

2007

# Bottom-up International Lawmaking: Reflections on the New Haven School of International Law

Janet K. Levit

Follow this and additional works at: [http://digitalcommons.law.utulsa.edu/fac\\_pub](http://digitalcommons.law.utulsa.edu/fac_pub)



Part of the [International Law Commons](#)

---

## Recommended Citation

32 Yale J. Int'l L. 393 (2007).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact [daniel-bell@utulsa.edu](mailto:daniel-bell@utulsa.edu).

# Article

## Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law

Janet Koven Levit<sup>†</sup>

I.	INTRODUCTION .....	393
II.	THE NATIONALIST CRITIQUE OF INTERNATIONAL LAW .....	396
III.	BOTTOM-UP INTERNATIONAL LAWMAKING: INTERNATIONAL LAW STORIES IN PRACTICE .....	398
	A. <i>International Trade and Export Subsidies</i> .....	399
	B. <i>Climate Change Regulation</i> .....	402
	C. <i>Corporate Social Responsibility and Human Rights</i> .....	405
	D. <i>Bottom-Up International Lawmaking</i> .....	408
IV.	THE MYTHS OF INTERNATIONAL LAWMAKING IN A NATIONALIST WORLD .....	410
	A. <i>Myth 1: States as Lawmakers</i> .....	410
	B. <i>Myth 2: International Law as Treaties and Custom</i> .....	413
	C. <i>Myth 3: International Law as Deliberate Choice</i> .....	416
V.	CONCLUSION: TOWARD INTERNATIONAL LEGAL PLURALISM .....	419

### I. INTRODUCTION

I am struck by the similarities between the present moment and the one that sparked the New Haven School of International Law.<sup>1</sup> Today, many

---

<sup>†</sup> Professor of Law, University of Tulsa College of Law; Yale Law School (J.D., 1994); Yale University (M.A., 1994); Princeton University (A.B., 1990). This Article is based in large part on a presentation I gave as part of the “Globalization and Executive Power” panel at the Yale Law School Southern Cone Faculty Research Seminar on Executive Power, Seminario en Latinoamérica de Teoría Constitucional y Política [Seminar in Latin America on Constitutional and Political Theory] (SELA) (June 9, 2006). The panelists’ presentations are available online. See Yale Law School, Centers & Programs, SELA 2006, <http://www.law.yale.edu/intellectuallife/sela2006.htm>. Their remarks will also be reprinted in Spanish in SELA 2006: EL PODER EJECUTIVO (Roberto Saba ed., forthcoming 2007). I would like to thank Robert Ahdieh, Elena Baylis, Paul Schiff Berman, Martin Böhmer, Laura Dickinson, Owen Fiss, Laurence Helfer, Kenneth Levit, Hari Osofsky, Tamara Piety, Carol Rose, Laura Saldivia, James Silk, Peter Spiro, Aida Torres Pérez, Verónica Undurraga, and Melissa Waters for their invaluable comments on this Article.

1. New Haven School scholars—Myres S. McDougal, Harold D. Lasswell, and Michael Reisman—were (and, in Michael Reisman’s case, are) prolific scholars, and I base this Article on a representative selection of their work: Myres S. McDougal, *International Law. Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953) [hereinafter McDougal, *International Law, Power and Policy*]; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pt. 1), 19 J. LEGAL EDUC. 253 (1967) [hereinafter McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*]; Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pt.2), 19 J. LEGAL EDUC. 403 (1967) [hereinafter McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*]; Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980); W. Michael Reisman, *International Lawmaking: A Process of Communication*, The Harold D. Lasswell

international legal scholars find themselves sandwiched by intellectual and geopolitical currents highly reminiscent of those that gave birth to the New Haven School.<sup>2</sup> On the one hand, the New Haven School was a response to Cold War realism, a philosophy “which underestimates the role of rules, and of legal processes in general, and over-emphasizes the importance of naked power.”<sup>3</sup> International law is now besieged by a neo-conservative, nationalist ideology, an ideology hauntingly similar to the Cold War realism of the 1950s and 1960s, that gives little (if any) independent normative weight to international law and instead conceives of it as a mere tool in furtherance of the “national interest” and power politics.

On the other hand, many scholars today, like their New Haven School predecessors, recognize that legal positivism is not a functional or meaningful response to the recurrent “international law is nothing but power” argument. A half-century ago, many international legal scholars attempted to refute the Cold War naysayers by repackaging international law as an indisputably palpable discipline, embarking on a doctrinal search for “the law” and creating a “scientific” taxonomy to systematize the doctrine.<sup>4</sup> As much as the New Haven School rejected Cold War realism, insisting that international law transcended mere power politics, it likewise rejected “an innocent-appearing insistence that the prime and unique task of legal scholarship is simply to ascertain ‘what the law is.’”<sup>5</sup> Indeed, most contemporary international legal scholars eschew an overly positivistic approach to their work, recognizing that the doctrinal quest for “the law” is a rather disconnected enterprise, explaining little of how international law actually operates, how it affects decisions, interacts with municipal law, and shapes norms.

Instead, New Haven School scholars responded to the Cold War realists by attacking the foundational assumptions that supported their critique. What is international law? Who makes international law? Is it the realm of political elites or a broader group of transnational actors or “decisionmakers”? Is international law an edict or a process? Indeed, in posing answers to these questions, the New Haven School revealed the naïve, self-serving simplicity of the Cold War realists’ bedrock assumptions and painted a nuanced, if not unduly complex, topography of international law and lawmaking. In this regard, in battling adversaries not on their terms but by redefining the battleground in a way that bears more resemblance to sociolegal reality, a new generation of international legal scholars—perhaps a “new” New Haven School—shares the strongest kinship with the founders.

---

Memorial Lecture at the American Society of International Law (Apr. 24, 1981), in 75 AM. SOC’Y INT’L L. PROC. 101 (1981) [hereinafter Reisman, *International Lawmaking*].

2. It is hauntingly familiar, almost prophetic, that New Haven School scholars crafted their theories in the wake of an NSA spying scandal, involving the NSA “reading the mail of its allies as well as its adversaries.” McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*, *supra* note 1, at 419. Of course, a modern version of such an NSA scandal is in the headlines. *See, e.g.*, Eric Lichtblau, *House Approves Power for Wiretaps Without Warrants*, N.Y. TIMES, Sept. 29, 2006, at A18; Kevin Krolicki, *Judge Allows NSA Wiretaps for Another Week*, REUTERS, Sept. 28, 2006, available at <http://today.reuters.com/News/CrisesArticle.aspx?storyId=N28372081>.

3. McDougal, *International Law, Power and Policy*, *supra* note 1, at 157.

4. *See, e.g.*, L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (H. Lauterpacht ed., 8th ed. 1955).

5. McDougal, *International Law, Power and Policy*, *supra* note 1, at 144-45.

Indeed, today's international legal scholars respond to a fresh, albeit reminiscent, ideological attack in a way that feels indelibly inspired by the New Haven School's tactics of challenging opponents' foundational assumptions about the nature of international law. I offer this Article on "bottom-up international lawmaking" as just one example of how such tactics are shaping a new generation of scholarly work. Part II of this Article explores the mounting neo-conservative, nationalist critique of international law, focusing particularly on Jack Goldsmith and Eric Posner's book, *The Limits of International Law*,<sup>6</sup> as a means to isolate the assumptions at its core.

The international law stories that the neo-conservative critics tell in support of their theory arise from an artificially outmoded conception of what international law is and how it is made. In the spirit of the New Haven School, Part III juxtaposes examples of bottom-up international lawmaking to illustrate how international lawmaking in practice often bears little resemblance to the top-down tales at the center of the neo-conservative critique. Bottom-up lawmaking is a soft, unpredictably organic process that generates hard, legal results. Private parties, nongovernmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on-the-ground experiences and perceived self-interests, "codifying" norms that at once reflect and condition group practices. Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereby become "law." Whereas top-down lawmaking, the type of lawmaking at the heart of the nationalist critique of international law, is a process of law internalized as practice, bottom-up lawmaking is a soft, unchoreographed pattern of practices externalized as law.

Part IV of this Article dissects these bottom-up lawmaking stories to expose three false assumptions at the root of the neo-conservative, sovereignty-centered account of international law: (1) the "nation-state" as the primary lawmaker; (2) the treaty as the preeminent form of international law; and (3) international lawmaking as an "off-the-shelf" process that political elites deliberately orchestrate.

In asking such foundational questions, I ultimately arrive at a conclusion, which, in its turn toward legal pluralism, is also New Haven School-esque.<sup>7</sup> In an era of globalization, the international lawmaking universe is disaggregating into multiple—sometimes overlapping—lawmaking communities, and neither the President, political elites, nor any of the other protagonists that star in the neo-conservative account are at the center of many of these communities. Some may recoil at this reality; I, on the other hand, celebrate this moment as one of possibility and promise, as an opportunity "to invite new worlds."<sup>8</sup>

---

6. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

7. W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 16, 26 (Rüdiger Wolfrum & Volker Röben eds., 2005) ("Thus the international system makes law through multiple processes and in multiple settings. It has multiple arenas or fora for the application of international law.").

8. Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 68 (1983).

## II. THE NATIONALIST CRITIQUE OF INTERNATIONAL LAW

The New Haven School was in part a reaction to and rebuke of Cold War realism, the ideology of George Kennan, Hans Morgenthau,<sup>9</sup> and many others, which argued that naked power and “national interest,” not legal rules, are the sole means to “suppress the chaotic and dangerous aspirations of governments in the international field.”<sup>10</sup> Similarly, many in the international legal academy are currently sparring with a group of conservative U.S. legal scholars (including some who have served in high level positions within the Bush administration) who believe that globalization has thrust the “sovereign” into a zero-sum power grab with international regimes.<sup>11</sup> While the game theory and the economic models may be more “sophisticated” than those employed by the Cold War realists, these scholars, like their predecessors, similarly fear that potent international laws and institutions detract from “sovereignty,” which is often shorthand for executive power and autonomy. For these scholars, the choice is clear—a strong, secure state *or* robust international law and institutions, but not both.<sup>12</sup> These scholars have created a theoretical framework that eviscerates international law, reconceptualizing it as a mere tool of a strong state.

While these scholars (I will call them—as have others—“neo-conservatives” or “nationalists”<sup>13</sup>) now concede that international law exists,<sup>14</sup> nationalists claim that “[i]nternational law emerges from states’ pursuit of self-interested policies on the international stage.”<sup>15</sup> Nationalists generally employ economist-style simplifying assumptions from which they build a rational-choice-inspired game-theoretic model of interstate interaction.<sup>16</sup> International law is simply a tool to help self-interested states achieve optimal

9. See, e.g., GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950* (1951); HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* (1951); HANS J. MORGENTHAU, *POLITICS AMONG THE NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1948).

10. KENNAN, *supra* note 9, at 95.

11. In this group, I include Jack L. Goldsmith, Henry Shattuck Professor of Law, Harvard Law School; Eric A. Posner, Kirkland & Ellis Professor of Law, University of Chicago Law School; and John C. Yoo, Professor of Law, University of California, Berkeley School of Law—Boalt Hall). In this brief Article, I necessarily translate their ideas without the nuance that they deserve, and I will focus solely on GOLDSMITH & POSNER, *supra* note 6.

12. This claim is implicit in a nationalist understanding of international law as “*endogenous* to state interests,” and likewise in its proclaiming that international law “is not a check on state self-interest; it is a product of state self-interest.” *Id.* at 13. “[T]he possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power.” *Id.*

13. See, e.g., Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, *The John W. Hager Lecture at the University of Tulsa College of Law* (Oct. 28, 2004), in 12 *TULSA J. COMP. & INT’L L.* 1, 7 (2004).

14. In contrast, the realists of the 1960s and 1970s denied that international law exists.

15. GOLDSMITH & POSNER, *supra* note 6, at 13.

16. Goldsmith and Posner explicitly embrace “rational choice theory” and its simplifying assumptions, including state interests (preferences) that are “consistent, complete and transitive.” *Id.* at 7. Even the nationalists concede that “the axioms of rational choice” may not “accurately represent the decision-making process of a ‘state’ in all of its complexity”; likewise, they do not “provide the basis for fine-grained predictions about international behavior.” *Id.* Nonetheless, given that “no theory predicts all phenomena with perfect accuracy,” Goldsmith and Posner embrace rational choice theory and argue that one of the following four rational-choice inspired strategic “games” explains all inter-state interaction and behavior: coincidence of interest, coordination, cooperation, and coercion. *Id.* at 11-12. International law, they write, is not an independent “pull” on state behavior, but merely a tool that the state may employ in carrying out one of these strategies. *Id.* at 13.

outcomes in any particular bilateral game. For instance, a state may negotiate a treaty in order to lower the transaction costs of inter-state interaction, surmount collective action and timing problems, and focus parties' attention and energies on similar information in furtherance of rational, self-interested decisionmaking. International law does not, in the nationalist account, have any independent, normative pull and thus does not stand in the way of a state determined to pursue its agenda.

For nationalists, "state interest" is coincident with the "preferences of the state's political leadership."<sup>17</sup> While nationalists presumably include elected legislators among this "political leadership," they tend to elevate and privilege *executive* decisions in the defining of "state interests."<sup>18</sup> First, in developing their state interest-based theory of international law, nationalists choose examples that discount the role of Congress, fixating instead on executive-driven diplomacy within a Westphalian universe.<sup>19</sup> When nationalists actually discuss the legislature's role in international lawmaking—i.e., Senate ratification of "legalized international agreements"—they often portray Congress itself as an instrument or extension of executive power.<sup>20</sup> Second, as others have noted,<sup>21</sup> nationalists deem "state interests" to be unitary.<sup>22</sup> Of those among the "political leadership," the President is the only "unitary" representative of the "state" and thus becomes the easy proxy

17. *Id.* at 6.

18. *See id.* at 218-19. The "executive" is of course a term that can have multiple meanings—some use it as shorthand for the President, others use it to encompass the entire administrative state. In this Article, unless otherwise stated, I use the term "executive," as the nationalists do, to mean the "political leadership" within the federal government's executive branch. While the President and Vice-President are the only political leaders whom the public directly elects, I consider the top layer of political appointees (i.e., cabinet members) to also be among the executive's political leadership.

19. There are very few discussions of Congress in GOLDSMITH & POSNER, *supra* note 6, a function primarily of the examples that the nationalists choose. Consider, for example, the discussion of customary international law. By definition, the legislature has very little, if any, role in the consolidation of customary international law norms. Thus, in all of Goldsmith and Posner's customary international law examples (treatment of neutral ships in belligerent (or blockaded) waters; diplomatic immunity; the breadth of the territorial sea), Congress is relegated to an invisible or back seat role. *See id.* at 45-78. Furthermore, in their discussion of human rights treaties, Goldsmith and Posner belittle the ratification (i.e. legislative) process as meaningless and costless, derivatively anointing the executive as the primary decisionmaker. *Id.* at 127. Still further, in an effort to demonstrate that international law yields no independent pull on state action, the nationalists highlight the "compliance" moment, a moment in which the state pursues its "interests" in a manner that may, or may not, be coincident with international norms. Thus the nationalist story is not predominantly one of lawmaking, in which the legislative branch might have a more natural role (*vis-à-vis* treaties), but rather one of enforcement and implementation (or lack thereof), functions that are fundamentally executive in nature.

20. For instance, Goldsmith and Posner argue that the President calculates whether to employ a "legalized" agreement (which requires Senate ratification) or a non-legalized agreement (which requires no legislative imprimatur) depending on whether the President believes: (1) the Senate will signal important information to a treaty partner; (2) the Senate ratification process will send a "credible signal about the President's degree of commitment to a treaty"; and/or (3) a legislative, in addition to a presidential, commitment to a treaty lessens, in the view of the treaty partner, the probability that a successor president would renege or change course. *Id.* at 92-93.

21. Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 6).

22. GOLDSMITH & POSNER, *supra* note 6, at 6 (while conceding that "[s]tate interests are not always easy to determine," arguing that "a state—especially one with well-ordered political institutions—can make coherent decisions based on identifiable preferences, or interests, and it is natural and common to explain action on the international plane in terms of the primary goal or goals the state seeks to achieve").

for the defining and carrying out of a “unitary” state interest.<sup>23</sup> Finally, in other writing and policymaking, these same nationalists privilege the role of the President in foreign affairs, arguing, often from a vaunted position within the administration, that the President’s constitutionally-endowed role as Commander-in-Chief bequeaths unfettered, unchecked, and autonomous power (particularly during times of war).<sup>24</sup> Thus, for nationalists, “state interests” often reduce to *executive* preferences and policies.

In collapsing “state interests” with “executive interests,” the nationalists’ critique of international law and defense of executive power become intertwined. In the nationalists’ view, international law is a series of rules that merely reflect or coincide with “state interests,” which, in turn, are largely “executive interests.” When an international norm would otherwise obstruct or constrain the executive’s pursuit of the “state interest,” political elites simply circumvent or ignore the norm. For nationalists, international law is thus an instrument that facilitates, but in no way limits, the executive’s exercise of its broad powers in pursuit of the “state’s interest.” Thus, the nationalist critique of international law is, on the flip side, a celebration of the autonomous, relatively unconstrained state, with a powerful executive at the helm.

### III. BOTTOM-UP INTERNATIONAL LAWMAKING: INTERNATIONAL LAW STORIES IN PRACTICE

The nationalist account, however, does not always comport with the on-the-ground, day-to-day realities of international lawmaking. The nationalists root their theory in a highly oversimplified and outmoded view of what international law is and how international law is made. If we unpack the nationalist thesis—the executive *controls* international law, creating it and using it instrumentally, in furtherance of the national interest—then we are left with three interdependent building blocks: (1) states, the executive in particular, as international lawmakers;<sup>25</sup> (2) treaties as the primary form of international law;<sup>26</sup> and (3) international law as a *deliberate* process that

23. Interestingly, Goldsmith and Posner conceive of the “state” as a “corporation,” hierarchical and ultimately depositing power in an individual. *Id.* at 5.

24. For nationalists, the executive branch has extensive power in foreign affairs. See Memorandum from Jay S. Bybee, Asst. Att’y Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (particularly Section V, The President’s Commander-in-Chief Power, written by John C. Yoo); see also Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2102 (2005); Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683 (2005); Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 488 (2002); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1192-1204 (2004); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002).

25. Nationalists consistently limit their analysis to the “state” and “state actors.” See GOLDSMITH & POSNER, *supra* note 6, at 4-5 (“[W]e give the state the starring role in our drama.”).

26. Goldsmith and Posner are quite dismissive of customary international law. See GOLDSMITH AND POSNER, *supra* note 6, at 45 (arguing that “robust customary international law” in four discrete areas—wartime maritime commerce, territorial sea, ambassadorial immunity, and wartime coastal fishing vessels—is “most easily and parsimoniously explained” away using the four strategic

political elites carefully choreograph from the top down.<sup>27</sup> Yet, these assumptions, fundamentally at the core of the nationalist project, simply do not reflect the dynamics of international lawmaking in an era of globalization. I offer the following three vignettes—export subsidies, climate change regulation, and corporate social responsibility initiatives—as a window into an alternative account of international lawmaking, one that I have labeled “bottom-up international lawmaking.”<sup>28</sup>

#### A. *International Trade and Export Subsidies*

As exports and foreign markets are increasingly an engine for economic growth and national prosperity, states, at one time or another, must consider whether and how to support—and even subsidize—the domestic exporting community. In the nationalists’ blunt account, the political leadership, the President in particular, decides, with some sensitivity to politically powerful domestic constituencies, whether subsidies further U.S. interests.<sup>29</sup> If the President concludes that subsidies are too expensive or economically inefficient, then the President turns to international law only to the extent that it furthers U.S. interests. In the case of export subsidies, a treaty presumably would help resolve the endemic cooperation, coordination, and free riding problems of creating an “even playing field” for U.S. exporters.<sup>30</sup> Ostensibly, the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures embodies such efforts.<sup>31</sup>

---

models discussed in *supra* note 16). Nationalists’ disbelief in and skepticism toward customary international law is also evident in Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). Goldsmith and Posner explicitly focus instead on treaties as the preferred form of international law. GOLDSMITH & POSNER, *supra* note 6, at 13.

27. “Instrumentalism” lies at the core of Goldsmith and Posner’s rational choice theory. They argue that political elites—in their terminology, the “political leadership”—“use treaties” in a “self-conscious” way to further cooperation or coordination strategies. GOLDSMITH & POSNER, *supra* note 6, at 6, 13.

28. See generally Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005) [hereinafter Levit, *Bottom-Up Approach to International Lawmaking*].

29. Although one might expect the nationalists to highlight congressional politics in arriving at a “state interest” vis-à-vis support for exports—presumably a discussion that would highlight debates between those states and regions with a significant exporting community against those states with businesses who produce primarily for the domestic market—such discussions are conspicuously absent from much nationalist writing on the subject. Even when Goldsmith and Posner discuss the GATT and WTO, they focus solely on the diplomatic negotiating process (one that would be led by the executive branch) and the decision of whether to comply with a WTO dispute settlement ruling, a decision driven by the executive. There is no discussion of congressional politics. See GOLDSMITH & POSNER, *supra* note 6, at 135-62 (discussing international trade agreements).

30. If a treaty is already in place, the President decides whether to abide by the rules (presumably negotiated by a previous president) or defect, balancing the state’s interest against any costs that the treaty regime would credibly impose.

31. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 14 [hereinafter Agreement on Subsidies]. The Agreement on Subsidies “disciplines the use of subsidies,” including some export subsidies, and “regulates the actions countries can take” to counteract the effects of “prohibited subsidies.” World Trade Organization, Subsidies and Other Countervailing Measures, [http://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm) (last visited Apr. 27, 2007).



The nationalist account, however, does not accurately describe the genesis of some of the international law of export subsidies. My story neither originates nor culminates in the Oval Office and starts long before the founding of the GATT or the WTO; it focuses on the rather arcane, technical world of officially supported export credit.<sup>32</sup> Export credit operates as an export subsidy whenever government support artificially lowers the cost of financing (interest rates, premiums, etc.) or when the government's backing, or "full faith and credit," creates financing opportunities that the market would not otherwise create.<sup>33</sup> Indeed, most industrialized countries provide official export credit to their nationals via a government entity, known as an export credit agency (ECA).<sup>34</sup>

Export credit insurance, one form of officially supported export credit, functions like automobile insurance, except that the asset the insurance company protects is not a car but rather a trade receivable. Private insurance companies, such as Chubb, American International Group, Inc., and FCIA Management Company, Inc., as well as ECAs, such as the Export-Import Bank of the United States (the U.S. ECA), issue export credit insurance policies. ECA participation in the export credit insurance industry marks it as a potential breeding ground for subsidies and thus a potential target for transnational coordination and regulation.

Indeed, that is what happened, although it did not start with some ministerial or the founding of a large institution, WTO-style. Instead it started in 1934 in a bar in Berne, Switzerland, between friends over drinks, when a small group of European export credit insurers decided to pool experiential data regarding claims and recovery experiences in the name of sound

---

32. I was Assistant General Counsel of the Export-Import Bank of the United States from 1998 to 2000, and I not only observed but also participated in the very lawmaking process that I now recount. For a more extensive treatment of this lawmaking story, see Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 144-57.

33. Just as domestic credit allows consumers to buy today and pay tomorrow, export credit allows importers (buyers) to buy today and defer payment to some point in the future. An exporter may extend such credit directly by offering the buyer "open account" terms, whereby the exporter (seller) ships goods with an invoice requesting payment in 60, 90, or 180 days. Often the exporter will not have the liquidity to extend such credit (i.e., in deferring payment, the exporter foregoes cash today) or the appetite for the risk that a buyer, often quite distant geographically, will ultimately default (i.e., does not pay when the invoice is due). At the same time, if the exporter were to require the importer to pay immediately upon receipt of goods, or pay cash in advance, the importer might try to find an alternative supplier for the goods (and, hopefully, attractive credit terms). Export credit instruments—instruments that pass credit risk to third parties (banks, insurance companies, or governments)—can solve these dilemmas for an exporter. For example, an exporter can buy an export credit insurance policy on a trade receivable (i.e., buyer's promise to pay ninety days following receipt of goods). If the ninety-day period passes and the buyer does not pay, then the exporter looks to the insurance company, rather than the buyer, for payment, and the insurance company, in turn, attempts to recover from the buyer. Thus, the exporter's risk of non-payment is essentially the risk that the *insurance company* will not pay. If the exporter does not want to wait the full ninety days for payment, the exporter can readily sell or borrow against a trade receivable backed by a credible insurance policy. Through this type of risk passing, or financial intermediation, exporters may offer competitive credit options while maintaining a viable risk portfolio and sufficient liquidity to increase business and overall volume of trade.

34. See Organisation for Economic Cooperation and Development [OECD], Export Credits, Official Export Credit Agencies Website Links, [http://www.oecd.org/countrylist/0,2578,en\\_2649\\_34169\\_1783635\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/countrylist/0,2578,en_2649_34169_1783635_1_1_1_1,00.html) (last visited Apr. 27, 2007); see also OECD, EXPORT CREDIT FINANCING SYSTEMS: IN OECD MEMBER COUNTRIES AND NON-MEMBER ECONOMIES (6th ed. 2001); Harvard Business School, Project Finance Portal, Export Credit Agencies, <http://www.people.hbs.edu/besty/projfinportal/ecas.htm> (last visited Apr. 27, 2007).

insurance practice. This informal gathering gave birth to the Berne Union.<sup>35</sup> Following World War II, when government ECAs began using export credit insurance as an aggressive backdoor to subsidize exports, Berne Union members—private insurers and government technocrats—decided to transform the Berne Union from a mere trade association into a regulator to target abusive and aggressive subsidy practices.<sup>36</sup>

Thus, over the years, the members have used the semi-annual Berne Union get-togethers as a focal point to collect and share their practices and approaches to a variety of regulatory questions, and they have codified these in a living document called the “General Understanding.”<sup>37</sup> The General Understanding essentially divides the universe of insurable goods and services into seven baskets. Within each category, the General Understanding prescribes specific, technical, and at times cumbersome rules to standardize the type of insurance products that members may offer and circumscribe the terms that such policies may contain.<sup>38</sup> Thus, the General Understanding is a comprehensive regulatory matrix for the export credit insurance industry, essentially translating insurers’ on-the-ground experiences into a set of technical rules designed to calibrate transactions, discipline ensuing practice, and thereby prevent an export credit insurance policy from masking a predatory export subsidy.

While the General Understanding is technically not international law,<sup>39</sup> these rules nonetheless function as law should—they are authoritative and effectively binding. My research shows that almost all Berne Union members follow the General Understanding rules, incorporating them into their insurance policies and designing programs and products in sync with the rules.<sup>40</sup> When a Berne Union member deviates from the rules, a host of informal “sanctions,” from public chastisement to hallway gossip to re-

---

35. Today, the Berne Union has fifty-two members, including both the private companies and the public ECAs. BERNE UNION Y.B. 158 (2005).

36. For a description of the Berne Union as regulator, see discussion of the Berne Union’s General Understanding in Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 149-53.

37. Int’l Union of Credit and Investment Insurers, *The Berne Union Agreements, Understandings and Obligations in the Export Credit Insurance Field: General Understanding* (2001) (on file with author). For an explanation of the ends to which the author went to obtain this source, see Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 151 n.107.

38. These rules are particularly focused on limiting the “length” of the outstanding credit. On the theory that “time is money,” an insurance policy that will cover a receivable for a year is certainly more valuable than an insurance policy that will cover the same receivable for only three or six months. The General Understanding, among other things, sets maximum coverage periods for each basket of goods.

39. In a formal sense, “international law” includes: (1) a treaty or other international agreement, as defined in the Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“Treaty” means an international agreement concluded between states in written form and governed by international law); (2) customary international law, *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1990) (“a general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*]”); and (3) general principles of law, *see* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. The General Understanding is self-purportedly not a binding treaty or other “international agreement.” While it is built on practice, the General Understanding is also not customary international law under this definition; it is not the “practice of states,” nor is it “general.”

40. Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 154-56 nn.119-20.

leveling the playing field by offering other members the option of matching deviant behavior, operate as a realigning check.<sup>41</sup>

Furthermore, as the Berne Union rules have consistently facilitated over a half-trillion of trade annually while dramatically reducing export credit subsidies,<sup>42</sup> it is unsurprising that other, more formal lawmaking institutions—notably the Organisation for Economic Cooperation and Development (OECD), the WTO, and the European Union—borrow from the General Understanding in developing their own approaches to export credit subsidies.<sup>43</sup> For instance, the Agreement on Subsidies deems any officially supported export credit insurance policy to be a prohibited export subsidy unless it complies with much of the General Understanding.<sup>44</sup> Thus, many Berne Union rules, even for a formalist, have hardened into the international laws that redress subsidies in the export credit insurance world.

### B. *Climate Change Regulation*

On its face, the Bush Administration's decision not to join the Kyoto Protocol<sup>45</sup> proves nationalists' theory; it is an example of an executive determined to protect U.S. business interests in spite of, and to the detriment of, a mounting international regulatory regime.<sup>46</sup> Yet, the nationalist account severs and ignores a parallel transnational lawmaking process that bluntly strives for, and is incrementally and imperfectly achieving, Kyoto-like goals.

U.S. multinational corporations (MNCs) operating in Kyoto signatory countries are subject to local Kyoto-related emission targets, taxes, and

41. *Id.* at 153-54. For this insight, I borrow from the private legal system literature. *See, e.g.,* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 138-40 (1992).

42. BERNE UNION Y.B. 118 (2005).

43. Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 156-57, 165-67.

44. In reality, the relationship between the General Understanding and the Agreement on Subsidies is more attenuated. The General Understanding rules have been incorporated into the Arrangement on Officially Supported Export Credit [the Arrangement] which is self-referentially a "Gentlemen's Agreement," drafted and managed by the Participants Group, an informal "club" of ECA export credit insurers that is loosely affiliated with the Export Credit Group of the OECD. *See* OECD, *Arrangement on Officially Supported Export Credits*, Doc. TD/PG (2004) 12/REV (Jan. 27, 2005). The Agreement on Subsidies creates a safe harbor for ECAs that comply with the Arrangement. *See* Agreement on Subsidies, *supra* note 31, at Annex I(k). For a more detailed discussion of the relationship between the Berne Union rules, the Arrangement, and the Agreement on Subsidies, see Levit, *Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 156-67. *See also* Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65, 125-26 (2004).

45. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22. The Protocol sets binding targets for developed countries to reduce greenhouse gas emissions on average 5.2 percent below 1990 levels in order to address global warming.

46. Indeed, President Bush rejects the Kyoto approach to global warming, arguing that cutting emissions will lead to higher energy prices, a reduction in GDP, and the loss of U.S. jobs; the administration favors an approach that combats climate change by supporting research and new, energy-efficient technologies. Press Release, White House, President Bush Discusses Global Climate Change (June 11, 2001), available at [www.whitehouse.gov/news/releases/2001/06/20010611-2.html](http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html); Climate Change Report, Cabinet-Level Group on Climate Change, July 31, 2001, available at <http://www.whitehouse.gov/news/releases/2001/06/climatechange.pdf>; *see also* Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. TIMES, May 14, 2005, at A9 (explaining that "Bush 'favors an aggressive approach' on climate change, 'one that fosters economic growth that will lead to new technology and innovation'").

regulatory standards, forcing such companies to reassess their policies and practices abroad, which discernibly impacts practices within the United States, as well.<sup>47</sup> NGOs not only collect information on environmental practices, but they have partnered with trade associations, intergovernmental organizations and investment funds to create meaningful incentives for corporations to reduce greenhouse gas emissions.<sup>48</sup> The World Economic Forum has begun credentialing and monitoring companies for climate change-related practices.<sup>49</sup> Climate exchanges now allow members to trade emissions credits as long as members agree to phased, overall reductions in emissions levels.<sup>50</sup> California recently adopted Kyoto-like standards as state law,<sup>51</sup> and other states are working on greenhouse gas emission initiatives designed to enhance corporate transparency and reporting in the environmental area.<sup>52</sup> Several municipalities have created climate change protection programs,<sup>53</sup> and in June

---

47. DANIEL BODANSKY, PEW CENTER ON GLOBAL CLIMATE CHANGE, IMPLICATIONS FOR U.S. COMPANIES OF KYOTO'S ENTRY INTO FORCE WITHOUT THE UNITED STATES (2002), available at <http://www.pewclimate.org/docUploads/Kyoto-USBusiness.pdf>; Telephone Interview with Miles Tolbert, Sec'y of Energy and Environment, State of Okla. (Mar. 24, 2006).

48. Of particular interest is Ceres, Inc., a U.S.-based coalition of institutional investors, environmental groups, and public interest organizations who have developed a scoring system to assess the "job that corporate executives and board members are doing to enact well-functioning governance systems to face the climate challenge." DOUGLAS G. COGAN, CORPORATE GOVERNANCE AND CLIMATE CHANGE: MAKING THE CONNECTION (2006), available at [http://www.ceres.org/pub/docs/Ceres\\_corp\\_gov\\_and\\_climate\\_change\\_sr\\_0306.pdf](http://www.ceres.org/pub/docs/Ceres_corp_gov_and_climate_change_sr_0306.pdf). Interestingly, Ceres also directs the Investor Network on Climate Risk, a group of fifty institutional investors, with over three trillion dollars in assets under management, who promote better understanding of the risk of climate change.

49. The World Economic Forum, in conjunction with trade associations, NGOs, and Deloitte Touche Tohmatsu, has launched a new global greenhouse gas registry to stimulate the disclosure and management by companies of their worldwide climate emissions. Pew Center on Global Climate Change, World Economic Forum Global GHG Registry, [http://www.pewclimate.org/we\\_forum.cfm](http://www.pewclimate.org/we_forum.cfm) (last visited Apr. 27, 2007). Any company that joins the registry agrees to certain greenhouse gas targets and agrees to disclose greenhouse gas-related information, conduct their finances in a transparent way, and submit itself to third-party monitoring.

50. The Chicago Climate Exchange, a greenhouse gas emission trading system, is a self-regulatory, rules-based exchange designed and governed by members, who make a voluntary but legally binding commitment to reduce emissions. By the end of Phase I in December 2006, all members will have reduced direct emissions 4% below a baseline period of 1998-2001. Chicago Climate Exchange, About CCX, <http://www.chicagoclimatex.com/about> (last visited Apr. 27, 2007). The U.S. Conference on Mayors endorsed the CCX at its June 2006 meeting. Press Release, The U.S. Conference of Mayors Partners with ICLEI to Combat Global Warming (June 5, 2006), available at [http://www.usmayors.org/74thAnnualMeeting/iclei\\_060506.pdf](http://www.usmayors.org/74thAnnualMeeting/iclei_060506.pdf).

51. Press Release, Gov. Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions (Sept. 27, 2006), available at <http://gov.ca.gov/index.php?/print-version/press-release/4111/> (signing legislation that would create in California greenhouse gas emissions caps, as well as an emissions trading system). Also of note, on July 31, 2006, Governor Schwarzenegger of California and Prime Minister Tony Blair of the United Kingdom entered into a partnership agreement in the name of coordinated emissions reductions. See Fact Sheet, Office of the Governor, California/Britain Announce Historic Partnership to Address Climate Crisis, <http://gov.ca.gov/index.php/fact-sheet/3585/> (last visited Apr. 27, 2007).

52. PEW CENTER ON GLOBAL CLIMATE CHANGE, CLIMATE CHANGE ACTIVITIES IN THE UNITED STATES: 2004 UPDATE (2004), <http://www.pewclimate.org/document.cfm?documentID=295>.

53. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1580-81 n.55, 1645-46 nn.393-94 (2006). Seattle, a trailblazer in municipal-based climate change activities, requires that cruise ships turn off their diesel engines and connect to the city's renewable energy supplies, a rule that has required some retrofitting of ships, easing the way for similar efforts in other port cities. Paul Brown, *US Cities Snub Bush and Sign Up to Kyoto*, THE GUARDIAN (London), May 17, 2005, at 19. Salt Lake City has embraced wind power, and New York City, under the stewardship of Republican Mayor Michael Bloomberg, is buying hybrid vehicles for the entire municipal fleet. Eli Sanders, *Seattle Leads US Cities*

2005 the U.S. Conference on Mayors unanimously endorsed the U.S. Mayors Climate Protection Agreement, which requires municipalities to embrace Kyoto-like policies.<sup>54</sup> Individual consumers purchase “carbon-offsets,” and thereby utilize Kyoto-like mechanisms to pay for and balance their own emissions.<sup>55</sup> Increasingly, in large part due to consumer preferences and demand, U.S. businesses self-regulate in recognition that long-term business interests are coincident with Kyoto-like goals.<sup>56</sup> Also, the U.S. Supreme Court recently stepped into the fray, placing some pressure on the Environmental Protection Agency to begin regulating greenhouse gas emissions within the United States.<sup>57</sup>

While a comprehensive account of climate change initiatives is beyond this Article’s scope, it bears noting that some of these efforts are changing the behavior of both private and public entities.<sup>58</sup> I do not claim that this smattering of climate change initiatives is as effective, efficient, and inclusive as a top-down, treaty-based effort. Nor do I claim that these corporate actors have suddenly become environmentally altruistic; long term profit motives undoubtedly remain at the core of their decisions (yet the mere fact that their decisions are motivated by self-interest does not in and of itself negate their normative impact).<sup>59</sup> My modest claim is that the normative efforts of parallel lawmaking communities may ultimately subvert the President’s choice not to join Kyoto.

---

*Joining Kyoto Protocol*, INT’L HERALD TRIB., May 16, 2005, at 2, available at <http://www.iht.com/articles/2005/05/15/news/global.php>.

54. U.S. Conference of Mayors, 2005 Adopted Resolutions: Environment, Endorsing the U.S. Mayors Climate Protection Agreement, [http://www.usmayors.org/uscm/resolutions/73rd\\_conference/env\\_04.asp](http://www.usmayors.org/uscm/resolutions/73rd_conference/env_04.asp) (last visited Apr. 27, 2007) (calling on municipalities to work with the ICLEI-Local Governments for Sustainability to monitor progress toward meeting these goals).

55. While corporations have been purchasing carbon offsets for years, social entrepreneurs (e.g., Carbonfund, Climate Care, Climate Trust, and TerraPass) as well as corporations, are now marketing carbon offsets to individual consumers (especially those susceptible to eco-guilt). Groups like Climate Care cleverly market gift certificates designed to neutralize all or part of such emissions (such as the “climate neutral wedding” certificates for approximately \$200, which offsets 14.5 tons of carbon dioxide, enough to offset “emissions for 150 guests and the happy couple’s honeymoon flight”). See Climatecare, Gift Calculator—Offset Calculator, <http://www.climatecare.org/calculators/gift> (last visited Apr. 27, 2007). Likewise, Ford Motor Company has joined with TerraPass to market carbon offsets to SUV purchasers for eighty dollars per year. See TerraPass, Ford and TerraPass Bring You Greener Miles, <http://www.terrapass.com/ford/> (last visited Apr. 27, 2007); see also Claudia H. Deutsch, *Attention Shoppers: Carbon Offsets in Aisle 6*, N.Y. TIMES, Mar. 7, 2007, at H1.

56. See, e.g., Thomas L. Friedman, *Marching with a Mouse*, N.Y. TIMES, Mar. 16, 2007, at A23; Felicity Barringer, *Corporate Hippies’ Seek Their Bliss in a New Environmental Economy*, N.Y. TIMES, Mar. 7, 2007, at H2; Felicity Barringer, *A Coalition for Firm Limit on Emissions*, N.Y. TIMES, Jan. 19, 2007, at C1.

57. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462-63 (2007).

58. See, e.g., COGAN, CORPORATE GOVERNANCE AND CLIMATE CHANGE, *supra* note 48, at 17-29; Lord Browne of Madingley, *The Path of Enlightened Self Interest*, WORLD PETROLEUM (2002), available at <http://www.world-petroleum.org/first/first2002/Lord%20Browne.pdf>; Miguel Bustillo, *A Shift to Green*, L.A. TIMES, June 12, 2005, at C1.

59. Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 196 (2004) (arguing that corporate self-interest drives international normative activity and that such motivations do not drain this activity of normative content).

### C. Corporate Social Responsibility and Human Rights

At best, the United States is sluggish to sign and ratify multilateral human rights treaties.<sup>60</sup> When the President actually sends human rights treaties to the Senate for ratification, he also sends qualifications—“Reservations, Understandings, and Declarations” or RUDs—carving exceptions for inconsistent U.S. law and proclaiming such treaties to be “non-self-executing,” meaning that they are not judicially enforceable within the United States absent implementing legislation.<sup>61</sup> Furthermore, most state policymakers contend that international human rights treaties only apply to official conduct and thus do not extend to the vast realm of private economic activity.<sup>62</sup> The story that the nationalists tell about these human rights treaties is that they are unnecessary (i.e., the United States is a human rights abiding country that protects civil liberties); nonetheless, ratification may be an incrementally useful public relations instrument for the President, who can cheaply insulate U.S. interests through RUDs that essentially transform such treaties into non-enforceable, aspirational documents.<sup>63</sup>

Yet human rights norms evolve and embed outside the formal treaty-making process. Consider, for example, the polycentric response to highly publicized allegations of abhorrent multinational labor and security practices, including claims of forced labor and torture.<sup>64</sup> On a domestic level, some U.S. courts, using the Alien Tort Claims Act,<sup>65</sup> now hold multinational corporations accountable and liable even though the underlying human rights norms are found in customary international law or in treaties which are not

---

60. For example, the United States signed the Genocide Convention on December 11, 1948 but did not ratify it until November 25, 1988. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Similarly, the United States signed the Convention on the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, S. Exec. Doc. C, 95-2, 660 U.N.T.S. 195, on September 28, 1966, but did not ratify it until October 21, 1994. The United States has not yet ratified the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981). Furthermore, the United States has already announced that it will not ratify the recently concluded United Nations Convention on the Protection of the Rights of the Disabled, arguably the “first comprehensive human rights convention of the 21st century.” *All Things Considered: U.N. Panel Crafts Rights Paper for World’s Disabled* (National Public Radio broadcast Aug. 28, 2006).

61. See, e.g., U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781, 4784 (daily ed. Apr. 2, 1992) (stating that “The Senate’s advice and consent is subject to . . . [t]hat the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing”).

62. However, it is generally accepted that for a group of human rights violations that would also be international crimes, for example genocide, the “state action” requirement no longer holds and private parties are subject to such provisions.

63. This paragraph is essentially a summary of the human rights chapter in GOLDSMITH & POSNER, *supra* note 6, at 107-34.

64. See, e.g., Linda Baker, *The Goal: “Sweatshop Free.” The Problem: Defining It*, N.Y. TIMES, Dec. 14, 2003, at C3; David Gonzalez, *Latin Sweatshops Pressed by U.S. Campus Power*, N.Y. TIMES, Apr. 4, 2003, at A3; Steven Greenhouse, *Labor Abuses in El Salvador are Detailed in Document*, N.Y. TIMES, May 10, 2001, at A12. See generally HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES (1999); HUMAN RIGHTS WATCH, COLOMBIA: HUMAN RIGHTS CONCERNS RAISED BY THE SECURITY ARRANGEMENTS OF TRANSNATIONAL OIL COMPANIES (1998), available at <http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm>.

65. 28 U.S.C. § 1350 (2000).

technically enforceable in U.S. courts.<sup>66</sup> On an international level, the United Nations Global Compact<sup>67</sup> asks multinational corporations to pledge support for human rights principles<sup>68</sup> and transparently implement “changes to business operations” so that these principles “become part of strategy, culture and day-to-day operations.”<sup>69</sup> Over 2000 companies from over eighty countries have signed onto the Global Compact, with eighty-three from the United States, including Nike and The Gap, two companies that have received particularly notorious publicity for their labor practices.<sup>70</sup> In addition to the Global Compact approach, consumer-driven boycotts have, in some instances, prodded corporate adoption of codes of conduct and social responsibility statements.<sup>71</sup> Alternatively, NGOs and trade associations urge sector-specific codes, including monitoring and reporting mechanisms.<sup>72</sup>

In other instances, state actors broker dialogue between stakeholders, abandoning their traditional lawmaking role in favor of a facilitating and conciliating function. Particularly notable in this regard are the Voluntary Principles on Security and Human Rights [hereinafter Voluntary Principles],<sup>73</sup> a U.S./U.K. facilitated initiative, bringing together the largest MNCs in the

66. These treaties are not directly enforceable in U.S. courts because: (1) the United States has not ratified the treaty; or (2) the treaty, while ratified, is non self-executing and Congress has not passed any implementing legislation. For an example of Alien Tort Claims Act litigation, see *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (claims of forced labor, murder, rape, and torture), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). Of course, the U.S. Supreme Court choked, but did not close, this path in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). For a more general discussion of courts' use of non-ratified or non-self-executing treaties in constitutional interpretation, see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007).

67. The Global Compact is a joint venture among the United Nations, the private sector, labor, and civil society to support ten universal principles in the areas of human rights, labor, the environment, and anti-corruption in furtherance of “responsible corporate citizenship.” United Nations Global Compact, *What Is the Global Compact?*, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Apr. 27, 2007). For enforcement, the Global Compact “relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action.” *Id.*

68. These human rights principles are inspired by various international instruments, most prominently including the Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) (United States has not ratified); the International Labor Organization Declaration on Fundamental Principles and Rights at Work, June 19, 1998, 37 I.L.M. 1233 (United States has not ratified); the Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874 (United States has not ratified); and the U.N. Convention Against Corruption, G.A. Res. 4, U.N. GAOR, 58th Sess., Item 108, U.N. Doc. A/RES/58/4 (2003), available at [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf) (United States ratified with non-self-executing declaration).

69. United Nations Global Compact, *Participation in the Global Compact*, <http://www.unglobalcompact.org/HowToParticipate/index.html> (last visited Apr. 27, 2007).

70. Jenny Strasburg, *Gap Finds Problems at Thousands of its Overseas Factories: Openness on Work Conditions Praised*, S.F. CHRON., May 13, 2004, at A1 (noting repeated “health and safety infractions” at most Gap supplier factories, “from China and Africa to India and Central and South America”); Ronald K.L. Collins & David M. Skover, *Foreword: The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 968-71 (2004) (recounting Nike's alleged labor practices in Indonesia and Vietnam).

71. See Spiro, *Disaggregating U.S. Interests in International Law*, *supra* note 59, at 208 n.41 (listing several consumer boycotts that resulted in changes in corporate practice).

72. For an excellent description of the relationship between NGOs and sector-specific codes and norms, see Gary Gereffi, Ronie Garcia-Johnson & Erika Sasser, *The NGO-Industrial Complex*, FOR. POL'Y, July-Aug. 2001, at 56.

73. Voluntary Principles on Security and Human Rights (Feb. 20, 2001), available at <http://www.state.gov/drl/rls/2931.htm> [hereinafter Voluntary Principles].

extractive industries, human rights NGOs, corporate responsibility groups, and labor.<sup>74</sup> The discourse spawned non-binding, yet “detailed” and “programmatic,” principles “to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.”<sup>75</sup> State actors played a similar “brokering” role in the apparel industry, convening stakeholders to work toward aligning “sweatshop” conditions with human rights and labor norms.<sup>76</sup>

Again, I recognize that I have done little more herein than describe some relatively isolated, industry-based initiatives, focusing on the nexus between multinational operations and human rights principles. Yet, there is evidence that these initiatives are incrementally shifting corporate outlook and molding behavior.<sup>77</sup> Consider the Voluntary Principles. All participating MNCs have adopted some type of “social responsibility” statement that acknowledges the corporation’s responsibility for respecting and promoting human rights.<sup>78</sup>

---

74. For an account of the process leading to the convening of the group and the drafting of the Voluntary Principles, see Bennett Freeman, Maria B. Pica & Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principle on Security and Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 423 (2001).

75. Voluntary Principles, *supra* note 73. Specifically, the Voluntary Principles instruct MNCs in: (1) assessing risk of the operating environment; (2) structuring relationships with the public security forces in a manner that encourages respect for human rights and avoids excessive use of force; and (3) structuring relationships with private security in a way that not only encourages respect for human rights principles (echoing the principles applied to public security) but also creates contractual incentives to aid in enforcement. *Id.* Since the Voluntary Principles’ “roll out,” the group has continued its dialogue, adding corporate, governmental, and civil society participants and creating a Secretariat, a web site, country-specific working groups, and a regular meeting schedule. See The Voluntary Principles on Security and Human Rights, Welcome, <http://www.voluntaryprinciples.org/> (last visited Apr. 27, 2007).

76. See, e.g., Apparel Industry Partnership’s Agreement, <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/apparell.htm> (Apr. 14, 1997) (between NGOs and multinational clothing manufacturers) [hereinafter AIP Agreement]; INTERNATIONAL LABOUR OFFICE, PROMOTING FAIR GLOBALIZATION IN TEXTILES AND CLOTHING IN A POST-MFA ENVIRONMENT (2005), available at <http://www.ilo.org/public/english/dialogue/sector/techmeet/tmtc-pmfa05/tmtc-pmfa-r.pdf>. The Fair Labor Association (FLA), a non-profit organization comprised of industry and NGO representatives, is a direct outgrowth of the AIP Agreement. The FLA has adopted the AIP Agreement as its Code of Conduct and, with the goal of maximizing compliance with the Code of Conduct, supports third party monitoring (as envisioned in the AIP Agreement and the FLA Code of Conduct), publishes the results of third party monitoring in an annual report, and creates a third party complaint procedure by which those third parties (NGOs, individuals) who witness violations of the Code of Conduct may confidentially file a complaint with the FLA and trigger an investigation. Over nineteen apparel companies, with 3500 suppliers in seventy-six countries, producing over \$30 billion of goods, have joined the FLA; in addition, over 190 colleges and universities have joined to promote practices consistent with the Code of Conduct in producing apparel bearing their logos. See Fair Labor Association, <http://www.fairlabor.org> (last visited Apr. 27, 2007).

77. Gereffi et al., *supra* note 72, at 56 (noting that Starbucks announced that it would buy coffee from importers who pay above market prices to farmers and DeBeers is avoiding investments in Africa to distance itself from “blood diamond” controversy). See also *id.* at 62 (noting that the Gap has started independent monitoring for foreign contractors to monitor compliance with the Gap’s code of conduct); Press Release, NIKE, Inc., Nike Issues FY04 Corporate Responsibility Report Highlighting Multi-Stakeholder Engagement and New Levels of Transparency (Apr. 13, 2005), available at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2005&month=04&letter=a> (noting several changes in Nike’s business practices due to concerns from NGOs).

78. See, e.g., Amerada Hess Corporation, Corporate Social Responsibility Policy (May 2006), <http://www.hess.com/ehs/policies/csrpolicy.pdf>; Marathon Oil Corporation, Social Responsibility, [http://www.marathon.com/Our\\_Values/Social\\_Responsibility](http://www.marathon.com/Our_Values/Social_Responsibility) (last visited Apr. 27, 2007); Newmont Mining Corporation, Social Responsibility Policy and Guidelines (Oct. 2003), <http://www.newmont.com/en/social/policy/social/index.asp>.



Some companies have created offices of human rights compliance.<sup>79</sup> Others create management training modules focusing on human rights concerns.<sup>80</sup> And those MNCs who were not part of the Voluntary Principles drafting process, but who want to join the group (albeit for self-interested reasons) must prove adherence and commitment to the principles.<sup>81</sup>

Granted, neither the Global Compact, Voluntary Principles, nor any other industry-specific, standard-setting group has miraculously transformed “participants” into model, socially conscious corporate citizens. And many may dismiss corporate human rights initiatives as mere self-interested lip service.<sup>82</sup> Yet, human rights norms are resilient, with a momentum of their own, and slowly, albeit imperfectly, some norms will seep into corporate consciousness and shape behavior in spite of high-level diplomatic maneuvering to limit human rights treaties’ reach.

#### D. *Bottom-Up International Lawmaking*

In each vignette, the nationalists offer a top-down tale; however, on-the-ground reality recasts tale as myth. Whereas nationalists depict the WTO Agreement on Subsidies as political elites’ tightly choreographed effort to create an “even playing field” for national exporters, many of the rules in the Agreement on Subsidies predate, by decades, the founding of the WTO and are the fruits of secretive, club-like, cocktail napkin agreements among private parties and low-level technocrats. Likewise, nationalists celebrate the President’s decision not to join Kyoto as critically preserving the “national” interest; yet this decision may very well be subverted, at least in part, by an irrepressible, and seemingly ever-growing, epistemic community of municipalities, governors, state legislatures, NGOs, private climate exchanges, international organizations, and multinational corporations. Similarly, nationalists cast human rights treaties in instrumental terms, as superfluous, yet relatively cheap “public relations” tools that the “political leadership” can tightly circumscribe through RUDs; yet human rights norms surface in

---

79. See Freeport-McMoRan Copper & Gold, Inc., Human Rights Policy and Implementation, <http://www.fcx.com/envir/hrpol.htm> (last visited Apr. 27, 2007).

80. SHELL INTERNATIONAL PETROLEUM COMPANY, BUSINESS AND HUMAN RIGHTS: A MANAGEMENT PRIMER (1998), available at [http://www.shell.com/static/media-en/downloads/business\\_and\\_human\\_rights\\_primer.pdf](http://www.shell.com/static/media-en/downloads/business_and_human_rights_primer.pdf).

81. It is clear that Anglo American was permitted to join the Voluntary Principles group in January 2005 only after “a lengthy period of risk assessment” and the “preparation of materials for implementing the Principles.” Anglo American, The Voluntary Principles on Security and Human Rights, <http://www.angloamerican.co.uk/cr/internationalcommitments/voluntaryprinciples> (last visited Apr. 27, 2007). The International Business Leaders Forum, one of the corporate social responsibility groups that lends support to the Voluntary Principles, notes that, before becoming a participant, the existing participants must achieve consensus that the prospective member will: (1) act in good faith in support of the Voluntary Principles; and (2) report at least annually on compliance with the Voluntary Principles. See International Business Leaders Forum, Voluntary Principles on Security and Human Rights: Doors Open to New Participants (May 19, 2006), [http://www.iblf.org/media\\_room/general.jsp?id=123765](http://www.iblf.org/media_room/general.jsp?id=123765).

82. In fact, this was a refrain of the discussion during SELA’s “Globalization and Executive Power” panel. See Panel Discussion, Seminario en Latinoamérica de Teoría Constitucional y Política [Seminar in Latin America on Constitutional and Political Theory] (June 9, 2006), in SELA 2006: EL PODER EJECUTIVO (Roberto Saba ed., forthcoming 2007) (Owen Fiss, Moderator; Janet Koven Levit, Laura Salvidia, and Aida Torres, Panelists).

palpable ways outside the treaty process, via private and/or NGO-driven, standard-setting initiatives; corporate social accounting, monitoring, and reporting; and private contractual relationships.

These counter-stories are examples of bottom-up international lawmaking. They are conspicuously not top-down enterprises driven solely by the “state.” Instead, relatively spontaneous, unchoreographed interactions among private parties, mid-level bureaucrats, and NGOs seemingly inadvertently spark a process which ultimately produces “law.” In labeling this process “bottom-up international lawmaking,” I focus on two defining features. First, the “bottom-up” label grounds the normative process in the practitioners, both public and private, including those motivated by altruism and those motivated by profit, who join with others similarly situated in avocation (although often quite distant in location) to share experiences and standardize practices toward shared goals. Some might question my use of the word “practitioner” to describe some of the NGO and public interest-related activities described herein. Yet I use the term loosely to describe those on the ground, armed with intimate knowledge of their niche trade and/or interest areas, who constitute norms rooted in the nitty-gritty technicalities of their trade rather than the winds of geopolitics and diplomacy. Second, as will be highlighted in Part IV,<sup>83</sup> the “lawmaking” label punctuates the flow from informal norm to hard (or harder) law. In each of these examples, issue-bound groups, some tightly-knit, others rather diffuse, grappled with problems by setting norms, rooted in practice, designed initially to be a form of self-regulation but which ultimately seeped into more formal or official legal structures. Thus, whereas top-down lawmaking is a process of law instituted as practice, bottom-up lawmaking is a process whereby practices and behaviors gel as law.

Bottom-up lawmaking at once debunks the perceived hegemony of official, top-down international lawmaking—lawmaking that often occurs beyond the physical and metaphysical reach of its subjects—and showcases an alternative route to law that is inherently grounded and pluralist. At least on a theoretical level,<sup>84</sup> bottom-up lawmaking is a participatory, organic process that ensues in the trenches, driven by a diverse community of transnational actors who share a stake in any particular regulatory outcome. Which emerges as a more democratic form of lawmaking? The State Department sending a team of diplomats to Japan to negotiate a climate change treaty? Or a type of epistemic community of corporate actors, NGOs, credentialing agencies,

---

83. See *infra* notes 106-110 and accompanying text.

84. But see *infra* notes 124-127 and accompanying text. Granted, the theoretical underpinnings of democracy undoubtedly remain a point of heated academic and philosophical debate. For some, democracy is participation. For others, democracy is deliberation. For still others, democracy has independent, normative weight. Bottom-up lawmaking’s democratic credentials would resonate particularly for those who embrace “participatory” or “deliberative” democracy. For a sampling of democratic theory, see CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP* (1984); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). See also Andrew Moravcsik, *Is there a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 *GOV’T & OPPOSITION* 336, 338-343 (2004) (discussing libertarian, pluralist, social democratic, and deliberative notions of democracy).

investors, technocrats, and municipalities grappling with the desirability and viability of climate change regulation? In the sheer number and variety of transnational actors that bottom-up lawmaking engages, and in its locating decisionmaking at the point of impact, bottom-up international lawmaking, particularly when compared with its top-down foil, offers a route to law firmly rooted in democratic principles.<sup>85</sup>

#### IV. THE MYTHS OF INTERNATIONAL LAWMAKING IN A NATIONALIST WORLD

A mushrooming of international norms and institutions is certainly one of the byproducts of globalization. Yet an equally important, yet less discussed and appreciated, phenomenon is the proliferation of international lawmaking processes, an exponential growth in the routes to international law. Indeed, this Article's account of bottom-up lawmaking is emblematic of just one of many decentralized international lawmaking processes that constitute (and continually reconstitute) a colorful and multidimensional *mélange* of international laws and legal regimes. While bottom-up lawmaking will never be (nor would I want it to be) a hegemonic process, I highlight it here because its rhythm and cadence challenge the integrity and transcendence of the nationalists' international lawmaking stories, exposing oversimplified myths that often transform their purported non-fiction into fairy tale. Thus, I revert to the general approach that my New Haven School predecessors embraced, offering concrete empirical examples that challenge the assumptions at the heart of the nationalists' model.

##### A. *Myth 1: States as Lawmakers*

As the bottom-up lawmaking examples in this Article illustrate, international lawmaking in an era of globalization is not merely the realm of the state's diplomatic elites; it is also the domain of corporations, insurance companies, NGOs, inter-governmental organizations, sub-national entities, cities, judges, bureaucrats, technocrats, the media, and individuals. Of course, this well-worn observation is deeply rooted in the New Haven School's panoply of "[p]articipants in the [w]orld [p]ower [p]rocess."<sup>86</sup> Likewise, Harold Hongju Koh, who weaves some New Haven School tenets into his Transnational Legal Process School, recognizes and celebrates the "transnational actor," as opposed to the classic state diplomat, as the engine of international law and lawmaking.<sup>87</sup> In highlighting the role of non-state actors, sub-state actors, and civil society, bottom-up lawmaking stories expose the first nationalist myth, that state political elites, the executive in particular, hold

---

85. It is quite apropos that I attribute many of these insights to Michael Reisman, a bearer of the New Haven School torch, who has recently argued that the proliferation of lawmaking processes, modalities, and participants has actually "facilitated the democratization of international law-making." Reisman, *The Democratization of Contemporary International Law-Making*, *supra* note 7, at 22.

86. See McDougal, *International Law, Power, and Policy*, *supra* note 1, at 173; McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*, *supra* note 1, at 261-67.

87. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 183 (1996) [hereinafter Koh, *Transnational Legal Process*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2626 (1997) (book review) [hereinafter Koh, *Why Do Nations Obey International Law?*].

a monopoly on international lawmaking. Political elites undoubtedly retain a role; yet, as other lawmakers, particularly private actors and sub-state actors, emerge on the transnational lawmaking scene, the state's hegemony in international lawmaking wanes.

Many scholars, including New Haven School scholars, have long recognized that non-state actors, particularly NGOs, influence international lawmaking.<sup>88</sup> Yet, international legal scholars have been relatively slow to appreciate a fact which the New Haven School noted decades ago: Private actors, not only NGOs but also corporations and private individuals, do not merely exert influence on state-driven lawmaking processes but in fact constitute such processes and make law themselves.<sup>89</sup> As we have witnessed privatization in some domestic lawmaking,<sup>90</sup> we are also witnessing privatization in some areas of international lawmaking.<sup>91</sup> A byproduct, of course, is that law emerges beyond the purview of the state.

Similarly, scholars traditionally underappreciate sub-state actors' role in international lawmaking.<sup>92</sup> Elsewhere, I have attributed this neglect to: (1) general neglect, throughout U.S. legal education, of state courts and state and

---

88. For an excellent treatment of the history of NGOs and their activities, see Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006). See also MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 35 (1998).

89. In reality, I think that even the New Haven School's position on this question—whether private actors are lawmakers or merely those who exert influence and pressure on lawmakers—is a bit ambiguous. On the one hand, New Haven School scholars consistently list NGOs and private business associations as “participants” in the world constitutive process. See, e.g., McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*, *supra* note 1, at 267-75. On the other hand, in reading some of the copious New Haven School writing, one at times questions whether such participation in the lawmaking process is primarily in the form of influencing the perspectives of those with decisionmaking authority and control, often official elites. Yet in defining the lawmaking process quite broadly, as triggered by a broad, social process of communication, one can just as easily conclude from New Haven School writings that influence, as a form of communication, is an integral part of “lawmaking” and thereby credibly argue that New Haven School scholars were on the forefront of recognizing private actors as lawmakers. See Reisman, *International Lawmaking*, *supra* note 1, at 108; McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*, *supra* note 1, at 424.

90. See, e.g., David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 377-82, 384, 397 (2003) (discussing private lawmaking in commercial law, through groups like the American Law Institute and the National Conference of Commissioners for Uniform State Law; securities law, through organizations like the New York Stock Exchange; and negotiable instruments law, through groups like the New York Clearing House Association). Also, U.C.C. art. 5 (letters of credit) perfectly reflects the International Chamber of Commerce's Uniform Customs and Practices, drafted by a private, transnational group of commercial bankers. See Janet Koven Levit, *The ICC Banking Commission and the Transnational Regulation of Letters of Credit: Exploring the Top of Bottom-Up Lawmaking* (unpublished manuscript, on file with author).

91. Laura Dickinson has eloquently noted that the state itself has ceded quintessential roles in foreign affairs to private actors, in areas such as foreign aid and military functions. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005).

92. Interestingly, the New Haven School has largely neglected sub-state actors, as well. The New Haven School scholars certainly abandon the stranglehold of the “nation-state” and, at times, use the term “territorial unit,” as opposed to “nation-state,” in delineating various participants in the world constitutive process. See, e.g., McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*, *supra* note 1, at 263. However, these scholars use the term primarily to encompass “dependent territorial units” without significant reference, other than references to “decentralization” and “pluralization,” to sub-state actors. *Id.* at 263-64.

municipal law;<sup>93</sup> and (2) the fact that the role of sub-state actors in international lawmaking is lost “in the cross-wind of several of the most contentious debates within the international legal academy.”<sup>94</sup> Yet, whether it is the Oklahoma Court of Criminal Appeals validating and complying with an ICJ decision regarding the Vienna Convention’s consular notification provisions,<sup>95</sup> or New England Governors and Eastern Canadian Premiers joining to impose on themselves Kyoto-like emissions and climate change standards,<sup>96</sup> or municipalities from across the country joining to embrace climate change regulation,<sup>97</sup> it is patently clear that sub-state actors also make international law and, in so doing, further detract from the state’s—particularly the executive branch’s—purported hegemony in such matters.<sup>98</sup>

Yet New Haven School scholars certainly did not pronounce the nation-state a defunct transnational actor—the state and official state actors remain quite prominent in New Haven School discourse. Likewise, the lesson from the bottom-up lawmaking vignettes is not that the nation-state is a “moribund” international lawmaker;<sup>99</sup> indeed, the state, the executive branch in particular, continues to play an indispensable role in many areas of international law. Yet, the state’s role in the development of much international law is changing. For instance, in efforts like the Voluntary Principles and the Apparel Industry Partnership Agreement,<sup>100</sup> state officials, often mid-level bureaucrats, assume the posture of a broker, bringing non-state stakeholders—private companies, NGOs, and trade associations—to the negotiating table and acting as a facilitator in the international lawmaking process. While the diplomat historically has mediated disputes among foreign diplomatic counterparts, state officials have not often mustered resources to corral *non-state actors* in the furtherance of international law.

Furthermore, as noted by many international law scholars, the nation-state is not unitary and does not pursue neatly packaged “national interests,” as the nationalists presume.<sup>101</sup> In this regard, not all state-based lawmaking

93. Janet Koven Levit, *Medellín v. Dretke: Another Chapter in the Vienna Convention Narrative*, 41 TULSA L. REV. 193 (2005).

94. Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 183 (2004).

95. *Torres v. Oklahoma*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005).

96. Pew Center on Global Climate Change, *Learning from State Action on Climate Change* (Mar. 2006), <http://www.pewclimate.org/docUploads/UpdatePewStatesBriefMarch2006%2Epdf>.

97. See *supra* notes 53-54 and accompanying text.

98. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 672 (2002); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225 (1999) (arguing that states are like “demi-sovereigns”). For additional discussions of the role of subnational actors in international lawmaking, see Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005) (discussing state-based climate change litigation as a forum for exploring supranational climate change issues).

99. See Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 200 (Gregory H. Fox & Brad R. Roth eds., 2000) [hereinafter Slaughter, *Government Networks*]; see also Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 202 (Michael Byers ed., 2000) [hereinafter Slaughter, *Governing the Global Economy Through Government Networks*].

100. See *supra* notes 73-76 and accompanying text.

101. This insight is developed quite eloquently in Berman, *Seeing Beyond the Limits of International Law*, *supra* note 21, at 1267.

occurs at the command of the President and high-level political appointees. The state itself is disaggregating and networking transnationally with counterparts.<sup>102</sup> Thus, the mid-level bureaucrat or technocrat is assuming an ever more important role in international lawmaking. For instance, those who actively participate in the Berne Union meetings, and its work, generally are not high-level ECA political appointees but rather career bureaucrats who day-in and day-out grapple with the minute technicalities of their niche industry. These career regulators occupy a relatively apolitical bureaucratic space, and their decisions are increasingly immune to administration-driven policy changes.

Thus, if scholars are to understand international law and lawmaking in a robust way, they must turn attention to the real-life decisionmaking trenches of a vast, transnational web of administrative agencies and bureaucrats and corporations and NGOs. Of course, a scholarly project that focuses on those with real, on-the-ground decisionmaking authority, is, in part, the fulfillment of the New Haven School's decades-old mantra.

#### B. *Myth 2: International Law as Treaties and Custom*

The nationalists assume that treaties and (secondarily) state-sanctioned custom constitute the international law universe.<sup>103</sup> Of course, this assumption flows from the first—if the President or diplomatic elites are the sole lawmakers, then the treaty is indeed a logical mechanism for contracting with global counterparts. Long ago, New Haven School scholars recognized the poverty of this narrow, overly simplistic definition of international law.<sup>104</sup> This Article's examples further illustrate the fallacy that nationalists perpetuate. They show that diverse casts of transnational actors parade multiple normative forms, including understandings, informal "gentlemen's agreements," pacts, codes, and court decisions. In the formal, international legal taxonomy, these are examples of "soft law," defined somewhat tautologically as everything that is not hard international law (namely treaties and state-sanctioned custom).<sup>105</sup>

---

102. This insight is at the core of the transgovernmental network theory of international law. These scholars concede that that much international lawmaking occurs without the imprimatur of the classic diplomat but argue that the state nonetheless retains a crucial role in international lawmaking through transgovernmental networks of similarly-situated technocrats. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *supra* note 99, at 199; Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *supra* note 99, at 177; Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 183; *see also* Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002).

103. *See supra* note 39 on the formal sources of international law.

104. *See, e.g.*, McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*, *supra* note 1, at 424 (arguing that Article 38 of the International Court of Justice Statute, *supra* note 39, the article that sets forth the "formal sources" of international law, is at once under-inclusive and over-inclusive but nonetheless a contorted, overly formalistic way to conceive of international law and lawmaking); *see also* Reisman, *International Lawmaking*, *supra* note 1, at 102 (noting that much that is in the form of law is not law, but also noting that some "soft law" actually may "prove quite effective").

105. "Soft law" is not a precise legal term. It includes a myriad of international instruments or, more inclusively, communications ranging from informal understandings or conversations to more

But is this “soft law” law? Are this Article’s vignettes appropriately labeled “lawmaking”? In some instances, the answers are unambiguous; norms that percolate from the bottom up frequently become hard law, either in the form of a formal international agreement or, on the domestic plane, a statute, court-pronounced rule of law, or administrative regulation. While instruments such as the Global Compact, the Voluntary Principles, and the General Understanding are admittedly “soft,” the norms embedded in such instruments often become “hard.”<sup>106</sup> To the extent that MNCs do not comply with their own Global-Compact-inspired corporate codes of conduct or public representations regarding their “green” policies and initiatives, they may be opening themselves to misrepresentation and unfair trade practices claims,<sup>107</sup> and third-party social responsibility audits or verification statements may strengthen such claims.<sup>108</sup> Likewise, if MNCs include social responsibility or environmental standards and/or reporting in their Securities and Exchange Commission disclosures, they could face regulatory sanctions for misrepresentation.<sup>109</sup> And, as MNCs incorporate social responsibility standards, or the Voluntary Principles, into contracts with third-party suppliers, private security providers, or in investment agreements with host governments, noncompliance may pave the way for breach of contract claims.<sup>110</sup>

---

formalized memoranda of understanding, diplomatic letters, protocols, codes of conduct, or informal agreements that have the feel of more formal treaties. See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 25-31 (Dinah Shelton ed., 2000) (discussing different soft law forms, including memoranda of understanding, communiqués, minutes, “soft commitments” embedded in formal treaties, declarations, and agendas, and proposing a classification scheme for soft law instruments). See also Edith Brown Weiss, *Introduction to INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS* (Edith Brown Weiss ed., 1997) (discussing nonbinding norms); *A Hard Look at Soft Law*, 82 ASIL PROC. 371 (1988) (scholarly discussion of the nature of soft law); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 AM. J. INT’L L. 443 (1983).

106. For instance, some of the Berne Union’s General Understanding rules ultimately becomes part of an international treaty, the WTO Agreement on Subsidies. See *supra* notes 43-44 and accompanying text. Some private and NGO-driven climate change initiatives have been incorporated into state statutes and municipal regulations. See *supra* notes 52-54 and accompanying text.

107. These types of claims were at issue in the case that the Supreme Court decided not to decide, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). For an excellent treatment of the issues in this case, see Tamara R. Piety, *Grounding Nike: Exposing Nike’s Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151 (2005).

108. See, e.g., BP Global, Environment and Society, Ernst and Young Verification Statement (Mar. 21, 2006), <http://www.bp.com/sectiongenericarticle.do?categoryId=9008328&contentId=7015269>.

109. It is arguable that reference to social responsibility statements in an SEC filing could expose the multinational to sanctions under Rule 10b-5, which declares any “untrue statement of material fact” or any omission of “material fact” to be “unlawful.” 17 C.F.R. § 240.10b-5. These types of disclosures would certainly benefit from non-financial disclosure rules. See *Corporate Storytelling: Non-financial Reporting*, THE ECONOMIST, Nov. 6, 2004, at 13-14.

110. The Voluntary Principles, for example, ask participants to include the Principles in “contractual provisions in agreements with private security providers.” See Voluntary Principles, *supra* note 73. For instance, the Caspian Sea Pipeline (know as the Baku-Tbilisi-Ceyhan pipeline project) officially opened on July 13, 2006. *Caspian Sea Pipeline is Declared Open*, BBC NEWS, July 13, 2006, <http://news.bbc.co.uk/2/hi/europe/5175676.stm>. BP Exploration Limited, the project sponsor, entered into a series of legally binding agreements with host governments, in which it committed to abide by “Security Principles,” which explicitly incorporate the principles set forth in the Universal Declaration of Human Rights, the European Convention on Human Rights, the United Nations Code of Conduct for Law Enforcement Officials, the United Nations Basic Principles on the use of Force and Firearms by Law Enforcement Officials, and the Voluntary Principles on Security. See, e.g., Protocol Between the

Yet, this Article's vignettes raise an even more profound question: Is it desirable, or advisable, to conceive of instruments such as the General Understanding, the Voluntary Principles, or the U.S. Mayors Climate Change Agreement not as soft law but simply as law? Consider this Article's discussion of the General Understanding, which, under the formal taxonomy, is a "soft" legal instrument; however once the WTO Agreement on Subsidies appropriates its rules, such rules embed in a treaty and become hard law. In a recent article, I tracked the General Understanding's trajectory, pinpointing moments when the rules cross the magical boundary from soft to hard law, and, unsurprisingly, that moment passes as a non-event with no practical or functional import and no discernible impact on overall compliance with Berne Union rules.<sup>111</sup>

Why, then, have international legal scholars traditionally divided the international law universe according to formal labels and classifications, segregating and elevating treaties and official state custom from everything else? At one time, this axis undoubtedly helped organize the discipline, adding methodological counterweight to the Cold War realists' attack on international law's very existence.<sup>112</sup> Today, at a moment when international law is here to stay, this justification looms vacuous, and New Haven School parlance may prove prophetic: "[I]nherited terminology has become an obstacle to, rather than an instrumentality of, scholarship."<sup>113</sup>

Yet, if the lines that we have drawn are imperfect or illogical, how should we distinguish between international law and everything else? Some scholars argue that there is no need to draw a line between practice, norms, and law—in this account, all is law.<sup>114</sup> Yet, to adopt this approach is to concede the normative value of "law" itself, something I am unwilling to do at this point. I find myself gravitating toward scholarly work that places a functional gloss on "law,"<sup>115</sup> looking at how rules actually operate in practice and asking whether the rules are authoritative and effectively binding. A functional approach—an approach that sheds labels and form in the name of prescriptive content, effectiveness, and authority—is precisely what New Haven School scholars advocated.<sup>116</sup>

---

Government of Georgia and BP Exploration (Caspian Sea) Limited on the Provision of Security for the Baku-Tbilisi-Ceyhan Pipeline Project, the South Caucasus Pipeline Project and the Western Route Export Pipeline and Related Installations Located at the Supsa Terminal, Oct. 19, 2004, available at <http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20Security%20Protocol%20EN.pdf>; The BTC Human Rights Undertaking, Sept. 22, 2003, available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (BTC Referring to the Baku-Tbilisi-Ceyhan Pipeline Company).

111. Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 156-57.

112. *Id.* at 129-30, 189-90.

113. McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*, *supra* note 1, at 424.

114. Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U. L. REV.* 179, 181-82 (1985) ("The status of such 'official' behavior and 'official' norms is not denied the dignity of 'law.' But it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs.")

115. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823 (2002).

116. See McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*, *supra* note 1, at 260 ("'Conventional' analysis in terms of government organs and doctrines, an effective technique for certain problems, is on the whole, inappropriate for the study of international decision. Conventional



C. *Myth 3: International Law as Deliberate Choice*

Nationalists are “control freaks.” The nationalist account is fundamentally premised on state elites *controlling* international law. Yet, international law often happens whether political leaders will it or not; international law is not always a “matter of choice.”<sup>117</sup> Long before the founding of the WTO or the drafting of the Agreement on Subsidies, the export credit insurance industry, private corporations and public technocrats from ECAs, created a regulatory regime that essentially eliminated predatory export subsidies in export credit insurance policies. While the President has decided that the United States will not join the Kyoto Protocol, states, cities, private companies, NGOs, and the United Nations make decisions and implement policies that, albeit imperfectly, circumvent the President’s decision. Although the President is hesitant to commit in a meaningful way to multilateral human rights treaties, numerous U.S. companies, at the urging of the United Nations, NGOs, trade associations, consumers, and courts, adopt codes of conduct and social responsibility statements that echo these very norms. International lawmaking is not always a deliberate, premeditated process; it is often spontaneous, unchoreographed, and self-propelling.

The New Haven School scholars, keenly focused on *lawmaking* as opposed to *law*,<sup>118</sup> first recognized international lawmaking as a complex process of decisionmaking, some of which occurs well beyond the purview and control of a few political elites; in order to develop a complete, realistic portrait of what international law is and how it comes to be, these scholars dissected (in painstaking step-by-step rigor) the decisionmaking process.<sup>119</sup> Some scholars, most prominently Harold Hongju Koh, refine New Haven School precepts, focusing on the ways that domestic legal systems diffusely incorporate, and ultimately come to obey, hard, international law.<sup>120</sup> Others, from the perspective of legal pluralism, examine the complexities of international lawmaking through the lens of overlapping, normative communities.<sup>121</sup>

Bottom-up international lawmaking, like the New Haven School and its progeny, celebrates international lawmaking as a complex, decentralized, and diverse process, a loosely stitched patchwork of multiple norm-generating communities rather than a predictably centralized process with the President as the steward. And, like the New Haven School, bottom-up lawmaking embraces sociological realism and thus tends to the intricacies of on-the-ground micro-decisions that often work subtly, quietly, and indirectly, through the

---

usage must yield to ‘functional’ analysis if comprehensive and realistic orientation is to be achieved.”); see also McDougal, Lasswell & Reisman, *The World Constitutive Process, Part II*, *supra* note 1, at 415-16 (critiquing European theories of international law for not applying a pure, functional approach).

117. Spiro, *Disaggregating U.S. Interests in International Law*, *supra* note 59, at 201 (also arguing that, as globalization ensues, “choice may become increasingly constrained”).

118. See generally Reisman, *International Lawmaking*, *supra* note 1.

119. See, e.g., McDougal, *International Law, Power and Policy*, *supra* note 1, at 177-79.

120. See Koh, *Why Do Nations Obey International Law?*, *supra* note 87; Koh, *Transnational Legal Process*, *supra* note 87.

121. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005) [hereinafter Berman, *From International Law to Law and Globalization*]; see generally Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

shaping of legal consciousness on an individual and institutional level.<sup>122</sup> Yet, as a lawmaking process rooted in the informal, in unofficial practices and behaviors of epistemic communities, bottom-up lawmaking stands apart from its relatives in important ways. First, it places greater weight on the normative role of non-state actors.<sup>123</sup> Second, as the bottom-up lawmaking community is sometimes quite loosely tied, the lawmaking processes are often more messy, organic, and improvisational, offering, except with the benefit of hindsight, few clear “decision” moments.

Yet, such decentralized spontaneity poses distinct normative concerns. To dislodge international lawmaking from the control of the state’s political leadership is to locate an unchoreographed and unpredictable lawmaking function in the hands of those who are not politically accountable to constituents. Indeed, some scholars have raised profound concerns about the democratic legitimacy of bottom-up lawmaking.<sup>124</sup> In a rather extreme example, the Berne Union does not publish the General Understanding anywhere, which, in and of itself, raises legitimacy “red flags.” My quest to find the General Understanding was a modern treasure hunt meeting countless dead-ends, spanning four aggravating months, and ultimately resulting in what I perceived as a veiled threat of legal action in an effort to “discourage” me from discussing the General Understanding in an upcoming article.<sup>125</sup>

Certainly, this personal anecdote highlights the extent to which some of these bottom-up lawmaking communities become black boxes, with club-like secrecy often assuming normative status. Yet, consider the exasperation of government officials in Brazil when in the heat of a dispute between Brazil (Embraer) and Canada (Canadair), the WTO proclaims that Embraer’s export credit programs essentially must abide by Berne-Union-esque rules or run afoul of the Agreement on Subsidies, with the concomitant risk of countervailing measures.<sup>126</sup> So what has happened here? An informal, yet exclusive, club-like group of private actors and technocrats from

122. Berman, *From International Law to Law and Globalization*, *supra* note 121, at 542-546 (arguing that a robust understanding of international law, and compliance with international law, requires qualitative sociolegal study of how international norms reshape “attitudes” and “aspirations” and “lay understandings of justice that circulate in everyday life”).

123. See *supra* note 89 for a discussion of the New Haven School’s somewhat ambiguous stance toward private actors.

124. In response to my presentation at the 2006 Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), the presentation that provided the outline for this Article, Professor Owen Fiss argues that “democracy must be the bedrock” of law’s legitimacy and that my search for an alternative grounding is a “dangerous” project. Owen Fiss, Moderator, Closing Remarks for Panel on “Globalization and Executive Power,” in SELA 2006, *supra* note 82.

125. For a more extensive treatment of my interaction with the Berne Union, see Janet Koven Levit, *A Cosmopolitan View of Bottom-Up Transnational Lawmaking: The Case of Export Credit Insurance*, 51 WAYNE L. REV. 1193, 1204-07 (2005), and Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 28, at 151 n.107.

126. Panel Report, *Brazil—Export Financing Programme for Aircraft*, ¶ 7.31, WT/DS46/R (Apr. 14, 1999). The decision essentially required that Brazil comply with the Arrangement on Officially Supported Export Credit rules, rules which are based in large part on the General Understanding. See *supra* note 44 for more detailed discussion of the attenuated relationship between the General Understanding and the Agreement on Subsidies. Brazil and other developing countries expressed much concern over being bound by rules made, in large part, by the exclusive club of developed, OECD countries. See *Brazil—Export Financing Programme for Aircraft*, *supra*, at ¶¶ 4.97-4.99.

industrialized countries have pooled their practices and experiences, transformed them into rules, initially intended to be a form of self-regulation, but which eventually (and perhaps inadvertently) were appropriated by more formal lawmaking institutions, in this case the OECD and then the WTO. Ultimately, these rules have essentially become the law that the WTO uses to decide a dispute against Brazil. Neither Brazil, nor any representative from any developing country, participated in the formation of these rules, either directly through participating in deliberations or indirectly through delegating authority to negotiate on their behalf. Quite to the contrary, the Berne Union operates as an impervious fortress, creating a mismatch between law and lawmaker, often referred to in the literature as a “democratic deficit.”<sup>127</sup>

In this account, is there a way to reconcile bottom-up lawmaking’s conceptual promise of organic inclusiveness with the club-like exclusivity that seemingly infects bottom-up lawmaking processes in practice?<sup>128</sup> We could pull from our well-worn remedial toolbox and insist that these bottom-up lawmaking communities inject transparency, often touted as the linchpin to accountability and democratic legitimacy, into their processes. Transparency, however, presupposes a more classic lawmaking model, where lawmaking is choreographed and linear, where there would be identifiable and productive moments when outsiders could assert pressure and influence over the course of law. Yet, bottom-up lawmaking, often quite messy in its spontaneity, does not always offer such clean moments. Do we condemn the Berne Union for not asking NGOs and representatives from developing countries to also have drinks in the bar where they discussed the ideas that led to the Berne Union’s creation? Obviously not. But when do these informal activities assume a conscious lawmaking posture? It is possible that only hindsight will tell.

Alternatively, some scholars propose rooting “legitimacy” in the efficacy of regulatory “outputs”—the meeting of regulatory goals—rather than the inclusiveness of the procedural “inputs.”<sup>129</sup> Yet, how do we measure efficacy? And from whose vantage point? From the perspective of Canadair, Berne-Unionesque rules effectively “level” the playing field and grease trade. I imagine that Embraer’s view might be radically different. Thus, “efficacy” is an elusively subjective standard, unsatisfactory in its post hoc relativity.

If neither “opening” the lawmaking process nor calibrating efficacy of ensuing regulation satisfactorily answers the legitimacy critique, are the rules born from such bottom-up lawmaking processes necessarily condemned as illegitimate? My current research suggests that “legitimacy” may actually be a “self-executing” feature of the bottom-up lawmaking process.<sup>130</sup> When informal lawmaking communities like the Berne Union interact with

127. See Moravcsik, *supra* note 84, at 336.

128. See *supra* note 85 and accompanying text.

129. See Robert O. Keohane & Joseph S. Nye, *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 285-87 (Roger B. Porter et al. eds., 2001) (noting that “[t]he legitimacy of governments is not determined solely by the procedures used on the input side. Substantive outputs also matter.”); see also Slaughter, *Government Networks*, *supra* note 99, at 234; Slaughter, *Governing the Global Economy Through Government Networks*, *supra* note 99, at 195.

130. Levit, *Transnational Regulation of Letters of Credit*, *supra* note 90, at 31-38.

officialdom, which is an endemic part of the bottom-up lawmaking process, the modicum of transparency and accountability that these institutions have themselves adopted (largely at the prompting of the broader international community) tends to “rub off.” For instance, while the Berne Union’s General Understanding is “secret,” WTO documents are publicly available, and, thus, the WTO functionally “publicizes” such rules when it incorporates them into the Agreement on Subsidies. In response to criticism from disenfranchised constituents, formal lawmaking institutions, like the OECD, have reached out to non-members as a means to enhance accountability;<sup>131</sup> likewise, the Berne Union established the “Prague Club,” a sister group of export credit insurers from the developing world, who do not meet the business-volume-driven membership requirements, but who nonetheless may observe and even participate in Berne Union deliberations.<sup>132</sup> The WTO, largely in response to a vociferous critique of its opaque processes, now identifies “transparency,” as one of the core principles of the international trading system and also has developed a comprehensive website which posts documents, interpretive material, and dispute settlement decisions.<sup>133</sup> For the first time, in late 2004, the Berne Union published a “Value Statement,” in which it nods to the importance of transparency, and the Berne Union has recently revamped its website a bit, posting additional information and periodic press releases.<sup>134</sup> In other words, the inter-institutional interplay inherent to bottom-up lawmaking may actually correct, or ameliorate, some of the democratic legitimacy deficits.

## V. CONCLUSION: TOWARD INTERNATIONAL LEGAL PLURALISM

Today, a new generation of international legal scholars arrives at a juncture hauntingly similar to that which the New Haven School confronted in the 1950s, and those of us who might be considered part of a “new” New Haven School have responded in a like manner. We choose to refute power-based, “national interest”-fueled realism, not by conceding its underlying premises, but by challenging them. And like our New Haven School predecessors, we embrace a type of sociolegal realism—looking to the complex, dynamic and varied social processes that mold international law in practice. In asking questions that strike at the very nature of international law, we paint a more representative portrait that is at once colorful in its nuance and daunting in its complexity.

Some might counter that the improvisational spontaneity endemic to bottom-up lawmaking would be anathema to the New Haven School, which,

---

131. See OECD, PUBLIC AFFAIRS DIVISION, PUBLIC AFFAIRS AND COMMUNICATIONS DIRECTORATE, ANNUAL REPORT 2006, at 7 (2006), available at <http://www.oecd.org/dataoecd/37/61/36511265.pdf>.

132. See International Union of Credit and Investment Insurers, Berne Union, Prague Club, [http://www.berneunion.org.uk/prague\\_club.htm](http://www.berneunion.org.uk/prague_club.htm) (last visited Apr. 27, 2007).

133. See, e.g., WTO, Understanding the WTO: Principles of the Trading System, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Apr. 27, 2007).

134. See, e.g., Press Release, Berne Union, Three New Members Join the Berne Union (Oct. 2004), <http://www.berneunion.org.uk/Press%20Release%20October%202004.pdf> (discussing a “Value Statement” which acknowledges the importance of “transparency”).

at a fundamental level, represents a scholarly commitment to preserving “public order of the world community.”<sup>135</sup> Yet, also at its core, the New Haven School acknowledges the inherently pluralist nature of the international legal community—that international lawmaking involves “multiple processes” unfolding “in multiple settings.”<sup>136</sup> Accordingly, for New Haven School scholars, “public order” is not coincident with tightly choreographed, top-down lawmaking, but rather with a type of international lawmaking that grows from diffuse social processes, involving an inherently grounded balance of “community expectations” with “enough effective power to be put into controlling practice.”<sup>137</sup> While admittedly “complex” and “confusing,” this “multiplicity of lawmaking” is neither “anomic nor chaotic”—in fact, as Michael Reisman recently noted, such multiplicity may be “systematically beneficial or eufunctional.”<sup>138</sup>

Indeed, Robert Cover’s statement that “[w]e inhabit a *nomos*—a normative universe” is no less relevant for the transnational space than it is for the domestic.<sup>139</sup> The nationalist account of international law, as was the Cold War realists’ account, is jurispathic in its denial of such possibility. I offer bottom-up lawmaking not because it alone is jurigenerative but because it challenges us to imagine the promise of “alternative futures” in international lawmaking.<sup>140</sup> And, in meeting this challenge, I find guidance in the enduring and timeless spirit of the New Haven School.

---

135. See generally MYRES S. McDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* (1981).

136. Reisman, *The Democratization of Contemporary International Law-Making*, *supra* note 7, at 26. See also Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 7 (1959); McDougal, Lasswell & Reisman, *The World Constitutive Process, Part I*, *supra* note 1, at 281-83.

137. Myres S. McDougal, *International Law and the Future*, 50 MISS. L.J. 259, 281 (1979).

138. Reisman, *The Democratization of Contemporary International Law-Making*, *supra* note 7, at 28-29.

139. Cover, *Nomos and Narrative*, *supra* note 8, at 4.

140. *Id.* at 9.