Chapter 9

How Nongovernmental Actors Vitalize International Law

Steve Charnovitz

In an important essay published a decade ago in honor of the 50th anniversary of the Universal Declaration of Human Rights (UDHR), Michael Reisman calls attention to the "anterior processes" of "private initiatives" that "precede formal law-making," and "shape the political environment."[1] Reisman begins his essay with this remark: "A moment's reflection should dispel the notion that legislation originates, transpires and concludes in the legislature."[2] His essay then guides the reader through the fascinating history of private initiative that pointed to the need for and promoted the adoption of what became the UDHR in 1948. Among the private initiatives detailed and analyzed by Reisman are projects undertaken by the Institut de Droit International, H.G. Wells, Quincy Wright, the Universities Committee on Post-War International Problems, Hersch Lauterpacht, the National Peace Conference, the American Jewish Committee, the Catholic Association for International Peace, the Commission to Study the Organization of Peace, the American Federal of Labor, and the International Council of Women. He explains:

> A large number of individuals, operating on their own behalf and through non-governmental organizations, played an important role in reinforcing the demand for a more effective

1 W. Michael Reisman, *Private International Declaration Initiatives*, *in* La Déclaration universelle des droits de l'homme 1948-98: Avenir d'un idéal commun 79, 79-80 (1999). For background on the UDHR, see Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 Brook. J. Int'l L. 17 (1999). For the UDHR, see G.A. Res. 217A, at 71, U.N. Doc. A/810 (Dec. 10, 1948).

2 Reisman, *supra* note 1, at 79; *cf.* Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part III, Chapter B, ¶ 46, 44 I.L.M. 1345, 1436 (NAFTA Chapter Eleven Arbitral Tribunal 2005), *available at* http://www.state.gov/documents/organization/51052.pdf ("Legislation in democratic systems involves, by its nature, participation by a wide spectrum of private individuals and interest groups in addition to the members of the legislature and the executive, insofar as its endorsement is also necessary for a bill to become law."). Reisman was appointed to the Tribunal in October 2002.

Mahnoush Arsanjani et al. *(eds.),* Looking to the Future: Essays on International Law in Honor of W. Michael Reisman.
 isbn 978 90 04 17361 3. pp. 135-162.

> regime, setting out the contours of what such a regime might be and drafting and then agitating for the inclusion of precise language in such a regime.[3]

Discussing the activities of the non-governmental organizations (NGOs) at the UN in 1947-48, Reisman concluded that while the diplomats and the United Nations Secretariat

> may have felt, at times, that the private initiatives and often intense pressure of the non-governmental organizations, which had been so critical in the initiation of this extraordinary enterprise, were not helping in the crafting of the compromises the diplomats believed necessary for the completion of the process. But the exasperated diplomats were wrong. The unrelenting pressure from those same non-governmental organizations was an essential, indeed, indispensable part of the making of the Universal Declaration at every phase.[4]

Furthermore, he notes that while the enactment of the UDHR was intergovernmental, the intelligence and promotion functions leading up to that enactment "were almost entirely private international initiatives, indeed had to be as they aimed at limiting government power. That is hardly likely to be an initiative that government officials undertake."[5]

My contribution to this volume in honor of Professor Reisman examines this thought—namely, that an initiative to limit government power is not likely to emanate from governments and is instead more likely to come from interested private actors. My essay will explore how and why nongovernmental actors vitalize international law. By the term "law," I agree with the New Haven School, which "defines law as a process of decision that is both authoritative and controlling."[6] This is especially true on the so-called international plane where it would be impossible to describe law as communications from a sovereign. In my view, if the process of decisionmaking is "law" in its dynamic form, then the individual decisions are also law. So I am comfortable with the definition in the *Restatement* that describes "[i]nternational law" as the "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical."[7]

Reisman's scholarship has always been characterized by attention to the role of participants in international lawmaking and by a recognition that there are many relevant actors besides nation-states. In adopting that approach, Reisman was influenced by the writings of and his collaboration with Professors Myres S. McDougal

---

3 Reisman, *supra* note 1, at 81.

4 *Id*. at 115.

5 *Id.* at 80 (internal footnote omitted). The footnote points out that Professor René Cassin's account of the genesis of the UDHR briefly explores the role of private endeavors.

6 W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 Yale J. Int'l L. 575, 576 (2007).

7 Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987).

and Harold D. Lasswell at Yale. After receiving an LLB degree from Hebrew University, Reisman came to study at Yale Law School in 1963.

An appreciation for the role of individuals, private associations and NGOs as functional participants is a prominent feature of the Jurisprudence of Lasswell and McDougal.[8] In an essay on NGOs I wrote in 2006 in honor of the centennial of the American Journal of International Law (AJIL), I noted that the first use of the term "non-governmental organization" in international law scholarship may have been in an article by Lasswell and McDougal in 1943.[9] In 1955, McDougal wrote an editorial comment about the new edition of Professor Hans J. Morgenthau's Politics Among Nations.[10] McDougal criticized Morgenthau's realist perspective as being too narrow. Noting that Morgenthau did discuss the fractionalization of the nation state by groups such as intergovernmental organizations, pressure groups, and private associations, McDougal argued that the new book's "emphasis is still largely upon the nation state"[11] and that the book minimizes "the degree to which today 'community' or 'society' is in fact trans-national."[12] In 1949, McDougal and collaborator Gertrude C.K. Leighton wrote an article on *The Rights of Man in the World Community* and opined that "the most critical challenge of our time is the task of devising a world law appropriate for all the new participants, such as international governmental organizations, transnational political parties, transnational private associations (cartels), and even the humble individual human being."[13]

In his essay on the UDHR, Reisman discusses the political and legal processes that precede formal lawmaking in modern democratic systems. In particular, he takes note of two distinct decision functions, intelligence and promotion. The intelligence function involves the gathering and assembly of data and the refinement of the problem and the proposed solution. The promotion function is the agitation and persuasion used to seek a legal solution, for example, stimulating formal lawmaking via a

8 *See, e.g.*, 1 Harold D. Lasswell & Myres S. McDougal, Jurisprudence for a Free Society 27, 188-89 (1992); Douglas M. Johnston, The Historical Foundations of World Order 117 (2008) ("Fourteen years after Lasswell's death their blueprint for a new, systematically re-configured, jurisprudence was produced." (internal citation omitted)). A student of Lasswell and McDougal from the late 1950s has outlined *Jurisprudence* in verse. Charles W.T. Stephenson, Transparency Cantos: Values for Human Dignity: Lasswell and McDougal (2008).

9 Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 Am. J. Int'l L. 348, 351 n.21 (2006) (taking note of the article on "Legal Education and Public Policy").

10 Myres S. McDougal, Editorial Comment, *The Realist Theory in Pyrrhic Victory*, 49 Am. J. Int'l L. 376 (1955).

11 *Id.* at 377.

12 *Id*. at 378.

13 Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 Yale L.J. 60, 84 (1949).

legal instrument.[14] Reisman notes that because many interest groups are involved, "the instrument that emerges is likely to reflect many of their concerns, indeed to metamorphose into something quite different from the initial promotion."[15]

Reisman's sense[16] of the complexity of the lawmaking process came principally from McDougal and Lasswell and their phase analysis applied to what they called the promotion function.[17] A preface to the chapters on constitutive process in McDougal and Lasswell's *Jurisprudence* explains that "[i]n later work, designed for inquiry about international law in a global community, the reference of 'constitutive process' was made sufficiently comprehensive to include the whole process of decision by which authoritative decision is established and maintained in a community."[18] The "later work" refers, in particular, to two essays by McDougal, Lasswell, and Reisman. In the first essay, written in 1967, the three co-authors present a comprehensive analysis of the world constitutive process. In the portion of their essay dealing with trends in decision, the authors specifically discuss trends in participation and look at pressure groups, private associations, and individuals.[19] This essay also famously divides the decision process into seven phases (or functions), known as intelligence, promotion, prescription, invocation, application, termination, and appraising.[20] In the second essay on *Theories About International Law*, written in 1968, the three co-authors present and appraise several frames or viewpoints about international law and identify

14 Promotional efforts include lobbying a government to ratify international conventions. For example, as Professor Franck has noted, "In their unbounded enthusiasm for the U.N., the Senators [considering U.S. ratification of the U.N. Charter] were undoubtedly influenced by an unprecedented coalition of private organizations and public interest groups united to exert pressure for U.S. participation." Thomas M. Franck, *Great Expectations: An Exploration of the Exaggerated Hopes Aroused by the U.S. Campaign for Ratification of the U.N. Charter*, *in* Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn 291, 295 (T. Buergenthal ed., 1984).

15 Reisman, *supra* note 1, at 79.

16 E-mail from Michael Reisman to Steve Charnovitz (Feb. 21, 2009) (on file with author).

17 *See* 2 Lasswell & McDougal, *supra* note 8, at 1193-202.

18 *Id*. at 1129 n.1.

19 Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1 & 2), 19 J. Legal Educ. 253, 403 (1967), *reprinted with revision in* Myres S. McDougal & W. Michael Reisman, International Law Essays: A Supplement to International Law in Contemporary Perspective 191 (1981). One European scholar has written that "McDougal's and Harold Lasswell's Yale School was only the most visible but perhaps among the least influential of the new approaches that grew up in the United States in the 1950s and 1960s." Martti Koskenniemi, The Gentle Civilizer of Nations 475 (2001).

20 The seven functions originated with Lasswell in 1956 and were not at that time directed to the international arena. Lasswell was a political scientist and proposed the seven functions to replace the tripartite organic distinction of legislative, executive, and judicial. W. Michael Reisman, Luncheon Address, *International Lawmaking: A Process of Communication*, 75 Am. Soc'y Int'l L. Proc. 101, 105 (1981).

each with their principal proponents.[21] In 1973, the three authors again collaborated to write an article about the intelligence function in world public order.[22] This article explicitly discussed the role of interest groups, private associations, and individuals in the intelligence function.[23]

In 1976, Reisman and Eisuke Suzuki co-authored an article on "recognition and social change" where they discussed the role of "aspirants" who are "groups which seek to participate in authoritative processes of a community with the aim of achieving influence or lawful control."[24] NGOs are one type of aspirant identified by Reisman and Suzuki, and they note that when NGOs protest government interference with political parties, such protests may not vindicate the position of aspirants, but can succeed in having "sustained a general international demand for the continuation of this norm."[25] Furthermore, Reisman and Suzuki postulate that "[t]he optimum international policy would appear to be the strongest and most explicit support for claims for recognition as aspirants."[26]

The *Jurisprudence* continued to be refined after Lasswell passed away. In 1980, McDougal and Reisman co-authored an article on the prescribing function that sought to further develop the theory of international prescription involving policy content, an authority signal, and a control intention. In a lecture in 1981, Reisman explained that viewing international lawmaking as a process of communication in

21 Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence,* 8 Va. J. Int'l L. 188 (1968).

22 Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The Intelligence Function and World Public Order*, 46 Temp. L.Q. 365 (1973), *reprinted in* McDougal & Reisman, *supra* note 19, at 287.

23 *Id*. at 304-07. *See* Laurence Boisson de Chazournes, *New Technologies, the Precautionary Principle, and Public Participation*, *in* New Technologies and Human Rights 161 (Thérèse Murphy ed., 2009) (noting the need for broad participation in decisions applying the precautionary principle).

24 W. Michael Reisman & Eisuke Suzuki, *Recognition and Social Change in International Law: A Prologue for Decisionmaking*, *in* Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal 403, 424 (W. Michael Reisman & Burns H. Weston eds., 1976); s*ee also* Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, Human Rights and World Public Order 102 (1980) ("Almost every measure that has a recognized relation to human dignity has been, or is currently, a target of pressure group action.").

25 Reisman & Suzuki, *supra* note 24, at 425. The role of NGOs in sustaining demands for international norms has been discussed creatively and analytically in scholarship by political scientists looking at "norm building." *See* the important study by Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 Int'l Org. 887, 896 (1998). Recently, Finnemore and Sikkink's work on norm entrepreneurs has been used as a framework to review and typologize the contributions of Nobel Peace prize laureates, many of whom were NGOs or NGO leaders. Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 Va. J. Int'l L. 61 (2008).

26 Reisman & Suzuki, *supra* note 24, at 425.

which these three coaxial messages are modulated would enable the scholar and practitioner "to make judgments about whether certain communications are law or are deficient in some significant way."[27] In 1988, Reisman, McDougal, and Andrew R. Willard described the world community as a "planetary social process," and they took note of the role of transnational pressure groups and transnational private associations oriented toward values other than power. With respect to the pressure groups, the authors pointed out that such "organizations often play a decisive role in the policies of parties, governments, and intergovernmental organizations."[28] With respect to the associations, the authors predicted that the "effect of these types of associations on value shaping and sharing will probably increase, especially if the transnational variety, mode, and number of channels for communication continue to multiply and remain accessible to individuals with diverse and parallel perspectives."[29] The authors made that prediction a few years before the rapid expansion of NGO communication facilitated by E-mail and the world wide web.

In 1997, following Reisman's suggestion, I wrote up how NGOs engaged and in all seven decision functions.[30] I wish I had been aware of the excellent article by Jerry Shestack discussing several categories of activities carried out by human rights NGOs.[31] Shestack's article is contained in a 1978 Festschrift for McDougal that I had studied in preparing my essay for this volume.

In scholarship published after his 1998 essay on the UDHR, Reisman elaborated his views on participants in the international arena. At a conference on *Developments of International Law in Treaty Making*, Reisman explained:

---

27 Reisman, *supra* note 20, at 119.

28 Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. Davis L. Rev. 807, 824 (1988); *see also* Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 Yale J. Int'l L. 393, 409 (2007) (defining "bottom-up international lawmaking" as consisting of "relatively spontaneous, unchoreographed interactions among private parties, mid-level bureaucrats, and NGOs" that "spark a process which ultimately produces 'law'"). Hari Osofsky, one of Reisman's students, has recently refined the inquiry regarding the planetary social process to explicitly incorporate geography into the New Haven School frame. Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 Yale J. Int'l L. 421 (2007).

29 McDougal et al., *supra* note 28, at 825.

30 Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 Mich. J. Int'l L. 183, 271-74 (1997). Reisman had written in 1971 that "[t]he role of nongovernmental organizations of national and transnational scope in all international decision functions remains relatively unexplored." W. Michael Reisman, *Sanctions and Enforcement*, *in* 3 The Future of the International Legal Order 273, 316 (Cyril E. Black & Richard A. Falk eds., 1971), *reprinted in* McDougal & Reisman, *supra* note 19, at 381, 419.

31 Jerome J. Shestack, *Sisyphus Endures: The International Human Rights NGO*, 24 N.Y.L. Sch. L. Rev. 89, 96, 120 (1978). The categories he discusses are: consultation, education, mediation, participation in government action, catalyst to government action, restraining government action, and monitoring.

> More than 50 years ago, Myres McDougal and his colleagues dismissed the "states as subjects" approach and proposed the then radical idea that, for purposes of explaining why past decisions had been taken the way they were, trying to predict future decisions or trying to influence the course of future decisions, the reality of international law had to be conceived of as a process of decision in which not only states, but a much wider range of actors participated: those actors, or "participants," as McDougal called them, included national and international officials, the elites of non-governmental organizations running the gamut from those concerned with wealth through to those concerned with religious rectitude, transnational business entities, gangs and terrorists, and individuals.[32]

He also pointed out that "by placing the word 'decision' under magnification" through the seven functions, it became "easy to see how each of the categories of actors or participants other than states played (or could play) some role in the various component functions of international decision."[33] Thus, the functional analytical terms became normative in being "empowering for non-state actors in that they indicated to all those to whom we now refer as 'civil society' how they could enhance their influence by finding niches in critical decision functions which would allow them to shape prescriptions incorporating their preferred policies."[34]

Although Reisman was heavily influenced by McDougal and Lasswell, one should take note of an earlier influence on Reisman from his days as a graduate student at Hebrew University studying with Professor Nathan Feinberg. Feinberg had served as the Secretary of the Committee of Jewish Delegations in Paris in the early 1920s and was a representative of the World Zionist Congress during the interwar period. Later, he became the first Dean of the Law Faculty of Hebrew University. While a student of Feinberg's in the 1960s, Reisman read Feinberg's book on the "Bernheim Petition," which was a detailed narrative of the diplomatic history of actors involved, namely, Bernheim, his NGO, Germany, and the League Secretariat. In a recent E-mail to me, Reisman recalled that he "thought a great deal" about this book. The Bernheim Petition was a private initiative of Franz Bernheim and other of Jewish residents in German Upper Silesia who, in 1933, invoked a provision in the Geneva Convention of 1922 that gave the League of Nations the duty to guarantee minority rights and pro-

---

32 W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* Developments of International Law in Treaty Making 15, 19 (Rüdiger Wolfrum & Volker Röben eds., 2005). I was in attendance at this conference and vividly recall Reisman's intense presentation at the beginning of the conference. During the coffee break, I overheard some very senior participants confide how much they enjoyed hearing a Reisman presentation even when they did not agree with it!

33 *Id*. at 20; *cf.* Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 Yale J. Int'l L. 301, 308 (2007) (noting that "we need to think of international law as a global interplay of plural voices, many of which are not associated with the state").

34 Reisman, *supra* note 32, at 21; *see also id.* at 24 (discussing the "infiltration of non-state actors").

vided a right to petition.[35] The petition carefully documented the discriminatory German laws that had been enacted and how they violated the Convention. The League Council accepted the petition as admissible and referred it to a committee for study and when the committee reported, there was a discussion in the Council about the plight of Jews in Germany. Bernheim received vindication, but the Council lacked the power to remedy the situation.

Although Reisman now recalls Feinberg in the 1960s as "not especially sympathetic to a functional notion of participants which could include actors other than governments of nation-states," in my view, Feinberg's earlier scholarship was notably attentive to the vital role of private actors. In 1932, Feinberg gave a Hague Academy lecture on The Petition in International Law where he discussed the role of petitions in the League of Nations and traced private initiatives back to the nineteenth century.[36] Feinberg's essay makes an important distinction between the "petition-complaint" (the Bernheim type) and the petition-voeu, in which the petitioner expresses views for the public interest. In 1948, Feinberg wrote an article on The Recognition of the Jewish People in International Law in which he took note how Jewish communities sent unofficial representatives to the Congress of Vienna in 1814.[37] In 1972, Feinberg wrote an article about the Jewish question at the Congress of Aix-la-Chapelle of 1818.[38] That article discusses an episode in which the Reverend Lewis Way, an English clergyman and member of a London organization, lobbied the Congress on the need to better the civil and political status of Jews. Feinberg shows that Way's documents were considered by the Congress and led to an unpublished Protocol recognizing the laudable object of Way's proposals. But Feinberg concludes that the Protocol had no practical results. In addition, Feinberg notes the presence of other private petitioners including Thomas Clarkson of the British anti-slavery movement.

In 1968, Feinberg authored a study on *The International Protection of Human Rights and the Jewish Question* in honor of the twentieth anniversary of the UDHR.[39] His historical study looks at the role of Jews and the Jewish question in instilling the concept of human rights into the conscience of mankind in the nineteenth and early twentieth centuries. Feinberg concludes that Jewish groups were themselves

> a most important factor in moving the Great Powers to take action on their behalf. Almost every act of intervention for the benefit of Jews was the result of petitions and appeals of Jewish organizations, such as l'Alliance Israélite Universelle, the Board of Deputies of

35 Dorothy V. Jones, Toward A Just World 122-31 (2002).

36 Nathan Feinberg, *La Pétition en droit international*, 40 Recueil des Cours 525 (1932).

37 Nathan Feinberg, *The Recognition of the Jewish People in International Law*, 1948 Jewish Y.B. Int'l L. 1, 13.

38 Nathan Feinberg, *The Jewish Question at the Congress of Aix-la-Chapelle, 1818*, 2 Isr. Y.B. on Hum. Rts. 176 (1972).

39 Nathan Feinberg, *The International Protection of Human Rights and the Jewish Question (An Historical Survey)*, 3 Isr. L. Rev. 487 (1968).

> British Jews and the Anglo-Jewish Association, or of influential and highly placed Jewish notabilities.[40]

One of the episodes he discussed was how Jewish groups submitted memoranda to the Congress of Berlin in 1878, and posited that these endeavors were "among the major factors contributing to the crystallization of a new principle established at the Congress of Berlin"[41] in regard to the protection of minority rights.[42] Another important episode occurred at the beginning of the Paris Peace Conference when the Committee of Jewish Delegations set up shop in Paris and influenced the drafting of the Minorities treaties.[43] Feinberg's article also takes note of the private declaration initiatives on human rights undertaken by the Institut de droit International and the International Diplomatic Academy.

The lasting impact of private initiatives on human rights led Reisman to offer the thought that one would expect the initiative for international human rights law to come from private actors rather than government officials because such officials would hardly be likely to undertake an initiative aimed at limiting government power.[44] In appraising this thought, there are several ways to unpack the issues. Is the proposition descriptively correct for the human rights regime? Can it be extended beyond human rights to any body of international law that limits the power of states and/or of government officials? Is there a theoretical basis for the idea that governments are hardly likely to limit their own power?

Looking at history, I think Reisman is correct insofar as he claims that new norms of international human rights law have originated mainly within civil society rather than in governments.[45] That was especially true for the great movements in respect to the slave trade, political prisoners, the rights of women, religious minorities, refugees, children, genocide, racial discrimination, torture, and national self-determination. The story of worker rights is more nuanced, as it did involve government regulators at an early stage and international civil servants beginning with the establishment of the International Labour Organization (ILO) in 1919. Still, one can hardly doubt the central role of unions in promoting worker rights internationally from 1916 onward.

Although human dignity in the New Haven School sense is broad enough to sweep in any field of international law, one can distinguish human rights from other

---

40 *Id*. at 495-96.

41 *Id.* at 497.

42 *Id*. at 496-97.

43 *Id*. at 497-98.

44 *See* Reisman, *supra* note 1, at 80.

45 *See, e.g.*, Dorothy B. Robins, Experiment in Democracy: The Story of U.S. Citizen Organizations in Forging the Charter of the United Nations (1971); William Korey, NGOs and the Universal Declaration of Human Rights (1998); Paul Gordon Lauren, The Evolution of International Human Rights (2d. ed. 2003); Linda Rabben, Fierce Legion of Friends: A History of Human Rights Campaigns and Campaigners (2002); Adam Hochschild, Bury the Chains: Prophets, Slaves, and Rebels in the First Human Rights Crusade (2005).

areas of law that put limits on states such as humanitarian law, commercial law, intellectual property, environmental law, among others. Yet looking across these disparate fields of international law, one can see from history that catalytic NGO and private initiatives generally precede treatymaking by states. The nature of the private actors, of course, differs from issue to issue. A central NGO for humanitarian law is the Red Cross movement, which started as a private initiative of elites, and later spawned mimetic efforts within countries and intergovernmentally.[46] For environmental protection and conservation, the early initiatives were NGO-driven, but soon pulled in government regulators and shaped the modern form of compartmentalized issue-driven policymaking through epistemic communities. For international economic law, on commercial transactions, investment, and trade regulation, the early driver was the business community, particularly the International Chamber of Commerce.

The reader might agree with these historical points about the origin of the major bodies of international law in the nineteenth and early twentieth century, including the UDHR, but then offer the claim that contemporary governments recognize the importance of international cooperation and lawmaking and no longer need NGOs to get the ball rolling. The claim is probably true to some extent as can be seen by the huge numbers of government officials in foreign ministries working to promote every facet of international law. These governmental actors are supplemented by international civil servants employed by the United Nations, its specialized agencies, the World Bank, and thousands of other organizations. The role of the media is also very important, particularly in carrying out the intelligence, promotion, and appraisal functions. Nevertheless, even in the contemporary world of thick international obligations, the role of civil society organizations (and for some issues, business groups) remains central to the achievement of new obligations on states.

The enzymatic role of NGOs can seen in one of the most important outputs of the UN over the past several years—the adoption by the U.N. General Assembly in 2005 of the Resolution declaring a Responsibility to Protect (R2P) populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[47] The R2P portion of the Resolution was an important achievement in proclaiming a new duty of states and a responsibility of the "international community, through the United Nations ."[48] Specifically, the Resolution says that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleaning and crimes against humanity."[49] That norm is backed up with a statement that governments are prepared to take collective action "should peaceful means be inadequate and national

46 The literature on the Red Cross movement is vast. *See, e.g.*, Ralph Zacklin, *International Law and the Protection of Civilian Victims of Non-International Armed Conflicts, in* Essays on International Law in Honour of Krishna Rao 282 (M.K. Nawaz ed., 1976).

47 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

48 *Id.* ¶ 139.

49 *Id.* ¶ 138.

authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[50]

Like all other important human rights and humanitarian initiatives, R2P was preceded by a medley of various kinds of intelligence and promotional work by civic society. I am not aware of any written history of this episode attempting to allocate credit to U.N. officials, sympathetic governments, and civil society organizations.[51] But close observers do acknowledge the valuable contribution of the network of NGOs including the World Federalist Movement, Human Rights Watch, the International Crisis Group, Amnesty International, and of course the International Commission on Intervention and State Sovereignty (ICISS), which, in 2001, shaped the R2P concept. In 2007, the Global Centre for the Responsibility to Protect was launched "to catalyze action to move … the responsibility to protect … from principle into practice."[52]

Having shown the descriptive accuracy of Reisman's observation that NGOs initiate prescriptions to limit government power, I will now move to the theoretical question of whether governments are likely to limit their own power. Obviously, governments do that all the time, at least formally, through treaty commitment. But what Reisman seems to be saying is that the impetus to do so would be unlikely to come from government officials and would instead be more likely to come from outside government. Yet that raises the question of whether outside influences are a prerequisite. Perhaps an answer to that question can be found in the rational choice lens of international law theory.

In their valuable contribution to international law theory, Jack Goldsmith and Eric A. Posner argue in *The Limits of International Law* that states act out of self-interest, not out of a legal or moral obligation to obey international law.[53] In my view, their work is aptly described as a "theory" because it can be used to generate predictions as to how states will act. Using game theory, Goldsmith and Posner offer several models of state interaction: coincidence of interest, coercion, cooperation in a so-called "prisoner's dilemma" game where the value of such cooperation depends on whether other states reciprocate, and coordination, where there is more than one action that can generate joint benefits if both states perform that action. With respect to human rights, they argue that while all four of these games have been in play over the centuries, modern multilateral human rights treaties reflect a coincidence of interest.[54]

---

50 *Id.* ¶ 139.

51 A brief history is presented in Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm "Responsibility to Protect" Make a Difference?*, 35 Denv. J. Int'l L. & Pol'y 353, 367-73 (2007). In the previous decade, NGOs were an important actor in the campaign against landmines and for the International Criminal Court. On the latter, the best article on the Rome Conference, taking note of the role of NGOs, is Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l L. 22 (1999).

52 Global Centre for the Responsibility to Protect, http://globalr2p.org/index.html.

53 Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005).

54 *Id*. at 107-24.

Goldsmith and Posner's volume was followed by a well-written book by Andrew Guzman titled *How International Law Works: A Rational Choice Theory*.[55] Guzman starts with the same rational behavioral assumption regarding states, namely that states will only enter into agreements when doing so make them better off.[56] His book is mainly focused on theorizing compliance rather than the making of international agreements, but it does cover the latter. Guzman explains that "multilateral agreements allow states to overcome collective action problems that bilateral agreements cannot adequately address."[57] With respect to the International Covenant on Civil and Political Rights, he says that it is not only a "tool" intended "to affect the payoffs of states," but that the Covenant also serves an "expressive function."[58]

My take on this new stream of literature is that, in theory, international human rights agreements can be crafted and ratified by states in their own interest without being encouraged to do so by NGOs. A state may agree to guarantee human rights either for its own internal purposes or as a price paid to commit other states to guarantee human rights. Of course, the logic of human rights agreements is far less compelling than in other areas of international law where there are true collective action problems. In an earlier work, I have termed agreements focused on the latter as "essential cooperation" between states, and contrasted it with "mutually reinforcing cooperation" where international agreements are helpful but not technically required for a state to act in its own interest.[59] Human rights fall mainly into the latter category.

Although I find the rational choice literature on international law interesting as a matter of legal philosophy and policy science, I am doubtful that its theories will generate many useful predictions because of the state-centricity of the assumptions. Explaining his own theory, Guzman says that it is predicated on the "assumption that states have a set of fixed preferences that motivate their international behavior."[60] While he agrees that "treaties may be used to achieve domestic objectives from time to time," he says his book had to put that aside as "a pragmatic necessity" because otherwise "the complexity of the model is greatly increased."[61] To wit, "to the extent that state preferences change as a result of changes in domestic politics, it is clear that no good general model of how preferences change exists."[62] Furthermore, he says that models that include "strong public choice components" are "less helpful in general models such as the one developed here, or as tools to generate predictions about state

55 Andrew T. Guzman, How International Law Works: A Rational Choice Theory (2008).

56 *Id*. at 121. Guzman also says that states may enter into agreements when it makes "their policymakers" better off. *Id.*

57 *Id*. at 64.

58 *Id*. at 20.

59 Steve Charnovitz, *Improving Environmental and Trade Governance*, 7 Int'l Envtl. Aff. 59, 63 (1995).

60 Guzman, *supra* note 55, at 128.

61 *Id*.

62 *Id*.

behavior."[63] Nevertheless, he does relax the assumption of states "as unitary actors" when considering particular issues of application of the models, such as whether a state should choose soft law over a treaty.[64]

Although for over the century, many international law scholars had been comfortable with an assumption of the unitary state for purposes of theorizing about international law, the *Jurisprudence* of Lasswell and McDougal broke through that miasma by seeing the processes of law as involving "participants" that include the "nation-state[]" only as one of many other participants.[65] Guzman's book takes no notes of the scholarship of McDougal, Lasswell, or Reisman. Perhaps Guzman sees it as irrelevant to his project.[66] Guzman explains that he bases his model on rational choice for a unitary state because that "yield[s] theory that is more parsimonious and predictions that are crisper and more falsifiable than is the case for alternative approaches."[67] Clearly, Guzman's model is more parsimonious than that of Lasswell and McDougal, and I will be interested to see whether future scholarship can derive crisp and accurate predictions from it.

The unitary construct of a "state" has heuristic value, but in an era of widespread democracy, the "state" is always at least one step removed from elected leaders, diplomats, agencies, legislatures, courts, and domestic and transnational economic and social actors. Consider this thought experiment: If I told you that a faraway planet had six states with listed fixed preferences, could one generate crisp realist predictions at to their inter-state relations? In my view, almost nothing could be said without more intelligence about the nature of the opportunities and problems facing the states, their relative power, and the views of the other stakeholders (human or otherwise). As Graham Allison demonstrated in *Essence of Decision* nearly forty years ago, there are limits to rational actor modeling because decisions are driven by many factors that do not fit the models.[68]

In my view, Lasswell and McDougal recognized early on that state-centric models were no more fruitful to understanding international law than they were in understanding municipal law. In other words, if one is interested in the law of contract, tort, product liability, manslaughter, discrimination, or pollution control, how far can one get by assuming a unitary state with fixed preferences? Obviously nowhere. Law concerns the interaction of people and their environment through markets and governments. A state's preferences may be parsimonious to reflect on, but does not help advocates or judges know define or reform the law.

---

63 *Id*. (internal citation omitted).

64 *Id*. at 129.

65 1 Lasswell & McDougal, *supra* note 8, at 417 (discussing power).

66 Lasswell and McDougal discuss game theory. *See* 2 Lasswell & McDougal, *supra* note 8, at 1090-99.

67 Guzman, *supra* note 55, at 21.

68 Graham Allison, Essence of Decision: Explaining the Cuban Missile Crisis (1971).

We owe to Lasswell the insight that the functions of authoritative decision within a state are the same as with authoritative decisions among states even though certain formalisms will vary (e.g., treatymaking bodies versus parliaments). Why would we expect that what a state does in its foreign affairs needs to be modeled differently (e.g., rational choice) than what a state does in its domestic affairs? It may be true that a state would have greater solicitude for the human rights of its own citizens than it would for aliens, but even for citizens, the level of domestic solicitude is often low.

In his grand essay published in 1973 on "civic enforcement" in international humanitarian law, Reisman makes an important contribution to the New Haven School jurisprudence by warning of the dangers of state-centric analysis.[69] He explains: "A state is a vast composite, interactive process in itself. For manipulative purposes, nothing is gained by viewing it as a monolithic actor."[70] To make humanitarian law more effective, Reisman calls for "civic enforcement" by individuals. Acknowledging that individuals may tend to view themselves as members of a nation-state rather than an "individual actor," Reisman urges the public to begin the intellectual task of "rediscovery, the recapture, of the self" in order to begin to view oneself as "a participating architect."[71] At the end of the essay, Reisman predicts that

> civic enforcement will become a major strut of international order if it can, by recruiting more and more private individuals, mobilize increasing support for the basic prescriptions of a world order of human dignity. Indeed, such support may be crucial for the transitions to an improved world order.[72]

The salience and accuracy of Reisman's prediction regarding the role of private initiative in international humanitarian law since its publication can be seen in multiple ways.

Over the past two decades, a great deal has been written about the internalization of international law into domestic law. Recently, Harold Koh has suggested that there is a "New" New Haven School centered on "Transnational Legal Process," by which he means "the transsubstantive process whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law."[73] I believe that Koh is right that this is a promising focal point for new directions of scholarship. And I would urge such scholars to reflect on the point made in the *Jurisprudence* that

---

69 Michael Reisman, *Making International Humanitarian Law Effective: The Case for Civic Enforcement*, *in* The United Nations: A Reassessment 31 (John M. Paxman & George T. Boggs eds., 1973).

70 *Id*. at 34.

71 *Id*. at 33. In addition, Reisman asks who authorizes the individual citizen to determine that a fundamental international prescription has been violated. Reisman's answer: "What prevents him?" *Id.* at 37.

72 *Id*. at 38.

73 Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 Yale J. Int'l L. 559, 567 (2007) (footnote omitted).

> [w]hen international law is regarded as a body of rules only, applied by state officials to state officials, there may be dangerous neglect of how rules are made and remade, as well as of many other aspects of the comprehensive global constitutive process of authoritative decision. When international law is regarded as something mystical or autonomous, distinct from *larger* community policy, no inquiry is admitted, or intellectual tools afforded, for relating decisions to events in transnational social process and assessing their consequences for global public order.[74]

In my view, although understanding the dynamics of games that states play is important to any useful international law model, the analyst should also look at the games that NGOs play.[75] (For some issues, such as international trade, one will also need to look at games that business actors play.) Like states, NGOs also operate at the two levels of domestic and international politics, including relations with intergovernmental organizations. Like states, NGOs are influenced by a variety of conditioning factors and their preferences change over time. Like states, NGOs can be presumed to act rationally.[76] Of course, not all rational actions by NGOs are in the public interest, and not all action by NGOs is rational.

Over the past decade, the influence of NGOs has led to greater concern about NGO accountability. Sometimes, as Lasswell and McDougal explained, "[i]n the eyes of the community the power exercised by unofficial organizations may be both controlling and authoritative."[77] The question that has arisen is whether there are adequate checks for the power of NGOs. Considerable literature exists of whose interests are pursued by NGOs and whether they are accountable.[78] In 1971, Reisman postulated that although the literature on private groups assumed that they pursued private or special interests, it "would be more accurate to record that private groups coalesce and operate in order to realize highly cherished and intensely demanded values and that these values may well be expressive in the highest degree of the common interest."[79]

---

74 1 Lasswell & McDougal, *supra* note 8, at 187 (emphasis added).

75 *See, e.g.*, Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders 13 (1998) (figure illustrating NGO games).

76 *See* John Boli & George M. Thomas, *INGOs and the Organization of World Culture*, *in* Constructing World Culture: International Nongovernmental Organization Since 1875 13, 14 (John Boli & George M. Thomas eds., 1999) (explaining that "[international nongovernmental organizations] are transnational bodies exercising a special type of authority we call rational voluntarism"); Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 Stan. L. Rev. 1667 1694 (2003) (suggesting that civil society can effectively engage in cosmopolitan action because groups consist of like-minded persons who come together to take advantage of the collective action powers that institutions can deliver).

77 1 Lasswell & McDougal, *supra* note 8, at 368.

78 *See, e.g.*, NGO Accountability (Lisa Jordan & Peter van Tuijl eds., 2006).

79 Reisman, *supra* note 19, at 419 (referring to writings of Otto von Gierke, John R. Commons, and Arthur F. Bentley); *see also* Siegfried Wiessner, *Legitimacy and Accountability*

Let me now return to the question raised at the beginning of my essay with respect to Reisman's observation that the intelligence and promotion functions leading up to the UDHR would be more likely to come from private initiatives than from governments. I think Reisman is correct, because although it is possible that a rational state would take action to limit its own power, in the real world this occurs through the agency of government officials interacting with numerous other participants including self-directed NGOs. The UDHR might have been written without the inspiration of private initiatives and the lobbying of the NGOs at the UN in national capitals, but I am sure that it would not have been the same Declaration as written. My point is that all of the international treaties and organizations we now enjoy have been shaped in part by the involved NGO (and sometimes business and scientific) communities, and it is impossible to imagine contemporary global governance without the NGOs.

While it may go too far to say that NGOs are a solvent of sovereignty,[80] NGOs vitalize international law by injecting new norms and ideas into policymaking processes.[81] NGOs are especially good at developing solutions to transnational problems that overlap international regimes. And for NGOs and other private actors, "the New Haven School assembles a set of tools for enhancing the understanding and more effective influencing of these international processes."[82]

International activity by NGOs may also serve as a remedy to the pathology of illegitimacy by distance[83] by which it is said that the gap between international legal processes and voting by individuals in their home countries renders international institutions undemocratic. Without buying into the hypothesis that the closer a gov-

---

of NGOs: A Policy Oriented Perspective, *in* International Law in Contemporary Perspective 305, 308 (W. Michael Reisman et al. eds., 2004) ("The legitimacy of an NGO in such a dynamic process of social life is tied to the authenticity of its mission, not the strength of its numbers."); Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, *in* Non-State Actors and Human Rights 93, 111 (Philip Alston ed., 2005) ("In sum, there is still much more reason for concern about the negative impact of 'irresponsible' governments than about 'irresponsible' NGOs.").

80 One problem with this metaphor is that international agreements do not necessarily undercut sovereignty; they may enhance it. *See, e.g.*, John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 Am. J. Int'l L. 782 (2003).

81 As I have explained elsewhere, in democracies, NGOs compete with bureaucrats to gain the support of elected officials. Although NGOs ideations are likely to be broader than bureaucratic ideations, the true benefit of private actors comes in adding a diversity of inputs to governmental decisionmaking aimed at solving societal problems. Clearly, NGOs are not single-minded about when a particular international norm should be "higher" than national law.

82 Reisman et al., *supra* note 6, at 577.

83 *See, e.g.*, Pascal Lamy, Director-General, WTO, Statement: Strengthening the WTO as *the* Global Trade Body (Apr. 29, 2009), http://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm ("Taking decisions by consensus increases the legitimacy of agreements reached in an international forum, which is necessary and welcome, as the degree of legitimacy decreases with distance from domestic political processes.").

ernment is to the individual the more legitimate it is, I would say that NGOs have served as an antidote to the challenge of distance by connecting the individual member of an NGO to the NGO's international activities in international organizations in New York, Geneva, and Nairobi. This is especially so when the "empowered self" objects to what her elected government is doing.[84]

Compared to the United Nations agencies, the role of NGOs in international economic organizations is much less significant.[85] Consider the world trading system where serious problems exist with respect to the lack of transparency and the lack of opportunity for NGOs to observe and offer suggestions. The problem was even worse in the pre-WTO GATT era, and to its credit the WTO has made improvements.[86] The need for improvement is recognized by WTO Director-General Pascal Lamy who recently in an oral report to the WTO General Council said: "Turning now to our external stakeholders—NGOs, parliaments, staffers, academics, business—there is also a need to strengthen networking and increase transparency."[87] Lamy is a visionary leader of the WTO who understands how vital public support is for the work done by the WTO.

Unfortunately, greater progress has been stifled by hidebound governments, or more accurately, trade officials from many countries who do not want the global public—or sometimes even the public in their own countries—to know what is going on at the WTO. For example, even in 2009, the WTO classifies many documents about ongoing rulemaking in the "JOB" series that is intended not to be available to the public. Occasionally there is a slipup and such "non-papers" are alluded to in official WTO public documents.[88] The secrecy in the WTO accession process is by far the worst. Typically, the unequal rules that governments applying to join the WTO have to agree to are not publicly released until after the WTO approves the accession agreement.

In an essay about human rights I should admit my own observational standpoint, which is that the right of an individual to engage in international trade—to import, export, invest, and disinvest—is a human right and should be a part of international hu-

---

84 *See* Thomas M. Franck, The Empowered Self: Law and Society in the Age of Individualism 87-88 (1999).

85 Robert O'Brien et al., Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (2000); Jackie Smith, *Social Movements and Multilateralism*, *in* Multilateralism Under Challenge? 395 (Edward Newman, Ramesh Thakur & John Tirman eds., 2006).

86 Yves Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues*, 11 J. Int'l. Econ. L. 751 (2008) (surveying progress made in the WTO on openness). For example, in recent years, a few panels and the Appellate Body have allowed the public to watch hearings with the consent of the disputing parties. *See* Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 J. Int'l Econ. L. 1021 (2008).

87 Lamy, *supra* note 83.

88 *See, e.g.*, Working Party on Domestic Regulation, *Report on the Meeting Held on 3 December 2003*, ¶¶ 2, 5, S/WPDR/M/24 (Jan 22, 2004).

man rights law.[89] I think that the WTO would be more effective if it connected its rules and rhetoric more closely to the needs of the individual consumer and trader. Instead, most individuals perceive themselves as quite removed from the WTO. For example, from the vantage point of the individual, the central feature of international human rights law (or at least "first generation" human rights) is that it imposes disciplines on a state (or government) on how it can treat its own citizens. By contrast, the same individual would see international trade law (i.e., the law of the WTO) as not imposing any such disciplines, but rather imposing disciplines on how one's own government can treat other governments. In other words, because the human rights regime gives states obligations that extend vertically down to citizens, the individual perceives that it has gained a right. But because the trade regime does not give states any such vertical obligations, the individual lacks any perception of a gained right and instead may feel a loss to the sovereignty of her own government to use trade policy instruments.

In my view, this disconnect between the WTO and the individual could be remedied if the WTO acted affirmatively to implement the provision in its organizational charter providing that "[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."[90] Although some might claim that the WTO is stronger and more effective than international human rights agencies because the WTO does not allow NGOs to speak at meetings and roam around the corridors, I think such a view is naive for the WTO of today. Although there are many NGOs (including business groups) that pursue economic nationalist agendas, it is rare that one sees transnational protectionism. It is the transnationalism of NGO activity that forces it to promote world community values rather than the interests of one particular country or market.

While the rulemaking branch of the WTO has not made any progress in allowing NGOs to participate, it once seemed as though the dispute settlement branch of the WTO was different. In 1998, the Appellate Body handed down its important *United States—Shrimp* decision holding that unsolicited amicus briefs were admissible.[91] This seemed like a milestone at the time, but as it turned out, nothing of value has emerged from these developments. Even worse, recently, there has been some

89 I first offered that observation at a conference honoring the 50th anniversary of the UDHR. Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 Brook. J. Int'l L. 113, 122 (1999); *cf.* Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, *in* Human Rights and International Trade 29, 41 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005) ("Individual freedom, diversity, and rivalry are core problems of both human rights and trade law.").

90 Marrakesh Agreement Establishing the World Trade Organization, art. V:2, Apr. 15, 1994, 1867 U.N.T.S. 154. For an excellent backgrounder on the issue, *see* Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. Int'l. Econ. L. 717 (2008).

91 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 83, 106-10, WT/DS58/AB/R (Oct. 12, 1998).

backtracking by the WTO Appellate Body.[92] Before discussing these developments, one should start at the beginning of NGO appearances before international tribunals.

In its earliest practice, the Permanent Court of International Justice (PCIJ) permitted international NGOs to make *oral* statements in four of the Court advisory proceedings regarding the ILO.[93] The PCIJ also permitted NGOs to make written statements in some of these cases.[94] The value of NGO participation can be seen clearly in Advisory Opinion No. 1, which was a case about *representativeness* of nongovernment delegates.[95] To understand this case, one must know that the ILO, unique among international organizations, requires that state members be represented by four delegates including two from government, one from workers, and one from employers. The decision of the authors of the ILO Constitution in 1919 to make representation tripartite reflected a recognition that tripartism would enhance the legitimacy of the ILO in its role of prescribing norms for incorporation into domestic law.

Let me briefly summarize the background of the case: At issue was the interpretation of the provision of the Treaty of Versailles requiring the "non-Government delegates" to be "chosen in agreement with the industrial organizations … which are most representative of employers or workpeople.[96] At that time, The Netherlands had five labor federations. In 1919 and 1920, the government chose a worker delegate from the largest federation. Tension ensued because the second and third largest federations were Christian federations and were being precluded from choosing ILO delegates even though together these two federations had more members than the largest federation. (This same problem was playing out in other countries with Christian unions that had fewer members than the non-Christian unions.) Looking ahead to 1921, The Netherlands announced that it would rotate the worker delegate to the other federations, and did so by selecting a delegate agreed to by the second, third, and fourth biggest federations. The largest federation complained to the ILO Conference, and triggered a credentials challenge claiming that the government had not selected the worker delegate in agreement with the largest federation, which was putatively the most representative. The credentials challenge failed. Recognizing the need for clarity, the ILO Conference asked the ILO Governing Body to request the Council of the League of Nations to seek an advisory opinion on the proper interpretation of Article 389, and the Council did so.

---

92 As the reader might intuit, I favor the possibility for NGOs and business groups to submit amicus briefs to WTO tribunals. For an argument against amicus briefs at the WTO, see Yuka Fukunaga, *Civil Society and the Legitimacy of the WTO Dispute Settlement System*, 34 Brook. J. Int'l L. 85, 101- (2008).

93 The PCIJ permitted NGO oral statements in its first two cases, both decided in 1922. The PCIJ did not offer to hear NGOs in the Court's first contentious proceeding, decided in 1923 or in subsequent contentious cases.

94 Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 Am. J. Int'l L. 611, 622-23 (1994).

95 Designation of the Workers' Delegate for the Netherlands at the Third Session of the Int'l Labour Conference, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 1, at 9 (July 31).

96 Treaty of Versailles, art. 389, June 28, 1919, T.S. No. 4, 225 Consol. T.S. 188.

In its Opinion delivered in 1922, the PCIJ upheld the selection by the Netherlands government and offered an important interpretation of Article 389 that has helped to guide credential challenges since. According to the Court, "[n]umbers are not the only test of the representative character of the organisations, but they are an important factor; other things being equal, the most numerous will be the most representative."[97] But agreement with the largest worker organization is not necessarily required. Because "the Workers' Delegate represents all workers belonging to a particular Member," when a country has "several industrial organizations representing the working classes, the Government must take all of them into consideration."[98] The Court made clear, however, that although a government should aim to get agreement from "all the most representative organisations of employers and workers," the lack of such an agreement should not hold up a selection seen as "best for the purpose of ensuring the representation of the workers of the country."[99]

When it docketed the matter, the PCIJ decided to hear representatives of international organizations that expressed a desire to be heard, and the PCIJ communicated that decision to the ILO and three private organizations.[100] Two international labor federations participated in oral pleadings; they were the International Federation of Trades Unions and the International Federation of Christian Trades Unions. As one might expect, the Christian Federation supported the government's choice and the International Federation opposed it. But both federations gave thoughtful pleadings containing factual points and legal arguments about the proper interpretation of Article 389.[101]

The International Federation of Trades Unions made an oral statement before the Court in the next case (also in 1922), Advisory Opinion No. 2, on the Competence of the International Labour Organization with Respect to Agricultural Labor.[102] I have not been able to find documentation for that statement translated into English. In a supplementary advisory proceeding on the ILO and agricultural production, leading to Advisory Opinion No. 3 announced on the same day, the Court did not invite NGOs to make statements.

---

97 *Designation of the Workers' Delegate for the Netherlands*, 1922 P.C.I.J. (ser. B) at 19.

98 *Id*. at 23.

99 *Id*. at 25.

100 *Id*. at 10-11. Commentators at the time took note of the opportunities given to private organizations by the Court. *See* Manley O. Hudson, *The First Year of the Permanent Court of International Justice*, 17 Am. J. Int'l L. 15, 20 (1923); A. Hammarskjöld, *The Early Work of the Permanent Court of International Justice*, 36 Harv. L. Rev. 704, 718 (1923).

101 Speech by M. Mendels, Designation of the Workers' Delegate for the Netherlands at the Third Session of the Int'l Labour Conference, Advisory Opinion, 1922 P.C.I.J. (ser. C) No. 1, at 58 (June 24, 1922) (representing the International Federation of Trades Unions); Speech by M. Serrarens, Designation of the Workers' Delegate for the Netherlands at the Third Session of the Int'l Labour Conference, Advisory Opinion, 1922 P.C.I.J. (ser. C) No. 1, at 75 (June 26, 1922) (representing the International Federation of Christian Trades Unions).

102 1 World Court Reports 122 (Manley O. Hudson ed., 1934).

Four years later, NGO participation occurred in Advisory Opinion No. 13, on the Competence of the ILO to Regulate the Personal Work of the Employer.[103] The quest for an advisory opinion sprung out of a disagreement that occurred during the drafting of the ILO Convention No. 20 on Night Work in Bakeries. That Convention prohibits night baking even by "proprietors as well as workers" although it does not prohibit night baking in a household for its own consumption.[104] During the Conference, the Employers Group objected to any regulation other than directly for workers, and after losing a vote on an amendment, the Employers requested the ILO Governing Body to seek a PCIJ advisory opinion through the League of Nations regarding the ILO's competence. The Court interpreted the question as asking about the ILO's competence to propose regulations on personal work of employers when that was incidental to regulating how an employer treated its employees.

In its answer, the Court held that the authors of the ILO intended it to have "a very broad power of co-operating" and that this included the incidental regulation of the employer.[105] The Court inferred that since governments retained the "individual legislative power" to adopt or reject any proposal of the Organization, they "must be assumed to have acted deliberately in providing for the co-operation, strictly limited as it is, of the International Labour Organization in the exercise of their sovereign powers in respect of labour measures, national and international."[106]

At the time it commenced that matter, the PCIJ gave notice to three international NGOs and invited them to file applications to furnish information to the Court. All three did so in writing and were invited to deliver oral statements to the Court.[107] The written briefs show the NGOs taking full advantage of the opportunity to influence the Court's decision, and are described briefly below.

The Memorial of the International Federation of Trade Unions is a political argument rather than a legal argument. The Memorial explains the background of the Convention, namely, the increased competition among bakers to provide customers fresh bread as early as possible. Because this involved working all night, the International Congress of Workers in the Baking Trade began agitating for prohibitions against night work. The Memorial further explains that from the bakery workers perspective, "[t]he prohibition of night work could not be carried out if night work by small proprietors was permitted, as certain members of the trade would then be in a specially favoured position."[108]

---

103 Competence of the Int'l Labour Org. to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion, 1926 P.C.I.J (ser. B) No. 13, at 6 (July 23).

104 Convention Concerning Night Work in Bakeries, art. 1(2), June 8, 1925, 38 U.N.T.S. 269.

105 *Personal Work of the Employer*, 1926 P.C.I.J. (ser. B), at 18.

106 *Id*. at 22.

107 *Id*. at 8. The oral statements and one of the written statements exist only in French and are not discussed here.

108 Memorial by the International Federation of Trade Unions, Competence of the Int'l Labour Org. to Regulate, Incidentally, the Personal Work of the Employer, Advisory Opinion, 1926 P.C.I.J (ser. C) No. 12, at 227 (June 5, 1926).

The "Consultation" of the International Organization of Industrial Employers is more interesting as it is a carefully prepared legal argument authored by distinguished counsel.[109] The Employers asked the Court to find no ILO competence based on several arguments: One was a textual argument about the ILO Charter and its focus on workers. Another argument called for a restrictive interpretation of public international law based on two fundamental principles, the sovereignty of the state and the liberty of the individual.[110] The most subtle line of argument was that "[i]t is essential in international law … not to prescribe rules that cannot be enforced."[111] Furthermore, the Employers explained:

> It is true that there is reserved to States the right not to ratify the conventions voted, but the exercise of this right should, in theory, be exceptional. It would be regrettable if, from an excessive widening of the competence of the International Labour Organization, governments were too often placed before the alternative of either refusing to ratify or adopting measures which were violently opposed to their own fundamental concepts; the former alternative would always be chosen. Useless work would thus have been performed for the Convention would inevitably remain a dead letter in important countries; the effect on the future of international law would be regrettable and would tend to perpetuate that frame of mind which regards States as not being bound by resolutions emanating from international bodies.[112]

To me, the brief of the Employers is fascinating in several ways: First, it looks like a modern amicus curiae brief, and that makes it the first to be offered to an international court. Second, the brief demonstrates that in the early days of the ILO, even the international employer association envisioned that non-ratification of ILO conventions would be "exceptional." Third, the brief is prophetic in worrying that important conventions could become "a dead letter in important countries" if they went too far in opposition to "fundamental concepts."[113] As for the Night Work in Bakeries Convention, it seems to be explainable more by public choice than by public policy. Not surprisingly, the Convention was ratified by only 17 countries, eight of which later denounced it beginning in 1950.

Space constraints prevent a discussion of the fourth advisory proceeding in which NGOs participated, on the Interpretation of the Convention of 1919 Concerning Employment of Women during the Night. Yet it can be pointed out that once again the Court took the initiative to notify the three international NGOs most involved with the ILO of the opportunity to furnish information to the Court on the question being

109 Consultation Given by Mm. Berthélémy, Le Fur, and Julliot de la Morandière, *id.* at 194 (June 14, 1926). Today the Organization is known as the International Organization of Employers (IOE).

110 *Id.* at 195-97.

111 *Id.* at 211.

112 *Id.* at 212.

113 *Id.*

considered. The two labor federations agreed to submit written and oral statements and did so.[114]

The pleadings of the international labor federations and employers organization to the PCIJ are in the nature of what Nathan Feinberg called a "*petition-voeu*." Although the International Court of Justice (ICJ) can permit amicus briefs in advisory proceedings, it has done so in only one instance, in 1950, in the *South-West Africa* advisory proceeding, and in that episode the statements arrived one month after the deadline set by the Court and were not used.[115] In 1970, during the *Namibia* advisory proceeding at the ICJ, Michael Reisman wrote to the Court to ask about the possibility of submitting an amicus curiae brief and noting that there was no bar to that in the ICJ Statute.[116] The ICJ's Registrar rejected Reisman's offer, and claimed that its ability to accept statements from international organizations precludes acceptance of such materials from others. Before being elected to the ICJ, Rosalyn Higgins wrote that "[t]he International Court settles disputes between States. Cases cannot be brought by individuals and indeed, nether they nor non-governmental organizations have any standing to intervene in inter-State litigation by amicus briefs."[117] But in my view, that an NGO lacks standing or a "right" to participate does not necessarily mean that a court cannot grant an opportunity to participate.

In the years after the 1970 episode, Reisman labored on an article he tentatively titled *Amici Curiae Jure Gentium: For a Court in Need of Friends*.[118] Unfortunately for scholars of international law, Reisman did not finish the article before events overtook him. Recently, he explained to me that he abandoned this project after Dinah Shelton's article on NGO participation in international courts was published by the *American Journal of International Law* in 1994.[119] Shelton's seminal article has informed and inspired considerable work on civil society intervention in international courts and other institutions.[120]

Despite the fact that NGOs are not allowed to submit amicus briefs to the ICJ, they were not embarrassed to try to do so at the WTO. In the *United States—Shrimp* case, the unsolicited NGO briefs were rejected by the panel as beyond its authority to accept, and that holding was appealed by the United States. To the surprise of

---

114 Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, at 367-68 (Nov. 15). One of the briefs arrived after the time limit, yet was accepted nonetheless.

115 Shelton, *supra* note 94, at 623-24.

116 *Id*. at 624.

117 2 Rosalyn Higgins, *International Law in a Changing International System*, *in* Themes and Theories: Selected Essays, Speeches, and Writings in International Law 903, 908 (2009).

118 Michael Reisman, *Accelerating Advisory Opinions: Critique and Proposal*, 68 Am. J. Int'l L. 648, 668 n.89 (1974).

119 E-mail from Michael Reisman to Steve Charnovitz (Apr. 26, 2009) (on file with author); *see also* Shelton, *supra* note 94.

120 *See, e.g.*, Civil Society, International Courts and Compliance Bodies (Tullio Treves et al. eds., 2005).

many observers, the Appellate Body held in 1998 that panels could accept unsolicited amicus briefs from interested groups or individuals despite no explicit authority to do so.[121] The presiding member of the Appellate Body decision in *Shrimp* was Florentino Feliciano, a student of McDougal's at Yale in the mid-1950s. In the *United States—Lead Bars* case, the Appellate Body held in 2000 that it too had the discretionary authority to accept and consider amicus submissions.[122]

The high water mark in the WTO for NGO amicus briefs probably came in November 2000 in the *EC—Asbestos* case when the Appellate Body established a procedure to invite written submissions from persons other than parties or third parties. The Appellate Body acted out of recognition that this was the first WTO appeal involving public health and that the expected amicus briefs should be subject to transparency and other rules. The procedure required applicants to file for leave to submit a brief and to include information about the applicant.[123] Following the promulgation of the procedure, however, many WTO member governments objected and called a special session of the WTO General Council to criticize the Appellate Body for establishing a procedure that appeared to legitimize amicus briefs. Following the debate, the Chairman of the General Council warned the Appellate Body to "exercise extreme caution in future cases,"[124] and the Appellate Body got the message that its judicial independence was less than it had thought.[125] Consequently, the Appellate Body rejected all of the requests for leave that it received.

In my view, a good practice for acceptance of amicus briefs in trade disputes can be drawn from investment arbitrations under the North American Free Trade Agreement (NAFTA). In October 2003, the intergovernmental NAFTA Free Trade Commission issued a *Statement on Non-Disputing Party Participation* which recommended procedures for NAFTA tribunals to follow.[126] These procedures were immediately put in place by the *Methanex* Tribunal, which soon received applications and

121 A.L.C. de Mestral & M. Auerbach-Ziogas, *A Proposal to Introduce an Advocate General's Position into WTO Dispute Settlement*, *in* Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano 159, 171 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005).

122 Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. Int'l & Comp. L. Rev. 235, 240-41 (2002).

123 Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 52, WT/DS135/AB/R (Mar. 12, 2001).

124 Hollis, *supra* note 122, at 253.

125 *Id.* at 251-55. The chairman issuing the threat was Kåre Bryn of Norway.

126 NAFTA Free Trade Commission, Statement on Non-Disputing Party Participation (Oct. 7, 2003), http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta_commission.aspx?lang=en. This is an example of the important phenomenon of "external controls on international courts." *See* Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 Va. J. Int'l L. 411, 420-23 (2008).

written submissions from two NGO applicants.[127] Those submissions were accepted. The tribunal did not summarize the briefs, but did give a website address where the briefs were posted.[128] At one point in the Award, the tribunal took note of the "carefully reasoned Amicus submission" from the International Institute for Sustainable Development (IISD) and quoted a statement from it.[129] As noted above, Reisman was a member of the *Methanex* Tribunal.

Unfortunately, WTO dispute settlement lacks these elements of the good practice from the NAFTA, which provide transparency and objectivity. In the WTO, the government parties have not provided an ex post procedure for amicus submissions. In the WTO, the Appellate Body sometimes rejects amicus submissions. In the WTO, the Appellate Body does not summarize the amicus briefs it receives or give a website address where they are posted. In the WTO, the Appellate Body rarely comments on the substance of submissions, and if so only in a negative way. In the WTO, the Appellate Body has settled into the habit of a formulaic brush-off that it did not find the submission of assistance or did not take it into account. Until recently, one could generally count on the Appellate Body to list the names of the groups submitting briefs so that readers could ask them for the brief. But in the most recent decision, in the first case brought against China, the Appellate Body failed even to do that. Rather, the Appellate Body apparently sought to take the dignity and identity away from the friend of the court by referring to its work product solely as "an unsolicited *amicus curiae* brief."[130] Appended to this essay is a Table showing how the Appellate Body has treated the *petitions voeu* in all 14 cases where such briefs were submitted.[131] The Table demonstrates the accuracy of the pessimistic prediction offered by Jeffrey Dunoff in 1998 that "while the *Shrimp-Turtle* legal analysis deprives NGOs of a powerful rhetorical argument about the closed nature of trade regime dispute resolution processes, the doctrine guarantees no access, and the procedure that is used

127 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Chapter C, ¶ 28, 44 I.L.M. 1345, 1365 (NAFTA Chapter Eleven Arbitral Tribunal 2005), *available at* http://www.state.gov/documents/organization/51052.pdf. In 2001, the Tribunal had decided that "it has the power to accept *amicus* submissions (in writing)" from the NGO petitioners, and that it would make a "final decision whether or not to receive them at a later stage of these arbitration proceedings." Methanex Corp. v. United States, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae" (NAFTA Chapter Eleven Arbitral Tribunal Jan. 15, 2001), http://www.state.gov/documents/organization/6039.pdf.

128 *Methanex*, Final Award of the Tribunal on Jurisdiction and Merits, Part II, Chapter C, ¶¶ 29 & n.9, 44 I.L.M. at 1365 & n.9.

129 *Id*. Part IV, Chapter B, ¶ 27, 44 I.L.M. at 1446.

130 Appellate Body Report, *China—Measures Affecting Imports of Automobile Parts*, ¶ 11, WT/DS339/AB/R (Dec. 15, 2008). The Appellate Body failed to name the friend of the court in one prior case, *European Communities—Sardines*, in 2002.

131 If I had more space in this essay, I would do a similar analysis of amicus submissions to WTO panels. One interesting issue is whether panels that got reversed by the Appellate Body might not have had if they had followed advice given in amicus submissions.

effectively keeps NGOs outside the domain of WTO dispute resolution."[132] Writing in 2009, I would say that with respect to amicus submissions, the WTO is now as closed as ever.

In conclusion, this essay celebrates the work of Professor Reisman in elucidating the vital role of private initiative in influencing the variegated and interconnected processes of law. Standing on the shoulders of Professors McDougal, Lasswell, Feinberg and others in the twentieth century, Reisman—as a scholar, teacher, and jurist—has opened our eyes to see how broader participation can help to achieve and better sustain a world of human dignity. In a famous editorial comment in the *American Journal of International Law* in 1990, Reisman advises not to "commit an anachronism" in harking back to outdated concepts of sovereignty when thinking about human rights.[133] With his perennially optimistic and creative approach to international law, Reisman continues to challenge his colleagues and students to learn all we can from the past in order to create an optimal public and civic order for the future.

Appendix

How the WTO Appellate Body Has Handled Amicus Briefs

Dispute	Month & Year Adopted	Identity of Amicus Petitioners	Admissibility
US—Shrimp WT/DS58/ AB/R, ¶¶ 79, 83, 92	Nov. 1998	Earth Island Institute, Humane Society, and Sierra Club Worldwide Fund for Nature (WWF); Foundation for International Environmental Law and Development (FIELD) Center for International Environmental Law (CIEL), Centre for Marine Conservation, Environmental Foundation, Mangrove Action Project Philippine Ecological Network, Red Nacional de Accion Ecologica, and Sobrevivencia	All three briefs attached to U.S. submission Accepted revised third brief submitted directly to Appellate Body but did not comment on it
US—Lead and Bismuth II WT/DS138/ AB/R, ¶¶ 36, 42	June 2000	American Iron and Steel Institute Specialty Steel Industry of North America	"[W]e have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision."

132 Jeffrey L. Dunoff, *Border Patrol at the World Trade Organization*, 9 Y.B. Int'l Envtl. L. 20, 23 (1998).

133 W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866, 876 (1990).

EC—Asbestos WT/DS135/ AB/R, ¶¶ 53–57	Apr. 2001	39 organizations, companies or individuals from 20 countries: From Argentina: Centro de Estudios Comunitarios de la Universidad Nacional de Rosario; From Australia: Australian Centre for Environmental Law, Mr. Don Anton, Prof. Jan McDonald; From Belgium: European Trade Union Confederation, European Chemical Industry Council, International Federation of Free Trade Unions; From Canada: Syndicat des Métallos; From Colombia: Asociación Colombiana de Fibras; From El Salvador: Duralita de Centroamérica S.A.; From France: Ban Asbestos International and Virtual Network; From Korea: Korea Asbestos Association; From India: All India A.C. Pressure Pipe Manufacturer's Association, Maharashtra Asbestos Cement Pipe Manufacturers' Association, Only Nature Endures, Roofit Industries Ltd.; From Japan: Japan Asbestos Association; From The Netherlands: Greenpeace International; From Portugal: Associação das Indústrias de Produtos de Amianio Crisótilo; From Senegal: Sénac; From Sri Lanka: Asbestos Cement Industries Ltd.; From South Africa: South African Asbestos Producers Advisory Committee; From Swaziland: HVL Asbestos; From Switzerland: CIEL, Lutheran World Federation, WWF International; From Thailand: Federation of Thai Industries, Roofing and Accessories Club; From the United Kingdom: Association of Personal Injury Lawyers, FIELD, International Ban Asbestos Secretariat, J&S Bridle Associates, Occupational and Environmental Diseases Association; From the United States: American Public Health Association, Asbestos Information Association, Environment and American Chemistry Council, International Council on Metals, Prof. Robert Howse, Society for Occupational and Environmental Health.	Some briefs returned; All applications for leave to file a brief denied; some briefs not accepted
Thailand—H-Beams WT/DS122/ AB/R, ¶¶ 62–78	Apr. 2001	Consuming Industries Trade Action Coalition (US)	Rejected brief because it included reference to Thailand's Submission Also stated: "[W]e did not find the brief filed by CITAC to be relevant to our task"
US—Shrimp (Art. 21.5) WT/DS58/AB/ RW, ¶¶ 75, 78	Nov. 2001	American Humane Society and Humane Society International Prof. Robert Howse	Attached to U.S. Submission Howse Brief: "[W]e have not found it necessary to take into account" this brief
EC—Sardines WT/DS231/ AB/R, ¶¶ 19, 153, 160	Oct. 2002	A private individual	The "brief submitted by a private individual does not assist us in this appeal."

US—Countervailing Measures on Certain EC Products WT/DS212/AB/R, ¶ 76	Jan. 2003	American Iron and Steel Institute	"The brief has not been taken into account by us as we do not find it to be of assistance in this appeal."
US—Steel Safeguards WT/DS248/AB/R, ¶¶ 9, 268	Dec. 2003	American Institute for International Steel	"We note that the brief was directed primarily to a question that was not part of any of the claims. We did not find the brief to be of assistance in deciding this appeal."
US—Softwood Lumber IV WT/DS257/AB/R, ¶ 9	Feb. 2004	Indigenous Network on Economics and Trade (Canada) Defenders of Wildlife, Natural Resources Defense Council, Northwest Ecosystem Alliance (US)	"These briefs dealt with some questions not addressed in the submissions of the participants or third participants. … Ultimately, in this appeal, the Division did not find it necessary to take the two *amicus curiae* briefs into account in rendering its decision."
EC—Export Subsidies on Sugar WT/DS265/AB/R, ¶ 9	May 2005	Association of Central American Sugar Industries	The division "did not find it necessary to take this *amicus curiae* brief into account."
EC—Chicken Cuts WT/DS269/AB/R, ¶ 12	Sept. 2005	Association of Poultry Processors and Poultry Trade (EC)	"The Division does not find it necessary to take the brief into account in resolving the issues raised in this appeal."
Mexico—Taxes on Soft Drinks WT/DS308/AB/R, ¶ 8	Mar. 2006	National Chamber of the Sugar and Alcohol Industries of Mexico	"The Division did not find it necessary to take the brief into account in resolving the issues raised in this appeal."
Brazil—Retreaded Tyres WT/DS332/AB/R, ¶ 7	Dec. 2007	Humane Society International A joint brief from 9 NGOs from 5 countries: From Argentina: Centro de Derechos Humanos y Ambiente; From Belgium: Friends of the Earth Europe; From Brazil: Associação de Combate aos Poluentes, Associação de Proteção ao Meio Ambiente de Cianorte, Conectas Direitos Humanos, Instituto O Direito por Um Planeta Verde, Justiça Global; From Germany: The German NGO Forum on Environment and Development; From U.S: CIEL	"The Appellate Body Division hearing the appeal did not find it necessary to take these amicus curiae briefs into account in rendering its decision."
China—Auto Parts WT/DS339/AB/R, ¶11	Jan. 2009	"An unsolicited *amicus curiae* brief"	The "Division hearing the appeal did not find it necessary to rely on this amicus curiae brief in rendering its decision."