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A NEW WORLD ORDER

CHAPTER FIVE

AN EFFECTIVE WORLD ORDER

"[T]here is a separate and critical need for programs like this one – programs devoted to the real nitty gritty of law enforcement against international cartels, where frontline enforcers can meet one another and try to solve common practical problems."

Former Assistant Attorney General Joel Klein, commenting on an international workshop for antitrust regulators[1]

A disaggregated world order, in which national government institutions are the primary actors rather than unitary states, would be a networked world order, a globe covered by an increasingly dense lattice of horizontal and vertical government networks. Yet how exactly would these networks create and maintain world order? How, in short, do they help us solve the world's problems?

Recall the definition of world order put forward in the Introduction: a system of global governance that institutionalizes cooperation and contains conflict sufficiently to allow all nations and their peoples to achieve greater peace, prosperity, stewardship of the earth, and minimum standards of human dignity. Describing the structure of this order is not enough. We must understand how all these networks achieve specific outcomes; how they actually conduct the business of global governance.

I will answer these questions in two parts: what government networks are already doing to strengthen world order and what they *could* do if they were self-consciously constituted and strengthened as mechanisms of global governance. I will take as a given the point made in the Introduction and previous chapters about the ability of government networks to solve the globalization paradox (by expanding our global governance capacity without centralizing policy-making power), as well as their general virtues of speed, flexibility, inclusiveness, ability to cut across different jurisdictions, and sustained focus on a specific set of problems. These features have led a number of European scholars, most focused on the EU, to conclude more categorically that networks are an optimal form for policymaking in general, superior either to hierarchies or markets.[2] But my purpose here is to catalogue the more specific ways in which government networks respond to global problems and could do so even more creatively and effectively in the future.

In both halves of the chapter, it will be useful to recall and distinguish among the three broad categories of government networks described in Chapters I-III: information networks, enforcement networks, and harmonization networks. Each can solve different problems, although in practice their activities overlap considerably. Harmonization networks contribute to world order by allowing nations to standardize their laws and regulations in areas where they have determined that it will advance their common interests in trade, environmental regulation, communications, protecting public health, or any number of other areas. (Many do not see this as an unalloyed good, to say the least, but bear with me.) Enforcement networks, again as the name suggests, contribute to world order by helping nations enforce law they have individually or collectively determined to serve the public good.

Information networks are a bit harder to peg. Scholars tend to assume automatically that more information is better, for a whole host of reasons. But in a world of information overload, that proposition is increasingly debatable. Further, politicians may be more concerned with the source of particular information – from within a particular polity, constituted by the people of a specific nation, or abroad – as more important than the content. Model legislation, codes of best practices, even judicial decisions developed by or passed along through government networks may actually be problematic. From another perspective, how can the mere provision of information, assuming that it is indeed valuable and helpful information, actually contribute to world order? What are the precise mechanisms by which all the talking and information exchange that is the lifeblood of many government networks translate into concrete action?

A second point to bear in mind throughout the chapter is that in cataloguing actual outcomes of government network activities, I am necessarily describing the exercise of different kinds of power. Transgovernmental networks, both horizontal and vertical, establish order through a variety of different types of power. Understanding the different mechanisms of impact requires appreciating these different types of power.

Power can generally be classified as either "hard" or "soft." As defined by Joseph Nye, hard power is "command power that can be used to induce others to change their position."[3] It works through both carrots and sticks – rewards and threats. Soft power, by contrast, flows from the ability to convince others that they want what you want. It is exercised through setting agendas and holding up examples that other nations seek to follow. "It co-opts people rather than coerces them."[4] Soft power is no less "powerful" than hard power. It is simply a different kind of power.

Part of the genius of government networks is that they marry soft with hard power. The power within the networks themselves – among different national regulators or judges, or

between a supranational court or parliament and a national court or parliament – is soft. Even when, as in a vertical network, the supranational entity has formal legal authority over its national counterpart, it has no actual means of enforcing the obligation. Instead, it must use everything from expertise to endearments: information, persuasion, socialization. Once convinced of a particular path of action or the wisdom of a particular result, however, the national government officials operating in both horizontal and vertical networks possess hard power to make things happen – as much hard power as they possess within their own domestic political systems.

At the same time, government networks are pioneering various forms of soft power. The power of information is particularly important in an age of information overload, when credibility becomes critical.[5] Government networks possess particular credibility through their capacity to collect, distill, and disseminate information from and to all their members on a regional or global scale. As the boundaries for information collection spread ever wider, the authority of an entity that, for example, promises a survey of multiple countries and a carefully considered code of best practices increases by the minute.

Turning to Part 1, I analyze the current impact of government networks on world order in three categories: convergence, compliance, and cooperation. In a wide variety of ways, government networks promote convergence of national laws and regulations – not simply through harmonization networks, which are expressly charged with this task, but through information networks. Kal Raustiala argues that this convergence often creates possibilities for deeper cooperation through more formal international agreements. Government networks also foster compliance with existing treaties and other international agreements, not only through

vertical and horizontal enforcement networks, which, again, often exist for this express purpose, but also through information networks.

Finally, government networks can improve the quality and depth of cooperation across nations. They can increase the number of nations cooperating in any particular regime and the scope of that regime across issues. Equally important, they can improve the effectiveness of the solutions adopted in two ways. First, information networks are ideally adapted to address a whole set of national and global problems that are more amenable to regulation by information, dialogue, and collective learning than by traditional command and control techniques. Simply providing information to individuals and organizations permits self-knowledge, which is the heart of self-regulation. Self-regulation in a collective context means setting standards collectively and pooling information in ways that can help all participants. It is the Weight Watchers model of global governance.[6]

Second, government networks are uniquely capable of addressing the many global problems that flow from domestic sources. To the extent that problems ranging from support for terrorism to destruction of the environment result from a failure of domestic government in some way in different countries – dictatorship, severe and systematic human rights abuses, corruption, poverty so severe it prevents the building of even a basic government infrastructure, or a lack of capacity to implement technical solutions, to name only a few – the solutions must implemented at the level of domestic government officials. The current international system assumes that nations will come together as unitary states and agree on the solutions, then turn to their domestic political processes to figure out how to translate those solutions into actual action. Government networks, by contrast, involve those officials in formulating the solution from the beginning, and can apply pressure or offer support directly to ensure implementation.

In Part 2 I move from what exists, however patchily in places, to a vision of what could be. I emphasize the capacity of government networks to regulate themselves. By making reputation matter, socializing their members, and developing clear criteria for initial and continuing membership, they could develop and support the implementation of "network norms" that would strengthen the integrity and competence of all their members. Government networks could also instill habits of multilateral discussion and argument in their members to maximize their ability to formulate informed, innovative, and legitimate solutions to common problems. Third, they are likely to be sites of positive conflict, conflict that will in the long term strengthen trust and habits of compromise among network members.

Two final caveats. It is impossible to support these various claims of impact systematically. The number and range of government networks described in the first four chapters – with different members, different purposes, different geographic reach, different structure (horizontal versus vertical), and different modes of operation – mean that the best I can hope for is to generalize from clusters of examples. Other scholars and practitioners will have to test and elaborate specific claims with specific networks. Further, in this chapter I do not review the various critiques of whether in fact convergence, in particular, and to a lesser extent compliance and cooperation enhance world order or stifle diversity in the service of hegemony. That is for Chapter VI.

1. What Government Networks Do Now

Raustiala's study of government networks among securities, antitrust, and environmental regulators leads him to conclude that networks promote regulatory export from stronger to weaker states.[7] This transfer of rules, practices, and whole institutional structures, in turn, "promotes policy convergence among states," an effect that he attributes to special

characteristics of government networks and to the role of "network effects," a concept developed by economists to explain the impact of private commercial networks.[8] Raustiala also finds that networks permit cooperation that would not otherwise be possible, and that they can build capacity in weak states that allow them to comply more readily with international obligations.[9] (We discussed this process of capacity-building in the regulatory context in Chapter I, also with regard to parliaments in Chapter III.)

I adapt these findings somewhat in the first half of this chapter. I discuss the present impact of government networks in terms of convergence, but also informed divergence of national rules, principles, and judicial decisions around the world. Part 2 addresses improved compliance with international agreements not only through capacity building but also through vertical networks. Part 3 argues that government networks improve cooperation due not only to networks effects, but also to the availability of new regulatory approaches through government networks that are particularly suitable for a host of global problems.

(a) *Creating Convergence and Informed Divergence*

Harmonization networks exist primarily to create compliance. Enforcement networks encourage convergence to the extent that it facilitates cooperative enforcement. Information networks promote convergence through technical assistance and training, depending on how they are created and who their most powerful members are. Indeed, some regulatory information networks have an explicit agenda of convergence on one particular regulatory model. At the same time, however, those who would export – not only regulators, but also judges -- may also find themselves importing regulatory styles and techniques, as they learn from those they train. Those who are purportedly on the receiving end may also choose to continue to diverge from the model being purveyed, but do so self-consciously, with an appreciation of their own reasons.

(b) *Regulatory Export*

Raustiala offers a number of examples of regulatory export in the securities, environmental, and antitrust areas. According to one securities regulator he interviewed, a prime outcome of SEC networking is the dissemination of "the 'regulatory gospel' of US securities law," including: "strict insider trading rules, mandatory registration with a governmental agency of public securities issues; a mandatory disclosure system; issuer liability regarding registration statements and offering documents; broad antifraud provisions; and government oversight of brokers, dealers, exchanges, etc."[10] This outcome is precisely what the SEC intended and hoped for when it began reaching out to foreign agencies in the early 1980s. Former SEC Commissioner Bevis Longstreth argued explicitly: "the trick will be to encourage the securities regulators of the other major trading nations to develop systems that provide protections to investors substantially similar to those provided in this country …."[11]

The many Memoranda of Understanding that the SEC has concluded with foreign securities regulators create frameworks for cooperation and provide technical assistance that deliberately seeks to transplant features of U.S. securities regulation abroad.[12] If a foreign authority does not have sufficient power under its domestic law to replicate these features, then the SEC generally requests it to obtain legislation to enable it to do so. This practice is explicitly recommended in IOSCO's Report on Principles for Memoranda of Understanding.[13] In addition, each year the SEC hosts the International Institute for Securities Market Development and the International Institute for Securities Enforcement and Market Oversight, which train hundreds of securities regulators from around the world.[14] Not surprisingly, this training "provides grounding in the basic principles and approaches employed by the SEC."[15]

In the environmental arena, the U.S. Environmental Protection Agency has engaged in many of the same activities as the SEC, both bilaterally and through the International Network for Environmental Compliance and Enforcement (INECE), which was founded in 1997 and plays a similar role to IOSCO. The EPA offers over 20 courses for foreign regulators on a wide range of issues regarding the running of an environmental protection agency and the enforcement of international, national, and local environmental laws and regulations.[16] In Raustiala's words, "Courses such as these essentially provide a handbook — 'environmental regulation in a nutshell' – that is closely tied to U.S. practice."[17] These training programs also showcase environmental technologies developed by U.S. firms, another way of fostering convergence between U.S. and foreign modes of environmental protection.[18]

The EPA founded INECE with the Dutch environmental protection agency; U.S. and Dutch environmental regulators had been working together since the mid-1980s, when the Dutch sought technical assistance from their U.S. counterparts. They jointly organized a series of conferences in the early 1990s, which were attended by scores of foreign regulators.[19] INECE now maintains a website that features training videos, sets of enforcement principles and regular newsletters.[20] Closer to home, as discussed in Chapter I, the U.S. has effectively extended the network technique that it uses domestically to strengthen state and local enforcement of environmental laws to Mexico. The Southern Environmental Enforcement Network, one of four regional associations of state and federal environmental enforcement agencies that work with the EPA in building domestic enforcement capacity in the United States, has provided training courses for the new Mexican environmental protection agency (PROFEPA), which was itself modeled on the EPA.[21]

Antitrust law and policy has long been a U.S. preserve, at least in the sense that the U.S. has had stronger antitrust laws than other countries and has actively sought to enforce them extraterritorially, generally in the face of stiff opposition.[22] In recent decades the tide has begun to turn. The EU has generally accepted and even embraced U.S. principles and modes of enforcement, although it now means that the EU commission is enforcing EU antitrust law against U.S. companies -- as in the EU Commission's high profile rejection of a proposed merger between Honeywell and G.E.[23] Indeed, Spencer Waller argued in 1997 that "the rest of the world looks to the United States as one of the most important sources of learning about competition law. Foreign legislators considering antitrust legislation often turn to the United States enforcement agencies and the American Bar for comments on the best path to choose."[24] The International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust confirms this trend.[25]

Scholars have documented training and technical assistance programs by the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) like those developed by the SEC and the EPA.[26] Of particular interest are programs under which U.S. antitrust regulators have been stationed abroad for months and even years – in countries from Poland to New Zealand. An ongoing Competition Law and Policy Roundtable sponsored by the OECD has also been an important forum for sharing expertise and problem solving, as has been the annual Fordham Law School Conference on International Antitrust Law and Policy. Indeed, the Advisory Committee reports its hope "that the United States will be able to build on the prevailing climate favoring international antitrust enforcement cooperation by sharing its recent experiences with foreign authorities in informal fora," giving as examples the Fordham conference and the DOJ's own International Cartel Enforcement Workshop in 1999.[27]

U.S. antitrust authorities have explicitly pushed a transgovernmental network approach to global antitrust regulation as an alternative to periodic efforts by other countries to push for a multilateral treaty regulating competition policy. These efforts have repeatedly stalled, although WTO members did agree at Doha in 2001 to begin negotiations on a common framework for regulating competition. At the same time, a senior Bush Administration official proposed the creation of an International Competition Network, a forum for countries to "formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement."[28] The network, "provide[s] competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns."[29] Its members include regulatory authorities from more than 65 states, held its first conference in September 2002 in Naples, Italy and its second in June 2003 in Merida, Mexico.[30] Initial topics of discussion included "the merger review process in the multi-jurisdictional context, and the advocacy role and activities of competition authorities."[31]

The U.S. has historically favored the network approach precisely because it has differed substantially with many other countries, including some of its most important trading partners, on the need for and the substance of a vigorous antitrust policy, and thus had much to lose in multilateral negotiations. Strikingly, however, existing networks are beginning to produce convergence around other models as well. The EU approach to competition policy has won out in Eastern Europe.[32] And according to an American Bar Association Report, "[c]lusters of nations are tending to adopt one or another of the different models," citing as examples Mexican convergence toward the U.S.; the laws of Argentina, Brazil, Chile, Colombia, and Venezuela combining aspects of U.S. and EU law; the laws of countries across Europe converging on the

EU model; and the laws of smaller Asian trading nations converging on Japanese and Korean models.[33]

What is clear from these three cases is that U.S. regulatory agencies offer technical assistance and training to their foreign counterparts to make their own jobs easier, in the sense that strong foreign authorities with compatible securities, environmental, and antitrust regimes will effectively extend the reach of U.S. regulators. It also seems clear that if foreign regulators are being trained by U.S. regulators, their practices and procedures are likely to reflect how the U.S. does things. But what is not clear is the extent to which U.S. regulators actually succeed in establishing themselves as the dominant model around which other regulators converge. Raustiala argues that the degree of convergence on any particular regulatory model in a subject area is most likely to reflect the "concentration of regulatory power" – in other words, how dominant a specific regulatory agency is in a regional or global arena.[34] The SEC is clearly the dominant securities regulator worldwide; the Antitrust Division of the DOJ is certainly a force but faces increasingly strong competition from the EU Commission; and the EPA is a relative latecomer to environmental regulation in comparison to many of its European counterparts.

Another factor that appears to affect the degree and type of convergence that occurs is the role of would-be regulatory "importers," as well as exporters. In each of the three cases discussed above, U.S. agencies were flooded with requests for training and technical assistance from countries all around the world, developing and developed.[35] Many of these countries were setting up regulatory systems from scratch and were actively looking for an effective and legitimate model. Requests for assistance from such countries may be motivated by a keen awareness of the global distribution of military and economic power, but it is also true that

regulators in countries with the most powerful economies have had the most experience with domestic regulation in areas like securities and antitrust and have thus had the most opportunity to develop genuine expertise. Even accepting that technocracy is rarely apolitical, a favorite point made by opponents of "technical" harmonization, it surely must be possible to build an objectively "better" mousetrap in some cases, or to develop codes of genuinely "best" practices.

Even for countries with relatively developed regulatory frameworks of their own, however, convergence to some general model through a network may pay off. Raustiala borrows from the economic theory of "network effects" to demonstrate that as with a network of telephones or computers, each participant in a regulatory network derives greater benefits from the network as the network expands. Government networks "are characterized by extensive sharing of information, coordinating enforcement efforts, and joint policymaking activities. These activities plausibly exhibit network effects: the more regulatory agencies that participate in coordinating and reciprocating enforcement efforts, for example, the better off are all the other agencies."[36] It follows that both "powerful and weak jurisdictions" have an incentive to join regulatory networks and "engage in the export and import of regulatory frameworks."[37]

In fact, however, we still do not have good empirical evidence on the actual degree of convergence among all countries or even a group of countries in any of these areas, much less the extent to which this convergence has actually resulted from network activity. Such evidence would have to be painstaking gathered country by country and accompanied by detailed research on the causes of any convergence found. But if technical expertise and network effects are driving a process of global regulatory convergence, then the learning that goes on through government networks should be a two-way street. Regulators from all countries should be able recognize better approaches when they see them – just as some U.S. judges have begun to do

when they encounter a foreign decision that seems to be a more sensible resolution of a particular legal issue. Conversely, they should be able still to diverge from a dominant regulatory model on the basis of a reasoned analysis as to why their nation's economic, political, or cultural circumstances differ.

(c) *Distilling and Disseminating Credible Information*

Convergence through regulatory export assumes a deliberate effort to create convergence, whether successful or not. An even simpler way to understand the power of government networks in promoting convergence is their role as distillers and disseminators of credible information in a world of information overload. Too much information translates into what Keohane and Nye call "the paradox of plenty. A plenitude of information leads to a poverty of attention."[38] The deluge of facts and opinions through phone, fax, email, and the Internet, not to mention more traditional print and other media sources, is simply overwhelming. As a result, sources that can command attention gain power.

Keohane and Nye note the importance of "[e]ditors, filters, interpreters, and cue-givers," as well as "evaluators" in distilling power from the plentitude of information.[39] "Brand names and the ability to bestow an international seal of approval will become more important" in determining which sources of information are utilized.[40] In short, the ability to provide credible information and an accompanying reputation for credibility becomes a source of power. Many NGO networks establish credibility by creating a community of like-minded professionals who can frame a particular issue, create knowledge around it, and set the agenda for how to pursue it. Government networks can do the same thing.

What better source on how to run a securities system, regulate commercial banks, protect the environment, pursue different types of criminals, safeguard human rights or foster business competition than networks of government officials from around the world charged with precisely those functions? These government networks understand themselves to be in the business of collecting, distilling, and disseminating information – precisely the "editing" or "filtering" role that is such a crucial source of soft power.

(d) *The Hard Impact of Soft Law*

Government networks often distill and disseminate information in a particular form that enhances its impact – as a code of best practices, model legislation, or a set of governing principles. Packaged this way, these exhortations become a soft version of soft law. Whereas traditional international law making has come in the form of hard law – treaties and other international agreements – soft law, provided in the form of international guidance and non-legal instruments, is emerging as an equally powerful, if not more powerful form of regulation.

Andres Rigo, former General Counsel of the World Bank, documents the extraordinary impact of the World Bank in areas including procurement policy, environmental protection, foreign investment, and international waterways.[41] In each of these cases, Rigo traces substantial harmonization or convergence among national laws, harmonization that is not part of the World Bank's official mission but that nevertheless frequently results from World Bank activity. The engine of such change is not hard law of any kind, but rather soft law in the form of principles, guidelines, codes, standards, and best practices.

Where states seek to create new legal rules and policies in the face of a dearth of local knowledge and expertise, they often seek to borrow from other states or internationally renowned experts. The World Bank is an obvious source to borrow from. In the procurement arena, for

example, the World Bank long ago developed a set of guidelines on procurement for its own internal use. Over time, it supplemented these guidelines with a set of standard bidding practices, both of which were adopted as part of every World Bank loan agreement. Bank officials built on their expertise in this area in advising UNCITRAL, the U.N. Commission on International Trade Law, on its model procurement law, which has subsequently served as a model for over 20 countries in drafting national legislation. Regional development banks have also followed the World Bank's procurement practices.[42] In short, through soft law, a new international standard was set, which states now borrow and apply domestically.

In environmental regulation, the World Bank issued an internal operation manual in 1984 collecting all the various instructions issued by the office of environmental affairs. Although these instructions were generally geared to specific countries and situations, the manual contained a more general set of policy principles, such as prohibitions on financing projects that "cause severe or irreversible environmental deterioration, displace people, or seriously disadvantage certain vulnerable groups without mitigation measures."[43] Rigo documents the ways in which both the "requirement and the process of environmental assessments has found its way into the national legislation of many countries," again through multiple channels. Some of these channels, such as conditions attached to various projects funded by the Bank or provisions developed by the Bank and subsequently adopted in international conventions, are not particularly surprising.[44] But in other cases the Bank's influence has been felt through the simple acts such as the publication of a handbook on pollution prevention or promulgation of a policy referring to FAO guidelines on packaging, storage, and labeling of pesticides.[45] Countries seeking to implement new rules have found the implementation of such guidelines into national law to be a cost effective means of determining and complying with international standards.

In developing these policies for its own purposes, the Bank has been increasingly aware of the need to consult a wide range of interested groups both within countries and in international civil society. The result is a brokered set of guidelines that tend to be all the more effective as models for being more representative. In the investment context, Bank officials surveyed bilateral investment treaties, multilateral instruments, national legislation, arbitral awards, and international law literature. They also consulted widely with "the executive directors of the World Bank, interested countries, intergovernmental organizations, business groups and international legal associations."[46] The resulting guidelines, after review by the Development Committee, were recommended to member states of the as "acceptable international standards which complement applicable treaties."[47]

These results should not be particularly surprising. They buttress Keohane and Nye's analysis of the value of credible information. Even more valuable is a distillation and evaluation of information from many different sources, wrapped up in a neat package with an official imprimatur. Recommended rules and practices compiled by a global body of securities regulators or environmental officials offer a focal point for convergence. Equally important, they offer a kind of safe harbor for officials the world over looking for guidance and besieged with consultants, who need not only to make a choice but to be able to defend it to their superiors In that sense, they are quite similar to the "rolling best practices" rules Dorf and Sable identify. Within a culture of democratic experimentalism, states ensure efficiency and compliance with international standards by borrowing the then existing best practices from other states or international actors.[48]

Critics who castigate government networks for being mere "talking shops" radically underestimate the power of this kind of activity. As Rigo explains:

> The enormous increase in transnational activities as a result of globalization highlights the legislative void at the international level. The activities described in this paper respond, sometimes unconventionally, to the need to fill this gap. Traditional means of treaty making are too cumbersome for the tasks at hand and too time consuming. There may also not be the need for full agreement in all the details that a treaty requires, but simpler and more expeditious means to provide guidance may be sufficient.[49]

In the examples cited above, then, the World Bank provides guidance, saves transaction costs and offers the luxury of security. The value of such guidance rises concomitantly with both uncertainty and complexity, circumstances likely to arise more and more frequently in a world of complex rules and technical regulations.

The guidance that organizations such as the World Bank provide is often informal. As Rigo's study shows, it may come "in the form of guidelines on which to base advice, inspire legislation or future treaties (Guidelines on Foreign Investment), or in the form of benchmarks against which to measure existing legislation (financial standards) or of an acceptable practice in the absence of regulatory instruments (Pollution Abatement and Prevention Handbook)."[50] Rigo himself, following Wolfgang Reinicke, sees his examples as incipient "cross-national structures of public interest" from which global public policy is emerging."[51] The effect is as great as or greater than the impact of many "harder" rules and conventions designed to provide global uniformity by reshaping international law.

(e) *Informed Divergence*

When states diverge, either in regulatory standards, legislative prohibitions, or legal doctrines, they can do so fortuitously or deliberately. Most divergence is a function of cultural,

historical, or political differences, or of simple path dependence over time – meaning that one nation chose one kind of typewriter keyboard and another chose another and those choices then dictated different typewriters, computers, personal desk assistants, etc. But divergence can also be deliberate and informed. When a nation has the option of harmonizing its rule or standard or decision to converge with other nations but *chooses not to*, it is making a statement about the uniqueness of its national tradition or the intensity of its political preferences.

It is easiest to see this phenomenon in the judicial arena. Take free speech, for instance. The United States offers more protection to freedom of speech than any other nation in its constitutional peer group. That is a historical and cultural artifact shaped over centuries by Supreme Court decisions interpreting the First Amendment and building on one another. Suppose that in a conference of constitutional judges from around the world U.S. judges become aware of just how far out of line they are with prevailing doctrine in other countries. They might discover, for instance, that their fellow constitutional judges from different countries, having consulted one another's decisions, virtually all agree that hate speech should not be permitted, that it should be an exception to a liberal constitutional right of freedom of speech.

Suppose further that the next First Amendment case before the U.S. Supreme Court involves hate speech. In the Court's opinion, the Justices openly discuss the prevailing trends in global constitutional jurisprudence and announce that under U.S. constitutional precedents, they have decided to continue to permit hate speech as a necessary concomitant, however deplorable of freedom of speech. They might justify their decision on the grounds that they are U.S. judges bound by a distinct legal and political tradition. Alternatively, they might declare that the U.S. historical and cultural trajectory has been sufficiently distinct from that of other nations as to

warrant a different understanding of what freedom of speech must mean. Or they might invoke the specific text of the U.S. Constitution as opposed to the texts of other constitutions.

Any of these options would be informed divergence, a deliberate decision to pursue an explicitly idiosyncratic path in the face of global trends in the other direction. It is equally possible to imagine legislators or regulators being made aware of the divergence between their laws or rules and those of a substantial number of other countries and nevertheless concluding to prize and preserve their differences on historical, cultural, political, economic, social, religious, or any other distinctive national grounds. What is critical is that the same forces pushing *toward* convergence -- the forces of regulatory export, technical assistance, distilled information, and soft law – can also result in informed divergence. They permit any subset of national officials, or indeed all three branches of a national government, to decide deliberately to affirm their difference.

(f) *Improving Compliance*

In addition to fostering convergence of national laws and regulations, government networks also improve compliance with international law. Indeed, vertical government networks exist essentially for that purpose, to use personal relationships to harness the power of national government institutions in the service of their counterpart supranational institutions. This approach strengthens compliance by backing enforcement effort with genuine coercive authority – at least as much as is typically exercised by a domestic court or regulatory agency. A second way to strengthen compliance is to improve the capacity to comply on the part of a government where the spirit is willing but the infrastructure is weak. Here the training and technical assistance provided through horizontal government networks does double duty, not only making

foreign regulators better partners for the enforcement of national laws, but also better able to comply with their own international obligations.[52]

(g) *Enforcement: Harnessing the Power of National Government Institutions*

Describing and praising the G-20, Canadian Finance Minister Paul Martin writes:

> Because it brings together finance ministers and central bank governors, the G-20 closely reflects the fiscal and monetary capacities of national governments and the realities of national economies. This provides a practical link between the objectives of international development and the national institutions that are crucial to bringing them to reality.[53]

He contrasts the G-20 with the public international financial institutions, such as the IMF and the World Bank, noting that they "remain at the heart of global economic development and stability."[54] Nevertheless,

> it is important to recognize the natural limits to what can be achieved by the international institutions acting alone. The IMF, for example, can recommend policies. It can hold out financial assistance as an incentive to get governments to accept its advice. And it can withhold its financial support if that advice is not taken. *But it is national governments that exercise the sovereign right to implement those policies, and who must answer to their populations for the consequences.*[55]

The same principle operated in the construction of the EU's legal system, although it was never overtly recognized. The ECJ was empowered to hand down decisions on European law, including decisions regarding the distribution of powers among EU institutions, between EU and

national institutions, and on the rights of individuals vis-à-vis their governments in matters falling within EU jurisdiction. But the ECJ had no direct enforcement power. It was up to the national courts, which retained the de facto sovereign right to implement the ECJ's decisions.

A third example of harnessing national governmental power is the coordinated efforts of national parliamentarians to pass legislation promoting environmental protection or human rights, as discussed in Chapter III. The adoption of international conventions or the evolution of customary international law on the environment or human rights involves a two-step process of implementation. National parliaments must first ratify the conventions their executive branches have concluded. Next, they must decide whether to pass specific implementing legislation, which they often fail to do. By contrast, where transgovernmental legislative networks succeed in coordinating action, the result is a plethora of similar national laws that are automatically enforceable.

In all these examples the key players are national government officials who exercise the same array of coercive and persuasive powers on behalf of transgovernmental decisions that they do domestically. They can coerce, cajole, fine, order, regulate, legislate, horse-trade, bully, or use whatever other methods that produce results within their political system. They are not subject to coercion at the transgovernmental level; on the contrary, they are likely to perceive themselves as choosing a specific course of action freely and deliberately. Yet having decided, for whatever reasons, to adopt a particular code of best practices, to coordinate policy in a particular way, to accept the decision of a supranational tribunal, or even simply to join what seems to be an emerging international consensus on a particular issue, they can implement that decision within the limits of their own domestic power.

(h) *Capacity Building*

Building the basic capacity to govern in countries that often lack sufficient material and human resources to pass, implement, and apply laws effectively is itself an important and valuable consequence of government networks. Regulatory, judicial, and legislative networks all engage in capacity-building directly, through training and technical assistance programs, and indirectly, through their provision of information, coordinated policy solutions, and moral support to their members. In effect, government networks communicate to their members everywhere the message that the Zimbabwean Chief Justice understood when he was under siege: "you are not alone."

Building domestic governance capacity obviously improves the prospect for compliance with domestic law. It is likely to have an equal impact on prospects for compliance with international law. Abram and Antonia Chayes have developed a "managerial theory" of compliance with international rules that locates problems of non-compliance as much in lack of capacity to comply as in lack of will.[56] They reject a "criminal law" model of international order, based on the threat of external sanctions, insisting instead that actors in the international system have a "propensity to comply."[57] The task of maximizing compliance with a given set of international rules is thus a task more of management than enforcement, ensuring that all parties know what is expected of them, that they have the capacity to comply, and that they receive the necessary assistance.

Chayes and Chayes argue that lack of capacity is a particular problem regarding compliance with complex international regulatory regimes, requiring nations not simply to refrain from certain action – such as shooting at ships on the high seas or harming another nation's diplomats – but rather to take positive steps to cut back on the production of ozone or carbon levels, to improve health standards, to reduce tariffs or corruption or poaching. Such efforts require both

administrative resources and information – precisely what many governments lack and what government networks can help to supply. Further, as Raustiala reminds us, the managerial theory assumes that "a successful compliance management process is explicitly cooperative and interactive," features that also characterize government networks.[58]

Raustiala reviews several other reigning theories of why nations do or do not comply with international law – theories about the role of transnational legal process and the legitimacy of the international norms or rules – and finds that they also predict a positive role for government networks in enhancing compliance.[59] Further, "by facilitating the export of ideas, technologies, and procedures," government networks help spread "extra-legal cooperative forces" that convince states that it is in their best interests to comply with a particular legal regime.[60] Overall, by harnessing hard power, building compliance capacity, and diffusing ideas and technologies around the world, government networks are likely to strengthen the rule of international law in ways long demanded and expected of traditional international institutions.

(i) *Enhancing Cooperation*

To understand the full impact of government networks, it is necessary to understand how the information revolution is changing the nature of government at home and the problems governments face abroad. Keohane and Nye are wise and right to warn against assuming that traditional resource-based power no longer matters; that technology has created a brave new world that will operate according to a brave new politics.[61] Nevertheless, in some very deep ways, the availability and cheapness of information is changing the way government works: the kind of power it possesses and the way it exercises that power.

Instead of deciding how individuals should behave, ordering them to behave that way, and then monitoring whether they obey, governments are learning how to provide valuable and

credible information that will let individuals regulate themselves within a basic framework of standards. Giandomenico Majone, who pioneered the concept of the EU as a "regulatory state,"[62] explains that whereas direct regulation relies on a variety of "command and control techniques" such as orders and prohibitions,[63] regulation by information attempts "to change behaviour indirectly, either by changing the structure of incentives of the different policy actors, or by supplying the same actors with suitable information."[64] Having access to credible information can change the calculations and choices that different actors make.

Regulation by information is government by soft power. By changing the information available to others, you convince them that they want what you want -- the very definition of soft power. Majone agrees with Keohane and Nye, however that the key is access to *credible* information. The core role of the state thus shifts from enforcer to provider and guarantor of the quality of the information available.

In the international arena, where government must become governance precisely because of the absence of any centralized authority to exercise command and control power, regulation by information is very promising. It holds out the simultaneous prospect of the effective exercise of power without hierarchy and of maximum diversity within a basic framework of uniformity. If governments can provide information to help individuals regulate themselves, then government networks can collect and share not only the information provided but also the solutions adopted. The network provides and guarantees the quality of information, possibly through a secretariat or information agency that facilitates the collection and transmission of information along the network.

A principal reason that governments are experimenting with regulation by information domestically is their perception that problems and contexts are changing faster than centralized

authorities could ever respond. They also seek to empower active citizen participation in addressing issues requiring regulation of some sort, although not necessarily formal legal rules. Cooperation across borders on a whole host of old and new issues in the coming decades will similarly have to address fast-changing circumstances and an astonishing array of contexts, as well as the need for active citizen participation in as many of the world's countries as possible. The availability of government networks will enhance the likelihood and quality of that cooperation.

Regulation by information is an idea gaining currency in many different political systems simultaneously. This section examines examples from the EU, NAFTA, and the UN. The EU example involves horizontal regulatory networks and supranational information agencies; the NAFTA example illustrates a vertical network operating through the provision of information; and the UN example engages private corporations in a collective learning forum.

(j) *European Information Agencies*

Within the EU, the shift from direct regulation to regulation by information is part of a "radical rethinking of the way in which norms are elaborated and applied."[65] Even the EU Commission has had to recognize that the straightforward model of regulation as "the elaboration of norms by legislators followed by their application by administrators or judges" is inadequate in the face of uncertain and complex public policy issues, particularly those involving risk regulation. The response has been what the EU dubs "co-regulation" –the simultaneous decentralization of regulatory authority, so as to shift more power to regulators within the EU member states, and the creation of a new generation of specialized administrative agencies at the supranational level.[66]

We discussed these agencies in the last chapter as an example of how an international organization could help facilitate the work of government networks – by providing a structure within which networks of national officials can operate most effectively.[67] The decentralization of regulatory authority to national officials increases the need to ensure minimum uniformity among them; hence the value of a network. The network can and does emerge on an ad hoc basis, but the existence of a supranational agency charged with its coordination strengthens it immeasurably. Thus, according to the Commission, the eight new agencies created at the European level between 1990 and 1997 have broadened the existing government network to include parallel networks of private actors, "with the aim of establishing a 'community of views'."[68] Creating these broader networks such techniques has resulted in "wider ownership of the policies in question" and has thereby achieved "better compliance, even where the detailed rules are non-binding."[69]

How then does this activity relate to regulation by information? To ensure that the European agencies do not usurp too much power from their national counterparts, "their powers are limited and their primary role is the collection of data and the provision of information."[70] The collection and dissemination of information, in turn, is the force that animates the networks and helps ensure a degree of common understanding and uniformity of interpretation.[71]

The link back to credibility here is interesting. To be effective, the European agencies must be credible, an attribute that they can only safeguard by being as independent as possible and pursuing a role as coordinator and honest broker among the national authorities. At the same time, the national authorities need to establish credibility as independent regulators with their publics. This means a potential three-way flow of information: among the members of a particular government network, facilitated by the information agence; from the government

network upward to policy makers at the European level; and downward to interested members of national publics.[72]

(k) *The NAFTA Commission on Environmental Co-operation*

To the extent that credibility is based on expertise, it is also undermined by claims of insulation and isolation from a broader public. This is the continuing conundrum of administrative law: how to assure both independent judgment and adequate consideration of legitimate political concerns. Majone and Dehousse, addressing this problem in the context of European agencies, emphasize the need to "integrate expert and social judgment *throughout* the regulatory process."[73] The EU Commission agrees, stressing the importance of bringing the widest possible range of stakeholders into the process, including the weak and disorganized.[74]

Crossing the ocean, NAFTA has inaugurated a novel dispute-resolution mechanism based entirely on the concept of mobilizing the public by informing them. That is the explicit charge of the Commission on Environmental Co-operation (CEC), established under the North American Agreement on Environmental Cooperation (NAAEC) (a side agreement to NAFTA).[75] Under its terms, Canada, the United States and Mexico granted private parties, including NGOs, the power to bring complaints before the CEC against one of the three states for failure to enforce its environmental laws.[76] The Secretariat of the CEC decides whether the complaint is sufficiently credible to justify the preparation of a "factual record." If the Secretariat decides that it is, the environmental ministers of all three states (known together as the "Council") must vote whether to proceed.[77]

If these ministers do vote to authorize preparation of a factual record, the Secretariat can not only solicit information from both the plaintiffs and the defending state concerning the charges, but can also develop the record by getting information from outside experts about the strength

and nature of the allegations.[78] Neither the Secretariat nor the Council can actually reach a legal conclusion as to whether the defending state is failing to enforce its environmental laws; however, the Council must vote whether to accept the factual record and make it public.[79] Making it public invites increased public participation in the enforcement process; the record, along with numerous supporting documents, becomes a strong weapon for NGOs to use in mobilizing domestic public opinion in favor of stronger domestic enforcement.[80]

This process is so new that it is not yet clear how well it works; many environmental NGOs seek a more traditional model of enforcement "with teeth." This preference assumes that coercive enforcement is still works best, in which case a dispute resolution model limited to providing information can only be a pale imitation of the real thing. But if officials increasingly regulate by information, then a key is to disseminate information to as many relevant parties as possible when disputes arise. Such information should then get fed back into the political process in ways that will change the incentives of non-compliant parties.

(l) *The UN Global Compact*

The EU's shift to regulation by network and by information and the NAAEC's dispute resolution process still operate on a static model. Both still assume that the information that is actually provided through an EU agency or the CEC Secretariat is collected at one point by a disinterested party and then provided to interested parties at a second point. This model does not allow for the possibility that the regulated parties themselves may be the most valuable source of information and that the most valuable information will continue to change in the face of changing problems and experimental solutions.[81]

The EU Commission alludes to this possibility by identifying several key issues to take into account in designing and reforming institutional arrangements: First is "the importance of

reflexivity or the ongoing questioning of assumptions, assessments of risks, etc."[82] Second is "the need to achieve a contextualised approach to the regulatory process."[83] And third is "the utility of a vision of the regulatory process as a process of collective learning."[84] As an EU White Paper explains, "structured and open [information] networks should form a scientific referee-system to support EU policy making."[85] Such networks of information are flexible and responsive to changing conditions. Even so, it is the Commission itself that is to publish the information provided by these networks.

The concept of regulation as a highly flexible process of collective learning through dialogue is precisely what animates the U.N.'s new effort to improve corporate behavior around the world through partnership with U.N. agencies and officials. The Global Compact brings companies together with United Nations organizations, international labour organizations, NGOs and other parties to foster partnerships and to build "a more inclusive and equitable global marketplace." [86] It aims, in the words of Secretary-General Kofi Annan, to contribute to the emergence of 'shared values and principles, which give a human face to the global market.'"[87]

Surprisingly, however, the Global Compact does not attempt to set forth a code of conduct and to monitor corporate compliance. On the contrary, the Compact itself is not an agreement to comply with anything, but rather to supply information. According to one of the Global Compact's chief architects:

> The core of its change model is a learning forum. Companies submit case studies of what they have done to translate their commitment to the GC principles into concrete corporate practices. This occasions a dialogue among GC participants from all sectors – the UN, labor and civil society organizations.[88]

The dialogue, in turn, is supposed to generate "broader, consensus-based definitions of what constitutes good practices than any of the parties could achieve through unilateral declarations."[89] The practices identified, along with illustrative case studies, are then made available both to members of the Global Compact and to the broader public through an "on-line learning bank."[90]

If it works as designed, the Global Compact will be a model of collective learning in action. "The hope and expectation is that through the power of dialogue, transparency, advocacy and competition good practices will help drive out bad ones."[91] The deep assumption here is that the simple provision of information will trigger a powerfully dynamic process. This is governance by dialogue. Posting information will invite a response, either from another corporation or from an NGO; the original speaker may then seek to justify itself, opening itself to persuasion by seeking to persuade; the effort by multiple speakers to demonstrate the relative value of their particular practices will then produce healthy competition and beneficial new ideas.

This model once again assumes that some practices are in fact better than others in terms of trying both to make a profit and live up to collectively agreed goals and values. The idea of actually learning rests on a belief that these often conflicting objectives can be reconciled in innovative ways when backed by a sincere commitment to try. Other underlying assumptions are hackneyed but true: that multiple minds are better than one and that experience is the best teacher. Based on these beliefs and assumptions, the hope is that providing information and subjecting it to debate, deliberation and dialogue will yield valuable lessons and new solutions.

Finally, the concept of a "learning forum" abolishes hierarchy in the learning process. It is the antithesis of the notion of experts handing down their carefully acquired and husbanded knowledge to a mass audience and thus moves beyond the EU model. Each participant in the

process bears equal responsibility for teaching and learning. Within the Global Compact, the U.N. has retained a university center to "facilitate" the debate, but not actually to teach or regulate the content and flow of information. The facilitators will at most distill the lessons generated by the participants.

If this entire process is understood as a substitute for traditional command and control regulation, then what is most striking is the apparent disappearance or dispersal of governmental authority. Government does not lay down rules or monitor their enforcement; it neither teaches nor learns. What it does is to bring the network into being, constructing and animating a forum for dialogue and collective learning. But then it steps back and lets the process run.

* * * * *

In all these cases – information agencies, providing information to political pressure groups, a learning forum – regulation through information establishes a very different relationship between the regulator and the regulated, one less of command than of facilitation. Through, for example, "benchmarking" and "rolling best practices rulemaking," regulators can create "the infrastructure of decentralized learning." [92] Dorf and Sabel argue that benchmarking "leads to the discovery of unsuspected goals and indicates the guiding principles and related kinds of means for obtaining them."[93]

Best practices are never static; they are instead subject to constant improvement through experimentation. The mode of analysis here is deeply pragmatic, meaning a complete acceptance of the "pervasiveness of unintended consequences" and "the impossibility of defining first principles that survive the effort to realize them . . . ."[94] In layman's language, we learn through doing and communicate the lessons we've learned on a rolling basis. We must plunge into a fast-changing information environment and recognize an ongoing dialectic between collective

uncertainty and collective experience. In the end, we must rely on our own dynamic capacity for learning and self-improvement.

Individuals can organize themselves in multiple networks or even communities to solve problems for themselves and for the larger society. These networks or problem solving groups are not directly connected to the "government" or the "state," but they can nevertheless compile and accumulate knowledge, develop their problem-solving capacity, and work out norms to regulate their behavior. The importance of this activity is increasing, precisely because the traditional separation between the formulation and application of rules is being dissolved by technology, a development that is in turn undermining "a shared common knowledge basis of practical experience."[95] Instead, public and private actors are coming together to develop new ways of "decision-making under conditions of complexity."[96]

Participants in these multiple, parallel networks, both domestic and transnational, face a continuous stream of problems and require a continuous stream of knowledge both about each other and about their counterparts in other networks. They are in "permanent, polyarchic dis-equilibrium," which they seeking to overcome through solving problems and pooling information.[97] The state's function is to manage these processes, rather than to regulate behavior directly. It must help empower individuals to solve their own problems within their own structures, to facilitate and enrich direct deliberative dialogue. It must also devise norms and enforcement mechanisms for assuring the widest possible participation within each network, consistent with its effectiveness.[98]

Taken together, these ideas add up to a new conception of democracy, or self-government. It is a horizontal conception of government, resting on the empirical fact of mushrooming private governance regimes in which individuals, groups, and corporate entities in domestic and

transnational society generate the rules, norms and principles they are prepared to live by. It is a conception in which uncertainty and unintended consequences are facts of life, facts that individuals can face without relying on a higher authority. They have the necessary resources within themselves and with each other. They only need to be empowered to draw on them.

2. What Government Networks Could Do

In this part I turn to the world of what could be and imagine a brave new world, or at least the hope of one. Suppose that heads of state, prime ministers, regulators, judges, legislators, pundits and scholars everywhere embraced the concept of government networks as prescription rather than description and sought actively to create and use them as instruments of global governance. Suppose that the participants in existing and new networks were much more self-conscious about their role in the larger architecture of world order.

In such a world, government networks would not only produce convergence and informed divergence, improve compliance with international rules, and enhance international cooperation through regulation by information. They would also regulate themselves in ways that would deliberately improve the governing performance of both actual and potential members; create fora for multilateral discussion and argument by all their members; and create opportunities to harness the positive rather than the negative power of conflict.

(a) *Inducing and Enforcing Compliance with Network Norms*

One of the most promising dimensions of government networks is their capacity for self-regulation and for socialization and support of their members. They exist currently to help their members – regulators, judges, and legislators –by providing access to needed information and exposure to new ideas, facilitating cooperation in enforcement and dispute resolution, and

providing a forum for harmonization of law and regulations. But they could become far more effective at regulating themselves, developing "network norms" designed to strengthen domestic governance capacity and competence. In particular, they could do much more to instill and champion norms of honesty, integrity, independence, and responsiveness and to bolster those members who face domestic resistance in enforcing those norms. In a world in which a growing number of international roots, they would simultaneously contribute to domestic and international order.

(b) *A Propensity for Self-Regulation*

Government networks have specific properties that are highly conducive to self-regulation. First, they are conduits for information, not only about regulating, judging, and legislating, but about the individual regulators, judges, and legislators who comprise their members. That means, as discussed in Chapter I, that they can be "bearers of reputation" – they can broadcast accounts of a particular member's actions and create a context in which it matters. Majone argues that the credibility of each member of a network is enhanced because each member must safeguard its reputation within the network and it can only do so by adhering to common norms. Outside observers understand how these pressures to conform act as safeguards and hence will accord the network participant greater legitimacy.[99]

Similarly, Professor Amitai Aviram has identified a set of features of private networks – of corporations and individual merchants – that make reputation matter.[100] Other members of a network will know whether a particular member has defaulted on its commitments; they can choose to switch their business to another network member; the defaulting member can be sanctioned by a central "control mechanism"; and in extreme cases the defaulting member can be excluded from the network.[101] To some extent, these features depend on the anonymity of

markets – a buyer can switch to another seller as long as the same goods are on offer; a seller can switch to another buyer as slong as the money is good. Further, exclusion from a commercial network means being denied an economic opportunity.

In government networks, by contrast, although network members will quickly come to learn of one another's reputation for competence and trustworthiness, a bad reputation carries social and professional opprobrium rather than any direct sanction. It is not clear, at least in information and harmonization networks, how one member would "switch its business" to a member with a better reputation. In enforcement networks it might be possible for a government official from one country to decide not to cooperate in enforcement efforts with officials from another country due to their bad reputation, but often it is countries with corrupt or ineffective governments that most need bolstering to make global enforcement efforts credible.

On the other hand, as with a private network, it might well be possible for network members to decide to block access to important information collected by the network to members caught violating network norms. Further, to the extent collaborating on common problems and developing codes of best practices is done through committees composed of a subset of network members, a good reputation can be an important criterion for selection to serve on these committees. And if a central "control mechanism" exists, like an information agency, it could suspend service to some members for breaking network rules.

But what would those rules be? How can government networks regulate themselves in ways that will strengthen world order? They can constitute themselves not only as networks devoted to specific substantive activities, but also, and simultaneously, as professional associations of regulators, judges, legislators, and even heads of state and ministers dedicated to upholding the norms and ideals of their profession. They can cultivate the concept of governance as a

profession, exercised through legislation, regulation, enforcement, provision of services, and dispute resolution. Like a bar association for lawyers or a medical association for doctors, a network of judges or legislators or regulators will provide both a focus of substantive learning and information exchange and a source of education in and enforcement of professional ethics.

It is not hard to imagine some general professional norms that government networks could inculcate in their members. Honesty, for instance. They could pledge adherence to agreed international standards of clean government, such as those set forth in the OECD Anti-Bribery Convention, which has now been signed and ratified by 35 countries.[102] They could agree to ongoing monitoring by NGOs such as Transparency International. A second general norm could be equal treatment of all citizens, regardless of family connections or social status. A third could be a concept of professional integrity that would require a degree of independence from the political process, at least for regulators and judges, and from electoral machines, for legislators.

These are general ideals of public service in virtually all countries; each branch of government would also develop more specific professional standards tailored to the profession of judging, legislating, and regulating different subjects, from securities to the environment. Indeed, in some cases such standards already exist, such as the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers, and are monitored by the International Commission of Jurists.[103] Individual government networks could promulgate these norms as standards for the profession and ensure that a reputation either for upholding them, on the one hand, or violating them, on the other, would have genuine consequences, either in terms of denial of membership benefits or loss of standing in network affairs. Better still, as discussed in the next section, network members could work to ingrain these standards in all their members through a general process of professional socialization.

(c) *Socialization*

Socialization is a complex and varied phenomenon, rich enough to merit its own discipline of sociology. But for our purposes a layman's definition will do. A socialized individual may want something intensely, but will not seek it if doing so would contravene prevailing social norms and result in social opprobrium. Alternatively, socialization may be so strong that it directly conditions an individual's interests and identity. In such cases, however, its effect will more likely be unconscious.[104]

Socialization can operate within government networks in a number of ways.[105] One of the most interesting is the phenomenon of inducing compliance with collectively generated rules through small, close-knit groups.[106] Many legal scholars have identified this phenomenon in the domestic context – most notably Yale law professor Robert Ellickson in his book *Order Without Law*.[107] Sheep farmers, diamond merchants, and sumo wrestlers are all able to establish and enforce a collective set of norms outside any formal legal framework.[108]

Mancur Olson identified the logic of this phenomenon as part of the logic of collective action. Small groups are particularly well suited to overcoming the problems of collective action because the benefits of providing collective goods are likely to exceed the costs and because they can use "social pressure and social incentives" to induce compliance with whatever norms they adopt.[109] Any member of a garden club, a charity committee, or a gang can testify to the power of these forces. Such incentives, in turn, are most powerful when they are *selective* – when "the recalcitrant individual can be ostracized, and the cooperative individual can be invited into the center of the charmed circle."[110]

These types of incentives operate primarily in groups small enough that the members can know each other personally and have face-to-face contact.[111] They are even stronger when the

groups are relatively homogeneous in terms of values.[112] Ellickson focuses less on the size of the group than the degree of cohesion, predicting greater norm compliance and ability to act for the maximum benefit of the group as a whole in "close-knit groups."[113] The members of these groups may be acting simply out of self-interest, wanting to be a member of the group and fearing expulsion for deviation as well as expecting praise for compliance. Alternatively, as predicted by mainstream socialization theory, members may internalize group norms.[114]

"Many international government networks have the descriptive characteristics identified as key to group solidarity: repeated, frequent interaction; shared values; small size; and opportunities for informal sanctions or rewards."[115] They thus have the potential, in Timothy Wu's phrase, to create "order without international law."[116] Many members of networks who reflect self-consciously on their meetings with fellow government officials across borders emphasize the importance of personal relationships, the building of trust and a sense of common enterprise, the awareness of each other's activities and the value of regular meetings.

The Basel Committee, most obviously, operates this way, deliberately keeping its membership small and selective. The central bankers who created it specified that members could send no more than two representatives each – a central banker with responsibilities for foreign exchange and another appropriate banking supervisor.[117] They have highly homogeneous beliefs about the need for stability in the world banking system and how to maintain it. They meet four times a year in Basel. They have no means of actually making their agreements binding other than mutual monitoring and peer pressure, which they exert freely.[118]

Other networks are either small enough to operate this way or contain sub-groups within them. IOSCO, for instance, has open membership. Yet it makes key decisions through the President's Committee and the Executive Committee, consisting of only 19 members.[119] On the

other hand, the Basel Committee, while tightly restricting full membership, invites non-member central bankers from other countries to participate in collective deliberations through larger biannual conferences and on-going contacts.[120] Groups like the G-20, which has ranged from 22 to 34 members before cutting back to 20, are also small enough to socialize their members if they meet on a regular and structured basis.

(d) *Selective Membership*

Commercial networks and small groups both rely on the power of exclusion as a way of enforcing compliance with their self-generated norms. Professor Aviram points out that "exclusion from a network may result in exclusion from the entire line of business; this is a very powerful sanction, rivaling the government's in effectiveness."[121] He notes further, however, that suspension may be even more effective than exclusion, as it avoids a situation in which the party to be excluded concludes that it has nothing left to lose.[122] Similarly, the literature on socialization through small groups, as just noted, emphasizes the value of selectivity, allowing a defaulting member to be "ostracized."

Exclusion and even suspension of this type is likely to be less effective in government networks, for the simple reason that representatives of different countries are reluctant actually to censure one another. Examples of this phenomenon in traditional international institutions are legion; it is precisely the reason that it is so hard to mobilize an international institution to condemn a member's actions. Principles of sovereign respect, live-and-let-live, and reciprocity, meaning fear of retaliation, all militate against censure and sanction. States have hesitated even to sue one other in an international legal forum expressly established to hear and resolve inter-state disputes.[123] Part of the point of government networks is to move away from the formalities and courtesies of traditional diplomacy and toward recognition of common professional interests

and standards. Even so, it is hard to imagine a group of regulators, judges, or legislators blithely expelling one of their members for corruption or bias or simple incompetence.

A more promising strategy is to recognize that government networks can be sources of status for their members, which means that potential members can be induced to regulate their behavior by the prospect of inclusion. The power to control admission to membership in any particular regime or "club" is a powerful weapon. States that would join the EU, for instance, face a long list of demands, including specific types of market regulation, or deregulation, and systems of safeguards for human rights, including the protection of ethnic minorities. The OECD, NATO, the Council of Europe, the Organization of African Unity and the Organization of American States all impose increasingly stiff membership requirements. Even the Commonwealth stipulated that Cameroon must meet certain human rights benchmarks as a condition of membership, as "admission to the commonwealth" constitutes a form of "implicit endorsement" of the government.[124]

Indeed, Abram and Antonia Chayes argue that governments actively seek to international regulatory regimes that impose real constraints on their freedom of action as an indication of status. To maintain this status, governments will work hard to remain members in good standing.[125] The international regulatory regimes that Chayes and Chayes describe are formal, treaty-based regimes comprised of unitary states. Nevertheless, the logic of their argument applies even more forcefully to individual government officials, who are likely to be the direct beneficiaries of the benefit conferred.[126]

Consider the following examples. The current G-20 started as the G-22, quickly expanded to the G-33 due to the insistence of a number of countries that their ministers be included, and was finally cut back to the G-20.[127] Russia fought to be included in the G-7, making it the G-8,

although finance ministers still meet periodically as the G-7 alongside formal G-8 meetings.[128] It appears that the general desire for national prestige is driving inclusion of specific ministers in these groups, but the desire of individual ministers to be included could also lead them to pressure their governments. And in either case, if one of the conditions of membership was evidence that the prospective member his or herself – regulator, judge, or legislator – met specified standards of behavior, the individual would have a strong incentive to meet these standards and the government as a whole would have an incentive to help, or at least not to hinder.

In other networks the current system is effectively automatic admission followed by exhortation to comply with network norms. The Organization of Supreme Courts of the Americas strongly endorses norms of judicial independence among its members. The Commonwealth Magistrates and Judges Association does the same, providing its members with moral support and examples of the professional norms they collectively espouse. In an effort to support judicial independence throughout the Commonwealth, particularly in the face of executive interference in some member states, the Association has issued explicit the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence. [129] Lord Howell also argues that the Commonwealth spreads practices of good governance by power of example.[130] Unfortunately, as any parent knows, it's not so easy.

Again, however, suppose that to gain admission a country's legislators, regulators, or judges had to meet specified criteria and that if they could not immediately they would become candidate members for a period of time, similar to EU candidate members or NATO's partners for peace. Other network members could serve as both trainers and monitors, bolstering individual government officials in the performance of their jobs. Even the presence of network

members could help in certain circumstances: Justice Richard Goldstone recounts that South African judges under apartheid were more inclined to assert their independence from the government in the presence of judicial observers from the American Bar Association at their trials.[131]

Further, if countries had to jump through these hoops to gain admission for their officials to these networks, they might also be more inclined to respect the obligation then incumbent on those officials to live up to network norms while members. Networks could also develop a disciplinary system providing for suspension of membership for severe and demonstrable infractions. Such a system would only have impact, however, if the value of membership, through status as much as services provided, were already clear.

A major advantage of inducing compliance with norms of good governance through selective admission and discipline of individuals members of government networks is the ability to target specific government institutions either for reform or reinforcement, regardless of how their fellow government institutions are behaving. This exercise of such targeted power holds the possibility of helping transitional states stabilize and democratize by offering inducements and applying pressure to some of their institutions, such as particular regulatory agencies or the executive, while bolstering others, like the courts. It avoids the pernicious problem of labeling an entire state "liberal," or "illiberal," or "democratic," or "undemocratic," or even "rogue" or "pariah." Many citizens comprise a state, and many institutions a government. All desire inclusion and dislike exclusion, and each can be individually subject to this power as circumstances warrant.

(e) *Generating Reasoned Solutions to Complex Problems*

Government networks that are self-consciously constituted as mechanisms of global governance can inculcate habits of discussion as part of a collective decision-making process. Networks that enforce network norms through the mechanisms just discussed will create favorable conditions for the emergence of a reasoned consensus on many problems. This process will produce better quality decisions than are likely to result from interest-based bargaining; adherence to prevailing political, economic, or social norms; or acquiescence to the will of the most powerful state or stats.

James Fearon argues that any group of people can have at least six reasons to want "to discuss matters before making a collective decision."[132] To paraphrase his account, discussion in a group decision-making context can allow everyone involved: 1) to make a decision based on more information both about one another's preferences and about the likely consequences of different decisions; 2) to pool their brainpower and think their way through a problem and brainstorm solutions that no one member of the group could do on her own; 3) to ensure that all of the solutions on the table satisfy basic criteria of public over private interest[133]; 4) to get members of the group to "buy in" to the solution ultimately adopted; 5) to spur the public engagement and hence civic virtues of group members; and 6) to engage each individual's inherent human ability "to compare and assess different reasons"[134] for action, which itself will make the decision taken more legitimate.[135]

Fearon does not claim that these outcomes will result from every discussion. On the contrary, he is careful to identify a number of underlying conditions. For instance, members of a group are only likely to reveal private information about their own preferences in a discussion when they perceive themselves to have largely convergent or at least non-conflicting interests.[136] And group discussion is only likely to overcome the "bounded rationality" of any one individual if the

problem on the table is sufficiently complex that pooling both knowledge and creativity is likely to result in a better solution. Similarly, the claim that discussion can result in more public-spirited solutions than would otherwise obtain assumes that "the people in question have the motivation, or can be motivated, not to appear selfish or self-interested …."[137] Finally, the claim that discussion will help legitimate the decision ultimately taken depends on two assumptions: that consensus is more likely to emerge than dissensus, on average, and that the overall culture or context is one "where people associate fair procedure with having the opportunity to have their say …."[138]

If we assume that government networks are constituted as professional associations, where the profession involved is judging or legislating or making and implementing regulations; that their members subscribe to basic standards of professional competence and ethics; and officials who do not measure up to these standards are not admitted, then the conditions specified for fruitful discussion should obtain. To begin with, we can assume that members' interests are convergent enough that they will reveal their actual preferences, as well as share information about the background or consequences of various decision options on the table. We can also assume that they come together to grapple with extremely complex problems.

Further, a common core of professionalism should motivate members of government networks not to appear overtly selfish or self-interested in front of their professional peers. Imagine, for instance, the Supreme Court Justices of the United States and the judges of the European Court of Justice meeting to discuss a problem of transatlantic judicial comity. It is difficult to imagine judges on either side saying, in Fearon's words, "'We don't care what anyone else gets; we just want more for ourselves.'"[139] Finally, although the participants in government networks come from many different cultures with many different assumptions about

the sources of legitimacy, it is not unreasonable to assume that where the basis of their association is public governance, fair procedure must include an opportunity to be heard.

If Fearon favors discussion, German social scientist Thomas Risse recommends argument. "Let's Argue!"[140] is the title of an article in which he makes the case for argument as a mode of "truth-seeking" that permits actors in the international realm, as in domestic affairs, to achieve desired outcomes through "communicative action." Instead of a lowest common denominator solution, in which all parties calculate their interests and how best to pursue them in a particular negotiation, or a norm-driven outcome, in which all parties figure out what is appropriate behavior given the rules or norms governing a particular context, deliberation and argument hold open the possibility that one or more parties will be persuaded to define their interests differently or to pursue them differently based on new information, new ideas, and new points of view. [141]

Imagine a group of teenagers in which the oldest and the most sophisticated member of the group lights up a cigarette and offers her pack around to other members. If the other teenagers are "rational calculators" following a "logic of consequentialism," then each one should calculate whether the future risk of dying is greater than the present benefit of looking cool.[142] If the other teenagers are socialized actors following a "logic of appropriateness," which way they decide should depend on prevailing social norms – whether ads featuring famous models with cigarettes in their ears have turned the tide against Joe Camel.[143] But according to Risse, if the teenagers are "reasoners," they will pursue a "logic of arguing,"[144] whereby they will seek "a mutual understanding based on reasoned consensus."[145] They will collectively discuss what each member of the group knows about the long-term risks of smoking, perhaps including examples of relatives or friends who have died of cancer; they will invoke celebrity role models who do and who do not smoke; they will argue about what they think is and is not cool.

The debate may be heated, with different members expressing strongly conflicting views. But the outcome, in this model, should reflect the side of the argument that ultimately has the most reasons in its favor. Thus, on the side of smoking, some famous people still smoke and some people still think it is cool. On the side against: smoking causes cancer; many famous people do not smoke; it is smelly and dirty and dumb-looking. The reasoned consensus? Don't smoke.

Risse recognizes that "[n]on-hierarchical and networklike international institutions characterized by a high density of informal interactions" are most likely to produce a reasoned consensus. [146] Equally important are situations in which participants in these networks are uncertain of their interests or relatively ignorant about the problems they face.[147] Recall the constitutional judges exchanging decisions and debating different approaches to human rights problems that they all face in various forms. Or the Finance Ministers trying to develop a code of core principles to guide the reconstruction of shattered national financial systems in the wake of the East Asian financial crisis of 1998. Or the environmental regulators in INECE seeking to find common policies to address communal environmental problems.[148] These are all settings in which both discussion and argument are likely to elicit information, proposed solutions, and contending justifications that will help produce a reasoned and legitimate consensus.

These are also settings in which differences of material power are minimized.[149] The idealized version of this world is one in which the "better argument" prevails, regardless of who makes it. In reality, such an ideal is elusive, to say the least. Differences of power almost always matter at some level. Nevertheless, just as the Canadian and the South African constitutional courts have proved more influential than the U.S. Supreme Court on many human rights issues,

officials searching for solutions may be less concerned with the source of an argument than with the merits of the argument itself.

Traditionally powerful actors may find themselves surprised and even entrapped by this dynamic. They may start out intending to use rhetoric, to persuade others to follow their desired course while remaining impervious to changing their own minds. Yet elementary psychology teaches that those who would persuade others of their views are likely to be most effective when they appear equally willing to be persuaded of their listeners' positions. Adopting such a psychological posture, even if intended as a ruse, is likely to open both minds and ears.

Risse provides a number of examples from the human rights arena in which powerful government officials seeking to deny human rights abuses have gradually shifted positions through extensive dialogue with human rights NGOs, in which declared acceptance of human rights norms has gradually become real acceptance.[150] The same dynamic is likely to operate regarding the acceptance of professional norms in a variety of government networks.

For scholars such as Lani Guinier, the potential for such a two - way exchange is the essence of "power with" rather than "power over"; a model of power that holds enormous potential for creative synergies and growth.[151] From "power with" to "power over" is precisely the transformation from hierarchy to network, from hard power to soft power. Guinier's ideal is that in wrestling to solve common problems, parties do not have to find solutions that rest on preexisting distributions of power, but can find answers that give new powers to all of them.

A final important dimension of this kind of power is its dynamism. Harking back to the concept of embracing uncertainty by continually experimenting and assessing the results, it becomes apparent that the very tentativeness and informality of "rolling codes of best practices" enhance their persuasiveness. Results are rarely fixed for long; they are instead presented and

debated as the latest best answer. A network of policymakers or regulators or judges thus becomes a rolling forum for "communicative action," generating ideas and prototypes that persuade only until a better one comes along.

So what does all this mean for world order? Government networks that encourage and even require multilateral discussion prior to all decisions taken are likely to produce more creative, more reasoned, and more legitimate solutions to many of the problems that members face. Many problems will not be suitable for resolution in these fora: problems involving vital national security interests, for instance, or touching on issues of high domestic political sensitivity. But others will – problems ranging from how best to balance the competing constitutional demands of liberty and order, problems of how best to regulate on-line sales of securities over the Internet, problems of how to mesh anti-terrorism legislation to minimize loopholes but maximize national autonomy. In many of these cases no one solution may prove 'the best" for all nations involved, but a set of preferred possibilities can likely be identified. And even in those cases where contending interests are too strong to allow a reasoned outcome, present conflict can be transformed into the stuff of future compromise.

(f) *Harnessing the Positive Power of Conflict*

Within government networks, conflict – meaning the non-forcible clash of interests -- need not be a source of separation or a struggle for lasting and definite dominance. Rather, it can be an engine of increased trust and ultimately cooperation. It is positive conflict. To say it is positive does not mean that it is pretty or pleasant; it is still conflict. But in government networks that are self-consciously constituted as mechanism of global governance; that induce and enforce compliance with norms of good governance particular to the network through socialization and selective membership and that impose requirements of collective discussion as part of decision-

making processes, the effects of conflict can be positive over the long term, helping to strengthen the networks themselves as structures of world order.

The very notion of positive conflict may seem an oxymoron. But conflict in many domestic societies is seen as the motor of positive change, as the engine of economic growth in the form of competition, and as the lifeblood of politics. Conflict in the international arena, by contrast, is worrisome because of the possibility, however distant, that it could escalate into military conflict and the perception that, on a zero-sum world, conflict will reduce overall welfare. Conflict between states has thus traditionally been a problem to be avoided, mitigated, and solved.

Here, then, is the paradox. Writing about "social conflicts as pillars of democratic market societies," Albert Hirschman underlines a point made by the German sociologist Helmut Dubiel: "social conflicts themselves produce the valuable ties that hold modern democratic societies together and lend them the strength and cohesion they need."[152] Hirschman reviews the long intellectual history of this idea, arguing that due to its paradoxical power it is "reinvented with considerable regularity" in literatures ranging from political philosophy to development studies.[153]

The same point can also be made closer to home. Quarrels among family members are often sharper than disputes among friends, precisely because the depth of the relationship and, thus, the diminished likelihood of serious consequences flowing from a quarrel are taken for granted. The same paradox arises. Conflict can be most intense between individuals who are closest to one another and who have myriad ties to cushion the blows, as well as between those who are furthest apart and have no other affiliating ties or even a guarantee that they will see one another again. It is in the center of the distribution, among those who have only some ties, that actors will most likely seek to avoid conflict and its untempered dangers.

But if conflict can be positive, it can also obviously still be deeply negative. It can destroy social and political relationships as well as deepen and improve them. Thus the task, as Hirschman presents it, is to move beyond identification of the phenomenon of positive conflict to an understanding of the conditions under which conflict is more likely to act as a "glue [rather than] a solvent."[154] He claims that learning to "muddle through" a "steady diet" of conflicts in "pluralist market societies" is more likely to be productive.[155] The conflicts typical of these societies, in his view, have three basic characteristics:

- They occur with considerable frequency and take on a great variety of shapes.
- They are predominantly of the divisible type and therefore lend themselves to compromise and to the art of bargaining.
- As a result of these two features, the compromises reached never give rise to the idea or the illusion that they represent definitive solutions.[156]

Conflicts of the "divisible type" refers to conflicts that are essentially distributive, "conflicts over getting more or less" of something, as opposed to nondivisible "either - or" conflicts "that are characteristic of societies split among rival ethnic, linguistic, or religious lines.[157]

The types of conflicts observable within government networks generally seem to fit the "divisible" description. Consider, for instance, the various conflicts described in Chapter II among national courts and between national courts and supranational courts. National courts from different countries frequently quarrel over which court should have jurisdiction over a transnational dispute, or which law should apply. Frequently the solution is to allow both courts to proceed with litigation of some or all of the issues in dispute and to allow the litigants to race to judgment. Alternatively, in relations between European national courts and the ECJ, the

balance of power is constantly shifting depending on which side is more assertive over a period of time or a series of cases. In both contexts the relationship is best described as an ongoing tug of war rather than a search for definitive solutions.

In the regulatory arena, to take one prominent example, conflict between U.S. and EU regulators often makes headlines. The fight over approval of a proposed merger between GE and Honeywell, granted in the U.S. and then denied by the EU Commission, put antitrust regulators at direct loggerheads. Yet as the *New York Times* pointed out in an editorial on the GE-Honeywell case, the prominence of the conflict should not be allowed to obscure the remarkable "record of cooperative relationship[s] on regulation" between EU-US antitrust regulators.[158] And in none of these areas, even where cooperation is spottier with fewer tangible results, does conflict suggest a broader rupture of relations.

Such empirical examples are anecdotal, though numerous. More systematic research is required. But we should expect to find empirical confirmation of the predominance of positive conflict in government networks precisely because of the preconditions that make such networks work in the first place. As discussed in Chapter I, network relations depend on "reputation, trust, reciprocity and mutual interdependence."[159] Positive conflict can be understood as the corollary of these characteristics. Trust, interdependence, and reciprocity do not guarantee harmony, defined as an absence of conflict.[160] But they do facilitate cooperation, which means resolving conflict in a positive way. Mutual adjustment does not happen spontaneously; it is a result of conflict. It follows that in a form of governance – networks – that depends on these characteristics, it is reasonable to assume that all conflict is positive conflict.

But what in fact does it *mean* to treat conflict as positive? How do we actually understand conflict as a force for cohesion rather than disruption, at least over the long term? Here it is

helpful to draw on insights from the legal process school in American law.[161] An emphasis on legal process, rather than the decisions and rules generated by that process, sees law as a tool more for managing conflict than resolving it.

Projecting some of the precepts of the legal process school into the international arena, Abram and Antonia Chayes depict compliance with international regulatory agreements as a process of "managing" the problems that face countries seeking to comply with their obligations against various odds.[162] Yet if law successfully manages conflicts, then repeated conflicts should actually strengthen the legal order. The process of managing each conflict will build strong transnational relationships, which in turn will generate the principles that ripen into law.[163]

This next step is captured by Robert Cover's concept of a "jurisgenerative process."[164] The procedures and substantive principles developed over the course of repeated conflicts among the same or successive actors take on precedential weight, both through learning processes and the pragmatic necessity of building on experience. As they become increasingly refined, these procedures and principles are increasingly likely to be codified in informal and increasingly formal ways. Indeed, Harold Koh captures many of these features in his concept of transnational legal process, although he does not specify the underlying conditions that make it work.[165]

A final dimension of positive conflict within transgovernmental networks is the power of conflict to generate information. A frequent source of conflict between regulatory officials from different countries is a failure to understand or to appreciate sufficiently the political constraints under which all regulators must operate. Thus, for instance, in the fights between the EU and the US over issues such as the importation of bananas or hormone-treated beef, the trade officials on the frontlines of the conflict are likely often to be in agreements about the applicable legal rules or the optimal course of action. However, their views are quite likely to be overruled in the

domestic political process by powerful domestic interest groups. In this context, a public conflict can clarify the positions of *all* the parties to the dispute, giving each side a better understanding of the actual room for maneuver in the strictly regulatory realm. Such public airings can help the regulators themselves understand their counterparts as individuals acting in good faith, but often under constraints beyond their control.

Understanding conflict as a positive force does not mean that it should not be resolved. On the contrary, the process of resolving a conflict is what generates its positive effects. What this understanding of conflict *does* mean is that conflict should not necessarily be avoided or suppressed as a dangerous dimension of relations between states. Within a disaggregated world order, it is an inevitable and natural part of transgovernmental relations, with all the attendant bumpiness and unpleasantness that recognition entails. Cooperation, understood as a process of mutual adjustment in the pursuit of common goals, would be impossible without it.

3. Conclusion

How do government networks contribute to world order? How do they institutionalize cooperation and contain conflict sufficiently to allow all nations and their peoples to achieve greater peace, prosperity, stewardship of the earth, and minimum standards of human dignity? In a variety of actual and potential ways.

Government networks promote convergence of national law, regulations, and institutions in ways that facilitate the movement of people, goods, and money across borders; that assure a high and increasingly uniform level of protection of legal rights; and that guarantees the cross-fertilization of ideas and approaches to common governance problems. That cross-fertilization, in turn, may produce competition among competing standards, in some cases. It also makes possible informed divergence, where national regulators, legislators, or judges deliberately

proclaim and preserve a national law, rule, principle, or tradition in the face of countervailing global trends.

Government networks also strengthen compliance with international rules and norms, both through vertical enforcement and information networks and by building governance capacity in countries that have the will to comply but not the means. Those international rules and norms are themselves efforts to achieve goals that will serve the peoples of all nations and the planet they inhabit; government networks allow them to penetrate directly into the domestic political sphere. Government networks also make it possible for national government officials of all kinds and from every nation to regulate by information, permitting nations to adopt cooperative regulatory solutions that are much better suited to rapidly changing problems and the need for decentralized solutions. They empower national government officials to empower the people they serve, giving them the information they need to help themselves from a global or regional database.

If we embraced government networks as the architecture of a new world order, co-existing with and even inside traditional international institutions, they could be even more effective. They could become self-regulating networks, each with the mission of inducing and compelling its members to behave in accordance with “network norms” that would reflect the highest standards of professional integrity and competence for judges, regulators, legislators, ministers and heads of state. The networks would create a context in which reputation matters; they would also condition initial and continuing membership in good standing on adherence to the norms.

At the same time, these networks designed to double as professional associations for government officials would bolster their members under pressure from other branches of their governments to depart from those norms, such as a court or a legislature in its efforts to resist political pressures from the executive branch.. Alternatively, in cases of post-conflict

reconstruction, these networks could help rebuild a country's institutions – judges helping judges, legislators helping legislators, regulators helping regulators. Help that is not simply technical assistance and training, but ongoing participation in a network of fellow government professionals with strong professional norms. Seeing states and aiding them as aggregations of different government institutions, at least for some purposes, will also help prevent labeling them inaccurately and potentially unfairly as illiberal, rogue, pariah, or simply failed. It is specific government officials and institutions that make the decisions that may merit these labels, not the state as a whole.

Finally, government networks designed as structures of global governance would harness the power of discussion, debate, and even heated conflict. Within a government network in which members had achieved a degree of professional homogeneity, at least, members should interact with sufficient trust and confidence in their underlying common interests to benefit from the fruits of vigorous discussion and argument as part of a collective decision-making process. Discussion under these conditions helps maximize the information available to the decision-makers, generate new and better solutions than would be available to any one member acting alone, and improve the legitimacy and likelihood of implementing the decision taken. Further, even where discussion produces protracted conflict, over time the resulting compromise, or even the decision simply to live with the disagreement, becomes an engine of greater trust.

Government networks use both hard and soft power. They can harness the coercive power of national government officials, but they also operate through information, socialization, persuasion, deliberation, and debate. They have as much power at their disposal as many national governments do and more power than many international institutions. They are also self-

propelling in ways that reach out to the institutions of all states, regardless of the divisions imposed by more traditional power, cultural, or ideological relations.

What is still missing from this order, however, is norms. Power without norms is both dangerous and useless. It is dangerous because of the risk of abuse. It is useless because it lacks purpose. The answer in both cases is to harness power and to constrain it through norms. The international order established by formal international law and international institutions operates according to many norms, established and promulgated through written texts and solemn declarations.

The informal order of global government networks operates largely without norms, or, at least, without explicit norms. To many, it also seems like a secret, technocratic, unaccountable, and exclusive order. The more power government networks exercise and the more effective they can be, the more worrisome their flaws. We turn now to the dark side of a networked world order, or at least the perceived dark side, and to an array of potential solutions.

[1] International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report*, Washington, DC: U.S. Government Printing Office, 2000, 190.

[2] For a classic description of networks as a fundamental category of human interaction, as distinct from either hierarchies or markets, see W.W. Powell, "Neither Market nor Hierarchy," in *Research in Organizational Behavior*, vol. 12, eds. Barry Staw and L.L. Cummings (Greenwich, Ct: JAI, 1979). For a discussion of recent European scholarship on "policy networks," see Tanja A. Börzel, "Organizing Babylon – On the Different Conceptions of Policy Networks," *Public Administration* 76 (1998): 253, 260, discussing the work of scholars such as Renate Mayntz, Fritz Scharpf, Patrick Kenis, Volker Schneider, and Edgar Grande.

[3] Joseph S. Nye, Jr., The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone (New York: Oxford University Press, 2002), 9. Nye first elaborated the concept of soft power in Bound to Lead: The Changing Nature of American Power (New York: Basic Books, 1990), 188-201.

[4] Nye, The Paradox of American Power, 9.

[5] Robert O. Keohane and Joseph S. Nye, Jr., "Power and Interdependence in the Information Age," *Foreign Affairs* 77 (1998): 81-94.

[6] In domestic politics this brave new world is often labeled "democratic experimentalism." Michael C. Dorf and Charles F. Sabel, "A Constitution of Democratic Experimentalism," *Columbia Law Review* 98 (1998): 267, 322. Joshua Cohen and Charles Sabel have described a polity built on this model as a "directly deliberative polyarchy." Joshua Cohen and Charles

Sabel, "Directly Deliberative Polyarchy," *European Law Journal* 3 (1997): 313.

[7] Kal Raustiala, "The Architecture of International Cooperation: Transgovernmental Networks and The Future of International Law," *Virginia Journal of International Law.* 43 (2002): 7.

[8] Ibid.

[9] Ibid.

[10] Ibid., 32.

[11] Ibid., 29, quoting Bevis Longstreth, "The SEC after Fifty Years: An Assessment of its Past and Future," *Columbia Law Review* 83 (1983): 1593, 1610 (book review).

[12] Raustiala, "The Architecture of International Cooperation," 30, n. 126, quoting Congressional testimony from former SEC Chair David Ruder in 1988.

[13] See Faith T. Teo, "Memoranda of Understanding among Securities Regulators: Frameworks for Cooperation, Implications for Governance," Harvard Law School (1998): 45. [On file with author]. The IOSCO blueprint for MOUs "provides that if an authority is not able to provide assistance absent a requirement of dual illegality, or if the authority cannot assure confidential treatment of information obtained pursuant to an MOU, that authority should consider recommending that appropriate amendments be made to its domestic legislation to enable the assistance to be given."

[14] Raustiala, "The Architecture of International Cooperation," 32-33.

[15] Ibid., 33.

[16] Ibid., 45-46. For ongoing information about the courses offered in a given year and the foreign agencies that have participated in EPA training programs, see the EPA's website, "Environmental Training Modules: International Catalogue," In Environmental Protection

Agency homepage [cited July 5, 2003]; available from http://www.epa.gov/international/techasst/training/traincatalog.html.

[17] Raustiala, "The Architecture of International Cooperation," 46.

[18] Ibid.

[19] Ibid., 44-45.

[20] International Network of Environmental Compliance and Enforcement homepage [cited July 4, 2003]; available from http://www.inece.org.

[21] Scott C. Fulton and Lawrence I. Sperling, "The Network of Environmental Enforcement and Complicance Cooperation in North America and the Western Hemisphere," *International Lawyer* 30 (1996): 111, 120.

[22] See, e.g., Mark R. Joelson, An International Antitrust Primer: A Guide to the Operation of the United States, European Union, and Other Key Competition Laws in the Global Economy (Kluwer Law International :The Hague, 2001).

[23] "G.E. and Honeywell Officially End Merger Agreement," The New York Times, 3 October 2001, C4.

[24] Spencer Weber Waller, "The Internationalization of Antitrust Enforcement," *Boston University Law Review* 77 (1997): 475.

[25] The Committee concluded in its 2000 report: "it appears that interest in [anti-cartel] enforcement is growing in many jurisdictions around the world and that U.S. experiences are receiving close scrutiny." International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report*, 190.

[26] See, e.g. Raustiala, "The Architecture of International Cooperation," 35-43; Daniel K. Tarullo, "Norms and Institutions in Global Competition Policy," *American Journal of*

International Law 94 (2000): 478; Waller, "The Internationalization of Antitrust Enforcement"; Nina L. Hachigian, "International Antitrust Enforcement," *Antitrust* 12 (1997): 22; Andrew Guzman, "Is International Antitrust Possible?" *New York University Law Review* 73 (1998): 1501.

[27] International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report*, 191.

[28] Address by Charles James, "International Antitrust in the Bush Administration" (Sept 21, 2001) cited in Raustiala, "The Architecture of International Cooperation," 40.

[29] "About the ICN," In International Competition Network homepage [cited July 5, 2003]; available from http://www.internationalcompetitionnetwork.org/aboutus.html.

[30] "International Competition Network: Members," In International Competition Network homepage [cited July 5, 2003]; available from http://www.internationalcompetitionnetwork.org/members.html; "International Competition Network: Annual Conference," In International Competition Network homepage [cited July 5, 2003]; available from http://www.internationalcompetitionnetwork.org/aboutus.html.

[31] "International Competition Network, News Archive," In International Competition Network homepage [cited July 5, 2003]; available from http://www.internationalcompetitionnetwork.org/news/newsarchives.html.

[32] Ibid., 41.

[33] "Report Concerning Internationalization of Competition Law Rules: Coordination and Convergence," *American Bar Association Sections of Antitrust Law and International Law and Practice* (January 2000): 19, 36-37, quoted in Raustiala, "The Architecture of International Cooperation," 43.

[34] Raustiala, "The Architecture of International Cooperation," 61.

[35] Ibid., 33, 39, and 44.

[36] Ibid., 64.

[37] Ibid.

[38] Ibid., 89.

[39] Ibid., 89.

[40] Ibid., 89.

[41] Andres Rigo, "Law Harmonization Resulting from the Policies of International Financial Institutions: The Case of the World Bank" (speech delivered at a conference on Globalization and the Evolution of Legal Systems, University of Ottawa, October 2000). See generally Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000).

[42] Rigo, "Law Harmonization."

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] Ibid.

[47] Legal Framework for the Treatment of Foreign Investment: Survey of Existing Instruments, vol. I, (Washington, D.C.: The World Bank, 1992), 6.

[48] See generally Dorf and Sabel, "A Constitution of Democratic Experimentalism," 267, 322.

[49] Rigo, "Law Harmonization."

[50] Ibid.

[51] Ibid., quoting Wolfgang H. Reinicke, "Global Public Policy," *Foreign Affairs* 76 (1997):

137); and Wolfgang. H. Reinicke and Francis Deng, *Critical Choices*: *The United Nations, Networks, and the Future of Global Governance* (Ottawa: International Development Research Centre, 2000).

[52] Raustiala also has a long discussion of the impact of government networks on treaty compliance, making many of the same points made here concerning capacity building. "The Architecture of International Cooperation," 76-83.

[53] "Notes for an address by the Honourable Paul Martin, to the Royal Institute of International Affairs**,"** Ottawa, 24 January 2001, In G-20 homepage [cited July 1, 2003]; available from http://www.fin.gc.ca/news01/01-008e.html, (July 1, 2003).

[54] Ibid.

[55] Ibid. (emphasis added).

[56] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995), 4.

[57] Ibid., 4.

[58] Raustiala, "The Architecture of International Cooperation," 79.

[59] Ibid., 80-83.

[60] Ibid., 83

[61] Keohane and Nye, Jr., "Power and Interdependence in the Information Age," 81-82.

[62] Giandomenico Majone, "From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance," *Journal of Public Policy* 17 (1997): 139-67.

[63] Giandomenico Majone, "The New European Agencies: Regulation by Information," *Journal of European Public Policy* 4 (1997): 261-75, 265.

[64] Majone, “The New European Agencies,” 265.

[65] Notis Lebessis and John Paterson, “The Future of European Regulation: A Review of the Workshop,” (Working Paper 1997, European Commission, Forward Studies Unit, 11 June 1997) (summarizing a workshop attended by Giandomenico Majone and Renaud Dehousse), In Europa homepage [cited January 2, 2003]; formerly available from http://europa.eu.int/comm/cdp/working-paper/nouveaux_modes_gouvernance_en.pdf.

[66] Commission of the European Communities, “European Governance: A White Paper” 25 July 2001, 21.

[67] Renaud Dehousse, “Regulation by Networks in the European Community,” *Journal of European Public Policy* 4 (1997): 246-61, 255.

[68] Lebessis and Paterson, “The Future of European Regulation”; Dehousse, “Regulation by Networks,” 255.

[69] Commission of the European Communities, “European Governance: A White Paper” 21.

[70] Dehousse, “Regulation by Networks,” 255.

[71] Ibid., 254.

[72] Lebessis and Paterson, “The Future of European Regulation”; see also Majone, “The New European Agencies,” 267-68.

[73] Lebessis and Paterson, “The Future of European Regulation” (summary of Dehousse and Majone presentation at conference).

[74] Ibid.

[75] “North American Agreements on Environmental Cooperation (NAAEC),” 14 September 1993, US-Can.-Mex., 32 *International Legal Materials* 1480 (1993).

[76] NAAEC, arts. 14 and 15.

[77] NAAEC, arts. 15(1) and (2).

[78] Ibid., art. 15(4).

[79] Ibid., art. 15(7).

[80] See David L. Markell, "The Commission for Environmental Cooperation's Citizen Submission Process," *Georgetown International Law Review* 12 (2000): 545, 571.

[81] See Jody Freeman, "Collaborative Governance in the Administrative State," *UCLA Law Review* 45 (1997): 1, 6 (arguing that a better model of regulation "views the administrative process as a problem-solving exercise in which parties share responsibility for all stages of the rule-making process, in which solutions are provisional").

[82] Lebessis and Paterson, "The Future of European Regulation."

[83] Ibid.

[84] Ibid.

[85] Commission of the European Communities, "European Governance: A White Paper," 19.

[86] "The Global Compact: Overview," In The Global Compact homepage [cited July 5, 2003]; available from http://www.unglobalcompact.org/Portal/.

[87] "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment," Address to the World Economic Forum in Davos, 31 January 1999, UN Doc SG/SM/6881/Rev.1*, In United Nations homepage [cited July 5, 2003]; available from http://www.un.org/partners/business/davos.htm#speech.

[88] John Ruggie, "Global_Governance.net: The Global Compact as Learning Network," *Global Governance* 7 (2001): 371.

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92] Dorf and Sabel, "A Constitution of Democratic Experimentalism," 352.

[93] Ibid., 348-49.

[94] Ibid., 352.

[95] Karl-Heinz Ladeur, "Towards a Legal Concept of the Network in European Standard-Setting," in *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations*, eds. Christian Joerges, Karl-Heinz Ladeur, and Ellen Vos (Baden-Baden: Nomos, 1997), 151-70, 157.

[96] Ladeur, "Towards a Legal Concept," 161.

[97] Oliver Gerstenberg and Charles F. Sabel, "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe," in *Good Governance in Europe's Integrated Market*, eds. Christian Jorges and Reanud Dehousse (Oxford: Oxford University Press, 2002), 289-341. This combination of direct participation in problem solving combined with constant, structured information pooling and benchmarking lies at the heart of Dorf and Sabel's vision of democratic experimentalism. Dorf and Sabel, "A Constitution of Democratic Experimentalism," 267.

[98] See Cohen and Sabel, "Directly Deliberative Polyarchy," 332-33.

[99] See Majone, "The New European Agencies."

[100] Amitai Aviram, "Regulation by Networks" [On file with author].

[101] Ibid., 16-21.

[102] "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD/DAFFE/IME/BR(97)16/FINAL 18 Dec. 1997," *International Legal Materials* 37 (1998). The number of signatories is available at the Organisation for Economic Cooperation and Development homepage [cited July 5, 2003]; available from

http://www.oecd.org/pdf/M00017000/M00017037.pdf.

[103] Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985); "Center for the Independence of Judges and Lawyers," In International Commission of Jurists homepage [cited July 5, 2003]; available from http://www.icj.org/rubrique.php3?id_rubrique=40&lang=en.

[104] See generally Michael Hechter, *Principles of Group Solidarity* (Berkeley: University of California Press, 1987).

[105] I am indebted to my former students Timothy Wu and Kal Raustiala for many of the insights in the discussion that follows. Now law professors themselves, they wrote papers for a seminar I taught in 1997 on transgovernmental regulatory cooperation. Each paper explored different ways that regulatory networks exercise power and how they can be said to establish "order without law."

[106] Timothy Wu, "Order Without International Law – The Compliance Inducing Capacity of Transgovernmental Networks," (May 1997). [On file with author].

[107] Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991 [1994 printing]).

[108] Ellickson, *Order Without Law*; Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," *Journal of Legal Studies* 21 (1992): 115; Lisa Bernstein, "Merchant Law in Merchant Court: Rethinking the Code's Search for Immanent Business Norms," *University of Pennsylvania Law Review* 144 (1996): 1765.

[109] Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, Mass., Harvard University Press, 1965), 65.

[110] Olson, *The Logic of Collective Action*, 61, quoted in Wu, "Order Without International Law," 11.

[111] Olson, The Logic of Collective Action, 62.

[112] Sociologist Sally Engle Merry argues that effective social control is possible only in "close-knit and durable social networks" where there are "homogeneous norms and values." Sally Engle Merry, *Urban Danger: Life in a Neighborhood of Strangers* (Philadelphia : Temple University Press, 1981), 196, quoted in Wu, "Order Without International Law," 23.

[113] Ellickson, *Order Without Law*, 182, cited in Wu, "Order Without International Law," 12.

[114] Wu, "Order Without International Law," 14-15.

[115] Ibid., 2.

[116] Ibid., 1.

[117] Ethan Kapstein, *Governing the Global Economy: International Finance and the State* (Cambridge, Mass.: Harvard University Press, 1994), 45.

[118] See Ibid.; also Wu, "Order Without International Law," 29-33.

[119] See International Organization of Securities Commissions (IOSCO) homepage [cited December 23, 2002]; available from http://www.iosco.org/gen-info.html.

[120] "The Basel Committee on Banking Supervision," In Bank for International Settlements homepage [cited December 23, 2003]; available from http://www.bis.org/bcbs/aboutbcbs.htm.

[121] Aviram, "Regulation by Networks," 18.

[122] Ibid., 18, n. 63 (citing Lisa Bernstein, "Opting Out of the Legal System," 129.

[123] Anne-Marie Slaughter and Laurence R. Helfer, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 273, 286.

[124] Foreign Affairs Committee, *The Future of the Commonwealth:* vol. 1, 27 March 1996,

xlviii.

[125] Chayes and Chayes, *The New Sovereignty*, 27.

[126] I owe this insight directly to Kal Raustiala, who made the connection to the Chayes and Chayes work as part of a larger paper he wrote examining the power of government networks to induce structural change in domestic bureaucracies. Kal Raustiala, "Order Without Law: Disaggregated Sovereignty and Structural Replication in the International System," (May 1997). [On file with author].

[127] "Backgrounder," In the G-20 homepage [cited December 23, 2002]; available from http://www.g20.org/docs/bkgrnd-e.html.

[128] "From G7 to G8," In G8 Information Center homepage [cited December 23, 2002]; available from http://www.g7.utoronto.ca/g7/what_is_g7.html.

[129] "Parliamentary Supremacy and Judicial Independence, Latimer House Guidelines (1998)," In Commonwealth Parliamentary Association homepage [cited January 2, 2003]; available from http://www.cpahq.org/download/latmrhse.pdf.

[130] David Howell, "The Place of the Commonwealth in the International Order," *Round Table*, 345 (1998).

[131] Justice Richard Goldstone, personal conversation with author, Hamburg, Germany, 23 August 2001.

[132] James D. Fearon, "Deliberation as Discussion," in *Deliberative Democracy*, ed. Jon Elster (Cambridge, England: Cambridge University Press, 1998), 44-68, 44.

[133] Compare, in this regard, Abram Chayes' claim that "the requirement of justification suffuses the basic process of choice. There is continuous feedback between the knowledge that the government will be called upon to justify its action and the kind of action that can be

chosen." Abram Chayes, *The Cuban Missile Crisis: International Crises and the Role of Law* (New York: Oxford University Press, 1974), 103.

[134] Fearon, "Deliberation as Discussion," 62. The quote is from Fearon, but he is paraphrasing Bernard Manin, "On Legitimacy and Political Deliberation," *Political Theory* 15 (1987): 338-68, 352.

[135] Ibid., 45. Fearon states the grounds he identifies for favoring discussion as follows:

1. Reveal private information;
2. Lessen or overcome the impact of bounded rationality;
3. Force or encourage a particular mode of justifying demands or claims;
4. Help render the ultimate choice legitimate in the eyes of the group, so as to contribute to group solidarity or to improve the likely implementation of the decision;
5. Improve the moral or intellectual qualities of the participants;
6. Do the 'right thing,' independent of the consequences of discussion.

[136] Ibid., 47,

[137] Ibid., 55.

[138] Ibid., 58.

[139] Ibid., 54.

[140] Thomas Risse, "'Let's Argue!': Communicative Action in World Politics," *International Organization* 54 (2000): 1-39.

[141] This account of how humans behave is a very basic summary, courtesy of Thomas Risse, of some of the theories of the great German philosopher Juergen Habermas, who has spent decades making room for reason in a world that all too often seems to hold only atomistic interest-driven individuals or suffocating social structures. Jurgen Habermas, *Theorie des kommunikativen Handelns* (Frankfurt am Main: Suhrkamp, 1981); Jurgen Habermas, *Theory of Communicative Action* (Boston: Beacon Press, 1984). Habermas sees individuals as beings who not only seek to persuade others, but who are themselves open to persuasion. A speaker's willingness to change his own mind in light of what he hears, often in response to what he says, is the precondition for "true reasoning." Risse, "Let's Argue!," 9.

[142] James G. March and Johan P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press 1989); James G. March and Johan P. Olsen, "The Institutional Dynamics of International Political Orders," 52 *International Organization* (1998): 943-69.

[143] March and Olsen, "The Institutional Dynamics," 943.

[144] Risse, "Let's Argue!," 2.

[145] Ibid., 1-2.

[146] Ibid., 15, 19.

[147] Ibid., 19.

[148] See Rigo, "Law Harmonization."

[149] Risse, "Let's Argue!," 33.

[150] Ibid., 28-31.

[151] Lani Guinier, "Rethinking Power," *Tanner Lectures on Human Values*, (lectures given by Professor Guinier at Sanders Theater, Harvard University, November 4-5, 1998); Lani Guinier, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, Mass.: Harvard University Press, 2002).

[152] Albert O. Hirschman, *A Propensity to Self-Subversion* (Cambridge: Harvard University Press, 1995), 235.

[153] Hirschman, *A Propensity to Self-Subversion*, 237.

[154] Ibid., 239.

[155] Ibid., 242-44.

[156] Ibid., 246.

[157] Ibid., 244.

[158] "Merger Busting in Europe," *The New York Times*, 21 June 2001.

[159] Andrea Larson, "Network Dyads in Entrepreneurial Settings: A Study of the Governance of Exchange Relationships," *Administrative Science Quarterly* 37 (1992): 76, quoted in R.A.W. Rhodes, *Understanding Governance* (Buckingham; Philadelphia: Open University Press, 1997), 51. Rhodes himself reaches a similar conclusion. R. A. W. Rhodes, "The New Governance: Governing without Government," *Political Studies* 44 (1996): 652-667.

[160] Robert Keohane, "Studying Cooperation and Conflict: Intra-Rationalistic and Extra-Rationalistic Research Programs," (talk at a round-table on conflict and cooperation, American Political Science Association annual meetings, San Francisco, CA, August 1996). [On file with author].

[161] Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, (prepared for publication from the 1958 tentative edition by

William N. Eskridge, Jr. and Philip P. Frickey), (New York: Foundation Press, 1994), lxxi-lxxii.

[162] Chayes and Chayes, *The New Sovereignty*, 22-28.

[163] Chayes and Chayes developed their analytical framework with regard to international regulatory treaties; it applies equally well to transnational regulatory relations. In earlier work Abram Chayes elaborated the link between regulatory law and public policy, arguing that the resolution of regulatory issues necessarily involves broad debates over public policy and public values. Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harvard Law Review* 89 (1976): 1281, 1302.

[164] Robert M. Cover, "The Supreme Court, 1982 Term – Forward: Nomos and Narrative," *Harvard Law Review* 97 (1983): 4, 15; cited for a similar proposition in Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181.

[165] Harold Hongju Koh, "The 1998 Frankel Lecture: Bringing International Law Home," *Houston Law Review* 25 (1998): 623.