

---

# Extended table of contents

---

<i>List of contributors</i>	xv
<i>Preface</i>	xvii
Introduction: International lawmaking in a global world <i>Catherine Brölmann and Yannick Radi</i>	1
1. Taking stock	1
2. Two landscapes	2
2.1 Features of the socio-legal landscape	3
2.2 Features of the theoretical landscape	6
3. The organization of this Handbook	7
PART I THEORETICAL VIEWS OF INTERNATIONAL LAWMAKING	
1. State consent as foundational myth <i>Wouter G. Werner</i>	13
1. Introduction	13
2. Consent, norm evolution and the purposes of law	15
3. Consent and sovereign equality	21
3.1 Consent as instrument to protect sovereign equality	21
3.2 The indeterminacy of sovereign equality	23
4. Territoriality	26
5. Conclusion	30
2. Subjects and actors in international lawmaking: The paradigmatic divides in the cognition of international norm-generating processes <i>Jean d'Aspremont</i>	32
1. Introduction	32
2. Empirical concord: The pluralization of international lawmaking	35
2.1 Manifestations of pluralization in the practice of international lawmaking	35
2.2 Persisting state dominance?	39
3. Conceptual discord: The paradigmatic divides in the cognition of international lawmaking	41
3.1 Subject and participant as cognitive tools of lawmaking processes	41
3.1.1 Static subject-based approaches to lawmaking	42
3.1.2 Dynamic participation-based approaches to lawmaking	45
3.2 Alternative models for the cognition of lawmaking processes	48
3.2.1 Static pedigree-based approaches to lawmaking	48
3.2.2 Dynamic output-based approaches to lawmaking	51
3.2.3 Dynamic pedigree-based approaches to lawmaking	52

4. Concluding remarks: Epistemic pluralism and epistemological self-interests	53
3. Transnational lawmaking	56
<i>Dennis Patterson</i>	
1. Introduction	56
2. Transnational legal phenomena	57
3. Causal and normative questions	60
4. Transnational law: International examples	60
5. Beyond positivism: Theorizing transnational law	62
6. Future work	65
4. Contemporary theories and international lawmaking	66
<i>Ingo Venzke</i>	
1. Introduction	66
2. From sources to communicative practice	69
2.1 Distinguishing lawmaking from law application	69
2.2 The linguistic turn: Lawmaking in communicative practices	70
2.3 Making law this way?	72
3. The New Haven School	74
4. Theory of transnational legal process	75
5. Systems theory	77
6. Practice theory	79
7. Governance theory	81
8. Outlook: Global administrative law and international public authority	83

## PART II INTERNATIONAL LAWMAKING IN AN INTER-STATE SETTING

5. Lawmaking by treaty: Negotiation of agreements and adoption of treaty texts	87
<i>Kirsten Schmalenbach</i>	
1. Introduction	87
2. Negotiation of international agreements	88
2.1 Defining international negotiation	88
2.2 Principles and rules of international treaty negotiations	89
2.2.1 Attempts to codify rules of international treaty negotiations	89
2.2.2 Procedural rules on negotiation	90
2.2.3 Substantive rules applicable to negotiations	94
3. Two-party negotiations	97
4. Multiplayer negotiations at diplomatic conferences	97
4.1 Pre-conference phase: Getting organised for formal negotiations	98
4.2 Conference phase: Formal negotiations	99
4.2.1 Decision on rules of procedure	99
4.2.2 Commencement of the formal negotiations	99
4.2.3 Fine-tuning of negotiation text(s)	99

4.2.4	Managing complexity	100
4.2.5	Group and coalition building	101
4.2.6	Background factors: Non-state actors, IOs and state observers	102
4.2.7	Final act	104
4.3	Negotiating international regimes	104
5.	Adoption of the treaty text	105
5.1	Procedural placement and significance of the adoption of the text	105
5.2	Voting procedures	106
5.2.1	Conclusion of bilateral treaty negotiations	106
5.2.2	Multilateral treaty negotiations: Article 9 para 2 VCLT	106
5.2.3	International practice: If possible consensus	107
5.2.4	Pragmatic stance: Bypassing consensus	109
6.	Conclusion	110
6.	Lawmaking by treaty: Conclusion of treaties and evolution of treaty regimes in practice	111
	<i>Daniel Costelloe and Malgosia Fitzmaurice</i>	
1.	Introduction	111
2.	The expression of consent to be bound in the procedure for the conclusion of a treaty under the VCLT	112
2.1	The forms of a state's expressing consent to be bound in lawmaking by treaty	114
2.2	Lawmaking instruments going beyond the requirement of consent under the VCLT	116
3.	Lawmaking through an evolving treaty regime	117
3.1	Lawmaking through tacit acceptance ('opting out system') under a treaty	118
3.2	Lawmaking through the decisions and activities of treaty bodies	118
3.2.1	Bases for the powers of COPs and MOPs to develop a treaty regime in practice	118
3.2.2	Types of powers typically enjoyed by treaty bodies	121
3.2.3	Instances of lawmaking by COPs and MOPs	123
4.	Lawmaking through the evolutionary interpretation of a treaty regime by a judicial organ	128
5.	Lawmaking through subsequent practice	130
6.	Conclusions	131
7.	The emergence of customary international law: Between theory and practice	133
	<i>Omri Sender and Michael Wood</i>	
1.	Custom as a principal source of international law	134
2.	The essential elements: Theory	137
3.	The essential elements in practice	145
4.	Bringing practice and theory a little closer? The International Law Commission's topic 'Identification of customary international law'	154
5.	Conclusion	157

8.	Relying on general principles in international law	160
	<i>Beatrice I. Bonafé and Paolo Palchetti</i>	
1.	Introduction: General principles as a source of international law	160
2.	The identification of general principles: A source ultimately based on consent	162
3.	General principles as an autonomous source of general rules	165
4.	The role of international courts and tribunals in the development of general principles	168
5.	The role of states in promoting the use of general principles	174
6.	General assessment	175

### PART III INTERNATIONAL LAWMAKING BEYOND THE STATE

9.	Institutional lawmaking: The emergence of a global normative web	179
	<i>Ramses A. Wessel</i>	
1.	Introduction: A diverse collection of normative bodies	179
2.	Lawmaking by international organizations	181
2.1	Defining institutional lawmaking	181
2.2	Lawmaking in practice	183
3.	Lawmaking by other international bodies	187
3.1	New forms of institutional lawmaking	187
3.2	Informal institutional lawmaking	189
3.3	Delegated institutional lawmaking	191
3.4	Lawmaking by networking	194
4.	Conclusion: An institutionalized global normative web	198
10.	International judicial lawmaking	200
	<i>Gleider I. Hernández</i>	
1.	Introduction	200
2.	International judicial lawmaking	200
3.	The International Court of Justice	202
3.1	The formal role of the International Court in international lawmaking	202
3.2	Limitations to the International Court's role in lawmaking	204
3.3	The lawmaking authority of the International Court	205
3.3.1	Beyond persuasive authority?	205
3.3.2	Judicial lawmaking in the application and interpretation of unwritten law	208
3.3.3	Judicial lawmaking through advisory opinions	209
4.	Other international courts and tribunals	212
4.1	European Court of Human Rights and Inter-American Court of Human Rights	213
4.2	The ad hoc international criminal tribunals	215
4.3	The World Trade Organization Appellate Body	216
4.4	Interaction between international courts and tribunals?	218
5.	Conclusion	219

11. Domestic judicial lawmaking	222
<i>Antonios Tzanakopoulos</i>	
1. Introduction: Can courts (ever) make law?	222
2. Domestic judicial engagement with international law	224
2.1 The ‘directionality’ of international obligations	224
2.2 The ‘domestication’ of international obligations	226
3. Domestic judicial impact on international law	229
3.1 Formal impact: Domestic court decisions as facts	230
3.2 Actual influence: Domestic court decisions as triggers	231
3.3 Domestic courts as the ‘natural judges’ of international law	237
4. Domestic courts as ‘agents’ of international law development	239
5. Conclusion: Assessing the lawmaking potential of domestic court decisions	241
12. Quasi-judicial bodies	242
<i>Mara Tignino</i>	
1. Quasi-judicial bodies: Shared task, diverse practice	243
1.1 The Aarhus Compliance Committee	243
1.2 The Economic, Social and Cultural Rights Committee	244
1.3 The International Financial Organizations’ investigative mechanisms	245
2. Quasi-judicial bodies: Leading institutional reform?	246
3. A contribution to common procedural fairness principles?	249
4. Quasi-judicial bodies and the development of substantive international law	253
4.1 Quasi-judicial bodies as caretakers of their applicable norms	254
4.2 Quasi-judicial bodies as substantive international lawmakers: How much influence?	257
5. Final remarks	260
13. International lawmaking by hybrid bodies: The case of financial regulation	262
<i>Michael S. Barr</i>	
1. Introduction	262
2. The international financial regulatory architecture before the recent crisis	264
2.1 Phase I: The Bretton Woods System	264
2.2 Phase II: Rise of the networks	267
3. Post-crisis reforms	272
3.1 The G-20	273
3.2 The Financial Stability Board	274
3.3 Procedural reforms	276
3.3.1 More formality	276
3.3.2 A clearer hierarchy	277
3.3.3 More political involvement	279
3.3.4 Stronger peer review	280
4. Conclusion	284

14. International lawmaking and civil society	286
<i>Barbara K. Woodward</i>	
1. Introduction	286
2. Definitions	287
2.1 Civil society	287
2.2 International lawmaking	289
3. Mapping and analysis of CS lawmaking	290
3.1 Conference lawmaking	291
3.1.1 International humanitarian law	291
3.1.2 International human rights law	292
3.1.3 International environmental law	292
3.1.4 International human security and criminal law	293
3.2 UN processes	294
3.2.1 International human rights law	294
3.2.2 International criminal law and state responsibility	295
3.2.3 International security law	296
3.2.4 International economic law	297
3.3 Institutional lawmaking outside the UN	297
3.3.1 UN specialized agencies	297
3.3.2 UN programmes	298
3.3.3 'Autonomous Institutional Arrangements'	299
3.4. Adjudicatory lawmaking	300
3.4.1 Human rights	300
3.4.2 Economic relations	301
4. Considerations of legitimacy and accountability	301
4.1 Legitimacy	302
4.2 Accountability	303
5. Conclusion	304
15. Lawmaking by scholars	305
<i>Jörg Kammerhofer</i>	
1. Introduction	305
2. Scholarship in article 38(1)(d) of the ICJ Statute	306
3. The juridical view and its limitations	310
3.1 The sources as basis for assessing the lawmaking faculties of scholarship	310
3.2 The dangers of admixture	313
3.2.1 The role of legal scholarship: A theory of legal science?	313
3.2.2 Scholarly activism	317
3.3 Can scholarship make law?	320
4. The socio-empirical view and its limitations	320
5. Conclusion	324

PART IV INTERNATIONAL LAWMAKING IN SELECTED ISSUE AREAS

16. The making of international human rights law	329
<i>Vassilis P. Tzevelekos</i>	
1. The making of human rights in international law: The short and the long version of the story to tell	329
2. A methodological impasse and two strands of shortcomings within international legal positivism	331
3. The role of judicial recognition	338
3.1 Broadening already existing rights and the usefulness in that respect of tools like soft law or the positive effect of human rights	339
3.2 The case of ethically sensitive questions and the role of consensus	343
3.2.1 Consensus as the basis for custom	345
3.2.2 Consensus versus principles	347
4. Concluding remarks: The main argument, its theoretical foundations and the quest for legitimacy	349
17. The making of international criminal law	354
<i>Sergey Vasiliev</i>	
1. Introduction	354
2. Complexities of lawmaking in ICL	356
2.1 Bridging formalist and realist views	356
2.2 Specialization and profusion: Norms, institutions, sources	357
3. Substantive constraints on lawmaking: legality in a paradox field	363
3.1 Sources of ICL: Legality between positivism and natural law	363
3.2 Interpretation as spectrum: Elucidating, developing, making ICL	373
3.3 Reclaiming legality in the march of progress	378
4. Source orthodoxy in ICL and dynamics of law (re)production	380
4.1 Creation v determination of law: Whither, old formalism?	381
4.2 An (almost) autopoietic system? Legitimacy of international criminal lawmaking	387
5. Concluding remarks	392
18. The making of international trade law	395
<i>Mary E. Footer</i>	
1. Introduction	395
2. Primary lawmaking in the WTO	398
2.1 Negotiation and adoption of WTO treaty instruments	399
2.1.1 The MTN process	399
2.1.2 WTO accession protocols	401
2.2 Modification of WTO treaty obligations	402
2.2.1 Treaty amendment	402
2.2.2 Modification by waiver	403
2.2.3 Authoritative interpretation	405
2.2.4 Subsequent agreement and subsequent practice	406
3. Secondary lawmaking in the WTO	411

3.1	Framework for analysis of secondary lawmaking	411
3.2	Forms of secondary lawmaking in the WTO	414
3.2.1	Delegated lawmaking	414
3.2.2	Waiver decisions as secondary legal acts	416
4.	Conclusions	417
19.	The making of international environmental law	419
	<i>Francesca Romanin Jacur</i>	
1.	Introduction: The originality of international environmental law	419
2.	Lawmaking by multilateral environmental agreements	420
2.1	The normative and institutional architecture: The framework model	422
2.1.1	The decision-making procedures	423
2.1.2	The legal nature of CoPs' decisions	425
2.1.3	Legitimacy concerns: Loosening or losing state consent?	427
2.2	The development and strengthening of environmental principles	428
3.	Judicial lawmaking in the settlement of environmental disputes	429
3.1	The judicial development of environmental law	430
3.2	Judicial lessons in dealing with environmental matters	432
4.	Normative developments in environmental matters through trade and investment law	434
4.1	Environmental matters in trade and investment agreements	434
4.2	The consideration of environmental matters in WTO jurisprudence	435
4.3	The consideration of environmental matters by arbitral tribunals	437
5.	Non-State actors' participation in international environmental lawmaking: NGOs, private persons and standard-setting associations	438
6.	Concluding remarks	440
20.	The making of international natural resources law	442
	<i>Owen McIntyre</i>	
1.	Introduction	442
2.	Lawmaking in international natural resources law through classic sources	446
2.1	International conventions	447
2.2	Customary international law	451
2.3	General principles of law	454
2.4	Judicial and arbitral tribunals	456
2.5	Publicists	458
3.	Lawmaking in international natural resources law beyond article 38	458
3.1	Reliance on 'soft law'	459
3.2	Technical complexity and the role of international institutions	460
3.3	Multi-level governance	461
3.4	Sophisticated participatory processes	462
3.5	Fragmentation vs integration	464
	<i>Index</i>	467