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Behavioral Comparative Law: Its Relevance to Global Commercial Law-Making

John Linarelli
*Touro Law Center, jlinarelli@tourolaw.edu

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BEHAVIOURAL COMPARATIVE LAW: ITS RELEVANCE TO GLOBAL COMMERCIAL LAW-MAKING

John Linarelli*

ABSTRACT

This is a book chapter written for a British Society of Legal Scholars funded conference held at Durham University Law School. It develops a framework by which to evaluate the making of commercial law at the global level. It offers an approach to evaluating the process by which primarily intergovernmental organisations produce commercial law. The approach grounds in both behavioural science and comparative law. The focus is mainly but not exclusively on global rule makers such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). It articulates what appears to be an emerging school of comparative law, which I call behavioural comparative law or BCL for short. BCL has the potential to advance substantially the ability to explain why commercial law is produced the way it is at the global level. The discussion will lead us to findings about the methods that global commercial law makers use, how they choose areas of law to work on, and how they go about doing their work. This chapter finds that because of the cognitive limitations on the participants in the global commercial law-making process, when feasible, global commercial law makers should use methods of cost-benefit analysis when evaluating project selection or get as close to they can in doing so when cost-benefit analysis is not feasible. It may not usually be feasible, due to methodological constraints and the lack of data, though other quantitative approaches might be able to substitute so long as they produce reliable results. The chapter also tentatively explores how cognitive constraints may be at work at the level of implementation of global commercial law at the domestic level.

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* Professor of Commercial Law, Durham University Law School.
INTRODUCTION

This chapter develops a new framework by which to evaluate the making of commercial law on the global level. It offers a new approach to evaluating the process by which primarily intergovernmental organisations produce commercial law. This approach grounds in both behavioural science and comparative law. The focus is mainly but not exclusively on global rule makers such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). It articulates what appears to be an emerging school of comparative law, labelled behavioural comparative law or BCL for short, which has the potential to advance substantially the ability to explain why commercial law is produced the way it is at the global level. The discussion will lead us to findings about the methods that global commercial law makers use, how they choose areas of law to work on, and how they go about doing their work. This chapter finds that because of the cognitive limitations on the participants in the global commercial law-making process, when feasible, global com-
mercial law makers should use methods of cost-benefit analysis when evaluating project selection or get as close to they can in doing so when cost-benefit analysis is not feasible. It will not usually be feasible, due to the lack of data and methodological constraints. Other methods of evaluation, designed to de-bias and around the statistical evaluation of evidence, should be used as much as is practical when cost-benefit analysis is not practical.

Part I of this chapter explains that the current approach to global commercial lawmaking is based in the expert judgment of traditional legal analysis. It examines how expert legal judgment has its origins in a prior era of codification and suffers from limitations imposed on it by what is now an antiquated nineteenth century historical school of jurisprudence. Nineteenth century approaches to commercial legislation imposed strict limits on the avowed aim of any reform project as mainly to memorialise pre-existing rules that have evolved in a society. Prior commercial law reform projects were, moreover, strictly national in scope. With these limited aims the expert judgment of the lawyer may have been enough. Present-day projects, however, go well beyond this limited ‘memorialisation’ remit and into improving the law, substantial reform and modernisation, and facilitating cooperation among states. They are primarily normative projects. Expert judgment will remain indispensable in the production of global commercial law, but it will likely be insufficient on its own in many cases.

Part II offers skeletal accounts of two dissenting or ‘external’ critiques of global commercial law-making, one grounded in rational choice theory in the American political economy school of thought and the other in a law and society approach. ‘External’ refers to approaches to the study of global commercial law-making that are not based in the dis-
cipline or social practices of law. These external critiques offer significant insights. They are the most influential investigations of global commercial law-making based in the social sciences to-date. The political economy approach is now dated, and fresh inquiries seem required that relax its rational choice assumption, to explore the psychology of expert judgment in the global commercial law-making context. Law and society approaches offer detailed or ‘thick’ descriptions focusing predominantly on institutional structure, an approach that is illuminating but which investigates different questions from those investigated in behavioural science.

Part III outlines an emerging school of thought known as behavioural comparative law (BCL). It explains why BCL offers substantial promise for improving our understanding of how global commercial law-making operates. BCL gets us closer to examining the behaviour of the participants in the law-making process and the mental processes that reliably predict that behaviour. It also informs us how to make better commercial law.

Part IV applies BCL insights to global commercial law-making. It explores how cognitive biases and motivated reasoning are likely in play in global commercial law-making, resulting in obstacles in the selection of superior or improved legal norms for the legal products produced in these processes. It also offers examples of how biases and motivated reasoning can impede implementation of legal products produced in global commercial law-making. Given the cognitive constraints likely at work in global commercial law-making, Part IV recommends the use cost-benefit analysis when feasible, and other complementary methods, as tools to de-bias the global commercial law-making process.
This chapter puts the discussion within the frame of comparative law for two complementary reasons. First, one of the aims of this chapter is to make clear a school of thought known as BCL. This work needs to be done for its own sake, independent of its application to commercial law-making. Second, incorporating the methods and insights of behavioural science into comparative law should lead to improvements in understanding how law is produced at the global level. Comparative law helps us to understand how to reform commercial law at the global level.\(^1\) With its substantial corpus on legal transplants, law reform, harmonisation, unification, comparison, legal culture, and legal families, comparative law offers an excellent framework for the study of global commercial law-making.

Before moving on, let us get clear on terminology. I use the term ‘law-making’ as an umbrella concept to refer to a variety of rule-producing activities occurring at the global level. I spend little effort in parsing the intricacies of the meanings of terms such as ‘codification,’ ‘harmonisation’, ‘unification’, ‘reform’ and ‘modernization’ of law.\(^2\) There are some shorthand definitions if the reader feels the need to consult them. One of the very first documents UNCITRAL produced, ‘Unification of the Law of International Trade: Note by the Secretariat’ defines ‘unification’ of international trade law as ‘the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction is replaced by a single rule.’\(^3\) Harmonisation, in contrast, is generally understood to refer to an approximation or co-ordination of legal rules and pol-

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icities in different jurisdictions by eliminating or minimizing major differences and creating minimum standards.4 ‘Codification’ can be understood as unification in the form of a code, but this definition just pushes the discussion down to the question of what is a ‘code.’ ‘Reform’ is an ambiguous concept, but it is often at work whenever any organization, domestic or international, formulates legal rules in some instrument. UNCITRAL’s mission, as stated in its founding documents, is the ‘progressive harmonisation and unification of law’, with ‘progressive’ signalling ‘reform’.5 At UNCITRAL’s founding, debate ensued in the United Nations as to whether UNCITRAL could ‘formulate’ law.6 UNCITRAL’s mission moreover, includes the ‘modernisation’ of law.7 ‘Modernisation’ is yet another ambiguous concept, which carries particular connotations about the role of law in economic development.8 UNIDROIT engages in similar aims.9 The distinctions between these concepts can have political or rhetorical value to the agents who use them, but from an analytical standpoint, whatever these organisations do can be described using a simple rubric of global law-making. As we shall see later when the chapter turns to discussion of the relationship of historical jurisprudence to the development of commercial law, it is of limited usefulness to conceptualize developments of commercial law at the global level to simple memorialisation of formal law already in existence through some pre-existing approach to law formation, such as case law or customary evolution. Global

7 See Part I.B below.
commercial law-making tends to be normative in its approach because decisions have to be made about the ‘right’ rules.

I. GLOBAL COMMERCIAL LAW-MAKING: THE STATUS QUO

This Part reflects on what lawyers do when they engage in the making of commercial law in the form of a legal product in the usual form of a convention or model law or in the production of a guide for national legislatures. The tool used almost exclusively in the relevant fora are those of the traditional lawyer. This part explores what the use of expert legal judgment entails and how it became firmly entrenched as the only method in play in global commercial law-making.

A. Expert Judgment: The Official Story

Lawyers rule global commercial law-making. The expert judgment of the lawyer is by far the most common method for project selection and development in international organizations with responsibilities in global commercial law-making. Clive Schmitthoff, characterized by Susan Block Lieb and Terence Halliday as UNCITRAL’s ‘founding institutional entrepreneur,’\(^{10}\) wrote a report in 1966 for the United Nations, which became one of the founding documents for UNCITRAL. In his report, Schmitthoff recommended that project identification requires ‘a thorough search for the right and ripe topics’ involving ‘close collaboration between legal experts and trade experts’.\(^{11}\) The 1970 UNCITRAL document, ‘Unification of the Law of International Trade: Note by the Secretariat’, one of the first documents produced by UNCITRAL, captures the essence of using expert

\(^{10}\) Block-Lieb & Halliday (n. 6) 59.

\(^{11}\) Ibid. 60.
judgment in project selection. The Secretariat noted that procedures have varied among organizations and according to the complexity and technical aspects of the subject, but invariably three steps are followed. The first step is the ‘selection of a subject appropriate for study and drafting’. The Secretariat continues:

In some cases selection of subjects has been made by bodies of legal experts which have been requested by Governments concerned to consider appropriate projects for unification, while in other cases the topics were chosen by organs concerned with economic or technical matters in the light of the problems facing these bodies.

The second stage following section of a subject is the preparation of the problem, which includes ‘an analysis of the various laws and a consideration of the extent to which these laws fulfil certain economic or other practical ends.’ The third stage is the drafting stage.

This three-stage procedure specified here might not reflect the complexity of actual practice over the course of UNCITRAL’s history and we could explore much more institutional detail, but UNCITRAL probably still approximately adheres to the essential aspects of these three steps. The procedure is an exercise in using the expert judgment of the lawyer along with intuition about the relevant economic conditions to be affected. John Spanogle, a former US delegate to several UNCITRAL Working Groups, including the Working Group that produced the UN Convention on the International Sale of Goods (CISG), described UNCITRAL’s process for project selection as often starting with ‘the convening of a “group of experts” which meets over a long period of time in a Study

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12 See (n 3).
13 Note of the Secretariat (n 3).
14 Ibid.
15 Ibid.
Group to do initial investigation of issues. Then, representatives of States meet in a Working Group to draft the proposed convention – again over a long period of time.  

Debates about whether cost-benefit analysis is feasible or desirable to evaluate financial regulation include a focus on whether expert judgment is a sufficient or superior alternative. Global commercial law-makers such as UNCITRAL and UNIDROIT lack remits over financial regulation, because of limitations formally imposed in their charters or informally imposed through a low-level politics among intergovernmental organizations and member governments, or simply because of historical trajectories as to which rule-making body does what. To further our understanding of the role of expert judgment, it nevertheless will be helpful to examine the role of expert judgment in the creation and evaluation of financial regulation. John Coates, a proponent of the use of expert judgment in the making of financial regulation, explains:

In the context of financial regulation, the judgment of regulatory staff is expert because the appointees of the financial agencies have generally spent their careers in and have developed specialized knowledge of finance, financial institutions, and financial markets. They have sharpened their intuitive sense of what kinds of regulations work and why – particularly relative to non-experts, such as generalist judges. Such intuitions can be disciplined and informed in ways other than through CBA, such as through discussions with other experts (within or outside the agency); case studies, surveys, and polls; retrospective evaluations; regulatory experiments that are deliberately adopted without specific predictions about how

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18 Other global law makers, such as the Basel Committee on Banking Supervision, promulgate norms in the form of soft law or guidance for domestic regulatory agencies, which does involve the regulation of finance. Chris Brummer, Soft Law and the Global Financial System, 2nd edn (Cambridge University Press 2015).
they will turn out; and other forms of assessment that are not part of quantified [cost-benefit analysis of financial regulation].

Similar considerations are relevant for commercial law-making.

The US Office of Management and Budget (OMB) Circular A-4, on ‘Regulatory Analysis’ provides some clarification of the concept of expert judgment, though it makes the case that it cannot be deployed without cost-benefit analysis. It states in a number of places that professional judgment has to be exercised when quantification is not realistic and to temper the use of quantified methods to avoid formulaic approaches to regulation.

What is expert judgment? The standard answer would seem to be: reliance on the traditional tools of the lawyer, including reliance on the lawyer’s sense of what areas of law need improvement. Schmitthoff also mentioned the need for ‘trade experts’ in his report on the need for a UN organization but really his emphasis was on legal expertise to lead what was to be an organization dedicated to law-making. Expert judgment for global commercial law-making of the kind Schmitthoff (and others) envisioned amounts to what Philip Bobbitt calls the ‘modalities of legal argument’ to determine the truth of propositions about law. It is a focus on the distinctive internal logic and integrity of the actual social practice of legal argument. It is what Richard Posner characterizes as law as an

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19 Coates, (n 17) 904 (footnotes omitted).

The expert judgment of the lawyer maintains a preclusive domination over global commercial law-making. Global commercial law-making is almost exclusively the realm of the traditional legal conceptualist. Normative welfare economics and its allied field, law and economics, which offer the most efficacious and pragmatic methods for evaluation of large-scale legal reform, which global commercial law-making projects constitute, are almost entirely absent from the process. Law and economics scholars are noticeably absent, no doubt at least partly the result of the critical literature on the work of so-called private legislatures, discussed in Part II.A below. A significant law and economics literature, moreover, advocates piecemeal evolution of the law and contends that the US Uniform Commercial Code (UCC) is a misguided project.\footnote{See e.g., Robert E. Scott, ‘The Rise and Fall of Article 2’ (2002) 62 Louisiana Law Review 1009; Lisa Bernstein, ‘An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL’ (2013) 50 Common Market Law Review 169.} Two diametrically opposed positions have ignored each other for quite some time: legal conceptualists hail the UCC as a success while lawyer-economists critique it as resting on dubious empirical grounds and find its amending processes prone to capture by interest groups.

\textbf{B. The Persistent Influence of the Historical School}

The almost exclusive reliance on the expert judgment of the lawyer may be a relic of a by-gone era. Here we consider the question whether we rely too much on methods of the past when the mission of legal change has moved from codification of what was under-

\footnote{Perhaps expert judgment shares affinities with Henry Richardson’s notion of ‘intelligent deliberation’. Henry Richardson, Democratic Autonomy (Oxford University Press 2002)(Ch. 9, ‘The Stupidity of Cost Benefit Analysis).}
stood to be existing law, to improving and modernizing the law, sometimes in dramatic ways, or in creating new law. Of course, one of the basic lessons in the application of social science methods to law is that what participants in any law-making process might say they are doing can differ substantially from what they actually do. Nevertheless, it is important to understand how a school of jurisprudence well-understood by prominent lawyers in the nineteenth century, the so-called historical school of jurisprudence, came to influence lawyers in the past and how its methods carried on well beyond the sell-by date of this particular school of jurisprudence.

A substantial movement to legislate commercial law on a national scale began in the late nineteenth century. The movement involved codification, a form of nationalising commercial law and putting it in the form of a set of positive declarations, away from a conception of law held by many lawyers and judges of the time that commercial law either evolved from or was custom, in the form of a law merchant. This move to legislate turned what was known as mercantile law or the law of merchants into what we call commercial law today. Whether or not a law merchant transcending the state’s control existed or not is beside the point; it was a notion accepted by many in centuries past but was the subject of some tension in the nineteenth century, in an era of the modern state in which positive law became an important source of law.25

The period in which this legislative innovation occurred was an era of economic globalisation, from about the mid-nineteenth century until World War I. The next great era of economic globalisation began in the 1990s and continues today, rising from the

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end of the Cold War with the liberalisation of global capital movements in the aftermath of the erosion of the Bretton Woods financial system.\textsuperscript{26}

As a national movement, codification had a political aim. In that prior era of economic globalisation, the push to nationalise commercial law was a means by which to consolidate state power, either to establish a common market within the state or to put the state firmly in control of all normative orders that could be considered legal in pedigree.\textsuperscript{27} To consolidate state power, it was considered necessary to liberalise national markets and make them more compatible for the industrial economy. Nineteenth century nationalism in commercial law reform occurred at a time before there were intergovernmental organisations such as UNCITRAL and UNIDROIT. The first German code was the Allgemeines Deutsches Handelsgesetzbuch, a commercial code for what was then the German Confederation.\textsuperscript{28} The German Civil Code was the product of Imperial Germany and came later.\textsuperscript{29} In the United States, the first uniform commercial legislation came into existence in the latter nineteenth and early twentieth centuries, largely modelled on English legislation.\textsuperscript{30} This first US legislative effort was largely driven by the need for uniformity of

\textsuperscript{26} For a brief outline of this history, see John Linarelli, Margot E Salomon & Muthucumaraswamy Sornaratjah, \textit{The Misery of International Law: Confrontations with Injustice in the Global Economy} (Oxford University Press 2018).


\textsuperscript{28} See David M Rabban, \textit{Law’s History: American Legal Thought and the Transatlantic Turn to History} (Cambridge University Press 2013).

\textsuperscript{29} John (n 27).


\begin{quote}
Moreover, the extensive commerce of and elsewhere has made the English Sale of Goods Act the recognized statement of the common law, as distinguished from the civil law. The wide enactment in the United States of the Uniform Sales Act, identical in most respects with the British Act, has strengthened this assumption. The British statute was intended to be a codification of the English common law, which had been largely formulated in the treatises of Blackburn and of Benjamin. There is no indication that the English Sale of Goods Act will be repealed or materially amended. Except in a few respects the Ameri-
\end{quote}
commercial law across a geographically dispersed common market.31 In England and Wales, legislation was the final step in getting mercantile law firmly into the category of state law, if there ever was a doubt by the nineteenth century.

It is reasonable to say that nineteenth century legislative reformers relied on expert legal judgment on how commercial legislation should be drafted but we must put their use of this judgment in historical context. We need to understand how lawyers of the time conceptualised law and legislation. Many lawyers of this era believed that legislative enactments of commercial law should go no further than codifications or legislative enactments of pre-existing law. Progressive development, formulation of new legal rules, or modernisation were not practices that a nineteenth century lawyer involved in this work could endorse, at least not officially, though what they said they were doing and what they actually did could diverge.32 Sir MacKenzie Chalmer’s address to the American Bar Association in 1902 illustrates the approach. Chalmers was the principal author of two of the most often copied pieces of commercial legislation in the common law tradition, the Bills of Exchange Act 1883 and the Sale of Goods Act 1893. Chalmers explained his approach to legislating commercial law in his American Bar Association address: ‘When the principles of the law are well settled, and when the decided cases that accumulate are

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31 The usual argument is that the US Supreme Court decision of *Swift v Tyson*, 41 U.S. 916 Pet.) 1 (1842) failed to achieve uniformity through the judiciary and that uniform legislation was needed. See, e.g., Grant Gilmore, ‘On the Difficulties of Codifying Commercial Law’ (1948) 57 Yale Law Journal 1541.

mere illustrations of accepted general rules, then the law is ripe for codification.” He also explained: “The province of a code, I venture to think, is to set out, in concise language and logical form, those principles of the law which have already stood the test of time. It co-ordinates and methodizes, but does not invent, principles.” To get to the point of being able to write such legislation, Chalmers recommended doing a digest of the law first, to synthesize the law as it is found in the existing case law. Something like this practice continues to this day in the production of American restatements, though restatements have different aims than the projects of relevance to this chapter.

This was a time when the school of historical jurisprudence, now almost entirely forgotten except by historians of legal thought, competed with positivist approaches to the

34 Ibid.
35 The American Law Institute Style Manuel provides as follows:

Like a Restatement, the common law is not static. But for both a Restatement and the common law the change is accretional. Wild swings are inconsistent with the work of both a common-law judge and a Restatement. And while views of which competing rules lead to more desirable outcomes should play a role in both inquiries, the choices generally are constrained by the need to find support in sources of law.

An unelected body like The American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law. The goals envisioned for the Restatement process by the Institute’s founders remain pertinent today:

It will operate to produce agreement on the fundamental principles of the common law, give precision to use of legal terms, and make the law more uniform throughout the country. Such a restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which make the law better adapted to the needs of life. (emphasis added in original)


Restatements are highly regarded distillations of common law. They are prepared by the American Law Institute (ALI), a prestigious organization comprising judges, professors, and lawyers. The ALI's aim is to distill the ‘black letter law’ from cases to indicate trends in common law, and occasionally to recommend what a rule of law should be. In essence, they restate existing common law into a series of principles or rules.

law. Legal historians are now reassessing the significance of historical jurisprudence and finding that it may have had more influence than previously thought, at least in the United States where commercial law codification was ever on the forefront of legal developments of the time. This is not the place for a detailed exposition of the historical school, assuming that it even formed a coherent school of thought, but suffice to say that historical jurisprudence offered a dim view of legislation. The historical jurisprudence saw legislation as not really law but politics, as an interference with the evolution of law, unless it was undertaken after serious study of the law as a historical science and then undertaking of codification of existing law. So, if legal entrepreneurs of the time were to get their legislative efforts to be accepted, it was imperative that they stylize any legislative interventions as merely codifications of pre-existing law. They could then be seen to have accommodated the competing interests of the status quo, supported by historical jurisprudence, and reform, supported by the competing school of thought, analytical jurisprudence. Whether the national legislative achievements of the late nineteenth century only codified pre-existing law is an empirical question beyond our scope here. The point for our purposes is only that for a good many prominent lawyers of the time, this was at least in their ‘legal consciousness’ as the proper way to proceed.

That legal entrepreneurs influenced by the ascendant schools of jurisprudence of the time sought only to codify existing law did not mean they were provincial in outlook. Chalmers (and his contemporaries) still looked to a law merchant transcending the state

36 Rabban (n 28).
37 Ibid.
38 Ibid. at 14.
for settled principles. Roscoe Pound characterised commercial lawyers of his day as cosmopolitan in outlook while contrasting private lawyers of the time as tribal in clinging to national traditions.\textsuperscript{40} Pound was prescient, advocating a uniform commercial law produced ‘through the adoption in different states of uniform statutes worked out by international conferences.’\textsuperscript{41} He said this at a time when the first wave of uniform legislation was working itself through the state legislatures of his home country the United States and when substantial interaction between British and American lawyers on how uniform legislative efforts should proceed was frequent.\textsuperscript{42}

In contrast to the resistance to legislative and non-evolutionary change of the historical school, modernisation of law was an ascendant idea when UNCITRAL was formed. It is embedded in UNCITRAL’s constitutional framework.\textsuperscript{43} Modernization theory, em-

\textsuperscript{40} Roscoe Pound, ‘Uniformity of Commercial Law on the American Continent’ (1909) 8 Michigan Law Review 91. It is difficult to say whether Pound’s views were more or less universally held, but a perusal of the commentary of the time suggests he was not an outlier on these points. Pound was one of the founders of the school of thought known as sociological jurisprudence, a middle way between analytical and historical schools of jurisprudence of the nineteenth century and presaging American Legal Realism, which brought us the American Uniform Commercial Code. See David Wigdor, Roscoe Pound, Philosopher of Law (Greenwood Press 1974); NEH Hull, Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence (University of Chicago Press 1997).

\textsuperscript{41} Pound (n 40) 98.

\textsuperscript{42} One only needs to read the scholarship of MD Chalmers to get this point. See, e.g., Chalmers (n 33); MD Chalmers, ‘Codification of Commercial Law’ (1902-03) 2 Canadian Law Review 146; MD Chalmers, ‘Experiment in Codification’ (1886) 2 Law Quarterly Review 125.


> The developing countries of recent independence have had the opportunity to participate only to a small degree in the activities carried out up to now in the field of harmonization, unification, and modernization of the law of international trade. Yet those are the countries that especially need adequate and modern laws, which are indispensable to gaining equality in their international trade. In many of these States the prevailing legal system was introduced before their independence by the metropolitan countries; often the provisions thus received are unsuitable to their present stage of economic development or to the requirements of newly independent states. The unification process in the field of international trade law would be a step in the direction of remediying this situation. (footnotes omitted)

The Report also states:
ployed principally by political scientists and political economists, is formed around the claim that economic development links casually to social and political change, usually in the form of a change toward liberal democracy. When modernization theory first came to prominence in political science in the 1950s and 1960s, the field of law and development also began to form as area of inquiry and as consulting on law reform and legal education in developing countries. Its rise tracked closely with the rise of modernization theory in political science. A functioning, modern legal system was seen as essential for a modern, then industrial, economy. A modern legal system was seen as essential for political and social development, with the idea being that a modern legal system would help to catalyse a move towards liberal democracy in which pluralism would flourish and rule of law would curtail arbitrary state action and help to bring about social change. UN-CITRAL was formed at a time when post-war decolonisation and the development of the state was very much on the agenda of international organisations. Reliance on modernisa-

To remedy the shortcomings described above, several measures such as the following should be taken. The process of harmonization and unification of the law of international trade should be substantially systematized and accelerated. This would entail a concerted effort to secure a wider participation in existing international conventions and a wider adoption of uniform legislation, where such conventions and uniform laws reflect the present requirements of world trade, as well as a wider use of standard trade terms, provisions and practices. It would also entail action towards further unification and modernization of legal techniques in this area, such as the adoption of new international conventions and uniform laws, codification of existing rules and trade practices and the dissemination of information on up-to-date methods and solutions. In addition, it would be desirable to secure a broad participation of the developing countries of recent independence in the progressive development and codification of the law of international trade; this would facilitate the adoption by those countries of laws and other measures adequate for the protection of the interests of their international trade transactions. Finally, it would be appropriate to bring about a close co-ordination of the activities of the existing formulating agencies, regardless of whether their members belong to one or another economic or legal system.

tion by the United Nations of the time is analogous to reliance on governance later when the World Bank sought to work around the restrictions in its Articles of Agreement prohibiting it from promoting human rights.\textsuperscript{47} Modernisation as an ideal may have changed meaning over the years to refer not so much to bringing democracy to former colonies but to promoting liberal global market orders. For our limited purposes, we can conclude with some certainty that (i) modernisation of law as it is understood in the mid-twentieth century differs in substantial respects from any modernisation by nineteenth century legal codifiers and (ii) modernisation as an aim of current law-making bodies entails something more than simple ‘memorialisation’ or codification of pre-existing legal norms.

We come to the problem: lawyers reforming, progressively developing, formulating, and modernising law still seem to adhere to the methods of Chalmers and others who needed to accommodate competing jurisprudential tensions in the prior era of economic globalisation, but their developing, formulating, and modernising tasks far outreach the ambitions of nineteenth century drafters and are now robustly global in scope.\textsuperscript{48} If all we are doing is codifying pre-existing domestic law that already existed in the form of case law or fragmentary legislation, then reliance on expert judgment in the law is probably enough. In fact, that is what historical jurisprudences advocated – a deep, rich historical scholarship.\textsuperscript{49} In these codifications, we would only be seeking the expert’s opinion on the state of the law and how to draft it into legislative form. These are the skills of the lawyer. The only concern in comparing the \textit{status quo} to the proposed situation would be in evaluating the advantages and disadvantages of legislative intervention. But if law re-


\textsuperscript{48} For an account based in law and sociology, \textit{see} Block-Lieb & Halliday (n 6) explored in section D below.

\textsuperscript{49} Rabban (n 28) 12-14.
formers seek to improve the law and need to cross borders where there may be no settled precedent or legal rules to codify, or where legal rules are not entirely compatible or even conflict across jurisdictions, will the expert judgment of the lawyer alone suffice? In the present day, no intellectual movement of global scope pulls lawyers towards simple legislative restatements of pre-existing law. Consistent with modernization arguments, global commercial law-making now in many forms produces change, often substantial, and is indeed designed to promote change\textsuperscript{50}, to improve the law, to fill gaps, to produce whole-cloth a new uniform law or international convention, or to produce cooperation among states in areas in which externalities are present.\textsuperscript{51} That their texts promote these aims, however, does not mean that actual legal change necessarily results.\textsuperscript{52} The limited point here is that a memorialisation or ‘sticking to existing law’ constraint do not exist when the drafters of these instruments do their work.

Why are the current operating methods for global commercial law-making largely continuous with methods made prominent in the prior era of economic globalisation? It is difficult to say without further empirical or experimental investigation. The behaviour of those involved in commercial law reform, however, is plausibly consistent with a form of path dependence characterized as ‘behavioural lock in,’ which can produce difficulties in

\textsuperscript{50} There are many examples. The UNCITRAL Model Law on Procurement of Goods, Construction and Services is an example of a model law that seeks to promote substantial change in domestic law. Much has changed since the first book on comparative and international public procurement law was published. \textit{See} Sue Arrowsmith, John Linarelli, & Don Wallace Jr., \textit{Regulating Public Procurement: National and International Perspectives} (Kluwer/Aspen 2000). Another is the UNCITRAL Model Law on Secured Transactions, which promotes significant change in secured lending based on the US UCC Article 9.


\textsuperscript{52} To appreciate the distinction, \textit{see}, e.g. John F Coyle, “The Role of the CISG in US Contract Practice: An Empirical Study} (2016) 38 \textit{University of Pennsylvania Journal of International Law} 195 (on how practitioners have excluded the CISG from contract practice or thought they were doing so in a choice of law clause).
reversing situations because of learning and habituation.\textsuperscript{53} It occurs when an agent’s behaviour is ‘stuck’ in a particular and sometimes sub-optimal position ‘due to habit, organisational learning, or culture.’\textsuperscript{54} Behavioural lock-in can result when professionals reject new standards when these standards could reduce their power or autonomy. Training can facilitate path dependence. Lawyers may have a professional concern from being asked to accept a situation beyond their training.\textsuperscript{55} Training is a form of organisational learning within groups and among professionals and becomes a source of power. Once a behaviour embeds, then \textit{status quo} bias makes change ever more difficult. A plausible argument can be made that the prior more traditional methods of law-making have a grip on our beliefs and attitudes as lawyers engaged in global commercial law-making.

\section*{II. THE DISSENTERS: PREVAILING EXTERNAL POINTS OF VIEW}

More international collaboration to improve commercial law always results in better law because experts gather to make it so. How can making the law better be a bad thing? Such arguments beg many questions. External observers of global commercial law-making question the unexamined premises of such positions. ‘External’ refers to methods of inquiry about global commercial law-making that do not depend on the discipline or the social practice of law-making itself. This Part offers skeletal surveys of the two most


\textsuperscript{54} Barnes, Gartland, & Stack (n 53).

influential social science critiques of global commercial law-making, one grounded in the American political economy school and the other in law and sociology. Inquiry about law-making processes using theory, methods, and evidence of the social sciences has produced scepticism about the efficacy of global commercial law-making. The limits of these approaches are also briefly explored.

A. Dissenters I: Political Economy

Anyone who has read into the law and economics literature on so-called private legislatures will discover disagreement between those who hold positive views of the work of domestic and global commercial law makers and those who do not. The disagreement is sharp, with some going so far as to critique the American UCC project, widely considered by many lawyers in the United States and beyond as a huge success. It reflects a longstanding fault line between legal doctrinalists and law and economics scholars.

The critique comes in particular from the American political economy school of thought, with its foundations in positive political theory and public choice theory. In summary, the argument, developed primarily by Alan Schwartz and Robert Scott, is that private legislatures produce two kinds of legal rules, depending on the structure of their


57 It is worth reading Scott (n 24) to appreciate at least some of the native critiques of the UCC.
decision-making process and the incentives the participants in the law-making process have. Model I rules are specific rules, usually ‘bright line’ in the sense that they require the application of objective facts to determine whether the rule criteria are met. Model II rules are more abstract and general, tending to rely more on the concepts like reasonableness and leaving it to the discretion of the decision maker on the application of the rule. The predictions of this research proceeds as follows. A law-making organization will produce Model II rules when the incentives of the delegates are to promote getting something done and widespread adoption. This is often the case, so the research concludes, because of the reputational benefits, prestige, and future work associated with a successful law-making project. The usual example offered for Model II rules is the CISG. Because of the emphasis on widespread adoption and getting something done upon which one can affix one’s name, most products that private legislatures produce are substantially based in Model II rules. A global law maker will produce a product with Model I rules when delegates are overwhelmingly from a single industry and the rules are designed to favour that industry. Paul Stephan offers the example of the Uniform Customs and Practices for Documentary Credits, produced by the International Chamber of Commerce, an industry group, as an example of a product with Model I rules. These cri-

58 Schwartz & Scott (n 56).
59 Ibid. Schwartz and Scott also explicate a Model III rule, which combines elements of Model I and Model II rules, but lumps Model III rules into Model II for purposes of analysis.
60 See Gillette & Scott (n 56).
61 Ibid.; Stephan, ‘Accountability and International Lawmaking’ (n 56).
62 Schwartz & Scott (n 56); Gillette & Scott (n 56).
63 Stephan, ‘Accountability and International Lawmaking (n 56).
tiques are more widely replicated in the study of experts in regulatory contexts, though not specifically around Model I and II rules.\textsuperscript{64}

The political economy research on private legislatures provides important insights but has several limitations. Its rational choice assumptions should be revisited. Its predictive or explanatory power is ready for re-examination based on advances in behavioural economics and the behavioural sciences more generally. A focus on behaviour would remove the need to focus on misaligned incentives.\textsuperscript{65} Moreover, how global commercial law-making has proceeded does not fit well in these models. On the global level this literature has focused on international conventions, but global commercial law makers now produce relatively few of these. The move has been well underway for quite some time towards soft law in the form of model laws and guides, reflecting a shift from unification or harmonisation to modernisation. While no empirical work exists on this subject, it appears, based on a tentative look at the evidence, that global commercial law-making now produces products that contain an appreciable number of Model 1 rules, even with the participation in the process of diverse interests. Finally, the rational choice literature has remained an outlier in the discussion of global commercial law-making because it does not deal with questions that legal comparativists explore, such as the role of culture. These limitations put into question whether the existing models are sufficiently predictive.


\textsuperscript{65} Ibid.
B. **Dissenters II: The Other Chicago School**

Another ‘external’ approach to the study of global commercial law-making is the ‘other’ Chicago School, to distinguish it from the Chicago School of economics.\(^6\) This Chicago School is one in sociology. It is best known for its work in the study of urban communities in Chicago though its research methods are generalizable. One of its most well-developed approaches is one of social ecologies, in which the research digs deep into qualitative fieldwork to study relevant actors and institutions. Recent work by Susan Block-Lieb and Terence Halliday offers insights into the law-making processes of UNCITRAL, with a focus on the UNCITRAL Model Law on Cross-Border Insolvency.\(^7\)

An ecological method, quite simply, focuses on the interactions of actors in an environment. It offers a rich account of institutional detail. It is ethnographic in approach, offering thick descriptions of actors and organisations. As its proponents say, it opens the ‘black box’ of the making of transnational commercial law, or at least one such black box.\(^8\) It has offered important insights on the ecologies of expert judgment at UNCITRAL. The focus on ecologies holds promise for a complementary relationship between law and society approaches and behavioural sciences approaches in the study of global commercial law-making. Law and society approaches may be able to assist in identifying socio-cultural variables at work in affecting the psychology of decision making in law-making processes. But as we shall see, the cognitive focus advocated in this

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\(^6\)Block-Lieb & Halliday (n 6). I cannot cover all methods of evaluating global commercial law making. At least two other approaches need to be taken seriously. One is grounded in critical theory and asks questions about the increasing role of private power in making of transnational commercial law. Critical approaches ground in the idea that the contemporary law merchant is political, essential to the juridical foundations of global capitalism. This critical work is in the main designed to expose the influence of private power over the state. It is perhaps best known though the work of A Claire Cutler. A Claire Cutler, *Private Power and Global Authority* (Cambridge University Press (2003)).

\(^7\)Block-Lieb & Halliday (n 6).

\(^8\)Ibid. 4, 11.
chapter opens not the black box of the environment for law-making but that of the psychology of law-making.

C. The Cognitive Turn

This chapter advocates an approach to evaluating global commercial law-making differing for our purposes in at least one fundamental respect from the above political economy and sociological approaches: the approach based in the behavioural sciences advocated in this chapter looks neither to institutions nor to structure to explain the actions of legal entrepreneurs in global commercial law-making. Rather, the focus is cognitive. It renders inessential to its task a focus on institutions but gets right into examining the psychology of expert judgment. It starts and ends with what is ‘in the head’: mental processes identified from repeat experiments in controlled laboratory settings, which tell us what motivates legal entrepreneurs to take positions and actions in global commercial law-making processes. In barest of terms and risking oversimplification, mental events are causes: our beliefs and attitudes cause us to behave in particular ways and this behaviour can be predicted from these beliefs and attitudes. As we shall see below, the behavioural sciences hold promise for discovering why actors in the law-making processes behave in particular ways and how this behaviour influences the law-making process.

III. Behavioural Comparative Law as a Field

To date there has been little published work deploying behavioural science in comparative law. Early work provides important insights. There is now a growing literature. A

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psychological intervention seems apt for comparative law. Ralf Michaels explains that ‘the problem among traditional comparative lawyers is that each of us tends to adopt the perspective of our own legal system’. Legal comparativists are humans too. They make decisions and take positions that will be subject to heuristics and biases well known in the behavioural sciences, even though they are inclined by the field in which they operate to compare law and legal systems across borders. But for comparative law to be even more robust in its use of the behavioural sciences to explain difference across legal systems, comparativists will have to go further and inquire into the psychology of the actors in the legal systems they study and, for purposes of this chapter, those involved in reforming, harmonizing, unifying, or otherwise making law meant to have authority across a significant number of states. Putting a group of lawyers from different jurisdictions in a deliberative process in an intergovernmental organisation to produce a legal instrument that will be widely accepted across a large number of jurisdictions could be understood as the setting for a natural experiment for comparativists.

BCL may be understood as aligned with law and economics, if we understand behavioural science about the law to be the use of behavioural economics to study the law. Putting it into economics, however, may be an exercise in reductionism. BCL may align in some respects with behavioural economics but it is broader in conception, relying on the

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full panoply of the behavioural sciences, including psychology and cognitive science, to inquire about differences in the law across jurisdictions. The approach of behavioural economics, on the other hand, is to look for exceptions to well-established theories in economics, and hence to see the move as one of relaxing the rationality assumption in economics,\(^{71}\) to look for ‘behavioural market failure’, or to replace expected utility theory with prospect theory.\(^{72}\) Still, given the importance of law and economics, and its dominance in private and transactional law research in North America, some placement of BCL in the context of law and economics seems necessary.

The rational choice economics of comparative law is an established field, though its beginnings where halting. In his 2002 article, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’, Mathias Reimann states that interdisciplinarity work in comparative law is the ‘rare exception’ and comparative law ‘has still not acquired a solid empirical basis’.\(^{73}\) Ralf Michaels, in his article, ‘The Second Wave of Comparative Law and Economics, argues that law and economics is ‘almost never used in comparative law.’\(^{74}\) Ugo Mattei, who wrote *Comparative Law and Economics*\(^{75}\) advocated that comparative law has no future, at least in the United States, unless it links to


\(^{74}\) Michaels (n 70) 199. Michaels explains that the exception is Ugo Mattei’s *Comparative Law and Economics* (Michigan 1997) and he notes that Hein Kötz ‘strongly endorsed’ law and economics.

the analytical social sciences tradition that is so robustly represented in the American legal academy.\footnote{Ugo Mattei, ‘An Opportunity Not to Be Missed: The Future of Comparative Law in the United States’ (1998) 46 American Journal of Comparative Law 709.}


Empirical comparative law has met with success as well, though distinguishing it from the economics of comparative law can be difficult. Holger Spamann’s article, ‘Empirical Comparative Law,’ surveys quantitative work that might be classified as empirical
comparative law.\textsuperscript{81} He surveys the comparative empirical literature on constitutions in comparative politics and political economy, the areas of law and finance, doing business, and legal origins, and empirical work in diffusion and legal transplants.\textsuperscript{82} Work by Tom Ginsburg, Nuno Garoupa, Holger Spamann, and others offer a clear case for the existence of a substantial corpus in empirical and comparative law and economics.\textsuperscript{83}

Several directions for BCL are evident when it comes to the study of law reform. The discussion to follow outlines three areas for BCL that seem to require further exploration, and which include but go beyond the standard behavioural law and economics paradigm. First, behavioural science offers tools to aid in comparing legal rules across jurisdictions. Second, behavioural science offers tools to evaluate legal transplants that will help us to understand how to make transplants more likely to succeed. Third, behavioural science helps us to get around the epistemological obstacles that ‘legal culture’ has presented in comparative law. A caveat: This three-part categorization works for comparative law because it is based in the way comparative law is organized as a subject, but it is arbitrary for behavioural science as some of the insights of behavioural science are relevant across these categories. Research can either rely on original experiments or on settled findings from behavioural research. The discussion to follow will demonstrate the relevance of these areas to global commercial law-making.

\textsuperscript{82} Spamann and Geest and Van den Bergh invite a boundary problem. If you are going to study the economics of a field of law, you can just as easily do that using law and data from a variety of jurisdictions. Comparing is simply subsumed within the social science methodology being used.
\textsuperscript{83} This phenomenon may be primarily American in origin. See Nuno Goroupa & Thomas S Ulen, ‘The Market for Legal Innovation: Law and Economics in Europe and the United States,’ in Eisenberg & Ramello (n 80): 78.
A. BCL and Comparing Legal Rules

Comparing legal rules is a routine occurrence in global commercial law-making. The actors in the institutions and processes of global commercial law-making often work from a few or several models from domestic legal systems. For example, the American UCC Article 9 has been widely influential in proposals for reform of the law on secured credit. To understand the effects of the American approach to secured credit and how it might affect lending is a comparative task. Other products, such as the CISG, are often characterized as hybrids between civil and common law. To characterize a law as a hybrid means that one must be able to know something of the difference between the two approaches being combined. Other global commercial law-making products, such as the UNCITRAL Model Law on Cross-Border Insolvency, facilitate cooperation and coordination between jurisdictions but does not purport to unify insolvency law of different states. To know how this cooperation might work in practice requires comparing insolvency systems across different countries. The actors in the institutional environment set by organizations such as UNCITRAL and UNIDROIT engage in frequent rule comparing and in negotiating rule formulations in their deliberations.

Behavioural science research can inform research on comparing legal rules in at least three ways, though the distinctions to follow may be artificial. First, behavioural science

can inform law-making. In Eyal Zamir’s scheme of classification, this is using behavioural science as an input into law-making.\textsuperscript{87} Legal experts are subject to heuristics and biases. An example of such a use of behavioural science is in the development of consumer protection legislation or regulation.\textsuperscript{88} Global commercial lawmakers can use behavioural science as a toolkit for understanding the effects of alternative sets of legal rules on behaviour. Second, legal rules can be examined to understand how they act on cognition. Loss aversion, for example, can in Zamir’s classification, be an output of legal rules. The first and second uses of behavioural science are two sides of the same coin and are conceptually difficult to disentangle. Think of the first use as \textit{ex ante}, related to the design of law, and the second as \textit{ex post}, related to the evaluation of law. A third use of behavioural science in comparative law research is in the evaluation of expert judgment in global law-making. This third use is relevant for global commercial law-making, when experts of different national traditions come together to produce law. Another way to understand this conceptual scheme is that there are producers and consumers of law, or experts and users, though producers and consumers, or experts and users, are sometimes the same people.

As for the third use of behavioural science, two not entirely distinct ways to evaluate expert legal judgment are relevant. One is to focus on heuristics and biases, an approach associated with behavioural economics and the work of Dan Kahneman and Amos Tversky. In this approach, experts will likely be subject to heuristics and biases when

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\textsuperscript{87} Eyal Zamir, \textit{Law, Psychology, and Morality} (Oxford University Press 2015) 99.

making law. The other is to focus on identity-protective cognition, an approach associated with the work of Dan Kahan and collaborators. In this second approach, we will explore how experts may (or may not) engage in motivated reasoning caused by their affiliations with their legal systems or countries. This second approach is known as the study of cultural cognition.

1. Heuristics and Biases

Several well-understood biases may be at work in the above three contexts. We will focus on the third context, that of the exercise of expert judgment, given the almost exclusive use of expert judgment in commercial law-making. Confirmation bias will predictably be at work in the exercise of expert judgment. Confirmation bias is the use of evidence and argument in ways partial to beliefs a person already holds. People are unable to ignore pre-existing beliefs when evaluating evidence and argument that their pre-existing beliefs cannot validate. So, a lawyer will tend to weigh evidence and argument more favourably that the rules of her particular legal system solve a legal problem in a superior fashion than legal rules from another legal system. She will tend to discount the evidence offered about the efficacy of rules of other legal systems.

Confirmation bias is part of a more general set of mental processes having to do with associative memory, the unconscious linking of ideas in our minds into categories and sequences. We cannot help ourselves but substitute association and familiarity for logic, truth conditionality, and the use of evidence. Familiarity is not easily distinguishable

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from truth. A reliable way to make people believe something is true is to repeat it and make it familiar. Frequent use of one’s own domestic law or legal practices biases us towards our own legal systems. Placing the discussion in the dual mental processing framework, we can use system 2 but we experience cognitive strain in doing so in contrast with the cognitive ease of association. We need system 2 deliberation-forcing tools to counteract these mental processes, such as cost-benefit analysis, as covered in Part IV below. Figure 1 is a rough illustration of how associative memory works in the context of expert legal judgment. It is a predictable tendency of humans to think they are starting with reason and evidence, which then affects their legal judgment and that familiarity and pre-existing beliefs have nothing or at least very little to do with reaching a conclusion. But mental processes work in the opposite direction, starting with the cognitive ease of familiarity and pre-existing beliefs, which determine how we exercise our legal judgment, and from there we deploy deliberation and evidence to justify or rationalize legal concepts we are already familiar with. Reasons become rationalisations for familiarity and pre-existing beliefs.

Figure 1: The Sequence of Comparative Legal Analysis

Another well-understood bias affecting expert judgment is status quo bias: people tend to prefer the present to alternative states, all things being equal. Status quo bias relates to two related and well-understood mental processes, the endowment effect and loss
aversion. Humans exhibit what Kahneman calls asymmetric intensity to avoid losses and achieve gains.91 When it comes to legal reform, there will be a bias favouring the law as it is to the delegate. The status quo in a comparative law context is the law as it is to the agent in question. For the English lawyer, for example, the status quo is English law. Lawyers feel the loss intensely if law reform moves away from ‘their’ law. Their law is a reference point in the reform process.

Finally, research on how anchors influence the interpretation of vague legal standards is relevant to evaluating expert judgment in the form of global commercial law-making. Anchoring occurs when a subject is exposed to a reference point, which then influences subsequent judgments.92 Yuval Feldman, Amos Schurr, and Doran Teichman have conducted experimental research showing that anchors influence the interpretation by legal experts of vague legal norms.93 This work offers methodological insights on how to conduct further experimental research on how anchoring might affect legal experts in law reform projects. For example, experimental design could encompass giving subjects different legal standards and asking them to recommend standards for incorporation into a new legal product.

2. Identity-Protective Cognition

The heuristics and biases approach developed in the preceding section is well developed in the law and behavioural economics literature. Another strand of research holds promise for research in comparative law on motivated reasoning, the tendency of individuals

91 Kahneman (n 90) 80-81.
92 Ibid. at 119-128; Adrian Furnham & Hua Chu Boo, ‘A Literature Review of the Anchoring Effect’ (2011) 40 Journal of Socio-Economics 35.
to conform their evaluation of evidence and use of reasons, as well as their sense of the matter and their intuitions, to some aim distinct and extrinsic to reaching a conclusion based only on reasons and evidence.\textsuperscript{94} Identity-protective cognition is a form of motivated reasoning, occurring when individuals selectively credit evidence and reasoning aligning with the group to which they belong.\textsuperscript{95} The insight at work here is not that we can override our biases in the fast and automatic system 1 mental processes with slow and deliberative system 2 processes, but instead, all our mental processes operate together to protect our identities. Evidence driven, deliberative system 2 mental processes magnify biases and do not defeat them.\textsuperscript{96}

Howard Margolis offers an influential psychological account of expert judgment.\textsuperscript{97} He offers and integrated and reciprocal relationship between automatic system 1-type cognition and deliberative system 2-type cognition in experts.\textsuperscript{98} For Margolis, expert judgement consists of habits of mind based in pattern recognition, the fast and automatic assimilation of evidence to a mental inventory of prototypes. A legal expert applies these prototypes to facts and evidence in legal decision-making. System 2 does not overrise system 1 but rather these dual modes of thought work together. Expert assessment needs a reliable system 1 or ‘preconscious’ apprehension to help the expert decide what requires more deliberative and evidence-driven mental processing. Once intuitive judgment is applied, the use of evidence and argument – the deployment of system 2 – will depend on

\textsuperscript{97} Ibid.
the expert’s ‘assimilation of such evidence to an inventory of patterns that consist in prototypical representations of cases that give proper effect to data of that sort’. In short, system 1 must reliably activate system 2.

Dan Kahan contends that Margolis’s account of professional judgment is like Karl Llewellyn’s account of the ‘situation sense’ of the judge. For Llewellyn, situation sense is a perceptive faculty that lawyers and judges develop through professional experience, enabling them to reliably connect legal controversies to ‘situation types’ to suggest appropriate legal resolution. Llewellyn saw legal reasoning as psychological not logical. For Llewellyn, formal legal reasoning primes or activates the situation sense of the legal expert.

In a recent experimental study on whether political predispositions influence judicial decision making, Kahan and colleagues found that professional judgment imparted by legal training and experience produces resistance to identity-protective cognition. Judges and experienced lawyers (but not law students) who were on the opposing sides of the US political spectrum did not engage in biased legal decision making. This study tested legal reasoning in a single country against political (nonlegal) predispositions in that country.

100 Ibid. Another way to understand identity-protective cognition is through Gerd Gigerenzer’s concept of expressive utility. Identity-motivated reasoning is expressively rational because it conveys and supports a person’s membership in a group. Gerd Gigerenzer, Adaptive Thinking: Rationality in the Real World (Oxford University Press 2002). Another complementary approach is Nancy Pennington and Reid Hastie’s story-based model, positing that decision-makers are endowed with a stock of story schema, which form templates for shaping the evidence presented in a legal case. Kahan (n 99) collects the research. The Pennington-Hastie research appears to be more relevant for juries than judges, though judges are factfinders too.
102 Kahan et al (n 99).
There is currently no answer to the question whether expert legal judgement would resist identity-protective cognition in a comparative legal context. It may be that we find identity-protective cognition in a comparative legal context for at least two reasons. First, the political and the legal are somewhat indistinct in the comparative realm, in the sense that one’s legal system may be perceived as part of one’s politics and associatively relevant to one’s political allegiances. In the Kahan et al study, the subjects were judges and lawyers in the same national legal system. Law in that study was a clearly distinct variable from political allegiance or culture, which may not be the case in a comparative legal context. Second, reputational motivations about promoting one’s own law as a global standard may be in play. The experimental work has yet to be done.

B. Cognitive Constraints and Legal Transplants

Much of global commercial law-making can be understood as some form of legal transplant. In the global commercial law-making process, one or a few influential national models often arise, upon which to base the law-making process. Usually in the process the legal systems of the participants play an influential role. Transplants are either piece-meal or wholesale. Borrowing can be explicit. In some cases, the law of a particular jurisdiction becomes a global standard as is the case for the law on secured transactions and American UCC Article 9. Borrowing can also be implicit or unintended, such as a result of the biases of the participants for their own law.

Suppose the working group of an international organization is in the early stages of preparing a model law. The process entails substantial negotiations among delegates. Assume that organization officials and member state delegates have several national codes under consideration for the potential borrowing of rules that seem to promote economic
activities that international financial institutions like the World Bank have found to promote economic growth. Behavioural science can assist us in predicting how member state delegates will deliberate on the borrowing. It can also assist in understanding how transplanted rules will be received in the borrowing country.

As for the process of producing, for example, a model law based on transplanting a national law or approach to the law from a particular state or group of states, Kahneman informs that loss aversion may generally be an ‘ever present feature of negotiations.’\textsuperscript{103} Along these lines, Tomer Broude has extended to treaty negotiations theories about the effects of \textit{status quo} bias on contract default rules.\textsuperscript{104} We can extend Kahneman’s thinking about trade and arms control negotiations to deliberations about the contents of a model law.\textsuperscript{105} The domestic law of the member state delegates are reference points for the deliberation. Any proposed move away from the existing domestic law of a delegate will inevitably be viewed as a concession by that delegate. One’s own law primes one to think about what is appropriate for transplanting to a model law. You might think system 2 is guiding you but really you are simply primed by your legal tradition. As we know, losses are felt more intensely than gains. We can thus predict significant negotiations over the contents of model laws, rationalized in the language of reason and doctrine, but what in fact is likely going on is delegates have a \textit{status quo} bias for their own law.

The heuristics and biases literature can also inform us how transplants will be received by states. Here we might see local experts, domestic lawyers of the importing country and judges who must interpret the new law once it is in force, experiencing loss

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\textsuperscript{103} Kahneman (n 90) 304.
\textsuperscript{105} Kahneman (n 90) 304-305.
}
aversion and resisting the importation. Until they are trained in the new law and accept it as their own, they may feel they are losing expertise and prestige while the exporters, the international organisation producing the model law and its experts, receive gains from reputational effects associated with the number of adoptions, but no real losses. An outside expert has no ‘dog in the hunt’ other than perhaps her reputation as an expert, but she is unaffected by the reform of the law itself. The behaviour of those who favour the status quo is like that of territorial animals who rigorously and swiftly protect against threats to territory. If status quo losers have political power or influence, they will use it. The actual outcome will likely be biased against real reform unless countermeasures are in place. As Kahneman explains, loss aversion is a ‘powerful conservative force’ favouring ‘minimal changes from the status quo in the lives of both institutions and individuals.’

The World Bank and other law reformers do put some counter-measures in place, such as training and the use of local consultants and not just outsiders in law reform projects.

Finally, identity-protective cognition might have a role in the drafting of the law, its implementation in-country, and its application by judges and lawyers. There has been empirical work by Daniel Berkowitz, Katherina Pistor, and Jean Francois Richard on the ‘transplant effect’: they find that what matters more for the success of a legal transplant is its acceptance in the borrowing country than the association of the transplant with a legal family.

This literature, grounded in rational choice, finds that for a successful transplant, the imported law must be ‘meaningful’ to the citizens who use it who will then

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106 Kahneman (n 90) 305.
107 Ibid.
demand institutions to make it work, and judges, lawyers and other legal intermediaries must be in a position to respond to this demand. Receptivity, a country’s ‘ability to give meaning to the imported law,’ requires significant adaptation of the foreign legal rules to pre-existing conditions. Research on motivated reasoning and identity-protective cognition holds the promise of shedding significant new light on what makes transplants viable and subject to reception and meaningfulness to end-users.

C. Demystifying Culture Arguments

One of the more casually and often repeated statements one hears in both global law-making processes and in the comparative law community is that law is about culture. The invocation of culture can at times seem to be a strategy to censor discussion of difference. Culture has been one of the most discussed areas in comparative law and we cannot cover all the approaches to studying it here.\(^\text{109}\) Given the focus of this chapter on behavioural science, at least three strands of thinking about culture are relevant to our discussion.

First, let us look at culture from the standpoint of rational choice theory as it has been deployed in traditional versions of law and economics. Rational choice economics can be understood as the predecessor to behavioural economics. Rational choice theorists have tended to ignore culture in comparative work. Chicago-school rationalists take a hard line against culture as having any real explanatory power, taking the standard position in favour of parsimonious economic models. J Mark Ramseyer and Minoru Nakazato, for example, explain in their book, *Japanese Law: An Economic Approach*:

> We do not use economics because we think everyone (or anyone) always rationally maximizes. We all know no one does. We use economics because we think classical Chicago-school economic intuition (taken alone

\(^\text{109}\) For an extensive discussion, see Siems (n 1) at 101-104, 119-135.
and simply, without much elaboration) goes far toward explaining much
(not all) law-related behaviour in Japan. Surely, many readers will protest,
Japan is a complex place, a multifaceted universe where every phenome-
non results from the subtle interplay of myriad disparate and interconnect-
ed causes. . . . But unless our critics tell us which of the myriad causes has
what relative impact (they rarely do), the complexity is not much of an
improvement.

The same readers will probably insist that we could explain more if we
added culture to our spare model. What we would gain in explanatory
breadth, however, we believe we would lose in theoretical parsimony. . . .
Consider [this book] an attempt to show just how far extremely spare eco-
nomic models go toward explaining the world of law-related behaviour.110

Of course, the law and economics of social norms literature could be said to be address-
ing cultural norms, but these approaches focus not on culture but on the incentive effects
of norms that are not official legal rules.111

There are at least two problems with the rational choice approach: it is not predictive,
as advances in behavioural science have shown in repeated experiments. Rational choice
assumptions have been shown to matter greatly when it comes to individual decision-
making and behaviour. Moreover, rational choice theory cannot explain why the law dif-
fers across jurisdictions.112 It is too parsimonious, risking falsification.

Second, work in empirical comparative law could be said to be seeking some reliabil-
ity in causal inferences relating to culture, though the gains are debatable and the re-
searchers in the field do not make direct claims or findings about culture. This literature
is responsive to Ramseyer’s and Nakazoto’s plea for evidence of causation. Culture itself
is not an independent variable and so this work, located primarily in the ‘law and finance’

110 J Mark Ramseyer & Minoru Nakazoto, Japanese Law: An Economic Approach (Harvard University
Press 1999) xii-xiii.
111 The norm theory literature in law and economics is substantial. A good place to start is with Robert C
For another book-length treatment, see Eric A Posner, Law and Social Norms (Harvard University Press
2002).
112 Michaels (n 69) 352.
literature, develops proxies such as variables for legal origins, tenure of supreme court judges, the power of judicial review, and so on. Legal origins variables are set up in the multiple regression models used in the ‘law and finance’ literature based on whether the origin of the legal system is England and Wales, France, or Germany. The problems with these variables in accounting for culture in statistical models is that we really do not know what is being tested. They may capture some element of culture, or they may simply be controlling for something else. The decision of what proxy variables might be testing for culture are in the heads of the modellers. Behavioural scientists might look at this as potentially a problem of artefacts, a situation in which the views or biases of the researchers unintentionally interfere with the validity of the research. Mathias Siems has offered an alternative set of variables. Culture, or some aspects of it, may be reflected in the error term in the law and finance multiple regressions. It is probably better just to say that a variable that tests for, say, legal origins, tests for legal origins as understood by the modellers and probably nothing more.

Third, postmodernists assert that culture is an overriding factor in the evaluation of legal systems. The focus of the critique here is on a mistake that legal postmodernists make in relying on an outdated distinction between explanation and understanding. An

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113 The law and finance or legal origins literature is vast. For a survey, see Siems (n 1) 146-187.
116 This point is suggested by Alvin E Roth, Vesna Prasnikar, Masahiro Okuno-Fujiwara & Shmuel Zamir, ‘Bargaining and Market Behaviour in Jerusalem, Ljubljana, Pittsburgh, and Tokyo; An Experimental Study’ (1991) 81 American Economic Review 1068, one of the first studies of cross-country variation in behaviour in bargaining contexts.
117 For a survey, see Siems (n 1) at 101-108, 119-145.
118 The distinction between explanation and understanding is a longstanding topic in epistemology and philosophy of science. For an analogous discussion about ethics, see Peter Railton, ‘Toward an Ethics that Inhabits the World’ in Brian Leiter (ed) The Future for Philosophy (Oxford University Press 2004) 265.
empirical or analytical social scientist seeking to explain a phenomenon will cite causes, general principles, and evidence of actual behaviour. The task of explanation complies with norms of empirical science: third party objectivity, nomological principles, the construction of general theories, all to promote the nomothetic ideal of causal adequacy. An explanation arising from this kind of social science might be unrecognizable to those immersed in the practice being studied. A social theorist focusing on understanding studies the world of those participating in a phenomenon by seeking meaning for the participants of the social practice under investigation, examining the qualities of lived experience. The task of understanding complies with the norms of hermeneutics: first person perspective, interpretive principles, phenomenological approaches, and an emphasis on the particular, all to promote the hermeneutic ideal of meaning adequacy. An understanding arising from this kind of account would be recognizable to those immersed in the practice being studied. We see these distinctions between the empirical and postmodern wings of comparative law.

Behavioural science has the potential to dissolve these distinctions or at least make them less important. It offers methods to explain causation in mental processes and events that are sufficiently replicable to be predictive of behaviour, but which also account for meaning and the lived experiences of those immersed in the social practice of law. It does not accept without further investigation the self-narratives of persons as authoritative concerning meanings but is by its very conception mentalist in seeking to account empirically for people’s actual beliefs. While not a perfect substitute for humanities-oriented approaches to comparative law inquiry, culture can no longer be used as a
blockage of comparative legal analysis, because psychology offers ways of explaining why actors think the way they do about ‘their’ law.

So how would we investigate culture using the behavioural sciences? A place to start would be in the evolutionary wing of behavioural science suggesting that the scientific project should be more fully understood in a larger frame of culture-gene co-evolution.\(^{119}\) In this research, culture is understood as a form of social learning to acquire behaviours that adapt to local conditions. Humans are endowed with learning capacities allowing us to acquire the beliefs and attitudes relevant and necessary for the given local social environment. Social learning accumulates over generations and can create multiple stable equilibria in and across societies. Over time, humans would have culturally evolved different social organizations and institutions to adapt to diversity. While cultural capacities develop over a much shorter time span than genetic evolution, they, so the theory holds, influence the human genotype.\(^{120}\) This theory predicts that humans can learn in a way that accurately and efficiently acquires the motivations and preferences relevant to a local and culturally evolved social equilibria. Social equilibria are the various forms of social organisation and institutions found in societies, which includes law. Our beliefs and attitudes become part of our preference functions.

The research to-date in this evolutionary wing is normal science in a Kuhnian sense: it does not challenge the basic teachings of behavioural science. It offers evidence that


Industrialised, Rich, and Democratic) to samples from different subpopulations. One study has found no endowment effect in a small-scale traditional society not exposed to markets and modern society.122

The science sketched above may be relevant for comparative law. Because of adaptive social learning processes, societies populated by people who historically adapted to divergent ecologies and historical circumstances may arrive at differing stable social equilibria. The result just might be that legal actors across societies may develop different forms of social organisation and institutions – different law – based on the psychology of legal decision-making in different historical trajectories. If properly developed, BCL could be at the vanguard of law-related behavioural science in attempting to replicate single-country experiments in different countries. For example, one BCL project could be the study the loss aversion of contract default rules across several countries using samples from each country. Notably, this means that claims about the effects of culture will be subjected to the demands of empirical validation.

But the above cross-cultural research about small-scale societies may be of limited relevance to comparative law for at least two reasons. First, comparative law research tends to be about large-scale societies with substantial market integration, dealing with people who have experienced substantial exchange-type interactions with a variety of people. The above research may support the position that we should not worry too much about culture in comparative law research. Law tends to be a large project of mass societies to solve large-scale problems of coordination and cooperation. Law just might be less

important than social norms in smaller scale societies. Second, the above literature is limited in its focus mainly on reciprocity and fairness. A more promising line of research into legal culture might be a focus on identity as it is understood cognitively, as in the identity-protective cognition work outlined above.

Extending the discussion to global commercial law-making, culture seems of dubious relevance. When it comes to the making of transnational commercial law, we are dealing with the regulation of people and firms – ‘merchants’ in the usual parlance – usually multinational enterprises, operating in explicit markets within a vast network of market integration comprising global supply chains. There will likely be little variation in the behaviour of these users of the law. But as we have discussed, there remains the possibility that the experts who will be making the law are subject to biases in favour of their own law and institutions. The origins of those biases may (or may not) be evolutionary, but that they are likely to exist is the more important question for us here.

IV. IMPROVING GLOBAL COMMERCIAL LAW-MAKING

This Part of the chapter moves on to applying the insights developed above to global commercial law-making. It focuses on two points: (i) how biases and motivated reasoning might interfere with the making of global commercial law and its operation and implementation in practice and (ii) how to de-bias and render less influential the cognitive constraints on expert judgment in global law-making. The focus in this second section is on the use of cost-benefit analysis when feasible.

A. Cognitive Imperialism

Your own legal system dominates your thinking. Call this cognitive imperialism: the domination of a lawyer’s reasoning about what is good and right about the law, based on
what they sense or know about their own law. ‘Domination’ connotes that a lawyer has no or few cognitive mechanisms by which to defeat this imperialism.

Applying these insights to global commercial law-making, lawyers involved in global commercial law-making will prefer their own law, regardless of any Pareto improvements for the prospective users of the law. The same holds for the implementation of the new law: all things being equal, lawyers and judges will subvert reform in favour of their own law. They will predictably substitute one question, ‘what is a good rule’ for another, ‘what is the rule I am familiar with’ which will inevitably be the rule in their own jurisdiction.

The argument in this form is at a stage of a rudimentary working hypothesis, based simply on what we know about the psychology of expert legal judgment. It would take significant refinement of the question and experimental research to explain these insights in actual operation. The first step in developing a theory or model in the social sciences is to rely on one’s intuition based on what we see anecdotally.123 That is what I do here.


Examples of potential loss aversion or identity-protective cognition in global commercial law-making processes seem apparent. I will focus on one: the debate in UNCITRAL Working Group 1 about whether minimum legal capital requirements should be recommended as a requirement for incorporation in the draft Legislative Guide on an UN-

CITRAL Limited Liability Organization (UNLLO) and in the UNCITRAL Draft Legislative Guide on Key Principles of a Business Registry.\textsuperscript{124}

American corporate law eliminated minimum capital requirements as a requirement for registering a corporation long ago. This abolition applies equally to publicly and privately held corporations. Other countries have also eliminated these requirements. The modern trend in corporate law appears to be for corporate enabling statutes not to contain minimum capital requirements for corporate formation. Minimum capital requirements are likely to be widely perceived by experienced American business lawyers as provisions left over in an antiquated state corporate legislation in need of updating, but which a state legislature has ignored. Younger American lawyers may not even know of their prior existence. If you attended law school in the United States in 1970s and into the early 1980s, you may have been instructed from a slim paperback by Bayless Manning, \textit{A Concise Textbook on Legal Capital}, first published in 1977.\textsuperscript{125} By about the late-1980s, the book became widely viewed as an anachronism in American legal education. The absence of minimum capital requirements in the United States can be widely seen as a move from a paternalistic view of corporate law as a matter of regulation to an autonomy-based view of corporate law comprised mainly of default rules.\textsuperscript{126} Minimum legal capital rules are widely understood as obsolete in the United States. Any lawyer working in the American tradition of corporate law will probably have a reference point that will

\begin{footnotesize}
\begin{itemize}
  \item For the UNCITRAL history on the development of these guides, see https://uncitral.un.org/en/working_groups/1/msmes (last accessed 1 Feb 2019).
  \item Bayless Manning, \textit{A Concise Legal Textbook on Legal Capital} (Little Brown 1977). This book, however, has more to do with legal capital requirements post-formation, which can affect distributions to shareholders.
\end{itemize}
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be strongly against minimum capital requirements as needless obstacles to corporate formation.

The European Union is not so far from the United States in terms of the letter of the law, though the move came much later and Europe remains an outlier on requiring minimum capital for some companies. Article 6 of the Second Company Law Directive (77/91/EEC) requires that publicly held companies have at least 25,000 euros in legal capital to incorporate, but there seems to be a trend in Europe away from minimum capital requirements for closely held firms, represented by such entities as the Unternehmergesellschaft (UG) in Germany and the société à responsabilité limitée (SARL) in France.\footnote{See Note by the Secretariat, Observations by the Government of the French Republic, 12 Aug 2015, A/CN.9/WG.1/WP.94; Note by the Secretariat, Micro, Small and Medium-Sized Enterprises, Features of Simplified Business Incorporation Regimes, 10 Dec 2013, A/CN.9/WG.1/WP.82, at p 6 (discussing the UG in Germany). It is doubtful a 25,000 euro requirement has any real significance for publicly held corporations. John Armour, Gerard Hertig, & Hikoki Kanda, ‘Transactions with Creditors’ in Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe, & Edward Rock, The Anatomy of Corporate Law: A Comparative and Functional Approach (Oxford University Press 3rd ed 2017) 109.}

The focus on the work of UNCITRAL Working Group 1 under consideration here is on micro, small and medium sized enterprises (MSMEs). Its work on the LLO seems to connect to the advent of the American limited liability company and similar forms of organization found in other countries. Why would some UNCITRAL delegates focus on minimum capital requirements? UNCITRAL started out in its early deliberations taking the position that ‘[i]mportantly, simplified corporate forms do not typically include a minimum capital requirement, or require only a nominal amount, thus allowing greater access to formalization for much smaller entrepreneurs and enterprises.’\footnote{Note by the Secretariat, Micro, Small and Medium-Sized Enterprises Features of Simplified Business Incorporation Regimes, 10 Dec 2013, A/CN.9/WG.1/WP.82, p 6.}
ently was resistance to this position, with the position taken being the standard European arguments in favour of minimum capital requirements.\textsuperscript{129} These included the argument that minimum capital requirements are necessary to offset the effects of limited liability.\textsuperscript{130} The dividing lines apparently having been drawn, the World Bank, which as a matter of practice participates in UNCITRAL working groups, offered substantial evidence on why minimum capital requirements are poor corporate policy. Its expertise in corporate registration derives from its Ease of Doing Business Index and Doing Business Reports.\textsuperscript{131} While the World Bank’s work in these areas has generated controversy, for our limited purposes here, the World Bank, an intergovernmental organization with a broad membership of most countries in the world, has no national law of its own to promote. It is worth quoting UNCITRAL’s summary at length of the World Bank evidence, in a document UNCITRAL styled as ‘Best Practices in Business Registration’:

Several reforms in recent years have questioned the function of the minimum capital requirement, which is said to considerably slow the registration of new businesses. Although supporters of the minimum capital requirement insist that it is necessary to protect creditors and investors, it has increasingly been observed that the requirement does not fulfil any regulatory function by protecting creditors, customers or the business itself against poor performance of the business. For instance, the requirement does not shield the business from insolvency: in several countries the minimum capital can be paid in kind or withdrawn immediately after registration. Furthermore, recovery rates in bankruptcy are not higher in countries with minimum capital requirements when compared with those with no such requirements. Minimum capital requirements do not protect investors and consumers from new firms that are carelessly set up or might not be financially viable, since the minimum capital is often a fixed amount that does not take into account the firms’ economic activities, size or risks. In some cases the amount of the capital requirement is the same even when

\textsuperscript{131} See http://www.doingbusiness.org/ (last accessed 14 may 2019).
the companies are of a different type. In one State, for instance, a small company in the services industry with a low start-up capital has to pay the same amount as a large manufacturing company with high initial capital. Research shows that States protect investors and creditors, particularly in the case of limited liability companies, through means other than the minimum capital requirements. Some economies adopt provisions on solvency safeguards in their legislation, others conduct solvency tests or require an audit report showing that the amount a company has invested is enough to cover its establishment cost.

Of the 189 economies reviewed in Doing Business 2014, 99 have no minimum capital requirement. Some economies never required businesses to deposit money for incorporation, while others have eliminated minimum capital requirements in the recent past. In other cases new forms of limited liability companies with lower minimum capital requirements and simplified incorporation procedures have been introduced. Some States allow initial incorporation of a simplified limited liability company for only 1 euro, provided that progressive capitalization occurs, for example, the company must set aside a certain percentage of its annual profits until its reserves and the share capital jointly total the required amount. In another State, the introduction of a lower capital requirement resulted in a 40 per cent increase in registration in the year following the reform.

According to a study of selected European Union (EU) States, lowering or abolishing the minimum capital requirement has led to a marked increase in the number of registered business in four of the States considered: in the year after the reform, average daily incorporations in those States increased by as much as 85 per cent.\textsuperscript{132}

Despite the substantial evidence against minimum capital requirements, resistance among some delegates seems to have continued, with the more prominent argument that without a minimum capital requirement, creditor protections would be all \textit{ex post} and not \textit{ex ante}.\textsuperscript{133} There appeared to be some consensus with the World Bank view along with some dissension, though delegate views are sometimes difficult to discern in official documents. The Working Group agreed that ‘the issues of minimum capital requirement and


protection of third parties should be treated under the general category of protection of creditors and other third parties.'\textsuperscript{134} The delegates did not agree on standards for protection but that the legal text should ensure ‘sufficient flexibility for a State to choose its own criteria as it saw fit.’\textsuperscript{135}

Some of the disagreement appears to have come from the German delegation. UNCITRAL published a note on the German position that appears to advocate minimum capital requirements and more regulatory burdens for SMSEs, arguing for ‘\textit{ex ante} preventive measures of justice’, but also making some pro-SMSE statements.\textsuperscript{136} One argument was that ‘it has become apparent’ through the Working Group 1 sessions ‘that a business cannot be separated from its national economic and cultural context’ and that the aim should be to ‘bridge gaps between different legal traditions in terms of business incorporation.’\textsuperscript{137} These arguments seem to contradict a well-settled claim that corporate law is substantially similar across nations, probably more so than other areas of law. As explained in the first paragraph of probably the most influential comparative work in the field, ‘despite the very real differences across jurisdictions . . . . the underlying uniformity of the corporate form is at least as impressive. Business corporations have a fundamentally similar set of legal characteristics – and face a fundamentally similar set of legal problems – in all jurisdictions.’\textsuperscript{138} The culture argument, moreover, appears to be an attempt to censor discussion of the evidence. The German position was also that ‘[e]xtensive contractual freedom might be problematic in countries where founders of business entities

\textsuperscript{134} \textit{Ibid.}
\textsuperscript{135} \textit{Ibid.} ¶ 78.
\textsuperscript{136} Note by the Secretariat, Observations by the Government of the Federal Republic of Germany, 19 Feb 2015, A/CN.9/WG.1/WP.90.
\textsuperscript{137} \textit{Ibid.}
\textsuperscript{138} John Armour, Henry Hansmann, Reiner Kraakman, & Marianna Pargendler, ‘What is Corporate Law’ in Kraakman et al (n 127) at 1.
lack the education or access to legal counsel to make best use of such freedom’. This argument appears to be a critique of the approach to corporate law that focuses on autonomy rather than paternalism. Finally, the note contains a section that is entitled ‘honouring what is already there,’ which seems to offer an example of status quo bias.

The minimum capital requirement eventually receded in importance in UNCITRAL deliberations. UNCITRAL reported that that no consensus existed on whether minimum capital requirements should be required to offset limited liability but that ‘there was broad agreement that the modern trend in legal reform in this area was to move away from minimum capital requirements.’ UNCITRAL began preparation of a draft model law on a simplified business entity that did not contain a minimum capital requirement, but consistently with the ‘modern trend’ was ‘sufficiently flexible’ to allow states to include such a requirement, but advocating restriction to a ‘nominal sum.’ How a nominal sum would serve any purpose other than to respond to loss aversion or identity-protective cognition by some of the members of Working Group 1 is unclear.

The current state of affairs as of the date of this writing is that UNCITRAL deliberations are ongoing on parallel tracks on a draft Legislative Guide on an UNCITRAL Limited Liability Organization and a draft Legislative Guide on Key Principles of a Business Registry. The draft Legislative Guide on an UNCITRAL Limited Liability Organization sets forth a recommendation 5: ‘The law should not contain a minimum capital require-

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140 Ibid.
142 Ibid. ¶ 16.
ment for the formation of an UNLLO*. The draft Legislative Guide on Key Principles of a Business Registry discourages countries from adopting minimum capital requirements offering rationales consistent with the evidence-based World Bank position.144

The point of this example is not to debate the merits of legal capital requirements but to illustrate how various biases or motivated reasoning might be in play in global commercial law-making. Of course, the above narrative is not proof but merely a set of observations that reasonably could lead us to believe that biases and motivated reasoning are at work. The next step would be in developing a set of clearly specified hypotheses and to conduct a set of experiments by which to test the hypothesis.

2. Cognitive Imperialism in Implementation

There is space in this chapter to only briefly explore a few illustrations in which biases and motivated reasoning may be at work in the implementation of global commercial law at the national level. The illustration is that of the non-use of the UN Convention on the International Sale of Goods (CISG) by contract parties. The discussion to follow is by no means exhaustive.

Commentators have expressed a longstanding concern about a ‘homeward trend’ in judicial interpretations of the CISG.145 The problem goes further: there seems to be attempts at wholesale exclusion of the CISG by lawyers across several countries. Several


145 The phrase is attributable to John Honnold but the phenomena has been examined in many articles too numerous to cite here. See, e.g., ‘The Sales Convention in Action -- Uniform International Words: Uniform Application? (1988) 8 Journal of Law and Commerce 207.
empirical studies offer evidence of very low reliance on the CISG in the United States, for example. This homeward trend might be explained with behavioural science. John Coyle’s work on the non-use of the CISG by American contract parties offers clues. Coyle developed a dataset of over 5,000 contracts and interviewed several lawyers involved in contract drafting. His research revealed that many US contracting parties (or their lawyers) ‘reflexively exclude’ the CISG, which means that they excluded the CISG from contracts even when it would clearly not apply. His research also revealed that US contracting parties almost never explicitly choose the CISG and they are often unaware that selecting the law of a US state can result in the application of the CISG.

Experimental research on how lawyers make decisions about the drafting of choice of law clauses would be the next step. Statutory interpretation problems have been the subject of experiments and there is no reason to believe that a valid experiment could not be developed to test expert legal judgment about choosing an international convention or foreign law in the drafting of a choice of law clause. There is some indication in this research that lawyers react to law nationally, as in choosing ‘New York’, though any such experiment will have to control for the location of the client, among other things.

Other illustrations can be offered. The thwarting of the universalism of the United Nations Model Law on Cross-Border Insolvency in the UK Supreme Court decision in

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Rubin v Eurofinance SA\textsuperscript{147} just might offer another illustration. In Rubin, the UK Supreme Court took a sharp break from precedent by rejecting the UK enforcement of default judgments entered by the Southern District of New York and the New South Wales Supreme Court, even though the centre of main interests (COMI) of the bankrupt estates were in the United States and Australia. The Rubin judgment is likely an example of motivated reasoning. Again, and more generally beyond Rubin or any single case, experiments testing the ‘nationalism’ of judging can be designed. It appears to reflect a similar homeward trend-type problem found in many CISG cases decided in many national courts.

B. De-biasing: Moving to System 2

Given what behavioural science tells us, an important aim of any global commercial law-making process should be to de-bias the process. The process should move away from reliance only on expert legal judgment of the traditional sort. Some form of ‘third-party’ neutrality is warranted. Even an attempt at system 2 reasoning by experts is problematic. Even experts trained to use evidence and reasoning may deploy evidence and reasoning in identity-protecting ways. The job of evaluation of new law should therefore be outsourced and cost-benefit analysis should be employed when feasible.

The ‘when feasible’ proviso is an important qualification. De-biasing should make the process better and not worse off. Feasibility has to do with both identifying what can be measured and measuring itself - both conceptual and empirical considerations are relevant. There will be many cases in which cost-benefit analysis is not feasible. So far there have been few advances in employing cost-benefit analysis to evaluate private or transac-

\textsuperscript{147} [2012] UKSC 46.
tional law.\textsuperscript{148} There is a considerable movement towards using cost-benefit analysis in the analysis of protocols to the Capetown Convention.\textsuperscript{149} For the Aircraft Protocol of that Convention, it can be demonstrated that secured financing of aircraft lowers the cost of credit for purchasers. How these lower private costs translate into lower social costs and increased social benefits is the more central question, about which it may be impractical to say much. Cost-benefit analysis probably did not come to be understood as a tool for evaluating proposed regulation until the early 1980s, when US President Ronald Reagan issued Executive Order 12,291 mandating the use of cost-benefit analysis on all major US federal proposed regulation.\textsuperscript{150} We should not have expected any global law-making body to have adopted cost-benefit analysis at the time to evaluate private or transactional law.

One potentially formidable feasibility constraint might be on the use of cost-benefit analysis at the international level: how to measure costs and benefits when it is unknown who will adopt a model law, ratify a convention, or follow a legislative guide. It is all too often the case that what is in force globally is a diversity of international conventions governing a particular area of commerce. Model laws are meant to be national laws and costs and benefits may be impractical to quantify unless tied to a national evaluation. Still

\textsuperscript{148} There has been considerable discussion on the use of cost-benefit analysis to evaluate financial regulation. See, e.g., (n 17) and two symposium issues at (2014) 43 No S2 and (2000) 29 S2 of the Journal of Legal Studies. A significant difference exists, however, between conducting cost-benefit analysis of financial regulation and commercial law. UNCITRAL’s remit, moreover, at least informally, excludes regulation.  
\textsuperscript{150} Adler & Posner (n 20).
we want to be able to use cost-benefit analysis or come as close as possible to using it at
the more abstract global level if we want it to de-bias global commercial law-making.

When cost-benefit analysis is not feasible, a solution might be to look for an alternative methodology.\textsuperscript{151} In 2003, attempting to repair the above political economy critique of private law harmonisation, I recommended as follows:

Model laws and international conventions tend to be accompanied by official commentary. States could require demonstrations in the commentary of efficiency improvements in the law. It would be naive to suggest that because the commentary says that the law is an efficiency improvement, that the law makers actually took efficiency into account in producing the law. That they are required to provide such an analysis, however, does at least five things to improve upon the status quo. First, it signals that unifying bodies are amenable to efficiency-oriented approaches. Second, it produces information about the content of the law. Third, it has the potential to focus the drafting of law on improvements in the law rather than on legal change by itself as a goal. Fourth, it assists in getting law and economics scholars to review proposed laws. Fifth, it is difficult to ‘fake’ efficiency. The public choice-oriented explanations for unification will remain relevant, and actors involved in unification projects will not somehow miraculously begin to act only in the public interest. There are no panaceas. And, uncertainty will remain for some laws as to whether they actually will be efficient when implemented by courts. But still, drawing attention to efficiency should channel some law-unifying behaviour towards the production of better or at least more efficient law.\textsuperscript{152}

Any such work would have to be done by ‘experts’ who are independent of the law-making process and with the appropriate expertise and should be as quantitative as is sensible to the production of reliable results. Moreover, regardless of the methodology employed, the work should be conducted under conditions of transparency, in which interested parties have access to the data and are in a position to evaluate the results.\textsuperscript{153}

\textsuperscript{151} Coates makes this same point about cost-benefit analysis of financial regulation. Coates (n 17).
\textsuperscript{152} Linarelli (n 55) at 1445-1446.
CONCLUSION

In this chapter I have strived to identify two innovations. One is the development of a new field of behavioural comparative law or BCL. The other is in the application of behavioural science insights to global commercial law-making. Scholars have paid scant attention to the potential for behavioural science to contribute to comparative law research, though work in behavioural law and economics, a major field in behavioural science, has emerged. Nothing to-date has been written about the application of behavioural science to global commercial law-making.

There appear to be promising lines of research still be done in both areas. Intuition informs us that heuristics and biases, as well as other cognitive insights associated with culture and national identity, are in play in global law-making. More generally, behavioural science seems to hold significant potential for understanding how legal problems are solved in different states. Future work would seem to require data-driven and experimental investigation. It is my hope that this chapter serves as a catalyst to instigate further work in the use of behavioural comparative law methods to study global commercial law-making.