

Sovereignty and Power in a Networked World Order

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[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 regulators¹

I. INTRODUCTION

Theorists, pundits, and policymakers all recognize that traditional conceptions of sovereignty are under assault. The result is a seemingly endless debate about the changing nature of sovereignty. What does it mean? Does it still exist? Is it useful? Louis Henkin laments the “S word,” arguing that it now obstructs more than it accomplishes.² Stephen Krasner offers four different definitions of sovereignty—international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty;³ Robert Keohane distinguishes between formal and “operational” sovereignty.⁴

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¹ INT’L COMPETITION POL’Y ADVISORY COMM. TO THE ATT’Y GEN. & ASSISTANT ATT’Y GEN. FOR ANTITRUST, U.S. DEP’T OF JUSTICE, FINAL REPORT 190 (2000) [hereinafter INT’L COMPETITION].

² Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999).

³ STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 3 (1999).

⁴ Robert O. Keohane, *Hobbes’s Dilemma and Institutional Change in World Politics: Sovereignty in International Society*, in *WHOSE WORLD ORDER: UNEVEN GLOBALIZATION AND THE END OF THE COLD WAR* 172, 177 (Hans-Henrik Holm & Georg Sorenson eds., 1995).

Westphalian sovereignty, which often seems compounded of equal parts myth and rhetoric, portrays the state as a defined physical territory “within which domestic political authorities are the sole arbiters of legitimate behavior.”⁵ Formally, Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference. But it is also the right to be recognized as an autonomous agent in the international system, capable of interacting with other states and entering into international agreements.

This conception of sovereignty is embedded in the U.N. Charter itself. The signatories to the Charter accept a number of restraints on their behavior in the international system, most notably the obligation not to use force except in self-defense. At the same time, however, according to Article 2(7), “Nothing in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State.”⁶

Westphalian sovereignty faces two fundamental challenges in contemporary international relations. (The underlying causes of these challenges are multiple, and are often subsumed under the general rubric of globalization, but are not of specific concern here.) First is the ineffectiveness challenge. Keohane identified this problem succinctly in 1993: “It is now a platitude that the ability of governments to attain their objectives through individual action has been undermined by international political and economic interdependence.”⁷ A state’s ability to control its own territory without external interference is no longer sufficient to allow it to govern its people effectively—to provide security, economic stability and a measure of prosperity, clean air and water, and even minimum health standards.

Second is the interference challenge. The letter of Article 2(7) remains; the spirit is violated repeatedly and increasingly routinely. All of human rights law deliberately infringes on the domestic jurisdiction of every state, denying governments the freedom to torture, murder, “disappear,” or systematically discriminate against their own citizens. Moreover, throughout the 1990s the Security Council repeatedly found that the conditions prevailing within a state, from starvation in Somalia to political intimidation and massacre in East Timor, constituted a threat to international peace and security sufficient to require collective armed intervention, and should have made such a determination regarding the genocide in Rwanda. States can no longer assume that if they refrain from interfering in the affairs of other states they will remain free from interference themselves.

Particularly important are the justifications for such interference. Systematic human rights abuses, ruthless political oppression bordering on extermination, or the anarchy resulting from the complete disintegration of

⁵ See, e.g., KRASNER, *supra* note 3, at 20 (“Westphalian sovereignty is violated when external actors influence or determine domestic authority structures. Domestic authority structures can be infiltrated through both coercive and voluntary actions, through intervention and invitation The fundamental norm of Westphalian sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior.”).

⁶ U.N. CHARTER art. 2, para. 7.

⁷ Robert O. Keohane, *Sovereignty, Interdependence, and International Institutions*, in IDEAS AND IDEALS: ESSAYS ON POLITICS IN HONOR OF STANLEY HOFFMANN 91, 92 (Linda B. Miller & Michael Smith eds., 1993).

political authority all prick the conscience of publics everywhere. Human rights groups and ethnic constituencies often composed of emigrants from a particular suffering state also work systematically to raise the salience of any particular human rights crisis. But states do not sign on to, or at least ratify and implement, human rights treaties solely for moral or even political reasons. Nor are they willing to send troops into battle solely for such reasons. On the contrary, governments increasingly understand that they often cannot *afford* to look the other way; that fundamental threats to their own security, whether from refugees, terrorists, the potential destabilization of an entire region, or a miasma of disease and crime, may well have their origins in conditions once thought to be within a state's exclusive domestic jurisdiction.

In short, states can no longer govern effectively by being left alone and by leaving other states alone. The converse proposition is equally true, although perhaps more startling: *States can only govern effectively by actively cooperating with other states and by collectively reserving the power to intervene in other states' affairs.* The world has indeed turned upside down; small wonder that the concept of sovereignty needs to be redefined!

Parts II and III of this Article draw on the work of Abram and Antonia Chayes and of the International Commission on Intervention and State Sovereignty to offer a redefinition of sovereignty. The "new sovereignty" is the capacity to participate in the international and transgovernmental regimes, networks, and institutions that are now necessary to allow governments to accomplish through cooperation with one another what they could once only hope to accomplish acting alone within a defined territory. This participation is conditioned, in the sense that it mandates acceptance of certain basic responsibilities required of all governments toward their own people.

Part IV of the Article illustrates the operation of the new sovereignty by exploring how "government networks"—networks of national government officials operating across borders—actually work. Particularly relevant is the kind of power exercised by participants in these networks and hence the importance of the right and capacity to participate. In Part V of the Article, I turn to how such networks *could* work if they were deliberately designed as mechanisms of global governance. Such a design would pay more attention to the conditions of participation for individual government officials and the possibilities of using mechanisms of socialization, support, and shaming not only to build domestic and international governance capacity but also to induce compliance with network-wide norms.

In the process of using the workings of government networks to help illustrate and provoke new thinking about sovereignty, I hope also to illuminate new ways of thinking about power. Sovereignty and power are both held by states but exercised by individuals. Thinking about how power is exercised concretely among individual government officials participating in a network, rather than in the more abstract context of interstate relations, should help illuminate the substance of a new sovereignty for a new era.

II. REDEFINING SOVEREIGNTY

Even a brief tour of the legal and political horizon reveals major efforts to redefine sovereignty in ways specifically designed to address the ineffectiveness and the interference challenges. According to Abram and Antonia Chayes, “the new sovereignty” is the right and the capacity to participate in the international institutions that allow their members, working together, to accomplish the ends that individual governments could once accomplish alone.⁸ And according to the International Commission on Intervention and State Sovereignty, participation in at least one of those institutions, the United Nations itself, means that the participating state accepts the right of its fellow members to intervene in its domestic affairs if it has failed in its most fundamental obligations to protect its own citizens—a kind of conditional social contract.

Writing in the mid-1990s, Chayes and Chayes saw the rise of what they called “the new sovereignty,” which they defined as the *capacity to participate* in international institutions of all types. This is a positive conception of sovereignty, by which the principal attribute of statehood is the ability to join in collective efforts to address global and regional problems.

For Chayes and Chayes, the international system itself has moved beyond interdependence. It has become a “tightly woven fabric of international agreements, organizations and institutions that shape [states’] relations with one another and penetrate deeply into their internal economics and politics.”⁹ In this context, where the defining features of the international system are connection rather than separation, interaction rather than isolation, and institutions rather than free space, sovereignty as autonomy makes no sense. The new sovereignty is status, membership, “connection to the rest of the world and the political ability to be an actor within it.”¹⁰ However paradoxical it sounds, the measure of a state’s capacity to act as an independent unit within the international system—the condition that “sovereignty” purports both to grant and describe—depends on the breadth and depth of its links to other states.¹¹

On the humanitarian side, Kofi Annan issued a challenge to all U.N. members at the opening of the General Assembly in September 1999 to “reach consensus—not only on the principle that massive and systematic violations of human rights must be checked, wherever they take place, but also on ways of deciding what action is necessary, and when, and by whom.” In response to this challenge, the Canadian government, together with a group of major

⁸ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 4 (1995).

⁹ *Id.* at 26. Similarly, Wolfgang Reinecke has emphasized the extent to which globalization, unlike interdependence, penetrates the deep structure and strategic behavior of corporations and other actors in the international system. See generally Wolfgang Reinecke, *Global Public Policy*, FOREIGN AFF., Nov./Dec. 1997, at 127–138.

¹⁰ CHAYES & CHAYES, *supra* note 8, at 26.

¹¹ This is what Kal Raustiala calls a “sovereignty-strengthening” theory. See Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT’L. ECON. L. 841, 843 (2003).

foundations, established the International Commission on Intervention and State Sovereignty (“ICISS”), headed by former Australian Foreign Minister Gareth Evans and Special Advisor to the U.N. Secretary General Mohamed Sahnoun and composed of a distinguished global group of diplomats, politicians, scholars, and nongovernmental activists. In December 2001 the ICISS issued an important and influential report, “The Responsibility to Protect,” which essentially called for updating the U.N. Charter to incorporate a new understanding of sovereignty.¹²

The ICISS seeks to change the core meaning of U.N. membership from “the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations,”¹³ to recognition of a state “as a responsible member of the community of nations.”¹⁴ Nations are free to choose whether or not to sign the Charter; if they do, however, they must accept the “responsibilities of membership” flowing from their signature.¹⁵ According to the ICISS, “There is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.”¹⁶ Internally, a government has a responsibility to respect the dignity and basic rights of its citizens; externally, it has a responsibility to respect the sovereignty of other states.

Further, the ICISS places the responsibility to protect on *both* the state and on the international community as a whole. The ICISS insists that an individual state has the primary responsibility to protect the individuals within it.¹⁷ However, where the state fails in that responsibility, a secondary responsibility falls on the international community acting through the United Nations. Thus, “[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”¹⁸

¹² ICISS, THE RESPONSIBILITY TO PROTECT, REPORT OF THE INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY (2001). The International Commission on Intervention and State Sovereignty (“ICISS”) began from the premise that “in key respects . . . the mandates and capacity of international institutions have not kept pace with international needs or modern expectations.” *Id.* at para. 1.11. More specifically, the ICISS argued that the intense debate over military protection for humanitarian purposes flowed from a “critical gap” between the immense and unavoidable reality of mass human suffering and the existing rules and mechanisms for managing world order. At the same time, it noted a widening gap between the rules and the principles of the Charter regarding noninterference in the domestic affairs of member nations and actual state practice as it has evolved since 1945. It frames the “responsibility to protect” as an “emerging principle” of customary international law—not yet existing as law but already supported both by state practice and a wide variety of legal sources. *Id.* at paras. 2.24–2.27.

¹³ *Id.* at para. 2.11.

¹⁴ *Id.* at para. 2.14.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at para. 2.29.

¹⁸ *Id.* at xi.

III. SOVEREIGNTY AS CAPACITY AND RESPONSIBILITY

These shifts may seem dramatic; they are certainly bold. But as Kal Raustiala compellingly argues, the transformation of sovereignty is only keeping up with the transformation of “both the international system and state-society relations . . . by events of the twentieth century.”¹⁹ Sovereignty itself refers to the “supreme authority and control over policy” within any delimited political space.²⁰ To exercise such authority and control in a world that has become so interconnected that people, politics, and pathogens are virtually able to disregard borders requires institutionalized cooperation and intervention. Thus, Raustiala claims, international institutions “actually serve as a means to reassert sovereignty.”²¹ So too does recognition of an individual and collective responsibility to protect.

The best illustration of the new sovereignty can be found in the operation of “government networks”—networks of national government officials of all kinds operating across borders to regulate individuals and corporations operating in a global economy, combat global crime, and address common problems on a global scale. As I have argued over the past decade, the state is not losing power so much as changing the way that it exercises its power.²² As corporations, nongovernmental organizations (“NGOs”), and criminals have all begun to operate increasingly through global networks rather than nation-based hierarchies, so too have government officials. The result is an ever denser web of government networks, allowing government officials to compensate for their decreasing territorial power by increasing their global reach.

Consider the examples simply in the wake of September 11. The Bush Administration immediately set about assembling an “ad hoc coalition” of states to aid in the war on terrorism. Public attention focused on military cooperation, but the networks of financial regulators working to identify and freeze terrorist assets, law enforcement officials sharing vital information on terrorist suspects, and intelligence operatives working to preempt the next attack have been equally important. Indeed, the leading expert in the “new security” of borders and container bombs insists that the domestic agencies responsible for customs, food safety, and regulation of all kinds must extend their reach abroad, through reorganization and much closer cooperation with their foreign counterparts.²³ And after the United States concluded that it did not have authority under international law to interdict a shipment of missiles from North Korea to Yemen, it turned to national law enforcement authorities to coordinate the extraterritorial enforcement of their national criminal laws.²⁴ Networked threats require networked responses.

¹⁹ Raustiala, *supra* note 11, at 860.

²⁰ *Id.* at 852.

²¹ *Id.* at 843.

²² See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004). This book synthesizes and builds on a series of articles dating back to 1994. Parts of this Article are drawn from Chapter V of the book.

²³ Stephen E. Flynn, *America the Vulnerable*, *FOREIGN AFF.*, Jan./Feb. 2002, at 60, 60–74.

²⁴ David E. Sanger, *The World: When Laws Don't Apply; Cracking Down on the Terror-Arms Trade*, *N.Y. TIMES*, June 15, 2003, at D4.

Turning to the global economy, networks of finance ministers and central bankers have been critical players in responding to national and regional financial crises. The G-8 is as much a network of finance ministers as of heads of state; it is the finance ministers who take key decisions on how to respond to calls for debt relief for the most highly indebted countries. The finance ministers and central bankers hold separate news conferences to announce policy responses to crises such as the East Asian financial crisis in 1997 and the Russian crisis in 1998.²⁵ The G-20, a network specifically created to help prevent future crises, is led by the Indian finance minister and is composed of the finance ministers of twenty developed and developing countries. More broadly, the International Organization of Securities Commissioners ("IOSCO") emerged in 1984. It was followed in the 1990s by the creation of the International Association of Insurance Supervisors and a network of all three of these organizations and other national and international officials responsible for financial stability around the world called the Financial Stability Forum.²⁶

Beyond national security and the global economy, networks of national officials are working to improve environmental policy across borders. Within the North American Free Trade Agreement ("NAFTA"), U.S., Mexican, and Canadian environmental agencies have created an environmental enforcement network, which has enhanced the effectiveness of environmental regulation in all three states, particularly in Mexico. Globally, the U.S. Environmental Protection Agency ("EPA") and its Dutch equivalent have founded the International Network for Environmental Compliance and Enforcement, which offers technical assistance to environmental agencies around the world, holds global conferences for environmental regulators to learn and exchange information, and sponsors a website with training videos and other information.

On the judicial front, national judges are exchanging decisions with one another through conferences, judicial organizations, and the Internet. Constitutional judges increasingly cite one another's decisions on issues from free speech to privacy rights. Bankruptcy judges in different countries negotiate mini-treaties to resolve complicated international cases; judges in transnational commercial disputes have begun to see themselves as part of a global judicial system. National judges are also interacting directly with their supranational counterparts on trade and human rights issues.

Finally, legislators, the most naturally parochial government officials due to their direct ties to territorially rooted constituents, are reaching across

²⁵ Robert Chote, *A World in the Woods*, FIN. TIMES, Nov. 2, 1998, at 20.

²⁶ The Financial Stability Forum was initiated by the Finance Ministers and Central Bank Governors of the Group of Seven industrial countries in February 1999, following a report on international cooperation and coordination in the area of financial market supervision and surveillance by the President of the Deutsche Bundesbank. In addition to representatives from the Basel Committee, the International Organization of Securities Commissioners ("IOSCO"), and the International Association of Insurance Supervisors, its members include senior representatives from national authorities responsible for financial stability in significant international financial centers; international financial institutions such as the Bank for International Settlements, the International Monetary Fund ("IMF"), the Organisation for Economic Co-operation and Development ("OECD"), and the World Bank; and committees of central bank experts. Financial Stability Forum website, at <http://www.fsforum.org>.

borders. International parliamentary organizations have been traditionally well meaning but ineffective. But today national parliamentarians are meeting to adopt and publicize common positions on the death penalty, human rights, and environmental issues. They support one another in legislative initiatives and offer training programs and technical assistance.²⁷

To understand how these proliferating government networks exemplify the new sovereignty, it is necessary to know more about how they actually work, in the sense of genuinely changing outcomes and achieving results in world affairs. They all share a number of basic features. They build trust and establish relationships among their participants that then create incentives to establish a good reputation and avoid a bad one. They exchange regular information about their own activities and develop databases of best practices, or, in the judicial case, different approaches to common legal issues. Finally, they offer technical assistance and professional socialization to members from less developed nations—whether regulators, judges, or legislators.

These features facilitate long-term cooperation and offer a foundation for more direct action, such as harmonizing law or collaborating in enforcement efforts. But how do participants in these networks actually reach decisions designed to change behavior? And once they have reached these decisions, how do they enforce them? Or, more precisely, how do they translate them into changed behavior on the ground? In short, how do they exercise power?

Understanding how government networks exercise power is the key to understanding that it is important for individual government officials to participate in networks, in order to simply do their domestic jobs more effectively. Further, understanding how government networks *could* exercise power if they were more deliberately and formally constituted as mechanisms of global governance illustrates the ways in which participating government officials would be able to accomplish the tasks they face even more effectively if they took greater responsibility for the performance of their counterparts in countries around the world.

At the same time, understanding the many different ways that government networks exercise power, or, alternatively, the many different kinds of power that government networks exercise, opens the door to more imaginative thinking about how to design the institutions in which sovereign states have the right and should have the capacity to participate, subject to certain conditions. Of particular interest are combinations of hard and soft power that operate quite differently from the more traditional hard power mechanisms such as vetoes and weighted voting that have dominated in institutions designed for a world of more autonomous sovereigns.

This Article divides all these different networks into three broad categories: harmonization networks, enforcement networks, and information networks. Each type of network can solve different problems, although in practice their activities overlap considerably. Harmonization networks

²⁷ American readers may be skeptical of these reports due to the widespread and completely false statistic about how few members of Congress have a passport. In fact, ninety-three percent of all members hold passports and average two trips abroad a year. Indeed, twenty percent claim to speak a foreign language. Eric Schmitt & Elizabeth Becker, *Insular Congress Appears to be Myth*, N.Y. TIMES, Nov. 4, 2000, at A9. What is true is that some members fear that their constituents will identify trips to meet their counterparts abroad with “junkets,” but that is a matter of public education.

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?

All three types of networks exercise both hard and soft power. As defined by Joseph Nye, hard power is “command power that can be used to induce others to change their position.”²⁸ 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.”²⁹ 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. Consider, for instance, the task of a group of justice ministers who

²⁸ JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* 9 (2002) [hereinafter NYE, PARADOX]. Nye first elaborated the concept of soft power in an earlier work. JOSEPH S. NYE, JR., *BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER* 188–201 (1991).

²⁹ NYE, PARADOX, *supra* note 28, at 9.

wish to convince as many of their peers as possible in as many countries as possible to adopt a certain set of procedures and tactics of proven value in fighting terrorism. They can use economic inducements, another form of hard power, but are equally likely to rely on the force of example, distillation and dissemination of credible information, persuasion, and socialization. These are the tools of soft power. Indeed, as I argue below, such tools often result in “the hard impact of soft law.”

Not all of these uses of soft power are likely to be welcomed by all states, particularly in the context of the redefinition of sovereignty discussed above. Networks of like officials operating by consensus, often with subcommittees composed of particular groups of powerful states, often allow those states to set the agenda in terms of issues to be addressed and sets of best practices to be distilled. Agenda-setting is its own form of power, of course, even in organizations with formal voting rules. Moreover, in many cases one of the express purposes of a network is to offer technical assistance and training to developing country members, assistance which often results in replication of regulatory models from developed countries.³⁰ Such assistance may well be essential to give meaning to the “capacity to participate” in global regulatory regimes promised by the new sovereignty, but it comes with strings attached.

On the other hand, as David Zaring has recently demonstrated in the context of networks of financial regulators, developing country officials have been eager for the advice and assistance provided by their developed country peers.³¹ Following codes of best practices and specific regulatory templates is a way of demonstrating sound financial policy to outside investors, without the binding and often procrustean demands of an International Monetary Fund (“IMF”) conditionality package.³² Moreover, as Raustiala shows, in many cases these networks do genuinely build governmental capacity in many countries—capacity that helps in treaty compliance, more effective domestic government, and meaningful participation not only in government networks but in formal international organizations.³³ Such gains may be ultimately much more valuable than the formal attributes of sovereignty as autonomy, which is so often negated by the realities of power politics.

IV. 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.³⁴ This transfer of rules, practices, and whole institutional structures, in turn, “promotes policy

³⁰ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks & the Future of International Law*, 43 VA. J. INT’L L. 1, 7 (2002).

³¹ David Zaring, *International Financial Regulatory Cooperation* (unpublished manuscript, on file with author). This article updates an earlier piece by Zaring. David Zaring, *International Law By Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L.J. 281, 323–25 (1998).

³² *Id.*

³³ Raustiala, *supra* note 30.

³⁴ *Id.*

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.³⁵ 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.³⁶

I adapt these findings somewhat in the first half of this Part. In Subparts A through E, I discuss the present impact of government networks in terms of convergence. The remaining Subparts address improved compliance with international agreements, not only through capacity building but also through vertical networks. Part V 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 they facilitate 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 the U.S. Securities and Exchange Commission (“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.”³⁷ 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 that “the trick will be to encourage the securities regulators of the other major trading nations to develop systems that provide

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 32.

protections to investors substantially similar to those provided in this country”³⁸

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.³⁹ 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 the IOSCO report, “Principles for Memoranda of Understanding.”⁴⁰ 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.⁴¹ Not surprisingly, this training “provides grounding in the basic principles and approaches employed by the SEC.”⁴²

Antitrust law and policy has long been a U.S. preserve, at least in the sense that the United States has had stronger antitrust laws than other countries and has actively sought to enforce them extraterritorially, generally in the face of stiff opposition.⁴³ In recent decades the tide has begun to turn. The European Union has generally accepted and even embraced U.S. principles and modes of enforcement, although it now means that the E.U. Commission is enforcing E.U. antitrust law against U.S. companies—as in the E.U. Commission’s high profile rejection of a proposed merger between Honeywell and G.E.⁴⁴ 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.”⁴⁵ The International Competition Policy Advisory Committee

³⁸ *Id.* at 29 (quoting Bevis Longstreth, *The SEC after Fifty Years: An Assessment of its Past and Future*, 83 COLUM. L. REV. 1593, 1610 (1983)).

³⁹ Raustiala, *supra* note 30, at 30 (quoting congressional testimony from former U.S. Securities and Exchange Commission (“SEC”) Chair Ruder in 1988).

⁴⁰ See Faith T. Teo, *Memoranda of Understanding among Securities Regulators: Frameworks for Cooperation, Implications for Governance*, Harvard Law School (1998) (on file with author). The IOSCO blueprint for memoranda of understanding (“MOUs”) provides that:

If a Requested Authority is not able to provide assistance with respect to matters which would not constitute violations within its own state without breaching its domestic legislation, the Requested Authority should consider recommending that appropriate amendments be made to this legislation to enable the assistance to be given, if it has the power to make such recommendations.

International Organization of Securities Commissions, Technical Committee, *Principles for Memoranda of Understanding*, at 3 (1991), available at <http://www.iosco.org/library/index.cfm?whereami=pubdocs&year=none>.

⁴¹ Raustiala, *supra* note 30, at 32–33.

⁴² *Id.* at 33.

⁴³ 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 (2001).

⁴⁴ See *G.E. and Honeywell Officially End Merger Agreement*, N.Y. TIMES, Oct. 3, 2001, at C4.

⁴⁵ Spencer Weber Waller, *Comparative Competition Law as a Forum for Empiricism*, 23 BROOKLYN J. INT’L L. 455, 457 (1997).

to the Attorney General and Assistant Attorney General for Antitrust confirms this trend.⁴⁶

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.⁴⁷ 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 Organisation for Economic Co-operation and Development (“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,” and gives as examples the Fordham conference and the DOJ’s own International Cartel Enforcement Workshop in 1999.⁴⁸

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 World Trade Organization 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.”⁴⁹ The network “provide[s] competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns.”⁵⁰ Its members, including regulatory authorities from more than sixty-five states, held its first conference in September 2002 in Naples, Italy, and its second in June 2003 in Merida, Mexico.⁵¹ Initial topics of discussion included “merger review in a multi-jurisdictional context, the role of competition advocacy, and how to create

⁴⁶ The Committee concluded in its 2000 report that “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.” INT’L COMPETITION, *supra* note 1, at 190.

⁴⁷ See, e.g., Andrew Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501 (1998); Nina L. Hachigian, *International Antitrust Enforcement*, 12 ANTITRUST 22 (1997); Raustiala, *supra* note 30, at 35–43; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478 (2000); Waller, *supra* note 45.

⁴⁸ INT’L COMPETITION, *supra* note 1, at 191.

⁴⁹ Charles James, Address on International Antitrust in the Bush Administration (Sept. 21, 2001), *quoted in* Raustiala, *supra* note 30, at 40, available at <http://www.usdoj.gov/atr/public/speeches/9330.htm>.

⁵⁰ *About the ICN*, ICN Homepage, at <http://www.internationalcompetitionnetwork.org/aboutus.html> (last visited May 19, 2004).

⁵¹ *International Competition Network: Annual Conference*, ICN Homepage, at <http://www.internationalcompetitionnetwork.org/aboutus.html> (last visited May 19, 2004); *International Competition Network: Members*, ICN Homepage, at <http://www.internationalcompetitionnetwork.org/members.html> (last visited July 5, 2003).

effective capacity building programs for agencies in developing and transition economies.”⁵²

The United States 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 E.U. approach to competition policy has won out in Eastern Europe.⁵³ And according to an American Bar Association Report, “[c]lusters of nations are tending to adopt one or another of the different models.”⁵⁴ The report cites as examples Mexican convergence toward the United States; the laws of Argentina, Brazil, Chile, Colombia, and Venezuela combining aspects of U.S. and E.U. law; the laws of countries across Europe converging on the E.U. model; and the laws of smaller Asian trading nations converging on Japanese and Korean models.⁵⁵

What is clear from these two 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 United States 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.⁵⁶ 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 E.U. Commission.

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.⁵⁷ 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

⁵² *World Antitrust Authorities Call for Improved Merger Review, Advocacy and Capacity Building at 2nd Annual International Competition Network Conference*, ICN Homepage, at <http://www.internationalcompetitionnetwork.org/news/june262003.html> (last visited May 25, 2004).

⁵³ Raustiala, *supra* note 30, at 41.

⁵⁴ American Bar Association Sections of Antitrust Law and International Law and Practice, *Report Concerning Internationalization of Competition Law Rules: Coordination and Convergence*, at 36–37 (January 2000).

⁵⁵ *Id.*

⁵⁶ Raustiala, *supra* note 30, at 61.

⁵⁷ *Id.* at 33, 39, 44.

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.”⁵⁸ 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.”⁵⁹

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 painstakingly 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 to 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.”⁶⁰ The deluge of facts and opinions through phone, fax, e-mail, and the Internet, not to mention more traditional print and other media sources,

⁵⁸ *Id.* at 64.

⁵⁹ *Id.*

⁶⁰ Robert O. Keohane & Joseph S. Nye, Jr., *Power and Interdependence in the Information Age*, FOREIGN AFF., Oct. 1998, at 81, 89.

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 plenitude of information.⁶¹ “Brand names and the ability to bestow an international seal of approval will become more important” in determining which sources of information are utilized.⁶² 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 nonlegal 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.⁶³ 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

⁶¹ *Id.*

⁶² *Id.*

⁶³ Andres Rigo, *Law Harmonization Resulting from the Policies of International Financial Institutions: The Case of the World Bank* (paper presented at the University of Ottawa Conference on the Evolution of Legal Systems, Bijuralism and International Trade, Oct. 20–21, 2000) (on file with author). See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) (exploring the effect on state behavior of nonbinding international norms in the areas of human rights, environment, arms control, and trade and finance).

states or internationally renowned experts. The World Bank is an obvious source from which to borrow. 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 the U.N. Commission on International Trade Law (“UNCITRAL”) on its model procurement law, which has subsequently served as a model for over twenty countries in drafting national legislation. Regional development banks have also followed the World Bank’s procurement practices.⁶⁴ In short, through soft law, a new international standard was set, which states now borrow and apply domestically.

In developing these policies for its own purposes, the World 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.”⁶⁵ The resulting guidelines, after review by the Development Committee, were recommended to member states of the World Bank as “acceptable international standards which complement applicable treaties.”⁶⁶

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 who are looking for guidance and besieged with consultants, and who need not only to make a choice but also to be able to defend it to their superiors. In that sense, these rules are quite similar to the “rolling best practices” rules that Dorf and Sabel 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.⁶⁷

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

⁶⁴ Rigo, *supra* note 63.

⁶⁵ *Id.*

⁶⁶ THE WORLD BANK GROUP, 1 LEGAL FRAMEWORK FOR THE TREATMENT OF FOREIGN INVESTMENT: SURVEY OF EXISTING INSTRUMENTS 5, 6 (1992).

⁶⁷ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 322 (1998).

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.⁶⁸

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)."⁶⁹ Rigo himself, following Wolfgang Reinicke, sees his examples as incipient "cross-national structures of public interest from which global public policy is emerging."⁷⁰ 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 upon 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

⁶⁸ Rigo, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ *Id.* (quoting Reinicke, *supra* note 9, at 137). See generally WOLFGANG H. REINICKE & FRANCIS DENG, CRITICAL CHOICES: THE UNITED NATIONS, NETWORKS, AND THE FUTURE OF GLOBAL GOVERNANCE (2000) (exploring the emergence of global public policy networks and their implications for both domestic and international governance).

judges from different countries, having consulted one another's decisions, virtually all agree that hate speech should not be permitted, and should be treated as 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 *towards* 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 making them better able to comply with their own international obligations.⁷¹

⁷¹ See generally Raustiala, *supra* note 30, 76–83.

G. Enforcement: Harnessing the Power of National Government Institutions

Describing and praising the G-20, former Canadian Finance Minister and current Canadian Prime 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.⁷²

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.”⁷³ Nevertheless:

[I]t 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.*⁷⁴

The same principle operated in the construction of the European Union’s legal system, although it was never overtly recognized. The European Court of Justice (“ECJ”) was empowered to hand down decisions on European law, including decisions regarding the distribution of powers among E.U. institutions, between E.U. and national institutions, and on the rights of individuals vis-à-vis their governments in matters falling within E.U. 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.

In these examples, the key players are national government officials who exercise the same array of coercive and persuasive powers on behalf of transgovernmental decisions as 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.

⁷² Paul Martin, Notes for an Address to the Royal Institute of International Affairs, Ottawa, Canada (Jan. 24, 2001), at <http://www.fin.gc.ca/news01/01-008e.html> (last visited May 19, 2004).

⁷³ *Id.*

⁷⁴ *Id.* (emphasis added).

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: “[Y]ou 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 noncompliance as much in lack of capacity to comply as in lack of will.⁷⁵ 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.”⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹ Overall, by harnessing hard power, building compliance capacity, and diffusing ideas and technologies around the world,

⁷⁵ CHAYES & CHAYES, *supra* note 8, at 4.

⁷⁶ *Id.*

⁷⁷ Raustiala, *supra* note 30, at 79.

⁷⁸ *Id.* at 80–83.

⁷⁹ *Id.* at 83.

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 correct 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.⁸⁰ 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 European Union as a “regulatory state,”⁸¹ explains that whereas direct regulation relies on a variety of “command and control techniques” such as orders and prohibitions,⁸² 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.”⁸³ 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

⁸⁰ Keohane & Nye, *supra* note 60, at 81–94.

⁸¹ Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 J. PUB. POL’Y 139 *passim* (1997).

⁸² Giandomenico Majone, *The New European Agencies: Regulation by Information*, 4 J. EUR. PUB. POL’Y 262, 265 (1997).

⁸³ *Id.*

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 European Union, NAFTA, and the United Nations. The E.U. example involves horizontal regulatory networks and supranational information agencies; the NAFTA example illustrates a vertical network operating through the provision of information; and the U.N. example engages private corporations in a collective learning forum.

J. European Information Agencies

Within the European Union, 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."⁸⁴ Even the E.U. 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 European Union dubs "co-regulation"—the simultaneous decentralization of regulatory authority, so as to shift more power to regulators within the E.U. member states, and the creation of a new generation of specialized administrative agencies at the supranational level.⁸⁵

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,

⁸⁴ Notis Lebessis & John Paterson, European Commission, Forward Studies Unit, *The Future of European Regulation: A Review of the Workshop 23* (June 11, 1997), at http://europa.eu.int/comm/cdp/working-paper/future_of_european.pdf (last visited May 19, 2004) (summarizing a workshop attended by Giandomenico Majone and Renaud Dehousse).

⁸⁵ European Governance: White Paper from the Commission of the European Communities 21 (European Commission, July 2001), available at http://europa.eu.int/comm/off/white/index_en.htm [hereinafter *European Governance*].

“with the aim of establishing a ‘community of views.’”⁸⁶ Creating these broader networks has resulted in “wider ownership of the policies in question” and has thereby achieved “better compliance, even where the detailed rules are non-binding.”⁸⁷

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.”⁸⁸ 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.⁸⁹

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 agency; from the government network upward to policymakers at the European level; and from the government network downward to interested members of national publics.⁹⁰

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.”⁹¹ The E.U. Commission agrees, stressing the importance of bringing the widest possible range of stakeholders into the process, including the weak and disorganized.⁹²

Crossing the ocean, the 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

⁸⁶ Lebessis & Peterson, *supra* note 84, at 13.

⁸⁷ European Governance, *supra* note 85, at 21.

⁸⁸ Renaud Dehousse, *Regulation by Networks in the European Community*, 4 J. EURO. PUB. POL’Y 246, 255 (1997).

⁸⁹ *Id.* at 254.

⁹⁰ In this respect, see for example the interesting discussion of recent developments in European regulation and governance in Lebessis & Paterson, *supra* note 84.

⁹¹ *Id.* at 21 (summarizing a presentation by Majone and Dehousse at a Forward Studies Unit Workshop entitled, “Improving the Regulatory Process in the European Community,” held in Brussels, Belgium, on June 11, 1997).

⁹² *Id.* at 13, 25.

the NAFTA.⁹³ 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.⁹⁴ 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 on whether to proceed.⁹⁵

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.⁹⁶ 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.⁹⁷ 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.⁹⁸

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 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 noncompliant parties.

L. The U.N. Global Compact

The European Union’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 E.U. 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

⁹³ North American Agreement on Environmental Cooperation, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

⁹⁴ *Id.* arts. 14 & 15.

⁹⁵ *Id.* arts. 15(1) & 15(2).

⁹⁶ *Id.* art. 15(4).

⁹⁷ *Id.* art. 15(7).

⁹⁸ See David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L L. REV. 545, 571 (2000).

continue to change in the face of changing problems and experimental solutions.⁹⁹

The E.U. 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.”¹⁰⁰ Second is “the need to achieve a contextualized approach to the regulatory process.”¹⁰¹ And third is “the utility of a vision of the regulatory process as a process of collective learning.”¹⁰² As an E.U. White Paper explains, “structured and open [information] networks should form a scientific referee-system to support EU policy making.”¹⁰³ 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 United Nations’ new effort to improve corporate behavior around the world through partnerships with U.N. agencies and officials. The Global Compact brings companies together with U.N. organizations, international labor organizations, NGOs, and other parties to foster partnerships and to build “a more sustainable and inclusive global economy.”¹⁰⁴ 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.”¹⁰⁵

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, “Its core is a learning forum. Companies submit case studies of what they have done to translate their commitment to the [Global Compact] principles into concrete corporate practices. This occasions a dialogue among [Global Compact] participants from all sectors—the UN, labor, and civil society organizations.”¹⁰⁶

The dialogue, in turn, is supposed to generate “broader, more consensus-based definitions of what constitutes good practices than any of the parties

⁹⁹ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1, 6 (1997) (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”).

¹⁰⁰ Lebessis & Paterson, *supra* note 84, at 17.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ European Governance, *supra* note 85, at 19.

¹⁰⁴ *The Global Compact: Overview*, The Global Compact Homepage, at <http://www.unglobalcompact.org/Portal/> (last visited Feb. 14, 2004).

¹⁰⁵ Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, Address to the World Economic Forum in Davos (Jan. 31, 1999), U.N. Doc. SG/SM/6881, available at <http://www.un.org/partners/business/davos.htm#speech> (last visited May 14, 2004).

¹⁰⁶ John Ruggie, *Global Governance.net: The Global Compact as Learning Network*, 7 GLOBAL GOVERNANCE 371, 372 (2001).

could achieve through unilateral declarations.”¹⁰⁷ 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.”¹⁰⁸

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.”¹⁰⁹ 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 E.U. model. Each participant in the process bears equal responsibility for teaching and learning. Within the Global Compact, the United Nations 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, provision of 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.”¹¹⁰ Dorf and Sabel argue that

¹⁰⁷ *Id.* at 373.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Dorf & Sabel, *supra* note 67, at 345–354.

benchmarking “leads to the discovery of unsuspected goals and indicates the guiding principles and related kinds of means for obtaining them.”¹¹¹

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”¹¹² 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.”¹¹³ Instead, public and private actors are coming together to develop new ways of “decision-making under conditions of complexity.”¹¹⁴

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 seek to overcome through solving problems and pooling information.¹¹⁵ 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.¹¹⁶

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

¹¹¹ *Id.* at 348.

¹¹² *Id.* at 352.

¹¹³ 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* 151, 157 (Christian Joerges et al. eds., 1997).

¹¹⁴ *Id.* at 161.

¹¹⁵ Oliver Gerstenberg & Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe*, in *GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET* 289, 289–341 (Christian Joerges & Renaud Dehousse eds., 2002). 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. *Cf.* Dorf & Sabel, *supra* note 67, at 267.

¹¹⁶ Dorf & Sabel, *supra* note 67, at 332–33.

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.

V. 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 national challenges have 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 also about the individual regulators, judges, and legislators who comprise their members. That means, as discussed in Part IV, 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.¹¹⁷

Similarly, Professor Amitai Aviram has identified a set of features of private networks—of corporations and individual merchants—that make reputation matter.¹¹⁸ 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.¹¹⁹ 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 long 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

¹¹⁷ See Majone, *supra* note 82, at 272.

¹¹⁸ See generally Amitai Aviram, Regulation by Networks (1998) (unpublished manuscript, on file with author).

¹¹⁹ *Id.* at 16–21.

association for lawyers or a medical association for doctors, a network of judges, legislators, or regulators can 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, like honesty, for instance, that government networks could inculcate in their members. 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 thirty-five countries.¹²⁰ 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 U.N. Basic Principles on the Independence of the Judiciary and the U.N. Basic Principles on the Role of Lawyers, and are monitored by the International Commission of Jurists.¹²¹ 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.¹²²

¹²⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 4 (1998). The number of signatories is available at the OECD website. *Convention on Bribery Ratification Status*, OECD, available at <http://www.oecd.org/dataoecd/59/13/1898632.pdf> (last visited Apr. 7, 2004).

¹²¹ *Basic Principles on the Independence of the Judiciary*, U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 7th Sess., at 59, U.N. Doc. A/CONF.121/22/Rev.1 (1985); *Center for the Independence of Judges and Lawyers*, International Commission of Jurists, at http://www.icj.org/rubrique.php?id_rubrique=40&lang=en (last visited Apr. 7, 2004).

¹²² See generally MICHAEL HECHTER, *PRINCIPLES OF GROUP SOLIDARITY* (1987) (exploring the subconscious bases for group behavior, solidarity, and conformity).

Socialization can operate within government networks in a number of ways.¹²³ One of the most interesting is the phenomenon of inducing compliance with collectively generated rules through small, close-knit groups.¹²⁴ Many legal scholars have identified this phenomenon in the domestic context—most notably Yale law professor Robert Ellickson in his book *Order Without Law*.¹²⁵ Sheep farmers, diamond merchants, and sumo wrestlers are all able to establish and enforce a collective set of norms outside any formal legal framework.¹²⁶

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.¹²⁷ 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.”¹²⁸

These types of incentives operate primarily in groups small enough that the members can know each other personally and have face-to-face contact.¹²⁹ They are even stronger when the groups are relatively homogeneous in terms of values.¹³⁰ 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.”¹³¹ 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.¹³²

¹²³ 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.”

¹²⁴ See Timothy Wu, *Order Without International Law: The Compliance Inducing Capacity of Transgovernmental Networks* (1997) (unpublished manuscript, on file with author).

¹²⁵ See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

¹²⁶ *Id.*; Lisa Bernstein, *Merchant Law in Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1763, 1765–1771 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) [hereinafter Bernstein, *Opting Out*].

¹²⁷ MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 65 (1965).

¹²⁸ *Id.* at 61.

¹²⁹ *Id.* at 62.

¹³⁰ 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* 196 (1981), cited in Wu, *supra* note 124, at 23.

¹³¹ ELLICKSON, *supra* note 125, at 182, cited in Wu, *supra* note 124, at 12.

¹³² Wu, *supra* note 124, at 14–15.

“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.”¹³³ They thus have the potential, in Timothy Wu’s phrase, to create “order without international law.”¹³⁴ 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.¹³⁵ 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.¹³⁶

Other networks are either small enough to operate this way or contain subgroups 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 nineteen members.¹³⁷ On the other hand, the Basel Committee, while tightly restricting full membership, invites nonmember central bankers from other countries to participate in collective deliberations through larger biannual conferences and ongoing contacts.¹³⁸ Groups like the G-20, which has ranged from twenty-two to thirty-four members before cutting back to twenty, 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.”¹³⁹ He notes further, however, that suspension may be even more effective than exclusion, as it avoids a situation

¹³³ *Id.* at 2.

¹³⁴ *Id.* at 1.

¹³⁵ ETHAN KAPSTEIN, *GOVERNING THE GLOBAL ECONOMY: INTERNATIONAL FINANCE AND THE STATE* 45 (1994).

¹³⁶ *Id.*; see also Wu, *supra* note 124, at 29–33.

¹³⁷ *IOSCO: Structure of the Organization*, International Organization of Securities Commissions Website, at <http://www.iosco.org/about/about.cfm?whereami=page2> (last visited Apr. 7, 2004).

¹³⁸ *The Basel Committee on Banking Supervision*, Bank for International Settlements, at <http://www.bis.org/bcbs/aboutbcbs.htm> (last visited Apr. 7, 2004).

¹³⁹ Aviram, *supra* note 118, at 18.

in which the party to be excluded concludes that it has nothing left to lose.¹⁴⁰ 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 interstate disputes.¹⁴¹ 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 European Union, 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, North Atlantic Treaty Organisation (“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.¹⁴²

Indeed, Abram and Antonia Chayes argue that governments actively seek to join 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.¹⁴³ 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.¹⁴⁴

¹⁴⁰ *Id.* at 18 n.63 (citing Bernstein, *Opting Out*, *supra* note 126, at 129).

¹⁴¹ Anne-Marie Slaughter & Laurence R. Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 286 (1997).

¹⁴² 1 FOREIGN AFFAIRS COMM., THE FUTURE OF THE COMMONWEALTH, at xlvi (1996).

¹⁴³ CHAYES & CHAYES, *supra* note 8, at 27.

¹⁴⁴ 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*:

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-20.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ Lord Howell also argues that the Commonwealth spreads practices of good governance by power of example.¹⁴⁸ 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 E.U. 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.¹⁴⁹

Disaggregated Sovereignty and Structural Replication in the International System (1997) (unpublished manuscript, on file with author).

¹⁴⁵ *G-20 Background*, Department of Finance of Canada, at <http://www.fin.gc.ca/g20/docs/bkgrnd-e.html> (last visited Apr. 7, 2004).

¹⁴⁶ *What is the G8?*, G8 Information Center, at http://www.g7.utoronto.ca/what_is_g8.html (last visited Apr. 7, 2004).

¹⁴⁷ Commonwealth Parliamentary Association, *Parliamentary Supremacy and Judicial Independence, Latimer House Guidelines*, June 19, 1998, at <http://www.cpahq.org/uploadstore/docs/latmrhse.pdf>.

¹⁴⁸ David Howell, *The Place of the Commonwealth in the International Order*, 347 ROUND TABLE 343, 345 (1998).

¹⁴⁹ Interview with Justice Richard Goldstone, Constitutional Court of South Africa, in Hamburg, Germany (Aug. 23, 2001).

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 individual 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. The 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," "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 decisionmaking 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 states.

James Fearon argues that any group of people can have at least six reasons to want "to discuss matters before making a collective decision."¹⁵⁰ To paraphrase his account, discussion in a group decisionmaking 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;¹⁵¹ (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

¹⁵⁰ James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44, 44–68 (Jon Elster ed., 1998).

¹⁵¹ Compare, in this regard, Abram Chayes's 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* 103 (1974).

human ability “to compare and assess different reasons”¹⁵² for action, which itself will make the decision taken more legitimate.¹⁵³

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 nonconflicting interests.¹⁵⁴ 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”¹⁵⁵ Finally, the claim that discussion will help legitimate the decision ultimately taken depends on two assumptions: that consensus is more likely to emerge than disagreement, on average, and that the overall deliberative culture or context is one “where people associate fair procedure with having the opportunity to have their say”¹⁵⁶

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 that 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 U.S. Supreme Court justices and the judges of the ECJ meeting to discuss a problem of trans-Atlantic 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.”¹⁵⁷ 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

¹⁵² Fearon, *supra* note 150, at 62 (paraphrasing Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 352 (1987)).

¹⁵³ 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. *Id.* at 45.

¹⁵⁴ *Id.* at 47.

¹⁵⁵ *Id.* at 55.

¹⁵⁶ *Id.* at 58.

¹⁵⁷ *Id.* at 54.

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!" 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."¹⁵⁸ 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.¹⁵⁹

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.¹⁶⁰ Equally important are situations in which participants in these networks are uncertain of their interests or relatively ignorant about the problems they face.¹⁶¹ 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 the International Network for Environmental Compliance and Enforcement seeking to find common policies to address communal environmental problems.¹⁶² 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.¹⁶³ 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

¹⁵⁸ Thomas Risse, *'Let's Argue!': Communicative Action in World Politics*, 54 INT'L ORG. 1, 1-39 (2000).

¹⁵⁹ 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 Jurgen 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. See generally JURGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (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, *supra* note 158, at 9.

¹⁶⁰ Risse, *supra* note 158, at 15-19.

¹⁶¹ *Id.* at 19.

¹⁶² Rigo, *supra* note 63.

¹⁶³ Risse, *supra* note 158, at 33.

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.¹⁶⁴ The same dynamic is likely to operate regarding the acceptance of professional norms in a variety of government networks.

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 online sales of securities over the Internet, problems of how to mesh antiterrorism 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 nonforcible clash of interests—need not be a source of separation or a struggle for lasting and definite dominance. Rather, conflict can be positive: an engine of increased trust and ultimately cooperation. To say it is positive does not mean that it is

¹⁶⁴ *Id.* at 28–31.

pretty or pleasant; it is still conflict. But in government networks that are self-consciously constituted as mechanisms 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 decisionmaking 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. Nonetheless, within the domestic context of many societies, conflict 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, in 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: “[S]ocial conflicts themselves produce the valuable ties that hold modern democratic societies together and lend them the strength and cohesion they need.”¹⁶⁵ 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.¹⁶⁶

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 as a] solvent.”¹⁶⁷ He claims that learning to “muddle through” a “steady diet” of conflicts in “pluralist market societ[ies]” is more likely to be productive.¹⁶⁸ 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

¹⁶⁵ ALBERT O. HIRSCHMAN, A PROPENSITY TO SELF-SUBVERSION 235 (1995).

¹⁶⁶ *Id.* at 237.

¹⁶⁷ *Id.* at 239.

¹⁶⁸ *Id.* at 243–44.

lend themselves to compromise and to the art of bargaining; and, as a result of these two features, the compromises reached never give rise to the idea or the illusion that they represent definitive solutions.¹⁶⁹

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.”¹⁷⁰ The types of conflicts observable within government networks generally seem to fit the “divisible” description. Consider, for instance, conflicts 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 each court 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 each of these 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 E.U. regulators often makes headlines. The fight over approval of a proposed merger between G.E. and Honeywell, granted in the U.S. and then denied by the E.U. Commission, put antitrust regulators at direct loggerheads. Yet as the *New York Times* pointed out in an editorial on the G.E.-Honeywell case, the prominence of the conflict should not be allowed to obscure the remarkable record of “cooperative relationship[s] on regulation” between E.U. and U.S. antitrust regulators.¹⁷¹ Even in areas where cooperation is spottier with fewer tangible results, conflict does not 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. Network relations depend on “reputation, trust, reciprocity and mutual interdependence,”¹⁷² and 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.¹⁷³ 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

¹⁶⁹ *Id.* at 246.

¹⁷⁰ *Id.* at 244.

¹⁷¹ *Merger-Busting in Europe*, N.Y. TIMES, June 21, 2001, at A24.

¹⁷² Andrea Larson, *Network Dyads in Entrepreneurial Settings: A Study of the Governance of Exchange Relationships*, 37 ADMIN. SCI. Q. 76, 76 (1992). Rhodes reaches a similar conclusion. See generally R.A.W. Rhodes, *The New Governance: Governing without Government*, 44 POL. STUD. 652, 652–667 (1996).

¹⁷³ Robert Keohane, *Studying Cooperation and Conflict: Intra-Rationalistic and Extra-Rationalistic Research Programs*, Address Before a Round-table on Conflict and Cooperation at the American Political Science Association Annual Meeting (Aug. 1996) (on file with author).

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.¹⁷⁴ An emphasis on legal process, rather than the decisions and rules generated by that process, reveals 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.¹⁷⁵ 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.¹⁷⁶

This next step is captured by Robert Cover’s concept of a “jurisgenerative process.”¹⁷⁷ 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.¹⁷⁸

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 European Union and the United States 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 agreement 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

¹⁷⁴ William N. Eskridge, Jr. & Philip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, lxxi–lxxii (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994).

¹⁷⁵ CHAYES & CHAYES, *supra* note 8, at 22–28.

¹⁷⁶ 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*, 89 HARV. L. REV. 1281, 1302 (1976).

¹⁷⁷ Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–15 (1983); *see also* Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 186 (1996).

¹⁷⁸ *See generally* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 25 HOUS. L. REV. 623 (1998).

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.

VI. CONCLUSION: DISAGGREGATING SOVEREIGNTY

What would sovereignty look like in a networked world order? If the new sovereignty is the right and the capacity to participate in international regimes, networks, and institutions, accompanied by a responsibility to fulfill certain minimum requirements of membership, then becoming or being a sovereign state would mean the participation of as many government officials as possible in plurilateral, regional, and global government networks. Yet if states are acting in the international system through their component government institutions—regulatory agencies, ministries, courts, legislatures—why shouldn't each of these institutions exercise a measure of sovereignty specifically defined and tailored to their functions and capabilities?

This proposal may seem fanciful, or even frightening, if we think about sovereignty in the old way—as the power to be left alone, to exclude, to counter any external meddling or interference. Such sovereignty is best exercised by states acting as unitary actors. But if sovereignty is relational rather than insular, in the sense that it describes a capacity to engage rather than a right to resist, then its devolution onto ministers, legislators, and judges is not so difficult to imagine. The sovereignty that would be exercised by government officials participating in government networks would be derived from the sovereignty possessed by the state as a whole and defined as legislative, executive, or judicial sovereignty. It would mean that legislative, executive, and judicial officials would be able to exercise at least some independent rights and be subject to some independent, or at least distinct, obligations. These rights and obligations might devolve from more unitary rights and obligations applicable to the unitary state, or they might evolve from the functional requirements of meaningful and effective transgovernmental relations.

Judges, for instance, increasingly respect each other's competence as members of the same profession and institutional enterprise across borders. A fully "sovereign" court would thus be entitled to its fair share of disputes when conflicts arise, could negotiate cooperative solutions in transnational disputes, and could participate in a transnational judicial dialogue about issues of common concern. Regulators would be similarly empowered to interact with

their fellow regulators to engage in the full range of activities described above. And legislators would be directly empowered to catch up.

But if disaggregated state institutions are already engaged in these activities, as is argued in this Article, what difference does it make if they are granted formal capacity to do what they are already doing? The principal advantage is that subjecting government institutions directly to international obligations could buttress clean institutions against corrupt ones and rights-respecting institutions against their more oppressive counterparts. Each government institution would have an independent obligation to interpret and implement international legal obligations, much as each branch of the U.S. government has an independent obligation to ensure that its actions conform to the Constitution. As in the domestic context, either the courts or the legislature would have the last word in case of disputed interpretations of international law, to ensure the possibility of national unity where necessary. In many cases, however, international legal obligations concerning trade, the environment, judicial independence, human rights, arms control, and other areas would devolve directly on government institutions charged with responsibility for the issue area in question.

By becoming enrolled and enmeshed in global government networks, individual government institutions would affirm their judicial, legislative, or regulatory sovereignty. They would participate in the formulation and implementation of professional norms and the development of best practices on substantive issues. And they would be aware that they are performing before their constituents, their peers, and the global community at large, as bearers of rights and status in that community, not only before their constituents, but also before an audience of their peers.

This idea is not as farfetched as it may seem. Actual examples already exist or are being proposed. Eyal Benvenisti has raised the possibility of formally empowering substate units to enter into agreements.¹⁷⁹ The Princeton Principles on Universal Jurisdiction make the case for establishing clear rules and principles under international law that are directly aimed at national judges, as they are the actual subjects of the international law doctrine. The ambiguity that helps statesmen negotiate treaties is often disastrous for judges, who must actually apply the law.

At first glance, disaggregating the state and granting at least a measure of sovereignty to its component parts might appear to weaken the state. In fact, it will bolster the power of the state as the primary actor in the international system, as Kal Raustiala argues about international institutions generally in an era of deep and complex interdependence.¹⁸⁰ Giving each government institution a measure of legitimate authority under international law, with accompanying duties, marks government officials as distinctive in larger policy networks and allows the state to extend its reach.

If sovereignty were still understood as exclusive and impermeable rather than relational, strengthening the state would mean building higher walls to

¹⁷⁹ Eyal Benvenisti, *Domestic Politics and International Resources: What Role for International Law?*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 109, 109 (Michael Byers ed., 2000).

¹⁸⁰ Raustiala, *supra* note 11, at 841.

protect its domestic autonomy. But in a world in which sovereignty means the capacity to participate in cooperative regimes in the collective interest of all states, expanding the formal capacity of different state institutions to interact with their counterparts around the world means expanding state power. Even in the conditions of a very changed world, sovereignty would once again mean what it should mean most fundamentally: a state's right and duty to protect and provide for its people.

