Extended table of contents

Lis	t of	contr	ibutors		XV
Pre	eface				xvii
Int	rodu	ction:	Internat	tional lawmaking in a global world	1
Ca	theri	ne B	rölmann	and Yannick Radi	
	1.	Taki	ng stock		1
	2.	Two	landsca	pes	2
		2.1	Feature	es of the socio-legal landscape	3
		2.2		es of the theoretical landscape	6
	3.	The	organiza	ation of this Handbook	7
PA	RT I	TF	IEORET	ICAL VIEWS OF INTERNATIONAL LAWMAKING	
1.	Sta	te co	ncent ac	foundational myth	13
1.			G. Werne		13
	1.		duction		13
				m evolution and the purposes of law	15
				sovereign equality	21
				at as instrument to protect sovereign equality	21
				determinacy of sovereign equality	23
	4.		itoriality		26
	5.		clusion		30
2.	Sul	ojects	and acto	ors in international lawmaking: The paradigmatic divides	
				of international norm-generating processes	32
	Jea	n d'A	spremon	at	
			duction		32
	2.	Emp	oirical co	ncord: The pluralization of international lawmaking	35
		2.1	Manife	stations of pluralization in the practice of international	
			lawmak		35
				ng state dominance?	39
	3.	Con	ceptual c	discord: The paradigmatic divides in the cognition of	
				lawmaking	41
		3.1		t and participant as cognitive tools of lawmaking processes	41
			3.1.1	Static subject-based approaches to lawmaking	42
		2.0	3.1.2	Dynamic participation-based approaches to lawmaking	45
		3.2		tive 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

viii Research handbook on international lawmaking

	4.	Concluding remarks: Epistemic pluralism and epistemological	50				
		self-interests	53				
3.	Tra	nsnational lawmaking	56				
		Dennis Patterson					
	1.	Introduction	56				
	2.	Transnational legal phenomena	57				
	3.		60				
	4.		60				
	5.	A CONTRACTOR OF THE PROPERTY O	62				
	6.	• • • • • • • • • • • • • • • • • • • •	65				
		*					
4.	Co	ntemporary theories and international lawmaking	66				
		o Venzke					
	_		66				
	2.	From sources to communicative practice	69				
		1	69				
		0 0 11	70				
			72				
	3.		74				
	4.		75				
	5.	•	77				
			79				
	7.		81				
	8.		83				
PA	RT I	I INTERNATIONAL LAWMAKING IN AN INTER-STATE SETTING					
5.	Lav	ymaking by treaty: Negotiation of agreements and adoption of treaty					
	tex		87				
		sten Schmalenbach					
	1.		87				
	2.		88				
			88				
		, ,	89				
			89				
			90				
	0		94				
	3.	1 , 0					
	4.	1 , 8	97				
		1 6 6	98				
		1 0	99				
			99				
		0	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	Negotia	ating international regimes	104
	5.	Ado	otion of	the treaty text	105
		5.1	Proced	ural 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.	Cond	clusion		110
		1.	lave 4	restry Constrain of treaties and avalution of treaty	
6.				reaty: Conclusion of treaties and evolution of treaty	111
			in practi		111
				and Malgosia Fitzmaurice	111
	1.		duction	ion of consent to be bound in the procedure for the	111
	2.			of a treaty under the VCLT	112
			The fo	rms of a state's expressing consent to be bound in	112
		2.1		king by treaty	114
		2.2		aking instruments going beyond the requirement of consent	111
		2.4		the VCLT	116
	3.	Law		through an evolving treaty regime	117
	J.	3.1		aking through tacit acceptance ('opting out system') under	
		5.1	a treaty		118
		3.2		aking through the decisions and activities of treaty bodies	118
		0,120	3.2.1	Bases for the powers of COPs and MOPs to develop a	
			0.2.2	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.	Law		through the evolutionary interpretation of a treaty regime	
			judicial		128
	5.	-		through subsequent practice	130
	6.		clusions		131
7.				of customary international law: Between theory and practice d Michael Wood	133
	1.			a principal source of international law	134
	2.			al elements: Theory	137
	3.			al elements in practice	145
	4.			actice and theory a little closer? The International Law	
				a's topic 'Identification of customary international law'	154
	5		clusion		157

x Research handbook on international lawmaking

8.		lying on general principles in international law atrice I. Bonafé and Paolo Palchetti	160	
		1. Introduction: General principles as a source of international law		
	2.	The identification of general principles: A source ultimately based on	160	
		consent	162	
	3.	General principles as an autonomous source of general rules	165	
	4.	and the state of t	1.00	
	5.	general principles The role of states in presenting the role of states in presenting the role of states in presenting the role of states in the role of st	168	
	6.	Promise Promis	174	
	0.	General assessment	175	
PA	RT I	III INTERNATIONAL LAWMAKING BEYOND THE STATE		
9.		titutional lawmaking: The emergence of a global normative web	179	
	Rai	mses A. Wessel		
	1.	The state of the s	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.		ernational judicial lawmaking	200	
	Gle	eider I. Hernández		
	1.		200	
		International judicial lawmaking	200	
			202	
		3.1 The formal role of the International Court in international law-		
		making	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.	Do	mestic judicial lawmaking	222
		onios Tzanakopoulos	
	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.	Qu	asi-judicial bodies	242
		ara Tignino	
	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	100 000
		mechanisms	245
	0	Quasi-judicial bodies: Leading institutional reform?	246
	0	A contribution to common procedural fairness principles?	249
		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:	0.55
		How much influence?	257
	5.	Final remarks	260
10	T4	and the standard for the by hybrid hodies. The case of financial regulation	262
13.		ernational lawmaking by hybrid bodies: The case of financial regulation	202
	-	chael S. Barr	262
	1. 2.	Introduction The international financial regulatory architecture before the recent	202
	۷.	crisis	264
		2.1 Phase I: The Bretton Woods System	264
		2.2 Phase II: Rise of the networks	267
	3.		272
	5.	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

xii Research handbook on international lawmaking

14.		ernational lawmaking and civil society	286	
		rbara K. Woodward		
	1.		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	Lor	wmaking by scholars	305	
13.			303	
	1.	Introduction	205	
			305	
	 3. 	Scholarship in article 38(1)(d) of the ICJ Statute	306	
	5.	The juridical view and its limitations	310	
		3.1 The sources as basis for assessing the lawmaking faculties of	210	
		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	
	4	3.3 Can scholarship make law?	320	
	4.	The socio-empirical view and its limitations	320 324	
	5. Conclusion			

PART IV INTERNATIONAL LAWMAKING IN SELECTED ISSUE AREAS

16.		making of international human rights law	329
		silis P. Tzevelekos	
	1.	The making of human rights in international law: The short and the	329
	_	long version of the story to tell	34)
	2.	A methodological impasse and two strands of shortcomings within	331
		international legal positivism	338
	3.	The role of judicial recognition	336
		3.1 Broadening already existing rights and the usefulness in that	220
		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.		240
		and the quest for legitimacy	349
			354
17.		e making of international criminal law	334
		gey Vasiliev	354
	1.		356
	2.	Complexities of lawmaking in ICL	356
		2.1 Bridging formalist and realist views2.2 Specialization and profusion: Norms, institutions, sources	357
	2	2.2 Specialization and profusion: Norms, institutions, sources Substantive constraints on lawmaking: legality in a paradox field	363
	3.		363
		3.1 Sources of ICL: Legality between positivism and natural law 3.2 Interpretation as spectrum: Elucidating, developing, making ICL	373
		3.3 Reclaiming legality in the march of progress	378
	4.	TOT III ' flow (no) and describe	380
	т.	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	. Th	e making of international trade law	395
	Mo	ary E. Footer	204
	1.		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	402
		2.2 Modification of WTO treaty obligations	
		2.2.1 Treaty amendment	402
		2.2.2 Modification by waiver	40.
		2.2.3 Authoritative interpretation	400
	2	2.2.4 Subsequent agreement and subsequent practice	41
	3.	Secondary lawmaking in the WTO	11.

xiv Research handbook on international lawmaking

		3.1	Framework for analysis of secondary lawmaking	41			
		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.	Cond	clusions	41'			
19.	. The making of international environmental law						
	Fre	incesc	a Romanin Jacur				
	1.	Intro	duction: The originality of international environmental law	419			
	2.	Lawı	making 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 state of the s	428			
	3.		cial 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.	Norn	native developments in environmental matters through trade and				
			tment law	434			
			Environmental matters in trade and investment agreements	434			
		4.2	The consideration of environmental matters in WTO jurisprudence	435			
	5.	Non-	The consideration of environmental matters by arbitral tribunals State actors' participation in international environmental	437			
		lawm	aking: NGOs, private persons and standard-setting associations	438			
	6.	Conc	luding remarks	440			
20.	The	maki	ing of international natural resources law	442			
			Intyre				
	1.	Introd	duction	442			
	2.	Lawn	naking in international natural resources law through classic				
		sourc		446			
			International conventions	447			
			Customary international law	451			
			General principles of law	454			
			Judicial and arbitral tribunals	456			
			Publicists	458			
	3.	Lawn	naking in international natural resources law beyond article 38	458			
			Reliance on 'soft law'	459			
		3.2	Technical complexity and the role of international institutions	460			
			Multi-level governance	461			
		3.4	Sophisticated participatory processes	462			
		3.5	Fragmentation vs integration	464			
Inde	ex			467			