the agenda of these institutions, particularly the World Bank.

During the same period, the major institutions for the development of private international law returned to the question of security credit law, and decided that the time was now ripe to work on the harmonization of parts of the legal regimes of states. As in the case of the ADB, World Bank, and IMF, attention to secured credit law was recognized a necessary follow-up to ongoing attempts at insolvency law reform. Over the past five years, this work has produced some substantial agreements. At the Hague Conference, a Convention on Certain Rights in Respect to Securities Held with an Intermediary, in the context of international transactions, was adopted in 2002. In 2001, UNIDROIT produced a Convention on International Interests in Mobile Equipment, which commits signatory states to a common framework for treating security interests in large-scale equipment (i.e. aircraft, ships, and rolling stock) that regularly move across national borders. Meanwhile, UNCITRAL has begun the development of a "legislative guide" to secured transactions law, which is meant to provide guidance to states interested in modernizing their secured finance regimes. All of these institutions are involved in substantial ongoing work on secured transactions law reform, as part of their goal of facilitating the movement of capital and goods throughout the transnational economy.

Together, current activity at the national, regional, and multilateral levels amounts to a sustained campaign to modernize the legal regime governing secured credit in a world of global capitalism, particularly in developing or emerging market economies. The central focus of this effort is the creation or reform of national legal orders; all the major actors accept the continued importance of the sovereign state in governing most

[15] The EBRD Model Law is available at http://www.ebrd.com/country/sector/law/st/core/modellaw/main.htm.
The Core Principles for a Secured Transactions Law is available at http://www.ebrd.com/country/sector/law/st/about/prin/main.htm.

[16] For the ADB project, see ADB (2000). A presentation and overview of the OAS Model Law by two of its key developers can be found in Kozolchyk and Wilson, 2002.

economic action and the impracticality at this point of a fully globalized regime of secured credit law. National legal reform is pursed by a combination of advocacy and persuasion of national legal and political elites, state and private legal assistance initiatives, and attaching legal reform conditions to the assistance programs of multilateral institutions. In some cases, especially in the work of the private international law bodies, specific problems presented by the transnational aspects of secured finance are addressed by international conventions. This work is supported by a continuing effort to use the institutions to private law harmonization to develop a transnational consensus around the substance and virtues of a "modern" and "efficient" secured transactions law.

How is Commercial Law Reformed, and By Whom?

The project to reform and harmonize secured transactions law is driven and shaped first and foremost by a group of lawyers, legal academics, and legal officials who are part of a transnational network of experts in credit and bankruptcy law. This network, which had formed as early as the 1970's, took advantage of the changed circumstances of the 1990's to articulate and sell a project of law reform as a necessary response to some of the new challenges of financial regulation and economic development. The membership is primarily of North American and European background, but experts from developing nations – with substantial legal training and in some cases employment in developed states – play an increasing role in the law reform movement. These experts share significant prestige within national and international legal circles, and have a history of varied experience in commercial law reform projects, including membership on advisory boards to multilateral institutions, designing legal reform projects for specific states, and representing states and bar associations in the development of harmonization projects.[17]

How do these actors advance the secured transactions law reform project?[18] First, those who are primarily academics publish frequently on the topic in a variety of contexts. From casebooks to technical papers, they provide updates of the current state of secured transactions law, evaluate the impact of different legal regimes on commercial practice, and make the case for law reform and harmonization. Second, experts take part in regular conferences and colloquia designed to bring together academics, practitioners, business, and government officials to discuss the need for and prospects of legal reform. These meetings are often the key step in launching national and international reform efforts, and are an important venue in which members of the expert network who are not academics (primarily practitioners and public officials) can shape the choice and direction of reform efforts. Third, experts work with all the major participants in a reform effort – business, states, bar associations, and as academics – in drafting and revising reform proposals. To a significant degree, reform proposals are the product of the negotiations of experts who represent different institutions but are part of the same professional and epistemic network. Fourth, experts are active in building support for proposed legal reforms through the lobbying of key interests and institutions, including business associations and publications, legislatures, and bar associations. Finally, experts work

[17] The American Bar Association (ABA) and International Bar Association (IBA) are especially active in legal reform and harmonization efforts.

[18] See Stone (2003) for an insightful review of different kinds of expert and professional networks, and their roles in shaping and governing the transnational political economy.

with national and international institutions – as employees or consultants – to oversee and direct the implementation of legal reform projects. This is particularly important in legal assistance efforts, where individual experts and key institutions such as the Center for the Economic Analysis of Law (CEAL) and the American Bar Association's Central and Eastern European Legal Institute (CEELI) are contracted by states and multilateral agencies.

In their analysis of the development global business regulation, Braithwaite and Drahos (2000) emphasize the importance of the 'enrollment' of states and institutions by experts and reformers. But expert networks are also mobilized by political actors who have decided on a course of legal reform, a process well illustrated in the area of secured transactions law. The major regional and multilateral development and financial institutions have played central roles in advancing – but also modifying – the secured transactions law reform agenda. The work of UNCITRAL provides one example. In the 1970's, the Secretariat developed an interest in this area, and commissioned a comparative study of legal regimes by Prof. Ulrich Drobnig, which was to form the basis of a model law development project. In 1980, however, the Assembly – made up of representatives of states – decided that the time was not ripe for such a project, and it was not until the mid-1990's that UNCITRAL returned to work on the issue.[19] In another case, the EBRD project and the World Bank's work on secured transactions reform in Eastern Europe can be traced to the initiative of some United States Agency for International Development officials working in the region in the early 1990's.[20] Officials from key states have played a similar role. In the US. case, for example, key officials of the Private International Law division of the State Department's Legal Advisor's Office played a leading role during the 1990's in inserting secured transactions law onto the agenda of various domestic and international bodies. The responsible individuals in states and international institutions are in regular contact with each other and with the network of experts, and have been central to the emergence of secured transactions law reform on the agenda of private international commercial law.

Certain developing states are increasingly active in the reform process as well. This activity varies by arena – UNCITRAL and the regional development banks seem most conducive to their participation – and by the ability of these states to access the relevant legal expertise. Moreover, my own observations suggest that key elites in some developing states are not (or no longer?) simply passive consumers of law reform. Rather, their involvement in the reform process is driven by a growing demand for the legal framework and tools that will help them stabilize financial markets and attract capital investment from the developed economies. For reasons of necessity and/or ideological acceptance of the market-based model of development, many states in the developing world are active in searching for new models of legal and regulatory governance.[21]

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[19] Tajti (2002): 323—24. UNCITRAL's work on secured transactions began in the late 1980's with the development of international conventions on limited and specific issues regarding cross-border security interests.

[20] Interview with expert involved in law reform project.

[21] In addition to interviews and documentary research, this interpretation relies heavily on my observation of the process of negotiation of a model law on security interests by UNCITRAL working group VI.

The third set of players in the legal reform movement is made up of representatives of the industry and business organizations most directly affected by secured transactions law. Their involvement is often difficult to trace, as such groups lack official representation at most of the organizations that actually put together agreements, but we do have some direct evidence of this involvement. Lawyers from the largest global law firms – which represent leading financial institutions – are often members of the advisory boards organized to develop or review legal instruments. They often appear as officials of groups of industry professionals and bar associations, which are consulted as part of legal reform efforts. In rare but important cases, they can be found as members of state delegations involved in negotiating agreements.

But the best evidence for the role of private business comes from the UNCITRAL process. Unlike most other international law-making bodies, interested non-governmental organizations are permitted to participate in these deliberations, though they do not have voting rights. At the working group on security interests, groups such as the International Chamber of Commerce (ICC), the Union of Industrial and Employers Confederations of Europe (UNICE), and the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL) are all active participants in the deliberations, and are often asked to assess which of a set of alternative proposals would be most likely to garner the acceptance of the business community. In this case, though, the most important private sector agent is the Commercial Finance Association (CFA), an association of banks and financial institutions specializing in providing finance to business.[22] The CFA's role in the development of a secured transactions legislative guide includes but extends well beyond the activities described above. From the beginning of the working group's activities, CFA representatives have been in close contact with the UNCITRAL secretariat and the state delegations. Before the first meeting of the working group, a colloquium sponsored jointly by UNCITRAL and CFA was convened in Vienna; the CFA played a key role in selecting the speakers and agenda of the meeting, and this in shaping the working group's agenda.

It is necessary, as well, to point out who is not involved in the process of transnational commercial law reform. With rare and only sporadic exceptions, there is no effective presence of consumers, unions, or any other "social" interests in the private law dimensions of the regulation of the global economy. This is true not only at the drafting stage, but includes the internal processes in which such agreements are ratified by states. Despite the potential impact of regimes of secured credit law on the distribution of property rights in commercial life, only a limited slice of the affected interests participate in the making of these regimes. There is some parallel to domestic commercial law making – the UCC process, for instance, involves the same limited group of participants – but over the past few decades consumer interests in many states have been able to inject themselves into various dimensions of commercial law-making. (see Carruthers and Halliday, 1998) These and other interests have become a important force in public international economic law-making as well. But they have made little impact in the world of private international commercial law.

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[22] For the membership and activities of the CFA, see its website at www.cfa.org.

Why Secured Transactions Law Reform?

What are the aims of the secured transactions law reform movement? What role is this kind of reform intended to play in the evolving legal framework for global capitalism? The best way to grapple with these questions is to begin with the arguments of the law reformers themselves. Those active in secured finance law reform share a common understanding of the purposes and importance of their work. This understanding can be broken down into three parts.

First, reform of the law of secured finance law is understood to be part of the larger project of legal reform necessary to accommodate and stabilize a globalized economy. In the case of secured finance, a number of developments in the past two decades has made secured finance more important in the way capitalism works – these include the privatization of public firms, the growth in spending on "big-ticket" items such as aircraft and tankers, the importance of the "securitization" of secured transactions, and the great geographic dispersion in the assets held by private corporations. (Goode, 1998) As a result, secured financing arrangements increasingly involve lenders and borrowers from different jurisdictions, and assets that move frequently across national boundaries. But the law of states vary in the kinds of security agreements that are acceptable and the ability to enforce these agreements. The modernization and harmonization of secured transaction laws, then, is necessary if lenders and borrowers having confidence that their arrangements will be recognized and enforced by all jurisdictions where they – or the relevant assets – happen to end up. In this view, the current state of secured transaction law places too many barriers in the way of the potential scope of secured finance.

A second and closely related concern is with the stability of the global financial system, and especially developing country financial markets. In reaction to the Asian financial crises of 1997-98, observers identified a group of related problems in these markets to which the scope of the crisis was attributed – in particular, the lack of transparency in the governance and activity of banks and corporations, over reliance on real estate-based lending by financial institutions, and the lack of effective insolvency systems. One important response, especially on the part of multilateral institutions and development banks, has been the push for reform of the whole legal-institutional framework of financial market and corporate governance in developing states. In the case of the World Bank, OECD, ADB, OAS and others, the creation of a modern regime of secured transactions law is seen as a central element in this reform program. As an IMF paper puts it, "The efficiency of the legal framework for secured credit is a critical factor in the strengthening of financial systems. In the fact of financial sector crises, an effective legal framework of security interests enables banks and other credit institutions to mitigate the deterioration of their claims; it also facilitates corporate restructuring by providing tools to support interim financing." (2002: 1) In part, then, the reform of the law of secured finance is driven by the need for a better regulatory framework to stabilize global financial markets.

Third, reform of secured credit law is understood as a key part of the promotion of economic growth in developing countries. The key issue here is access to sources of

credit, both domestically and internationally. A modernized secured transactions regime allows more forms of wealth to be used as collateral, thus expanding the flow of credit. "In the longer term, an effective framework for security interests fosters economic growth. Specifically, it supports access to affordable credit, thereby facilitating the acquisition of goods. Further, it increases the capacity of enterprises to finance expansion fueled by the supply of credit." (IMF, 2002: 1) As an UNCITRAL report put it, "… modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries and in the share such parties had in the development of international trade.: (2001: 3) This argument is linked to a more specific claim, that secured transactions law reform is especially helpful in promoting the development of small and medium sized enterprises (SME's) in developing states. The obstacles to the extension of secured credit on movables, still pervasive in the law of most developing states, puts these businesses at a disadvantage, as they do not have the sizeable fixed property or personal connections of established interests. (Fleisig, 1996) In the words of an ADB report, "…the creation of a legal framework that allows a creditor to take a security interest over a debtor's movable property is the key to SME's access to readily available, cheap and long-term credit. This is all the more so as SME's, unlike larger enterprises, are likely to have less immovable property (land and buildings thereon) that can be offered as collateral to secure loans from creditors." (2000: v) The growth of smaller business and the expansion of access to credit are widely believed to be crucial to economic development, and reform of the law of secured transactions is understood to be crucial to attaining this goal.

It is important to emphasize the focus on the capital markets of developing states in all of these arguments. While reformers believe that the law of secured transactions in even the most advanced economies needs change, the center of the effort is on emerging markets. These are the states in which there is little protection for secured lending itself and in which the threats to financial market stability are believed to be the greatest. Moreover, it is in the developing economies where the demand for reform is clearest, and where the opportunities for growth in secured lending and the possibilities for a resulting burst of economic growth are most promising. Indeed, some of the more hopeful advocates of secured transactions law reform see it as a key step in promoting the larger social and political foundations of liberal capitalism in developing states.

What Kind of Secured Transactions Law?

In the view of reformers, then, a modernized and "efficient" system of secured transactions law is central to the stability and prosperity of the global economy. But what kind of law is this? What are the essential elements of a modernized legal regime? Here, there is little doubt; Article 9 is central in defining the ideal for reformers. "Undoubtedly, the most significant event in the development in secured financing law during the second half of this century was the publication of Article 9 of the American Uniform Commercial Code…concepts and approaches to the regulation of secured financing transactions contained in the UCC, Article 9 are viewed by a growing number of reformers as the basis for modernizing national secured financing law of jurisdictions outside the USA." (Cuming, 1997: 500) This assessment, presented by an important participant in the reform movement, is widely shared by other reformers, expert

observers, and scholarly commentators both supportive (Tajti, 2002) and critical (Moglia Clapps and McDonnell, 2002) .

This impact of this model can be seen in all of the sites where law reform is being pursued. From national legislation to multilateral agreements, a common set of principles for secured transactions is offered as embodying the essence of a "modern" legal framework.[23] The major elements can be organized as follows:

> 1. The rules for creating security interests (and thus secured transactions) should be simple and clear, and as uniform as possible across the different kinds of security agreements.
>
> 2. To the degree possible, the law should give market agents autonomy to define the nature and structure of secured finance agreements.
>
> 3. The law should allow the creation of security interests in all types of assets. In particular, it must protect and encourage the creation of non-possessory security interests in movable assets.
>
> 4. There must be a system for easy, cheap, and effective registration and publicity of all security interests, and the requirements for the description of the security should not be too detailed or specific.
>
> 5. The enforcement of security rights should be as easy and efficient as possible. This should be the case both outside of insolvency proceedings, and inside such proceedings, where the rights of secured creditors should be protected as much as possible.

These are the same principles embodied in Article 9, and they are based on a shared philosophy of credit finance law – an emphasis on the initiative and autonomy of private agents, the adaptation of the law to the practices of commercial life, the unique value of secured finance and the rights of secured creditors, the preference of as much uniformity in the treatment of different forms of security interests, and the need for an "efficient" legal process. For reformers, the attractions of the Article 9 model are clear. No other approach so effectively combines the expansion of access to credit; it removes "outdated" obstacles to security agreements while simultaneously protecting the rights of creditors, a necessary incentive for lending. Moreover, it combines an emphasis on the autonomy and expansion of private credit markets with a regulatory framework that is transparent and efficient. Article 9 secured transactions law, then, resolves exactly those deficiencies identified in existing legal and regulatory structures regarding secured finance, and embodies the virtues necessary to achieve the goals of the law reform effort. As the most "modern" and "efficient" model of secured transactions law, it guides the efforts of

[23] I have derived this summary set of principles from the writings of those advocating reform and from the models, guides, and statements of principle developed by the regional and multilateral institutions active in the secured transactions reform effort.

reformers efforts from the most technical work on national law reform to the development of models and guides at the regional and global levels.[24]

Resistance to Reform: The Contest of Principles…and Interests.

There remains, however, substantial and often effective resistance to the project of harmonizing secured transaction law around the Article 9 model, and it comes from two different kinds of sources. First, domestic legal practitioners and institutions often see Article 9-inspired reforms as threats to established practices and thus to their position within the legal order. This kind of resistance takes somewhat different forms in advanced and developing states. A good example of the former is England, were the legal and political establishments have successfully argued that existing legal regimes for security interests are fully adequate to the needs of commercial and financial practice. The impact of English law in shaping key areas of global finance provides an important material interest to support this opposition; indeed, it is common for English (and other) experts to suggest that the export of the UCC system is driven by the interests of U.S. and U.S.-trained lawyers and legal academics. Here, the ongoing competition between London and New York law and lawyers to shape the rules of global commerce finds another important outlet. (Beaverstock, et al., 2002) In the case of developing states, legal practice regarding secured lending is often deeply tied to a whole set of practices – involving financial institutions, the role of notaries, insolvency regimes, registration systems for securities, etc. – that are incompatible with an Article 9 regime. Here, again, principles and interests are closely tied, as the positions of key legal and political actors are closely tied to these practices In addition, resistance is often tied as well to a suspicion and fear of the opening to foreign actors that reform could generate.[25] In both kinds of cases, established legal agents and institutions have employed substantial political influence to frustrate proposed reforms.

The second source of resistance, which is found especially in the attempts to develop model laws and international agreements, comes from experts and officials in the developed states with non-UCC based commercial law systems, especially the civil law systems of Continental Europe. Despite their significant differences, these legal orders share a suspicion of many of the principles driving the Article 9 approach to secured transactions law – especially the ideal of one basic set of rules for all forms of security interests, the reduction in the formalities necessary for the creation of security interests, and the ease of private remedies for creditors. At the basis of this suspicion is a concern about the abilities of secured creditors to abuse their power over the assets of debtors. In this view, the easier it is for security interests to be created, the more vulnerable are borrowers and unsecured creditors manipulation by secured creditors. Moreover, most civil law systems maintain clear distinctions between security interests

[24] For reformers, a secured transactions law is "efficient" if it promotes the extension of credit, and thus economic growth. This use of the concept of legal efficiency is rooted in the "economic analysis of law" theoretical tradition. Interestingly, both this tradition and the UCC movement itself were deeply influenced by the "realist" school of American jurisprudence.

[25] For a sensitive and detailed discussion of the experience of Argentina, see Moglia Clapps and McDonnell, 2002. In those parts of the developing world that inherited various forms of the civil law tradition from colonialism, as in Argentina, these traditions contribute to domestic resistance to the reform of secured finance law on UCC lines. However, the growing influence of U.S. law among the elites of the legal profession in many developing states may be changing this situation. See Dezalay and Garth, 2002.

over, and the ownership of, assets. For adherents of these systems, the Article 9 approach to security interests blurs the clarity of ownership of "title" to assets, which is considered crucial for the effective regulation of credit markets.

This critique, of course, is linked to the desire to defend and promote the viability of the civil law alternative as a model of credit finance law. If the Article 9 principles were to gain clear hegemony in the effort to develop a global standard of law, these critics fear, long-established practices and the actors attached to them would be threatened. As a result, civil law critics are active in advancing a more "balanced" approach to reform at all the major fora of private international law-making. It is in this conflict at the level of principles and models that we can see a true "contest of principles" regarding secured transactions law. But this contest is also inextricably tied to competition for power and influence in shaping the larger legal framework for governing financial markets in a world of regulatory capitalism. Even at its most abstract level, the arguments over legal models is tied to question of which actors and institutions will dominate the governance of regulatory capitalism.

The impact of this counter-Article 9 movement is best illustrated in the efforts of multilateral banks and institutions to develop model laws regarding secured transactions. In each important arena, the commentary begins by noting the intrinsic virtues (and often superiority) of the Article 9 approach, but concludes that there is too much resistance to its full-scale adoption around the world. In response, these model laws and legislative guides attempt to incorporate Article 9 principles as much as possible while adapting them to the structure and needs of (primarily) civil law systems. This is precisely the approach of the EBRD, ADB, and (to a lesser extent) the OAS model laws. It is reflected in the stated understandings by the IMF, World Bank, and ADB that, while modernization of security interests law is necessary, it need not follow one common path, and needs to be adapted to specific local traditions and situations. The same considerations shaped the development of more limited UNCITRAL and UNIDROIT agreements, and shapes the current UNCITRAL efforts to develop a legislative guide on secured transactions. As the Report establishing the latter's work program puts it, "…in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, could constitute a flexible alternative." (2001: 3)[26] The current direction of secured finance law reform is perhaps best summarized by the following analysis, presented in a report to the World Bank by a group of pro-Article 9 experts:

> There seems little doubt that the Article 9 regime has greatly simplified the conceptual treatment of security interests…However, while it may represent an ideal, the security/title-retention dichotomy is so deeply embedded in legal systems outside North America that it would be unrealistic to expect this to change in the foreseeable future…" (1999: 9)

The Article 9 model is setting the direction for legal reform and harmonization efforts, but a contest of principles and interests – based on an ongoing competition over the

[26] My own observations of this work suggests that the tension between the two approaches remains alive, and is expressed in debates over the degree of "uniformity" and "diversity" of rules that the legislative guide should accommodate. These debates can be followed in the periodic reports of the UNCITRAL Working Group on Security Interests, available at www.uncitral.org.

ability to shape the basic institutions of the global economy – shapes and limits its influence.

Commercial Law Reform and the Global Political Economy.

The movement to reform secured transactions law is one part of a growing activism in the world of private international law. (see Cutler, 2003: chapter 6) Reformers are at work on a variety of subjects – including banking practice, insolvency, arbitration, and e-commerce – essential to the governance of regulatory capitalism. What does the secured transactions law reform project tell us regarding the dynamics and processes that drive the private international law reform process, and the governance of regulatory capitalism more generally?

The Persistence of the National: Regulatory capitalism is a transnational phenomenon, in which governance structures and models are connected and often interdependent across national boundaries. Nonetheless, national institutions, models, and practices play a crucial role in the way power is constructed and exercised. This dialectic between the transnational and the national is essential to the world of private international law, and is well illustrated in the secured transactions law reform project. In their pursuit of an international consensus on the principles of secured finance law, reformers advance one particular national model as the most efficient and modern, and critics respond by defending a diversity of national approaches. For reformers, the ultimate significance of internationally-agreed upon standards of law would be their influence in shaping legal reform within individual states, which remain the most important sites for the governance of credit markets. The success of a transnational reform project, then, depends the ability to mobilize national coalitions of support behind the reform of domestic law. To the degree that this dimension secured finance law is typical of other aspects of governance in contemporary capitalism, and I believe that it is, we need to take seriously the ways in which transnational spaces of power are constituted by the interaction of national spaces and institutions.

The Importance, and Ambiguity, of the Public/Private Boundary: The project of reforming secured transactions law illustrates well how regulation in the transnational political economy destabilizes key social boundaries. In particular, the intersection between the "public" and "private" becomes a key site of contestation as actors and institutions struggle over the ground rules of the global economy. In the account I have presented, we see a process in which key agents of change (and their opponents) work together across these boundaries to advance (or resist) a common agenda. The agents themselves are located on both sides of these boundaries, and often shift position over time – a private lawyer develops proposals for public agencies, a law professor represents one state, advises a multilateral agency, and represents private clients, etc.

We are now familiar with this sort of boundary-crossing in the study of governance. The case of secured transactions law reform, though, sheds light on the role of a set of institutions often overlooked by observers of regulation in the global economy. Commercial law-making at the national and international levels relies on a set of quasi-legislative bodies – which combine "public" and "private" characteristics – through which much of the agenda of legal change is determined. These institutions – the

ALI/NCCUSL complex, the UNCITRAL/UNIDROIT/Hague Conference complex, the advisory boards of development banks and regional organizations – are opaque to the public but provide important access for legal organizations, government officials, and some commercial interests. In both the U.S. UCC process and the developing transnational law-making system, institutions governed by public officials are a hub around which networks of public and private experts mobilize to pursue law reform projects. It is in these networks that much of the agenda-setting for the development of transnational commercial law takes place.

As such, the world of private commercial law-making poses important challenges for those who are concerned with the regulation of contemporary capitalism. While these institutions and networks are active in shaping the legal rights and obligations of individuals, groups, and businesses, they have to this point been inaccessible to many if not most of those whose interests are potentially shaped by their deliberations. Despite the presence of state officials, these processes as a whole remain quite insulated from widespread public participation. Whatever historical case can be made for the appropriateness of this way of approaching the "technical" issues of private international law, though, it no longer seems persuasive in light of the increasing scope and importance of the projects now being undertaken. Moreover, private international law is engaging issues long considered part of public law – intellectual property rights, development policy, dispute resolution, insolvency, etc. – and the same is happening in the other direction. The interaction moves beyond substance to process, as the divide between public and private international commercial law institutions blurs. This erosion or mutation of the public/private boundary asks us to think in different ways about how to design and evaluate regulation and law-making in the global economy.

The Role of Knowledge and Expertise: In the case of secured transactions law reform, I have suggested, the work legal experts is central to the way in which both the national/international and public/private boundaries are maintained and questioned. In this area, indeed, the networks of expertise are central to the constitution of a transnational law-making process itself. It is through these networks, and the connections to institutions that they provide, that experts on secured transactions law are able to exercise influence and power. This picture fits well with the emerging literature on regulation and law-making in the global political economy, but this should only highlight the need to explore in more depth the ways in which expert knowledge and those who have it helps shape the contours of a transnational regulatory regime.

The area of private international law is an especially relevant context for this kind of analysis. In both national and international arenas, legal experts have long played a particularly central role in the development and reform of private commercial law. In the emerging arena of transnational commercial law, the same pattern can be found. How does legal knowledge and expertise shape the perceptions and choices of states and private interests? How do the professional interests of lawyers interact with these perceptions, and what are the implications for the substance of commercial law and the allocation of property rights? Finding answers to these and related questions will be important if we are to understand why the legal framework of regulatory capitalism takes the form that it does, and more fundamentally why so much of that framework is articulated in the form of law in the first place.

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