

## International Law Happens: Executive Power, American Exceptionalism, and Bottom-Up Lawmaking

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This essay introduces “bottom-up transnational lawmaking” in the context of contemporary ideological and theoretical debates regarding the breadth and depth of executive power vis-à-vis international law. In an era of globalization, with a proliferation of transnational actors and regulatory instruments, the international lawmaking universe is disaggregating into multiple, sometimes overlapping, lawmaking communities. Neither the President nor others in the “political leadership” sits at the center of many of these communities. Thus, the nationalist critique of international law, rooted in an all-powerful executive who *controls* international law, creating it and using it instrumentally, in furtherance of the “national interest,” ignores a vast universe of transnational lawmaking activity.

Bottom-up transnational lawmaking is just one of many polycentric lawmaking processes. Bottom-up lawmaking features non-state actors and mid-level bureaucrats who grapple with the day-to-day technicalities of their trade. On the basis of their on-the-ground experiences, these transnational actors create, interpret and enforce their rules; over time, these initially informal rules embed in more formal legal systems. Whereas nationalists conceive of international lawmaking as a process of law internalized as practice, bottom-up lawmaking is a process whereby practices and behaviors are externalized as law. Bottom-up lawmaking, as a soft, non-choreographed path to hard, legal results, thus challenges the assumptions at the heart of the nationalist critique—diplomats as lawmakers, the treaty as the preeminent form of law, and lawmaking as a deliberate, executive choice.

This essay offers three bottom-up lawmaking vignettes—export subsidies, climate change regulation, and corporate social responsibility initiatives. In each of these realms, spontaneous interactions among private parties, mid-level bureaucrats, sub-state actors, and NGOs seemingly inadvertently spark a normative process in spite of contrary executive decisions or conspicuous executive inaction. Thus, executive power in transnational lawmaking is limited, in this instance not by the strictures of the Constitution or the structure of international law but by the reality of multiple lawmaking processes unfolding beyond the executive’s command.

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## INTRODUCTION

International law is a premeditated casualty of the Bush administration's most publicized exertions of executive power. The intellectual weight behind such executive decision making is a group of conservative U.S. legal scholars (some who also 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. These scholars fear that potent international laws and institutions detract from "sovereignty," which is often shorthand for executive power and autonomy. The choice, in their view, is executive power *or* international law, but not both. Of course, the mere framing of this choice preordains the outcome. And in support of an outcome that maintains the pre-eminence of the "sovereign," these scholars have handed the Bush administration a theoretical framework that eviscerates international law, reconceptualizing it as a mere tool of a strong executive.

In response, other scholars recast the underlying question as international law *and* executive power rather than international law *or* executive power.<sup>1</sup> These scholars eschew a zero-sum view of a globalizing world and see great potential for the “sovereign” in an era of international law. They argue that international laws and legal institutions may actually strengthen the executive branch (particularly vis-à-vis the legislative branch) by forcing an inter-governmental re-allocation of competencies and responsibilities in favor of the executive.

I believe that the critics of international law, as well as the defenders, unduly fixate on the relationship—whether tense or synergistic—between international law and executive power. Globalization renders the executive less hegemonic in international lawmaking, sidelining questions of executive power vis-à-vis international law in some instances. In practice, much international law unfolds on planes detached and removed from the executive. Yet the current debate myopically ignores these worlds. In this essay, I place questions of international law versus executive power on a richer and vaster international lawmaking topography that diminishes, but by no means eliminates, their significance.

In part I of this essay I will explore the mounting conservative critique of international law, focusing particularly on Eric Posner and Jack Goldsmith’s new book,

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<sup>1</sup> This was the position of the other scholars who were co-panelists on the “Globalization and Executive Power” panel. See Laura Saldivia, *Globalization and the Transformation of the Argentine Executive Branch*, at Yale Law School’s Southern Cone Faculty Research Seminar: Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), *Executive Power*, Bogota, Colombia (June 9, 2006), reprinted in SELA 2006: EL PODER EJECUTIVO: (Roberto Saba, ed., Editores del Puerto 2007, forthcoming); Aída Torres Pérez, *The Internationalization of Lawmaking Processes: Constraining or Empowering the Executive?*, at Yale Law School’s Southern Cone Faculty Research Seminar: Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), *Executive Power*, Bogota, Colombia (June 9, 2006), reprinted in SELA 2006: EL PODER EJECUTIVO: (Roberto Saba, ed., Editores del Puerto 2007, forthcoming).

*The Limits of International Law*.<sup>2</sup> While these scholars admittedly cast their critique in terms of “sovereignty” in pursuit of state interests, their notion of “sovereignty” and “state interests” is so often coincident with executive decisions that the critique becomes inextricably intertwined with questions of executive power. Yet the international law stories that the 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 part II, I juxtapose examples of “bottom-up transnational lawmaking” to illustrate how international lawmaking in practice often bears little resemblance to the top-down tales at the center of the conservative critique. In part III, I dissect these bottom-up lawmaking stories to expose three false assumptions at the root of the sovereignty-centered account: 1) the executive 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 the executive deliberately orchestrates. Finally, in part IV, I address some of the normative concerns that bottom-up lawmaking poses.

In an era of globalization, the international lawmaking universe is disaggregating into multiple, sometimes overlapping, lawmaking communities, and neither the President nor others in the “political leadership” 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>3</sup>

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<sup>2</sup> JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005) [hereinafter *THE LIMITS OF INTERNATIONAL LAW*].

<sup>3</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 67 (1983).

## I. THE NATIONALIST CRITIQUE OF INTERNATIONAL LAW

In the United States, a group of youngish, right-leaning academics have launched a strong, albeit reminiscent, attack on the efficacy and usefulness of international law.<sup>4</sup> While these scholars (I will call them – as have others – “nationalists”)<sup>5</sup> now concede that international law exists,<sup>6</sup> nationalists claim that “international law emerges from states’ pursuit of self-interested policies on the international stage.”<sup>7</sup> Nationalists thereby conceive of international law as a mere *instrument* of the state and in no way a *constraint* on the state’s pursuit of its own interests. Nationalists generally employ economist-style simplifying assumptions from which they build a rational-choice-inspired game theoretic model of interstate interaction. International law is simply a tool to help self-interested states achieve optimal 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 decision making. 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>8</sup> While nationalists presumably include elected legislators among

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<sup>4</sup> In this group, I include Jack L. Goldsmith (Henry Shattuck Professor, Harvard Law School); Eric A. Posner (Kirkland & Ellis Professor, University of Chicago Law School); and John C. Yoo (Professor, University of California Berkley Law School). In this brief essay, I necessarily translate their ideas without the nuance that they deserve. They are all admirably prolific scholars; their work is too numerous to cite in this footnote – it would perhaps occupy the entire 25 pages. In this piece, I will focus solely on THE LIMITS OF INTERNATIONAL LAW, *supra* note 2.

<sup>5</sup> See e.g., Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1, 7 (2004)

<sup>6</sup> In contrast, the realists of the 1960s and 70s who denied that international law exists.

<sup>7</sup> THE LIMITS OF INTERNATIONAL LAW, *supra* note 2 at 13.

<sup>8</sup> *Id.* at 6.

this “political leadership,” they tend to elevate and privilege *executive* decisions in the defining of “state interests.”<sup>9</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>10</sup> When nationalists do 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>11</sup> Second, as others have eloquently noted,<sup>12</sup> nationalists deem “state interests” to be unitary. Of those among the “political leadership,” the President – chief executive – is the only “unitary” representative of the “state” and thus becomes the easy proxy for the defining and carrying out of a “unitary” state interest. Finally, in other writing, these same nationalists privilege the role of the President in foreign affairs, arguing, often from a vaunted position within the Bush administration, that the President’s constitutionally-endowed role as commander-in-chief

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<sup>9</sup> See e.g., *id.* at 218-19.

<sup>10</sup> There are very few discussions of Congress in *THE LIMITS OF INTERNATIONAL LAW*, 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 Posner and Goldsmith’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 *THE LIMITS OF INTERNATIONAL LAW*, *supra* note 2, at Ch. 2, Customary International Law: Case Studies). Furthermore, in their discussion of human rights treaties, Posner and Goldsmith belittle the ratification (the legislative) process as meaningless and costless, derivatively anointing the executive as the primary decision maker. *Id.* at 127. Furthermore, in an effort to demonstrate that international law wields 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), fundamentally executive functions.

<sup>11</sup> For instance, Posner and Goldsmith 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. *THE LIMITS OF INTERNATIONAL LAW*, *supra* note 2, at 92-93.

<sup>12</sup> Paul Schiff Berman, *Review Essay: Seeing beyond the Limits of International Law*, 84 *TEXAS L. REV.* 1265 (2006).

bequeaths unfettered, unchecked, and autonomous power (particularly during times of war).<sup>13</sup> For all of these reasons, I have come to view a defense of executive power as an important subtext or undercurrent to the nationalists' critique of international law. For nationalists, the "state" and the executive are often one in the same, and the very "state interests" that international law cannot, will not, and do not intrude upon are indeed predominantly executive interests.

Thus, the nationalist critique reduces in great part to the following: international law is a series of rules that merely reflect or coincide with the interests of the *executive*;<sup>14</sup> when an international norm would otherwise obstruct or constrain the *executive's* pursuit of its interests, the executive simply circumvents or ignores the norm. For nationalists, international law is an instrument that facilitates, but in no way limits, the executive's exercise of its broad powers in pursuit of the "national interest." Thus, the nationalist

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<sup>13</sup> For nationalists, the executive branch has extensive power in foreign affairs. See, Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Attorney General, *Standards of Conduct for Interrogation under U.S.C. §§2340-2340A*, Aug. 1, 2002 (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 for the War on Terrorism*, 118 HARV. L. REV. 2047, 2102 (2005) (arguing that the general, post-September 11 Congressional Authorization for Use of Military Force grants the President broad authority and power to make decisions "incident" of war, such as detaining enemy combatants and further arguing that such Congressional authorizations do not require a "tight fit" with the powers exercised by the executive); 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); John C. Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1192-1204 (2004); John C. Yoo & Robert J. Delahunty, *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) (arguing that the "Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the nation in its foreign relations, to use military force abroad, especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States"); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002). These same nationalists paraded similar arguments in defense of broad executive/presidential powers in the context of the Bush administration's use of domestic wiretapping/spying in the name of national security. See Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. TIMES, January 28, 2006, at A13.

<sup>14</sup> 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 paper, 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 who 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.

critique of international law is, on the flip side, a celebration of the autonomous, relatively unconstrained executive. And executive control over international law is a hallmark of executive power.

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

The nationalist account, however, does not always comport with the on-the-ground, day-to-day realities of transnational 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; 2) treaties as the primary form of international law; and 3) international law as a *deliberate* process that the executive carefully choreographs from the top down. Yet, as parts II and III illustrate, 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 human rights—as a window into an alternative account of international lawmaking, one that I have labeled “bottom-up transnational lawmaking.”<sup>15</sup>

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<sup>15</sup> 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).

### ***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, with the President at the helm, decides, with some sensitivity to politically powerful domestic constituencies, whether subsidies further U.S. interests.<sup>16</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>17</sup> Ostensibly, the WTO Agreement on Subsidies and Countervailing Measures [hereinafter Agreement on Subsidies] embodies such efforts.<sup>18</sup>

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

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<sup>16</sup> 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 Posner and Goldsmith's discuss international trade agreements, 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 decision, a decision driven by the executive. There is no discussion of Congressional politics. See *THE LIMITS OF INTERNATIONAL LAW*, supra note 2, at 135-62 (chapter on International Trade).

<sup>17</sup> 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.

<sup>18</sup> *AGREEMENT ON SUBSIDIES AND COUNTERVEILING MEASURES*, Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. 1144.

credit.<sup>19</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. Indeed, most industrialized countries provide official export credit to their nationals via a government entity, known as an export credit agency or an ECA.

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.<sup>20</sup> Private insurance companies, such as Chubb, AIG, FCIA, and ECAs, such as Ex-Im Bank (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 some type of transnational coordination and regulation.

Indeed, that is what happened, although it did not start with some ministerial or the founding of some 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 insurance practice; this informal gathering gave birth to

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<sup>19</sup> I was Assistant General Counsel of Ex-Im Bank from 1998-2000, 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 15, at 144-57.

<sup>20</sup> With the backing of an insurer, an exporter may extend credit to an importer without incurring risk of buyer default – the risk instead is of insurance company default. Where liquidity is an issue, the backing of an export credit insurer enhances the exporter's ability to monetize the receivable, either by selling it or borrowing against it. Export credit insurance, therefore, is one solution to a recurring exporter problem – how to extend credit to a buyer who might be thousands of miles away without choking the seller's working capital and ability to continue producing and engaging in trade transactions.

the Berne Union.<sup>21</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.

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>22</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>23</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.

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<sup>21</sup> Today, the Berne Union has 52 members; including both the private companies and the public ECAs. BERNE UNION Y.B. 158 (2005).

<sup>22</sup> International 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).

<sup>23</sup> 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. For instance, if an exporter approaches a Berne Union member to insure the export of consumer goods, the General Understanding rules prohibit the member from supporting repayment terms in excess of six months, with the “repayment clock” starting to tick on the date that the buyer accepts the goods. If the export had been of consumer durables, or parts and components, the Berne Union member would face different limitations on the repayment terms that it could support, with a different “starting point” triggering the transaction’s “repayment clock.”

While the General Understanding technically is not international law,<sup>24</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>25</sup> When a Berne Union member deviates from the rules, a host of informal “sanctions,” from public chastisement to hallway gossip to re-leveling the playing field by offering other members the option of matching deviant behavior, operate as a realigning check.<sup>26</sup>

Furthermore, as the Berne Union rules have consistently facilitated over a half-trillion of trade annually while dramatically reducing export credit subsidies,<sup>27</sup> it is unsurprising that other, more formal lawmaking institutions – notably the OECD, the WTO and the European Union – borrow from the General Understanding in developing their own approaches to export credit subsidies. The Agreement on Subsidies, for instance, deems any officially supported export credit insurance policy to be a prohibited export subsidy unless it complies with Berne Union rules.<sup>28</sup> Thus, many Berne Union

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<sup>24</sup> 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, 1155 U.N.T.S. 331, art. 2, U.N. Doc. A/CONF.39/27 (1969), 8 I.L.M. 679 (1969) (“Treaty” means an international agreement concluded between states in written form and governed by international law); 2) customary international law (“a general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*]”); and 3) general principles of law. THIRD RESTATEMENT OF FOREIGN RELATIONS LAW § 102 (1987); Statute of the International Court of Justice, June 26, 1945, art. 38, 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: is not the “practice of states” nor is it “general.”

<sup>25</sup> Levit, *Bottom-Up Approach to International Lawmaking*, supra note 15, at 154-56 n. 119-20.

<sup>26</sup> Id. at 153-54.

<sup>27</sup> BERNE UNION Y.B. 118 (2005).

<sup>28</sup> 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 “Gentleman’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 Organisation for Economic Co-operation and Development, *Arrangement on Officially Supported Export Credits*, Doc. TD/PG (2004). The Agreement

rules, even for a formalist, have hardened into the international laws that redress subsidies in the export credit insurance world.

### ***Climate Change Regulation***

On its face, the Bush Administration's decision not to join the Kyoto Protocol<sup>29</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>30</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. multinationals operating in Kyoto signatory countries are subject to local Kyoto-related emission targets, taxes and regulatory standards, forcing such companies to reassess their policies and practices abroad, which discernibly impacts practices within

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on Subsidies creates a safe harbor for ECAs that comply with the Arrangement. See Agreement on Subsidies, supra note 18, 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 15, 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).

<sup>29</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997), 37 ILM 22 (1998). 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.

<sup>30</sup> 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, President Bush Discusses Global Climate Change, June 11, 2001, available at [www.whitehouse.gov](http://www.whitehouse.gov) (last visited on June 21, 2006); Cabinet-Level Group on Climate Change, Climate Change Report, July 31, 2001, available at <http://www.whitehouse.gov/news/releases/2001/06/climatechange.pdf> (last visited on June 21, 2006). See also Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, NY TIMES, May 14, 2005 (Michele St. Martin, communications director for the White House Council on Environmental Quality, said the Kyoto Protocol would have resulted in a loss of five million jobs in the United States and could raise energy prices. Ms. St. Martin said that President Bush 'favors an aggressive approach' on climate change, 'one that fosters economic growth that will lead to new technology and innovation.'").

the U.S., as well.<sup>31</sup> NGO's not only collect information on environmental practices, but they have partnered with trade associations, inter-governmental organizations and investment funds to create meaningful incentives for corporations to reduce greenhouse gas emissions.<sup>32</sup> The World Economic Forum has begun credentialing and monitoring companies for climate-change-related practices.<sup>33</sup> Climate exchanges now allow members to trade emissions credits as long as members agree to phased, overall reductions in emissions levels.<sup>34</sup> Numerous states within the U.S. have either legislated greenhouse gas emission standards and/or targets or have started initiatives (some voluntary and some mandatory) designed to enhance corporate transparency and

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<sup>31</sup> Pew Center on Global Climate Change, Implications for U.S. Companies of Kyoto's Entry into Force without the United States, available at <http://www.pewclimate.org/docUploads/Kyoto-USBusiness.pdf> (last visited on March 27, 2006); Phone Interview, Miles Tolbert, Secretary of Energy and Environment, State of Oklahoma (March 24, 2006).

<sup>32</sup> Of particular interest is Ceres, Inc., a U.S.-based coalition of institutional investors, environmental groups, and public interest organizations who have developed scoring system to assess the "job that corporate executives and board members are doing to enact well-functioning governance systems in the face of climate change." See e.g., Douglas G. Cogan, Corporate Governance and Climate Change: Making the Connection (March 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) (last visited on March 27, 2006). Interestingly, Ceres also directs the Investor Network on Climate Risk, a group of 50 institutional investors, with over \$3 trillion in assets under management, who promote better understanding of the risk of climate change.

<sup>33</sup> The World Economic Forum, in conjunction with the International Emissions Trading Association, the Pew Center on Global Climate Change, the World Business Council for Sustainable Development, the World Energy Council, the World Resources Institute, the World Wildlife Fund 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, available at [http://www.pewclimate.org/we\\_forum.cfm](http://www.pewclimate.org/we_forum.cfm) (last visited on March 23, 2006). 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.

<sup>34</sup> The Chicago Climate Exchange (CCX), a greenhouse gas (GHG) emission registry, reduction and trading system for all six greenhouse gases. CCX is a self-regulatory, rules based exchange designed and governed by CCX Members. Members make a voluntary but legally binding commitment to reduce GHG emissions. By the end of Phase I (December, 2006) all Members will have reduced direct emissions 4% below a baseline period of 1998-2001. Chicago Climate Exchange, About CCX, available at <http://www.chicagoclimatex.com/about/> (last visited on March 23, 2006). The U.S. Conference on Mayors endorsed the CCX at its last 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) (last visited on June 21, 2006).

reporting in the environmental area.<sup>35</sup> Several municipalities have created climate change protection programs,<sup>36</sup> and in June 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>37</sup>

While comprehensive account of climate change initiatives is beyond this essay's scope, it bears noting some of these efforts are changing behavior of both private and

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<sup>35</sup> Pew Center on Global Climate Change, *Climate Change Activities in the United States: 2004 Update*, available at [www.pewclimate.org](http://www.pewclimate.org). 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 to 1) evaluate market-based mechanisms to speed emissions reductions; 2) collaborate on research; and 3) coordinate efforts vis-à-vis low emissions technologies. See United Kingdom and California Announcement on Climate Change & Clean Energy Collaboration, available at <http://gov.ca.gov/index.php/fact-sheet/united-kingdom-and-california-announcement-on-climate-change-clean-energy-c/> (last visited on August 28, 2006); see also Fact Sheet: California/Britain Announce Historic partnership to Address Climate Crisis, available at <http://gov.ca.gov/index.php/fact-sheet/3585/> (last visited on August 28, 2006). In addition, Governor Schwarzenegger has proposed legislation that would create in California greenhouse gas emissions caps, as well as an emissions trading system. See Tamara Keith, *Divisions Surface Over Calif. Greenhouse Gas Cap*, Day to Day, Aug. 24, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5703590> (last visited on August 28, 2006).

<sup>36</sup> 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 n. 393-94 (2006). Seattle, a trail-blazer 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 Sigh Up to Kyoto*, THE GUARDIAN, May 18, 2006. 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 Joining Kyoto Protocol*, INTERNATIONAL HERALD TRIBUNE, May 16, 2005.

<sup>37</sup> 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 on June 20, 2006). The Resolution calls upon municipalities to: 1) urge the federal and state governments to meet or beat by 2012 Kyoto target levels of 7% below 1990 greenhouse gas emission levels; 2) inventory the municipality's emissions; 3) adopt a comprehensive plan for reduction of emissions, including land-use policies, promotion of alternative transportation options, favoring energy efficiency in municipal procurement, increase recycling, and promote local education. The resolution also calls upon municipalities to work on a transnational plane with the ICLEI – Local Governments for Sustainability to monitor progress toward the meeting of these goals. See <http://www.iclei.org/> (last visited on June 20, 2006). The U.S. Mayors Climate Protection Agreement, spearheaded by Seattle Mayor Greg Nickels, sought support among US mayors for greenhouse gas emissions targets. See Letter, *Cities Working Together to Protect Our Air Quality, Health and Environment: A Call to Action*, March 30, 2005, available at [http://www.seattle.gov/mayor/climate/PDF/USCM\\_6-page\\_Climate\\_Mailing\\_ALL.pdf](http://www.seattle.gov/mayor/climate/PDF/USCM_6-page_Climate_Mailing_ALL.pdf) (last visited on June 21, 2006). The Agreement, originally endorsed by 10 mayors, now carries the endorsement of over 238 municipalities. 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) (last visited on June 21, 2006).

public entities.<sup>38</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>39</sup> My modest claim is that the normative efforts of parallel lawmaking communities may ultimately subvert the President's choice not to join Kyoto.

### ***Corporate Social Responsibility and Human Rights***

At best, the U.S. is sluggish to sign and ratify multilateral human rights treaties.<sup>40</sup> When the President does send human rights treaties to the Senate for ratification, it 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 U.S.<sup>41</sup> The story that the nationalists tell about these human rights treaties is that they are unnecessary

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<sup>38</sup> See e.g., Cogan, *Corporate Governance and Climate Change*, supra note 32, at 17-29; Lord Browne of Madingly, Group Chief Executive, BP, *The Path of Enlightened Self Interest*, WORLD PETROLEUM (article on file with author); Miguel Bustillo, *A Shift to Green*, L.A. TIMES, June 12, 2005.

<sup>39</sup> Peter Spiro argues that corporate self-interest is driving international normative activity and further argues that these motivations do not drain this activity of normative content. Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 101, 102 (2004).

<sup>40</sup> 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, 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 U.S. 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 human rights treaty of the twenty-first century." *UN Panel Crafts Rights Paper for World's Disabled* (NPR All Things Considered, Aug. 28, 2006).

<sup>41</sup> See e.g., U.S. Senate Resolution of Advice and Consent to the Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8070 (1992) (delineating reservations, understandings and declarations, including a declaration proclaiming none of the rights in the ICCPR to be self-executing).

(i.e., the U.S. 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>42</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>43</sup> On a domestic level, some U.S. courts, using the Alien Tort Claims Statute,<sup>44</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 technically enforceable in U.S. courts.<sup>45</sup> On an international level, the UN (directly and not through its governmental members) has utilized the Global Compact as a mechanism to prompt private companies to pledge support for ten human rights principals,<sup>46</sup> set “in motion changes to business operations” so that these principles

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<sup>42</sup> This paragraph is essentially a summary of the human rights chapter in THE LIMITS OF INTERNATIONAL LAW, supra note 2, at 107-134.

<sup>43</sup> See e.g., Linda Baker, *The Goal: 'Sweatshop Free.' The Problem: Defining It,* N.Y. TIMES, Dec. 14, 2003, at 34; David Gonzalez, *Latin Sweatshops Pressed by U.S. Campus Power,* N.Y. TIMES, April 4, 2003, at A3; Steven Greenhouse, *Labor Abuses in El Salvador are Detailed in Document,* N.Y. TIMES, May 10, 2001, at A12. See also 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).

<sup>44</sup> 28 U.S.C. § 1350.

<sup>45</sup> These treaties are not directly enforceable in U.S. courts because 1) the U.S. 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 e.g., *Doe 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 has choked, but not closed, 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 Waters, *Creeping Monism in the World's Common Law Courts*, January 2005 (unpublished manuscript on file with author).

<sup>46</sup> These human rights principles are inspired by various international instruments, including most prominently including the Universal Declaration on Human Rights, G.A. res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948), (U.S. has not ratified); the ILO Declaration on Fundamental Principles and Rights at

“become part of strategy, culture and day-to-day operations,” and publish in its annual report a description of the ways in which it is implementing such principles.<sup>47</sup> Over 2000 companies from over 80 countries have signed onto the Global Compact with 83 from the U.S., including Nike and The Gap, two companies that had received particularly notorious publicity for their labor practices.<sup>48</sup> In addition to the Global Compact scheme, consumer-driven boycotts have, in some instances, prodded corporate adoption of codes of conduct and social responsibility statements.<sup>49</sup> Alternatively, NGOs and trade associations urge sector-specific codes, including monitoring and reporting mechanisms.<sup>50</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>51</sup> a U.S./U.K. facilitated dialogue between the largest MNCs in the extractive industries, human rights NGOs, corporate responsibility

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Work, 37 I.L.M. 1233 (1998) (U.S. has not ratified), the Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992) (U.S. has not ratified), and the UN Convention Against Corruption, 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) (last visited on March 28, 2006) (U.S. ratified with non-self-executing declaration).

<sup>47</sup> The Global Compact, How to Participate in the Global Compact, available at <http://www.unglobalcompact.org/HowToParticipate/index.html> (last visited on March 23, 2006).

<sup>48</sup> 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).

<sup>49</sup> See Sprio, *Disaggregating U.S. Interests in International Law*, supra note 39, at 114 n. 41 (listing several corporate practice altering consumer boycotts).

<sup>50</sup> For an excellent description of the relationship between NGOs and sector-specific codes and norms, see Gary Gereffi, Ronie Garcia-Johnson, and Erika Sasser, *The NGO-Industrial Complex*, FOR. POL’Y, July-Aug., 2001.

<sup>51</sup> U.S. Department of State, Voluntary Principles on Security and Human Rights [Voluntary Principles], Feb. 20, 2001, available at <http://www.state.gov/g/drl/rls/2931.htm> (last visited on June 21, 2006).

groups, and labor.<sup>52</sup> The dialogue spawned the 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>53</sup> Since the Announcement of the Voluntary Principles, 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.<sup>54</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>55</sup>

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<sup>52</sup> For an excellent account of the process leading to the convening of the group and the drafting of the Voluntary Principles, see Bennett Freeman, Maria B. Pica, and Christopher N. Camponovo, *A New Approach to Corporate Responsibility*, 24 HASTINGS INT’L & COMP. L. REV. 423 (2001) (contemporaneous account written by Deputy Assistant Secretary of State for Democracy, Human Rights and Labor; Senior Advisor in Bureau of Democracy, Human Rights and Labor; and Attorney-Advisor, Office of Legal Adviser, Human Rights and Refugee Affairs). The original participants in the group included: multinationals in the extractive industries (Chevron, Texaco, Freeport-McMoran, Conoco, Shell, BP, Rio Tinto); human rights NGOs (Human Rights Watch, Amnesty International, International Alert, Lawyers Committee for Human Rights, Fund for Peace); corporate responsibility groups (Council on Economic Priorities, Business for Social Responsibility, the Prince of Wales Business Leaders Forum); and labor (International Federation of Chemical, Energy, Mine and General Workers’ Unions). *Id.* at 425.

<sup>53</sup> *Id.* at Preamble. 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.*

<sup>54</sup> See Voluntary Principles on Security & Human Rights at <http://www.voluntaryprinciples.org/> (last visited on June 22, 2006) (home page for the Voluntary Principles, including the Voluntary Principles, an updated list of participants, and an annotated timeline of the group’s substantive and procedural decisions). The International Business Leaders Forum and Business for Social Responsibility, two corporate responsibility groups, sponsor the web site, which has become a virtual centripetal medium to both record the progress of the group and facilitate continuing iterative dialogue.

<sup>55</sup> See e.g., Apparel Industry Partnership Agreement [AIP Agreement], signed April 14, 1997, between NGOs and multinational clothing manufacturers; International Labour Office, Promoting Fair Globalization in Textiles and Clothing in a Post-MFA Environment, TMTC-PMFA/2005, 2005. 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 the 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 19 apparel companies, with 3500 suppliers in 76 countries, producing over \$30 billion of goods, have joined the FLA; in addition, over 190 colleges and universities

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>56</sup> Consider the Voluntary Principles. All participating multinationals have adopted some type of “social responsibility” statement that acknowledges the corporation’s responsibility for respecting and promoting human rights.<sup>57</sup> Some companies have created offices of

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have joined to promote practices consistent with the Code of Conduct in producing apparel bearing their logos. See Fair Labor Association, [www.fairlabor.org](http://www.fairlabor.org) (last visited on June 23, 2006). While there are some who question the efficacy of the FLA, or are suspicious of its strong ties with the industry, see FLA Watch: Monitoring the Fair Labor Association, [www.flawatch.org](http://www.flawatch.org) (last visited on June 23, 2006), FLA audits find over 20 violations per factory. See FLA Releases Statement In Response to the USAS website, FLA Watch (March 28, 2006), available at

<http://www.fairlabor.org/all/news/docs/ResponsetoUSAS32806.pdf> (last visited on June 23, 2006).

Similarly, the European Union’s Corporate Social Responsibility Forum brought together representatives from business, labor, and civil society, with the European Commission playing a facilitating role. See CSR Europe, <http://www.csreurope.org> (last visited on June 23, 2006). The European Union has recently emboldened its support of corporate social responsibility efforts, announcing the European Alliance for CSR, a more robust version of the CSR Forum. See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility, [\\*com/2006/0136](http://ec.europa.eu/com2006/0136) (March 22, 2006).

<sup>56</sup> NGO-Industrial Complex 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 from “blood diamond” controversy); Press Release: Nike Issues FY04 Corporate Responsibility Report Highlighting Multi-Stakeholder Engagement and New Levels of Transparency, April 13, 2005, available at <http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2005&month=04&letter=a> (last visited on March 28, 2006); the Gap has started independent monitoring for foreign contractors to monitor compliance with the Gap’s code of conduct, NGO-Industrial Complex at 62.

<sup>57</sup> See e.g., Amerada Hess Corporation, Corporate Social Responsibility Policy, available at <http://www.hess.com/ehs/policies/csrpolicy.pdf> (last visited on June 23, 2006) (“We affirm our commitment and will respect the law in the countries and communities where we operate and accept and uphold the principles contained in the United Nations Universal Declaration of Human Rights”); Marathon Oil Corporation, Social Responsibility, available at [http://www.marathon.com/Our\\_Values/Social\\_Responsibility/](http://www.marathon.com/Our_Values/Social_Responsibility/) (last visited on June 23, 2006) (pleading to “respect fundamental human and worker rights and condemn the violation of human rights in any form; observe and promote, within our sphere of influence and legitimate business role, basic standards in accordance with the goals and principles of the United Nations Universal Declaration of Human Rights.”); Newmont Mining Corporation, Social Responsibility Policy and Guidelines, available at <http://www.newmont.com/en/social/policy/social/index.asp> (last visited on June 23, 2006) (“[E]very Newmont operation will: Respect the Universal Declaration of Human Rights in its business operations; Respect the social, economic and cultural rights of indigenous people”).

human rights compliance.<sup>58</sup> Others create management training modules focusing on human rights concerns.<sup>59</sup> And those multinationals 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>60</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>61</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 high-level diplomatic maneuvering to limit human rights treaties’ reach.

### ***Bottom-Up Transnational Lawmaking***

The lawmaking processes described in this part II are conspicuously not top-down enterprises driven by the executive branch political leadership. Instead, relatively spontaneous, unchoreographed interactions among private parties, mid-level bureaucrats,

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<sup>58</sup> See Freeport-McMoRan Copper & Gold, Inc., Social and Human Rights Policy, available at <http://www.fcx.com/envir/hrpol.htm> (last visited on June 22, 2006)

<sup>59</sup> Shell International Petroleum Company, Business and Human Rights: A Management Primer, 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) (last visited on June 23, 2006);

<sup>60</sup> 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, available at <http://www.angloamerican.co.uk/corporateresponsibility/internationalcommitments/> (last visited on June 23, 2006). The International Business Leaders Forum, one of the corporate 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; 2) report annually on compliance with the Voluntary Principles. See International Business Leaders Forum, Voluntary Principles on Security and Human Rights: Doors Open to New Participants, available at [http://www.iblff.org/media\\_room/general.jsp?id=123765](http://www.iblff.org/media_room/general.jsp?id=123765) (last visited on June 23, 2006).

<sup>61</sup> In fact, this was a refrain of the discussion during SELA’s “Globalization and Executive Power” panel, see *supra* note \*.

and NGOs seemingly inadvertently spark a process which ultimately produces “law.” In labeling this process “bottom-up transnational lawmaking,” I focus on two defining features. First, it is grounded in the practitioner, both public and private, including those motivated by altruism and those motivated by profit, who joins 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, whereas top-down lawmaking is a process of law internalized as practice, bottom-up lawmaking is a process whereby practices and behaviors are externalized as law. The following part III will hold this bottom-up lawmaking model up to the assumptions at the core of the nationalist vision.

### **III. THE MYTHS OF INTERNATIONAL LAWMAKING IN A NATIONALIST WORLD**

A mushrooming of international norms is certainly one of the byproducts of globalization. Yet an equally important, yet less discussed and appreciated, phenomenon is the proliferation of transnational lawmaking processes, an exponential growth in the routes to international law. Indeed, this essay’s account of bottom-up lawmaking is emblematic of just one, of many, decentralized transnational lawmaking processes that constitute (and continually reconstitute) a colorful and multidimensional patchwork 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.

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

As the bottom-up lawmaking examples in this essay 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; individuals; cities; judges; bureaucrats; technocrats, the media; and individuals.<sup>62</sup> In highlighting the role of non-state actors, sub-state actors, and civil society, these lawmaking stories expose the first nationalist myth, that state political elites, the executive in particular, hold a monopoly on international lawmaking. The executive undoubtedly retains a role as international lawmaker. Yet, as other lawmakers emerge on the transnational lawmaking scene, particularly private actors and sub-state actors, the executive's hegemony in international lawmaking wanes.

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<sup>62</sup> Of course this well-worn observation has deep roots in the Yale Law School, starting with Myres McDougal and W. Michael Reisman of the New Haven school. See MYRES S. MCDUGAL, *INTERNATIONAL LAW, POWER, AND POLICY: A CONTEMPORARY CONCEPTION* 8 (1954); W. Michael Reisman, *International Lawmaking: A Process of Communication*, The Harold D. Lasswell Memorial Lecture, (April 24, 1981), in 75 AM. SOC'Y INT'L L. PROC. 101 (1981); see also generally Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* [1992]); Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266 (1985) (remarks of Oscar Schacter); Myres S. McDougal, et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967). Harold Hongju Koh and the transnational legal process school also recognizes and celebrates the "transnational actor" as opposed to the classic state diplomat as the engine of international law and lawmaking. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

Scholars have long recognized that non-state actors, particularly NGOs, influence international lawmaking.<sup>63</sup> Yet, international legal scholars have been relatively slow to appreciate that 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. As we have witnessed privatization in some domestic lawmaking,<sup>64</sup> we are also witnessing privatization in some areas of international lawmaking.<sup>65</sup> A byproduct, of course, is that law emerges beyond the purview of the state (executive included).

Similarly, scholars traditionally under-appreciate sub-state actors' role in international lawmaking. Elsewhere, I have attributed this neglect to: 1) general neglect throughout U.S. legal education of state courts and state law; and 2) the fact that the role of sub-state actors in transnational lawmaking is lost "in the cross-wind of several of the most contentious debates within the international legal academy."<sup>66</sup> Yet, whether it is the Oklahoma Court of Criminal Appeals validating and implementing an ICJ decision regarding the Vienna Convention's consular notification provisions,<sup>67</sup> or New England

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<sup>63</sup> MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 35 (Cornell Univ. Press 1998). 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).

<sup>64</sup> See e.g., David S. Snyder, *Private Lawmaking*, 64 OHIO ST. L. J. 371 (2003)

<sup>65</sup> Professor Laura Dickinson has eloquently noted that the state itself has ceded quintessential roles in foreign affairs to private actors, discussing foreign aid and military functions. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WILLIAM & MARY L. REV. 135 (2005)

<sup>66</sup> 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). Cities and municipalities are also becoming transnational actors, and U.S. legal education neglects municipal law more blatantly than state law. See e.g., the UN Global Compact is focusing on the role of cities in a 2006 conference, UN Global Compact Cities Programme 1st International Conference "Resolving urban issues through cross-sector partnerships" <http://www.unglobalcompact.org/ParticipantsAndStakeholders/cities.html> (last visited on March 19, 2006).

<sup>67</sup> *Torres v. State of Oklahoma*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004).

Governors and Eastern Canadian Premiers joining to impose on themselves Kyoto-like emissions and climate change standards,<sup>68</sup> it is patently clear that sub-state actors make international law and, in so doing, further detract from the executive's purported hegemony, in such matters.<sup>69</sup>

The state, however, is not a “moribund” international lawmaker,<sup>70</sup> and the executive branch 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>71</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.

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<sup>68</sup> Pew Center on Global Climate Change, Learning from State Action on Climate Change, available at <http://www.pewclimate.org/docUploads/UpdatePewStatesBriefMarch2006%2Epdf> (last visited on March 21, 2006). C

<sup>69</sup> 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, 1227 (1999) (arguing that states are like “demi-sovereigns”). For additional discussions of the role of sub-national actors in international lawmaking see Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. LAW Q. (spring 2006, forthcoming) (discussing state-based climate change litigation as a forum for exploring supra-national climate change issues); see also Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility: Mapping the Role of Sub-National Climate Change Litigation* (Draft for University of Pacific McGeorge School of Law, Conference on the Business of Climate Change, Feb. 24-25, 2006) (on file with author).

<sup>70</sup> 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); 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)

<sup>71</sup> Supra notes 51-55 and accompanying text.

Furthermore, as noted by many international law scholars, the executive branch is not unitary and does not pursue neatly packaged unitary interests, as the nationalists presume.<sup>72</sup> In this regard, not all executive-branch-driven lawmaking occurs at the command of the President and political appointees. The “executive” itself is disaggregating and networking transnationally with counterparts.<sup>73</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-day-out grapple with the nitty gritty 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, just as the rise of the administrative state in the U.S. created a decision making bureaucracy somewhat insulated from the administration at the helm,<sup>74</sup> so, too, the rise of transnational regulatory networks creates a cadre of executive branch lawmakers distinct from (and at times independent of) the President. This development may very well

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<sup>72</sup> This insight is developed quite eloquently in Berman, *Seeing Beyond the Limits of International Law*, supra note 12.

<sup>73</sup> 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, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997; Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, supra note 59, at 199; Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, supra note 59, at 1771; 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).

<sup>74</sup> See generally Robert L. Radin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (describing the growth of the administrative state, the mushrooming of bureaucracy, and varied efforts to control a rapidly expanding bureaucracy).

anchor international law and international legal commitments in a manner that the nationalists simply do not imagine.

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

The second nationalist myth is that treaties (and secondarily) state-sanctioned custom constitute the international law universe.<sup>75</sup> Of course, this myth flows from the first—if one considers the President or diplomatic elites to sit comfortably in the lead of the lawmaking process, then the treaty is indeed a logical mechanism for contracting with global counterparts. Yet, again, reality belies myth. In this essay’s examples, diverse casts of transnational actors parade multiple normative forms, including understandings, informal “gentleman’s” agreements, pacts, codes, and court decisions. In international legal parlance, these are examples of “soft law,” defined somewhat tautologically as everything that is not hard international law (namely treaties and state-sanctioned custom).<sup>76</sup>

But is this “soft law” law? Are this essay’s vignettes appropriately labeled “lawmaking”? In some instances, the answers are unambiguous; norms that percolate from the bottom up frequently become hard law (sometimes international and sometimes municipal), even in the eyes of the most die hard formalists. While instruments such as

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<sup>75</sup> See supra note 24 the formal sources of international law.

<sup>76</sup> 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 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*, in 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).

the Global Compact, the Voluntary Principles, and the General Understanding are admittedly “soft law,” the norms embedded in such instruments often become hard law. To the extent that multinationals 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>77</sup> and third-party social responsibility audits or verification statements may strengthen such claims.<sup>78</sup> Likewise, if multinationals include social responsibility or environmental standards and/or reporting in their Securities and Exchange Commission disclosures, they could face regulatory sanctions for misrepresentation.<sup>79</sup> And, as multinationals incorporate corporate 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>80</sup> In a globalizing and interdependent world, money, goods

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<sup>77</sup> These types of claims were at issue in the case that the 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 *TEMPLE L. REV.* 151 (2005).

<sup>78</sup> See e.g., BP Global, Environment and Society, Ernst and Young Verification Statement, available at <http://www.bp.com/sectiongenericarticle.do?categoryId=9008328&contentId=7015269> (last visited on June 23, 2006).

<sup>79</sup> 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.

<sup>80</sup> 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 51. For instance, the Caspian Sea Pipeline (know as the Baku-Tbilisi-Ceyhan pipeline project) officially opened on July 13, 2006. BBC News, *Caspian Sea Pipeline is Declared Open*, July 13, 2006, available at <http://news.bbc.co.uk/2/hi/europe/5175676.stm> (last visited on July 21, 2006); 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 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, October 19, 2004, available at <http://subsites.bp.com/caspian/Security/HR/Georgia%20BTC%20Security%20Protocol%20EN.pdf> (last

and services are not the only commodities that travel – norms cross boundaries and are not hermetically trapped within the confines of any particular instrument or document. Often this seepage corresponds with normative hardening, transformation from soft to hard law.

Yet, this essays' 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 essay's discussion of the General Understanding, which 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 discernable impact on overall compliance with Berne Union rules.<sup>81</sup>

Why, then, have international legal scholars traditionally divided the international law universe according to formal labels and classification, 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 realist attack on the very international law's very existence.<sup>82</sup> Today, at a moment when international law is here to stay, this justification looms vacuous. Yet, if the lines that we have drawn are imperfect or illogical, this simply leads to the next question: how and

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visited on July 21, 2006); The BTC (Baku-Tblisi-Ceyhan Pipeline Company) Human Rights Undertaking, September 23, 2003, available at <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (last visited on July 21, 2006).

<sup>81</sup> Levit, *Bottom-Up Approach to International Lawmaking*, supra note 15, at 156-57.

<sup>82</sup> Id. at 129-30; 189-90.

where should we draw lines 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>83</sup> Yet, to adopt this approach is to concede the normative value of “law” itself, and I am unwilling at this point. I am increasingly attracted to those theories which superimpose a functional gloss on “law,” looking how rules actually operate in practice and asking whether the rules are authoritative and effectively binding.<sup>84</sup> As these questions inevitably touch upon the most fundamental of all jurisprudential questions – what is law? – this essay could not possibly do more than simply flag them for future discourse.

### ***Myth 3: International Law as Deliberate Choice***

Nationalists are “control freaks.” The nationalist account is not only based on the executive as lawmaker-in-chief but is also fundamentally premised on the executive *controlling* international law. Yet, international law often happens whether the President wills it or not and, in many cases whether the President likes it or not. International law is not always a “matter of choice.”<sup>85</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.

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<sup>83</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. U. L. REV.* 179, 181 (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.”).

<sup>84</sup> See generally Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823 (2002).

<sup>85</sup> Peter Spiro, *Disaggregating US Interests in International Law*, *supra* note 39 at 106 (arguing further that as globalization ensues, “choice may become increasingly constrained”).

While the President has decided that the U.S. 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.

Some scholars, most prominently Harold Hongju Koh, package this phenomenon as “transnational legal process.”<sup>86</sup> Others place these processes under a “law and globalization” rubric.<sup>87</sup> And, as already noted, I have described these processes as “bottom-up transnational lawmaking.” What ever the label, this scholarship collectively celebrates international lawmaking as messy, organic, and improvisational, often engaging the subjects of law as lawmakers and thereby anchoring law in on-the-ground practice. And these processes do not always bear fruit in direct and palpable ways but rather work subtly, quietly, and indirectly, through the shaping of legal consciousness on an individual and institutional level.<sup>88</sup> Thus, international lawmaking itself is a diverse enterprise, conceived as a loosely stitched patchwork of multiple norm-generating

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86. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Cambridge: Harvard University Press 1995)); Koh, *Transnational Legal Process*, *sputa* note 62.

87. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); see also generally Paul Schiff Berman, *Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

<sup>88</sup> Berman, *Law and Globalization*, *supra* note 87, at 542-546 (arguing that a robust understanding of international law, and compliance with international law, requires qualitative socio-legal study of how international norms reshape “attitudes” and “aspirations” and “lay understandings of justice that circulate in everyday life”).

communities rather than a predictably centralized process with the President as the fulcrum.

#### IV. A NORMATIVE CHALLENGE POSED BY BOTTOM-UP LAWMAKING

While I began to explore bottom-up lawmaking in the niche world of international trade finance,<sup>89</sup> this essay's inquiry suggests that bottom-up lawmaking is a ubiquitous phenomenon that will remain a steadfast feature of the lawmaking landscape. In discussions regarding this essay, scholars have challenged me to assess whether bottom-up lawmaking is normatively desirable.<sup>90</sup> In answering this challenge, I am torn. On the one hand, bottom-up lawmaking offers salvation to international law in the face of President Bush's breed of America exceptionalism.<sup>91</sup> With the current U.S. administration using the mantra of "executive power" and "sovereignty" to circumvent some international treaty commitments and to disengage from international institutions, especially in the realm of human rights, national security and the environment, bottom-up lawmaking becomes a spontaneously irrepressible, yet unpredictable, "work around" that may offset executive recalcitrance.

Furthermore, from my experience in government, I have seen some bottom-up lawmaking in action and have even been a bottom-up lawmaker. In reality, bottom-up

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<sup>89</sup> See generally Levit, *Bottom-Up Approach to International Lawmaking*, supra note 15; Levit, *The Dynamics of International Trade Finance Regulation*, supra note 28.

<sup>90</sup> E-mail from Aida Torres Pérez to Janet Koven Levit (May 31, 2006, 9:20 PM CST) (on file with author).

<sup>91</sup> Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003). The following quote in a recent New York Times editorial about the WHO's Framework Convention on Tobacco Control, World Health Assembly, WHO Framework Convention on Tobacco Control, WHA Doc. 56.1 (May 21, 2003), is quite telling of the depth of the Bush administration's disengagement with formal international law and international lawmaking institutions: "Two years ago, the Bush administration did something uncharacteristic: it signed a treaty." Take the Tobacco Pledge, N.Y. Times, July 23, 2006, at sec. 4(11).

lawmaking has been quite useful in resolving complex, technical issues. For example, the General Understanding rules manage over one-half trillion in trade per year,<sup>92</sup> and these rules inure not only to the benefit of large multinational corporations but also help small exporters and importers gain relatively inexpensive credit and participate on a “level playing field.” As bottom-up rules are “indigenous,”<sup>93</sup> the fruits of those who day-in and day-out grapple with nitty gritty technicalities, it should come as no surprise that the solutions embodied therein often work quite well, especially from the vantage point of the crafters.

On the other hand, if we recognize and accept that these bottom-up lawmaking trajectories are routes to law,<sup>94</sup> although often not direct, linear, or predictable, then we should at least consider whether they are legitimate routes. Some scholars have raised profound concerns about the democratic legitimacy of bottom-up lawmaking,<sup>95</sup> perhaps most poignantly illustrated by the following anecdote. 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 and spanning four aggravating months.<sup>96</sup> Then, unexpectedly, one

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<sup>92</sup> See supra note 27 and accompanying text.

<sup>93</sup> I borrow the term “indigenous law” from Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEG. PLURALISM 1, 17 (1981).

<sup>94</sup> See supra notes 77-84 and accompanying text for discussion of applying the terms “law” and “lawmaking” to the bottom-up examples that I have developed in this essay.

<sup>95</sup> Indeed, 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 essay, Professor Owen Fiss responds that “democracy must be the bedrock” of law’s legitimacy and that my search for an alternative grounding is a “dangerous” project. See Owen Fiss, “Concluding Remarks,” Moderator for “Globalization and Executive Power,” at Yale Law School’s Southern Cone Faculty Research Seminar: Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), *Executive Power*, Bogota, Colombia (June 9, 2006), reprinted in SELA 2006: EL PODER EJECUTIVO: (Roberto Saba, ed., Editores del Puerto 2007, forthcoming).

<sup>96</sup> I tried to contact the Berne Union directly, and was rebuffed because the rules, according to the Berne Union, were the property of the members. Then I turned to the members, who were hesitant to share due to confidentiality concerns. I even drafted a FOIA request directed at Ex-Im Bank and other agencies who I

Berne Union member sent me the General Understanding without any confidentiality stipulations. Coincidentally, the Secretary General of the Berne Union also granted me a phone interview in which she requested a draft of the article prior to publication, which I provided as a courtesy. After seeing a draft of the article, where I discussed the Berne Union rules and criticized its penchant for secretive lawmaking, the Secretary General dangled, and continues to dangle, a threat of legal action against myself and the law journal.

I recall this story to highlight that some that these bottom-up lawmaking communities are black boxes, and club-like secrecy often assumes normative status. My personal frustration was great, but my frustration was merely linked to the fact that I knew I had a story to tell, and that I felt excommunicated from a community in which I had enjoyed membership. The rules themselves, however, had no direct impact on me (or only the most attenuated effect as a consumer of goods).

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-Unionesque rules or run afoul of the Agreement on Subsidies, with the concomitant risk of countervailing measures.<sup>97</sup> So what has happened here? An informal, yet exclusive, club-like group of

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knew had access to the rules (and which I knew would land on the desk of one of my former colleagues and friends at Ex-Im Bank). 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).

<sup>97</sup> The reference here is to a recent dispute between Canada and Brazil over Brazil's export credit program in support of Embraer aircraft. WTO Dispute Panel Report on Canada Compliant Concerning Brazil's Export Financing Programme for Aircraft (April 14, 1999) WT/DS46/R, ¶ 7.31. 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 28 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

private actors and technocrats from 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 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 black box, creating a disjuncture, a mismatch, between law and lawmaker.

In this account, are the rules born from such bottom-up lawmaking process condemned as illegitimate? Is there a way to reconcile bottom-up lawmaking with notions of democratic legitimacy that we normally demand of law? While distasteful to

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exclusive club of developed, OECD countries. This concern was best articulated by Brazil in its pleadings in the Aircraft Finance case: “[P]aragraph (k) [the safe harbor] makes clear that the developed country Members of the WTO that are also Members of the . . . OECD have taken care of themselves. . . . Brazil argues that developing countries did not bargain for the OECD “alternative” in the Uruguay Round. They are not members of the OECD. They have no voice in the OECD. . . .” See World Trade Organization, *Brazil-Export Financing Programme For Aircraft*, supra at ¶¶ 4.97-99. Several developing countries raised similar concerns following the Doha round of WTO negotiations. See World Trade Organization, *Intervention by India on the Proposal by the EC Captioned WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures TN/RL/W/30*, (29 November 2002). (“The present provisions in respect of export credits has virtually grand-fathered some of the OECD provisions on export credits into the WTO. Consequently, the GATT membership at large, with the exclusion of a selected few member countries, had no role in negotiating this provision . . . . The developing countries are in effect being asked to waive their rights to negotiate provisions on export credits, if the scope of the so-called safe harbor on export credits is expanded to include other forms of export financing in accordance with the OECD Arrangement. Another concern regarding the OECD Consensus is that non-OECD countries are not aware of the details of the Arrangement.); see also World Trade Organization, *Export Credits in the WTO: Paper by Brazil, TN/RL/W/5* (25 April 2002) (“Another question that needs to be addressed is the interpretation by panels that the reference to the OECD Consensus gives a permanent ‘carte blanche’ to the participants of that Arrangement to alter WTO rules. . . . [N]on-OECD participants may be faced with a situation where, all of a sudden, their legislations, once in perfect compliance with WTO obligations, become vulnerable to action under the DSU for the simple reasons that the OECD participants, with no warning, changed some provisions of their Arrangement”).

some,<sup>98</sup> one group of scholars answers the legitimacy critique by eschewing “democratic legitimacy” as the sole normative route to legitimate “law.” In particular, these scholars argue that democratic processes—inputs—are not the only arbiter of law’s legitimacy; rather, performance, or effective outputs—norms, rules, or law—may also lend legitimacy to law.<sup>99</sup> And, as I have already noted, some of these bottom-up lawmaking communities demonstrate much ingenuity in the face of complex issues. Yet, this “ends justify the means” approach is unsatisfactory, perhaps unsettling, on numerous levels. “Effectiveness” is an inherently subjective inquiry, turning on perspective and vantage point. If Berne Union rules limit export subsidies and, thereby, maintain prices at a relatively high level, are the rules “effective” from the perspective of an importer or consumer in a developing country who cannot benefit from an ECA willing and able to subsidize the cost of imported goods?

Even if it were possible to set objective parameters, “effectiveness” entails judgment. Yet, how can institutions like the Berne Union open themselves to evaluation, showcasing skill and alacrity, behind currently high and nearly impenetrable walls? Some type of openness or transparency, therefore, is essential if “efficacy of outputs” is to become a mechanism that legitimates ensuing legal rules. Transparency will naturally lead to increased opportunities and demands for participation in the lawmaking process.

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<sup>98</sup> See Fiss, *supra* note 95 (arguing that the use of “substantive outcomes” to legitimate law is “unexceptional,” and further noting that “substantive outcomes may lead people to approve of the results,” which is quite different from legitimacy, which requires “an independent set of criteria.”).

<sup>99</sup> 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 (noting that “[t]he legitimacy of governments is not determined solely by the procedures on the input side. Substantive outputs also matter.”); Anne-Marie Slaughter, *Government Networks*, *supra* note 59 at 234 (stating that “[o]n the other hand, legitimacy may be conferred or attained independent of mechanisms of direct accountability—performance may be measured by outcomes as much as process. Courts, and even central banks, can earn the trust and respect of voters without being ‘accountable’ in any direct sense.”); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, *supra* note 70 at 195.

To the extent that these lawmaking processes are rooted in the technical experiences of niche communities, broad-based participation may counterproductively open the floodgates to outside pressure, scrutiny and demands, conceivably spelling the disintegration of the very practice-based, bottom-up lawmaking community that delivers effective regulatory outputs.

Other scholars respond to the legitimacy critique by reducing bottom-up lawmaking to trade-association-like self-regulation. Indeed, if bottom-up lawmaking communities are truly closed microlegal systems,<sup>100</sup> then they perhaps become the transnational equivalent of Shasta County,<sup>101</sup> the diamond bourses of 47<sup>th</sup> Street,<sup>102</sup> or the tuna courts of Tokyo, Japan.<sup>103</sup> As long as these microlegal systems are open to all affected parties, then they may actually function as insular-micro-democracies, generating rules which are unexceptional from a legitimacy perspective.<sup>104</sup> In fact, the

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<sup>100</sup> Michael Reisman, *Lining Up: the Microlegal System of Queues*, 54 U. CIN. L. REV. 417, 419 (1985) (arguing that microlegal systems “are the atoms and building blocks of which a society is composed); Michael Reisman, *Mires S. McDougal Distinguished Lecture: Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DEN. J. INT’L L. 165, 172 (1983) (arguing that a microlegal system arises when “a very small group of people, as a result of their social, if not physical proximity (they may be proximate telephonically or sequentially by mail) have the opportunity to interact. . . . [Microlegal systems] have the complex and significant normative components that are characteristic of law in its [sic] conventional usage.”).

<sup>101</sup> ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991). Ellickson, in his classic work, studied social norms among ranchers and farmers in Shasta County, California. He documents how the residents of Shasta County, California, including ranchers and farmers, develop their own rules to mediate disputes that occur when stray cattle wander onto a farm or ranch. While California law clearly allocates liability between ranchers and famers for cattle trespass and fence damage, *id.* at 42-48, the Shasta County residents nonetheless develop their own rules for handling disputes under an “overarching norm of cooperation among neighbors.” *Id.* at 53.

<sup>102</sup> See Lisa Bernstein, *Opting Out of the Legal System*, 21 J. LEG. ST. 115 (1992) (discussing the system of “private lawmaking” in the New York Diamond Dealers Club, including a system of private arbitration and dispute resolution).

<sup>103</sup> Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. 313 (2006) (documenting a microlegal system governing the sale and purchase of tuna in Tokyo, although distinguishing from the 47<sup>th</sup> St. Diamond Burses and Shasta County because the tuna courts are state-sanctioned).

<sup>104</sup> To the extent that these micro-legal systems tread upon other norms, such as norms favoring competition, then antitrust laws or laws governing cartels might come into play.

vast and rich social norm or private lawmaking literature offers insights as to how groups like the Berne Union initially gel and constitute norms.<sup>105</sup>

Yet, my vision of bottom-up lawmaking is bolder than mere self-regulation, and neither the Berne Union nor any of the other lawmaking communities discussed in this essay is a truly closed, self-regulatory system. First, in their exclusivity, these lawmaking communities are not open to all interested and affected parties. Furthermore, rules developed behind opaque, fortress-like walls, inadvertently, yet inevitably, seep beyond the insular lawmaking group, often when more formal lawmaking institutions (both international and national) appropriate the rules as “hard law”. When this happens, illustrated most poignantly by the alienation and disaffection Brazil articulates when embroiled in a dispute with Canada involving Berne Union rules,<sup>106</sup> the correspondence between law and lawmaker disintegrates, and bottom-up lawmaking seemingly presents a classic democratic deficit.<sup>107</sup>

Now this mismatch between governed and governors does not per se condemn bottom-up lawmaking as undemocratic. Democratic theory has for centuries, since the demise of the Roman city-state assemblies, grappled with ways to assure that that governance that was not literally “by the people” remains “of the people.”<sup>108</sup> While the

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<sup>105</sup> For a more extensive discussion of the relationship between the social norm and private lawmaking literature, see Levit, *Bottom-Up Approach to International Lawmaking*, supra note 15, at 183-188.

<sup>106</sup> See supra note 97 and accompanying text.

<sup>107</sup> The “democratic deficit” generally refers to institutional and/or structural features of a lawmaking community that result in the lawmaking process falling short of the democratic ideal, most frequently understood in the participatory sense, infra note 111. See e.g., Stephen C. Sieberson, *The Proposed European Union Constitution: Will It Eliminate the EU’s Democratic Deficit?*, 10 COLUM. J. EUR. L. 173 (2004); Dan Hunter, *ICANN and the Concept of a Democratic Deficit*, 36 LOY. L.A. L. REV. 1149 (2003); Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451 (1999). See also generally ALFRED C. AMAN, *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

<sup>108</sup> See ROBERT A. DAHL, *ON DEMOCRACY* 7-25 (Yale University Press 1998) (noting that “pure” democracy or direct democracy is of the type developed in Athens or ancient Rome); see also ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (Yale University Press 1982).

theoretical underpinnings of democracy undoubtedly remain a point of heated academic and philosophical debate,<sup>109</sup> a common bedrock is lawmaker accountability.<sup>110</sup>

Prominent theories of representative and republican democracy often anoint voting and elections as guarantors of democratic accountability.<sup>111</sup> However, one of the defining features of bottom-up lawmaking is that the lawmakers – private companies, NGOs, trade associations, standard setting or credentialing bodies, and individuals – tend to be non-state actors. And the state actors who participate in bottom-up lawmaking, primarily public technocrats and bureaucrats, do not stand for re-election.

Yet, accountability need not be direct through voting for representatives. In the United States, much lawmaking occurs in spheres where lawmaker accountability is quite attenuated. Consider the vast realm of administrative rulemaking,<sup>112</sup> which stands as a legitimate part of our democratic legal system even though the authors are often the bureaucrats and technocrats in the trenches who do not stand for re-election and who are

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<sup>109</sup> For some, democracy is participation; for others, democracy is deliberation; yet for others, democracy has independent, normative weight. For a sampling of democratic theory, see CARLOS SANTIAGO NINO, *CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1998); ROBERT POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP* (1984); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961); ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956). For an overview of these competing theories, especially as they relate to accountability in international politics, see Andrew Moravcsik, *Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 *GOV'T & OPPOSIT'N* 336, 338-343 (2004) (discussing libertarian, pluralist, social democratic and deliberative notions of democracy).

<sup>110</sup> David Held & Mathias Koenig-Archibugi, *Introduction to Special Issue of Miliband Conference on Global Governance and Public Accountability, London School of Economics and Political Science, May 17-18, 2002*, reprinted in 39 *GOV'T & OPPOSIT'N* 125 (2004) (“[T]here is agreement among democrats that wherever power is exercised there should be mechanisms of accountability”). Accountability means simply that those governed may make demands on the governors. *Id.* at 127 (“Accountability refers to the fact that decision-makers do not enjoy unlimited autonomy but have to justify their actions vis-à-vis affected parties, that is, stakeholders”). In fact, Justice Anthony Kennedy recently noted that “accountability is the essence of democracy.” Associate Justice Anthony Kennedy, Plenary Address, American Society of International Law Annual Meeting, March 30, 2006, Washington, D.C.

<sup>111</sup> Thomas Jefferson, Letter to John Taylor (May 28, 1816), reprinted in *SOCIAL AND POLITICAL PHILOSOPHY* 251-255 (John Somerville and Ronald E. Santoni, eds. 1963); DAHL, *ON DEMOCRACY*, *supra* note 108, at 37 (arguing that voting, in particular voting equality, is a cornerstone of all democracy).

<sup>112</sup> 5 U.S.C. §553 (codifying informal, notice-and-comment rulemaking). Note that the administration of George W. Bush has aggressively used notice-and-comment rulemaking, especially in the environmental areas. See e.g., Bruce Barcott, *Changing All the Rules*, *N.Y. TIMES MAG.*, April 4, 2004.

not political appointees. Nonetheless, we hold these lawmakers accountable through a variety of indirect mechanisms and feedback loops:<sup>113</sup> notice and comment rulemaking demands that agencies publish (and republish) proposed rules, accept comments from interested parties (this often includes oral hearings), and justify the ultimate rules in the context of the comments;<sup>114</sup> the Freedom of Information Act grants all citizens access to government records regarding rules and rulemaking;<sup>115</sup> and sunshine laws require that certain agency decisions be made in open meeting at published times.<sup>116</sup> In the end, if administrative law operates as it should, agencies, and agency lawmakers, are not black boxes; we accept these rules as democratically legitimate law because the processes are open and more or less transparent; thus those who have a stake in the law have an opportunity to participate in the lawmaking process in some fashion.

Transparency, therefore, seems to be a minimum for accountability. Where there is transparency, there is information; where there is information, stakeholders have the ability to react to or form opinions based on this information; and where there is the ability not only to form opinions but to voice opinions, there is a presumption that lawmakers are at least receptive, if not responsive, to such opinions. And here, of course,

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<sup>113</sup> I owe this insight in great part to the work of Laura A. Dickinson. See e.g., Dickinson, *Government for Hire*, supra note 65, at 169-78 (although agency officials do not stand for election and re-election, administrative law and governance offer alternative mechanisms to create “feedback loops” that infuse varying degrees of accountability in the system of administrative law).

<sup>114</sup> 5 U.S.C. § 553(b) (agencies must publish a notice of proposed rulemaking in the Federal Register, which includes: 1) time, place and nature of rulemaking proceedings; legal authority for proposed rule; and “either terms or substance of proposed rule or a description of the subjects and issues involved); 5 U.S.C. § 553(c) (“the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”); 5 U.S.C. §§ 553(c); 706(2) (the agency must justify the ultimate rule with a “general statement of their basis and purpose” and a reviewing court may overturn the rule if it is “arbitrary, capricious, an abuse of discretion.”). Some courts take an in-depth look (referred to as a “hard look) at whether an administrative agency has justified its ultimate rule vis-à-vis the comments that it receives. See e.g., *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

<sup>115</sup> Freedom of Information Act, 5 U.S.C. § 552.

<sup>116</sup> The Government in the Sunshine Act, 5 U.S.C. § 552b.

lies the problem with the bottom-up lawmaking -- the processes are often opaque and do not provide an opportunity for broad-based participation. At a minimum, these lawmaking processes must be transparent, or at least partially so, if they are to comport with democratic norms.

While transparency is quite a “buzz word” in international governance today,<sup>117</sup> and while it is a necessary predicate of accountability, it alone is not sufficient. The transparency has to be such that it invites *meaningful* stakeholder participation. If the Berne Union were to publish all of its rules on its website, but publish them post hoc, then this type of transparency would not be of the type that induces meaningful participation in the lawmaking process.<sup>118</sup> Alternatively, if the Berne Union were to invite “stakeholders” or civil society to semi-annual meetings, but hold them in the world’s most exclusive resorts (as they have in the past)<sup>119</sup> or give only nominal notice of the meetings or only have a few slots for outside participants,<sup>120</sup> this type of “openness” would not encourage robust participation.

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<sup>117</sup> Transparency has been of particular concern vis-à-vis the International Monetary Fund, the World Bank and the World Trade Organization. See e.g., Miles Kahler, *Defining Accountability Up: the Global Economic Multilaterals*, 39 *GOV'T & OPPOSIT'N* 132, 143-48 (2004); Joseph J. Norton, *International Financial Institutions and the Movement Toward Greater Accountability and Transparency: The Case of Legal Reform Programmes and the Problem of Evaluation*, 35 *INT'L LAW* 1443 (2001); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 *NW. J. INT'L L. & BUS.* 681, 726-729 (1997). See also generally Dickinson, *Government for Hire*, supra note 65, at 168-79 for discussion of transparency and transparency-enhancing mechanisms.

<sup>118</sup> I take some solace that during my ordeal with the Berne Union, it, for the first time, posted on its website a press release acknowledging the importance of transparency to Berne Union values; and recently the Berne Union has revamped the web site to enhance transparency a bit. Press Release, Berne Union, *Three New Members Join the Berne Union* (Oct. 2004), at <http://www.berneunion.org.uk/Press%20Release%20October%202004.pdf> (last visited on Aug. 30, 2006).

<sup>119</sup> See BERNE UNION Y.B. 121 (2006) for a list of the locations of semi-annual meetings since 1995.

<sup>120</sup> See Levit, *Bottom-Up Approach to International Lawmaking*, supra note 15, at 199 n. 304 (with regard to OECD efforts to promote transparency and participation, noting that consultative sessions were short, offering only a few “seats” for members of civil society interested in participating, and that the notice of the sessions were short, offering limited opportunities for real, effective participation).

Furthermore, the very notion of transparency as a vehicle to meaningful participation presupposes a more classic, nationalist lawmaking model, where lawmaking is choreographed and linear, providing identifiable and productive moments when outsiders may assert pressure and influence over the course of law. In contrast, bottom-up lawmaking is an inherently organic process, messy and unpredictable in its spontaneity. All the transparency in the world may not actually engender meaningful participation because it simply may not be clear to stakeholders when, where or how to participate. Do we condemn the Berne Union members for not inviting NGO representatives to also have drinks in the bar when they discussed the ideas that led to the Berne Union's creation? Obviously not. But when do these informal activities cross the line? When do they assume a conscious lawmaking posture? It is possible that only hindsight will tell. The challenge, of course, is how to add transparency to processes of an improvisational and unplanned character.<sup>121</sup>

In the end, transparency is not an end in and of itself but must be a means to an end – that end being an inclusive, participatory process that re-inserts accountability as the bridge between the governed and governors. Yet, if we surmount the challenges and imagine a bottom-up lawmaking community that practices meaningful openness,<sup>122</sup> then bottom-up lawmaking actually emerges as profoundly democratic, at least when

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<sup>121</sup> Here, I believe scholars play a critical role – doing a bit of digging or investigative reporting so that those outside the relatively closed lawmaking communities at least know what the law is, how it works, and how to pressure for change (or become their own alternative lawmaking community) if the legal outcomes are less than desirable.

<sup>122</sup> I recognize that participation in these lawmaking processes will not be truly inclusive and honestly representative of a plurality of ideas unless we account for asymmetries of power, imperfect information flows, unequal distribution of resources or simply the chaos of lawmaking in such a decentralized, improvisational, and unpredictable way. But is this not also true of any law making process, particularly those that occur on a transnational plane? Anytime we journey from a hypothetical world, the friction of real-life intercourse creates an inevitable gap between imagined and hard reality. Why should we hold these bottom-up processes to a higher standard than state-driven lawmaking? See generally, Moravcsik, *Is there a 'Democratic Deficit' in World Politics?*, supra note 108, at 338-343.

juxtaposed with the classic top-down account of international lawmaking.<sup>123</sup> What is more democratic? 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, investors, technocrats, and municipalities grappling with the desirability and viability of climate change regulation?

From Seattle to Doha, one of the recurrent critiques of globalization (and concomitantly inter-governmental institutions) is that it exports decision-making and lawmaking to a supranational sphere, creating intolerably wide physical and metaphysical space between the governed and the governors. In this version, accountability is minimal, at best. Bottom-up lawmaking is quite the opposite; it is an inherently grounded process, where international lawmaking ensues in the trenches, driven by those who have a stake in the regulatory outcome, and it simultaneously contemplates a type of horizontal, transnational web of those similarly situated around the globe. Certainly, if we understand democracy in the participatory sense, of direct “participation” of those governed in the governing process, or even in the deliberative sense,<sup>124</sup> then the sheer number and variety of transnational actors that bottom-up lawmaking engages may actually anoint it the “poster-child” for democratic participation.

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<sup>123</sup> Resnik, *Law's Migration*, supra note 36, at 1666; 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 (Herausgegeben von Rüdiger & Volker Rüben, eds., 2005).

<sup>124</sup> For an account of deliberative democracy, see NINO, CONSTITUTION OF DELIBERATIVE DEMOCRACY, supra note 109.

## CONCLUSION: INTERNATIONAL LAWMAKING AND TRANSNATIONAL PLURALISM

An air of arrogance and insecurity lies at the heart of the nationalist vision. On the one hand, the nationalists believe that they have found the right way, that they know the single viable path to international law—a strong “sovereign” (i.e., executive) chooses whether (or not) to conclude treaties with other sovereign states. On the other hand, globalization lobs constant reminders of transcendent international law, institutions, and regimes that intractably entrench often beyond the reach of the executive. *The Limits of International Law* is a nostalgic effort to hold onto an era bygone.

Bottom-up lawmaking challenges the assumptions at the heart of the nationalist account—diplomats as lawmakers, treaty and state-sanctioned custom as law, and lawmaking as a deliberate, executive choice. Thus, executive power in transnational lawmaking is limited, in this instance not by the strictures of the Constitution or the substance of international law but by the reality of multiple lawmaking processes unfolding beyond the executive’s command.

There are multiple routes to international law, only some of which center on the executive and implicate questions of executive power. Globalization merely punctuates that we inhabit a world of multiple norm generating communities. I am certainly not the first to recognize international law as a “polycentric process,”<sup>125</sup> generating law through “multiple processes and in multiple settings.”<sup>126</sup> Indeed, Robert Cover’s statement that “we inhabit a nomos – a normative universe” is no less relevant for the transnational space than it is for the domestic.<sup>127</sup> The nationalist account is jurispathic in its denial of such possibility. I offer bottom-up lawmaking not because it alone is jurisgenerative but

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<sup>125</sup> Spiro, *Disaggregating U.S. Interests in International Law*, supra note 39 at 110.

<sup>126</sup> Reisman, *The Democratization of Contemporary International Law-Making Processes*, supra note 123.

<sup>127</sup> Cover, *Nomos and Narrative*, supra note 3, at 4.

because it challenges us to imagine the promise of “alternative futures” in international lawmaking.<sup>128</sup>

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<sup>128</sup> *Id.* at 9.