Should States be Monopolizing International Treaty Law?

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I. INTRODUCTION

There are numerous ways international law becomes law. It is formed through a variety of methods, a mélange that includes customary practice, widely held principles, even scholarly and judicial pronouncements. Yet treaties between States remain the most common source of international law. States voluntarily become signatories to treaties and are bound by their terms, establishing new international law in the process. But the dominance of this model, which elevates the nation-state above all other legal actors, may damage the efficacy of the international law regime. Indeed, "[w]hether international law is ultimately effective in accomplishing its goals may depend less on whether a [S]tate complies and more on whether sub-state entities act consistently with the goals of

international law."[1] There is evidence that "sub-state entities" (the private sector) comply with international law only 51% of the time.[2] This level of noncompliance is especially troubling at a time when non-state-actors' actions weigh heavily on the objectives set forth in almost all types of treaties including those on human rights, the environment, global health, and financial regulations.

This Note proposes that bottom-up soft international lawmaking can be used to create hard international treaty law, and that bottom-up treaty law naturally creates conditions that enhance treaty compliance according to the persuasion treaty theory. That is, that the norms and standards enforced among non-state actors can be injected into the treaty making process as a way of enhancing non-state actor compliance. A convergence of these two theories has been modeled by the novel Cape Town Treaty, which could serve as a template for a new kind of international lawmaking. Part II provides background on international law, international law compliance, the persuasion treaty theory, and the Cape Town Treaty. Part III argues that the Cape Town Treaty is an example of bottom-up hard international lawmaking and that the bottom-up lawmaking model naturally creates conditions that are likely to encourage treaty compliance. Finally, Part IV makes incremental recommendations for future treaty-makers based on the Cape Town Treaty model. This Note is offered as a contribution to the growing body of scholarship arguing that the State-centric international lawmaking model is just one of numerous models that should be used to create international law in the future.[3]

II. BACKGROUND

A. History of Treaties

The term "international law" was coined in 1789 by Jeremy Bentham to refer to "the mutual transactions between sovereigns as such."[4] One way international law is created is through treaties.[5] Sir Gerald G. Fitzmaurice, a rapporteur on the Law of Treaties for the United Nations (U.N.) International Law Commission defined a treaty as:

> [A]n international agreement embodied in a single formal instrument . . . made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law.[6]

The law of treaties has been codified in the Vienna Convention on the Law of Treaties

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1. Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743, 747 (2013).
2. *Id.* at 750–51 (assessing the international financial transparency law compliance of more than 1000 firms).
3. *See, e.g.*, Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 268 (2016) [hereinafter Durkee, *Business of Treaties*] (discussing the consequences of a state-centric international treaty perspective that ignores global business actors); *see generally* David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 203 (May 2, 2016); Charles W. Mooney Jr., *The Cape Town Convention's Improbable-but-Possible Progeny Part Two: Bilateral Investment Treaty-Like Enforcement Mechanism*, 55 VA. J. INT'L L. 451 (2015).
4. M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 62 (1984).
5. MARK WESTON JANIS, INTERNATIONAL LAW 16–17 (7th ed., 2016).
6. Denys P. Myers, *The Name and Scope of Treaties*, 51 AM. J. INT'L L. 574, 574–75 (1957).

(Vienna Convention) in 1980.[7] While the Vienna Convention organized treaty-making by establishing concrete steps to treaty development and implementation,[8] treaties have been utilized by States for centuries. In 160 B.C., the Jews and the Romans entered into a bilateral mutual defense treaty; in 1648, the Peace of Westphalia, a multilateral treaty, ended the thirty-year war between the Catholics and Protestants in the Holy Roman Empire and Sweden; and the declarative bilateral treaty of 1867 outlined the cession of Alaska from Russia to the United States.[9] To date, the Vienna Convention has been adopted and ratified by 116 countries.[10]

As one of the primary sources of international law, treaties are legally binding because they are voluntarily created and entered into by sovereign States.[11] Treaties are created to accomplish different goals. For example, a contract treaty—such as the aforementioned 1867 treaty that outlined the purchase of Alaska—facilitates an exchange.[12] A legislation-like treaty formulates rules to regulate behavior.[13] An aspirational treaty codifies goals for the international community.[14] And a constitution-like treaty such as the U.N. Charter establishes the foundation of an international legal body.[15]

The immediate post-WWII era was the apex of the idealistic international law system. International lawyers maintained faith in the State-centric system, believing "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[16] This sunny belief was at odds with a growing chorus of political scientists and international relations theorists who asserted that "law is simply a mask for power" and "when power and law come into conflict in international affairs, politics is the phenomenon and law is the epiphenomenon."[17] This strained dichotomy—one half conceiving of international law as the embodiment of noble principles, the other as the shrewd application of power—is brought into sharp relief by the ever-shifting answers given to the following question: who does international law

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7. WESTON JANIS, *supra* note 5, at 17.

8. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331I.

9. MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 31–49 (5th ed. 2014).

10. Vienna Convention on The Law of Treaties, *supra* note 8. While the United States is not a party, the United States Department of State recognizes the convention as "the authoritative guide to current treaty law and practice." WESTIN JANIS, *supra* note 5, at 17.

11. WESTIN JANIS, *supra* note 5, at 10.

12. *Id.* at 14.

13. *Id.*

14. *Id.*

15. *Id.* The U.N. Charter is a multilateral agreement that established the purpose, governing structure, and the overall framework of the U.N. which has an overarching goal of maintaining international peace and security. Richard Edis, *A Job Well Done: The Founding of the United Nations Revisited, in* INTERNATIONAL LAW CASES AND COMMENTARY 623, 623–28 (5th ed., 2005). The U.N. Charter went into effect in June 1945 after World War II when the United Nations emerged from the ashes of the League of Nations. *Id.* Today the U.N. Charter has 193 member States. *See Growth in United Nations Membership*, UNITED NATIONS, https://www.un.org/en/about-us/growth-in-un-membership#2000-Present [https://perma.cc/J4YV-NNDV] (listing 51 members at the original 1945 signing, and 193 members with the signing of South Sudan in 2011).

16. Harold Hongju Koh, *Transnational Legal Process,* 75 NEB. L. REV. 181, 191–92 (1996) (quoting Louis Henkins' assertion of international law compliance).

17. *Id.* at 192 (describing the perspective of international relations theorists, particularly political realists).

govern?[18]

B. Subjects of International Law

During the 19th and 20th centuries, the positivist theory of international law defined individuals as objects of international law, meaning individuals had no rights or duties under international law.[19] However, individuals as subjects have long resided on the periphery of international law. In 1784, a U.S. court determined that the Chevalier De Longchamps, an individual, was guilty of violating international law.[20] In 1900, the U.S. Supreme Court determined that individual U.S. citizens had the right to rely on the international customary law that protects fishing boats from seizure during war in *The Paquete Habana* case.[21] After WWII, military tribunals at Nuremberg and Tokyo prosecuted individuals as war criminals under international law.[22] Today, individuals are less likely to be thought of as mere objects of international law; instead, individuals are subjects of international law whose rights are established in numerous multilateral treaties.[23]

C. Actors in International Law

While individuals can now be the subject of international law, the current Westphalian international law model[24] only allows States to create law; therefore, "private actors do not have legal identity in the production of law."[25] Despite this technicality, non-state actors have carved out avenues of influence—both legal and illegal. Article 71 of the U.N. Charter is one legal route for non-governmental organization (NGO) lobbying in the international arena.[26] Article 71 states: "The Economic and Social Council [ECOSOC] may make suitable arrangements for consultation with non-government organizations which are concerned with matters within

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18. For a deeper analysis of the various models of international law interpretation, see generally Anne-Marie Slaughter & Steven R. Ratner, *Appraising the Methods of International Law: A Prospectus for Readers,* 93 AM. J. INT'L. L. 291 (1999).

19. JANIS & NOYES, *supra* note 9, at 441. Positivism is theory of individuals as objects of international law. *Id.*

20. Respublica v. De Longchamps, 1 U.S. 111, 114 (1784).

21. The Paquete Habana; The Lola, 175 U.S. 677, 713–14 (1900).

22. Janis, *supra* note 4, at 65–66.

23. *See generally id.* at 61 ("This Article rejects the positivist subject based approach to international law and calls for a definition of the discipline that recognizes individuals as subjects of international law.").

24. "Westphalian international law model" refers to the centralized power of the nation-State. In 1648, the Thirty Years' War ended with the Peace of Westphalia. The Peace of Westphalia helped bring about European political rule by emperors, clergymen, or feudal lords and established "the domestic jurisdiction of each territorial state." *See generally* Jason Farr, *Point: The Westphalia Legacy and the Modern Nation-State,* 80 INT'L SOC. SCI. REV. 156, 156–57 (2005).

25. Caroline Devaux, *The Role of Experts in the Elaboration of the Cape Town Convention: Between Authority and Legitimacy*, 19 EUR. L.J. 843, 844 (2013).

26. Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742, 1754–55 (2018). Interestingly, Article 71 was successfully lobbied for by NGOs during the San Francisco round of negations of the U.N. Charter. NGOs had a role in the League of Nations and wanted a role codified in the U.N. Charter. Article 71 is evidence of NGO success in this matter; however, NGO's are clearly defined as consultants—subservient to States. *Id.* at 1746 n.3.

its competence."[27] ECOSOC[28] has established three levels of accreditation for which NGOs can apply to be consultants: General, Special, and Roster.[29] General Consultants have a broad range of access and privileges, while Special and Roster Consultant's access has a more limited scope.[30] Currently, there are 4,600 ECOSOC-accredited NGOs.[31] The legal scope of influence, however, is limited to ECOSOC and does not extend to other highly influential U.N. governing bodies such as the General Assembly[32] or the Security Council.[33] Other prototypes exemplifying legal consultation by non-state actors are exemplified in the International Monetary Fund's model—where expert input is elicited during specific decision periods—as well as in the International Labour Organization, U.N. Women, and the GAVI Alliance—which offer membership and voting rights to non-State actors.[34]

Defining non-state actors in this sphere is rife with complication. The ECOSOC consultation accreditation program is limited to nonprofits; however, the accreditation qualifications are interest-blind, meaning NGOs can advocate on behalf of for-profit businesses.[35] Indeed, many multinational corporations have created nonprofit organizations for the sole purpose of having a voice on the international stage.[36] Other private actors have chosen more nefarious routes to influence such as bribery, backdoor-dealing, and illegal lobbying.[37] Currently, there is "no international law that regulates business participation in the making of treaties."[38]

D. The Cape Town Treaty

The multilateral Cape Town Treaty entered into force on March 1, 2006—the culmination of years of collaboration between States, corporations, and intergovernmental organizations.[39] The goal of the treaty was to address "the lack of recognition, priority, or enforcement in one state of a security interest in mobile

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27. U.N. Charter art. 71.

28. *See About Us*, ECONSOC, https://www.un.org/ecosoc/en/about-us [https://perma.cc/BLK2-2B26]. ECOSOC: [I]s at the heart of the [U.N.] system to advance the three dimensions of sustainable development – economic, social and environmental. It is the central platform for fostering debate and innovative thinking, forging consensus on the ways forward, and coordinating efforts to achieve internationally agreed goals. *Id.* It is "one of the six main organs of the [U.N.]." *Id.*

29. Durkee, *supra* note 26, at 1757.

30. *Id.* ECOSOC outlines the goals of having consultants and the rules for becoming a consultant in Resolution 1996/31. Economic and Social Council Res. 1996/31 (July 25, 1996).

31. Melissa J. Durkee, *Industry Lobbying and "Interest Blind" Access Norms at International Organizations*, 111 AJIL UNBOUND 119, 120 (2017) [hereinafter Durkee, *Industry Lobbying*].

32. The U.N. General Assembly was established through the U.N. Charter in 1945. It is comprised of all member States and is the "chief deliberative, policymaking and representative organ of the United Nations." *About the General Assembly*, UNITED NATIONS, https://www.un.org/en/ga/about/background.shtml [https://perma.cc/XY45-ES4K].

33. Durkee, *supra* note 26, at 1755.

34. *Id.*, at 1758.

35. Durkee, *Industry Lobbying*, *supra* note 31, at 121.

36. Durkee, *Business of Treaties*, *supra* note 3, at 268 (detailing how corporations form transnational coalitions to address their concerns to international lawmakers).

37. Durkee, *supra* note 26, at 1799.

38. Durkee, *Business of Treaties*, *supra* note 3, at 268.

39. Mark J. Sundahl, *The Cape Town Approach: A New Method of Making International Law,* 44 COLUM. J. TRANSNAT'L L. 339, 341 (2006).

equipment created under the law of another state"[40]—essentially, to create a modern, international law of secured transactions.[41] One major issue at this time was that the financing of mobile equipment was subject to the domestic law in which the equipment was located. So when equipment failed, the investor's rights could be subject to any number of domestic laws.[42] This uncertainty led to difficulties in obtaining financing and made financing for mobile equipment expensive.[43] When the treaty was proposed in June of 1988 by the Canadian Government to the intergovernmental organization UNIDROIT,[44] the need for a global standardization for secured transactions for mobile equipment was apparent.[45] Before 1988, this issue had been explored by the European Economic Community, the U.N. Commission on International Trade Law, the International Civil Aviation Organization, and the U.N. However, due to clashes between civil and common law, a solution proved elusive.[46]

UNIDROIT decided to take on the challenge only after extensive analysis.

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40. Ronald C.C. Cuming, '*Hot Issues' in the Development of the (Draft) Convention on International Interests in Mobile Equipment and the (Draft) Aircraft Equipment Protocol*, 34 INT'L LAW. 1093, 1095 (2000). Mobile equipment includes airframes with aircraft engines installed or helicopters, railway rolling stock, "space assets," and "agricultural equipment" and "construction equipment" as defined by the Harmonized Systems code (listed in full in the Mining, Agricultural and Construction Equipment (MAC) Protocol Annex 2 and 3, respectively). Note that only the Aircraft Protocol has been ratified. *Convention on International Interests in Mobile Equipment*, UNIDROIT, https://www.unidroit.org/english/conventions/mobile-equipment/181219-ctc-print-ef.pdf [https://perma.cc/9W9S-GY8E]. In contrast, The Rail Protocol, Space Protocol, and MAC Protocol have not entered into force. *Status – Luxembourg Protocol to the Convention on the International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007),* UNIDROIT, https://www.unidroit.org/instruments/security-interests/rail-protocol/status/ [https://perma.cc/3B62-FE32] [hereinafter *Rail Protocol*]; *Status – UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 2012)*, UNIDROIT, https://www.unidroit.org/status-2012-space [https://perma.cc/B4NY-LACS] [hereinafter *Space Protocol*]; *MAC Protocol – Status*, UNIDROIT, https://www.unidroit.org/instruments/security-interests/mac-protocol/status/ [https://perma.cc/Z6XK-V4Y8] [hereinafter *MAC Protocol*].

41. Sundahl, *supra* note 39, at 344.

42. Durkee, *Business of Treaties*, *supra* note 3, at 292. For example, if:

> a Boeing airplane, came to rest in Country X[,] under the laws of Country X, would the investor's loan have priority over other interests? Would the investor be able to auction the equipment and pocket the proceeds in satisfaction of the debt? Before the Convention, because investors were subject to the domestic law of the regime in which the aircraft was located, they suffered the uncertainty of not knowing up front—at the time of making the initial financing contract—what rules would attach at the time of default.

Id.

43. *Id.*

44. "The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organization . . . [with a] purpose [] to study needs and methods for modernizing, harmonizing and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives." UNIDROIT was originally an auxiliary organ of the League of Nations and was later reestablished through a multilateral treaty in 1940. *History and Overview,* UNIDROIT, https://www.unidroit.org/about-unidroit/overview [https://perma.cc/G72X-LUV4]. UNIDROIT has 63 members, the vast majority of which are from the global north. *See generally Membership,* UNIDROIT, https://www.unidroit.org/about-unidroit/membership [https://perma.cc/5SKE-9RLM] (listing all member States by geographic region).

45. Martin J. Stanford, *Completion of a First Draft of Unidroit's Planned Future Convention on International Interests in Mobile Equipment,* 1 UNIF. L. REV. 274, 274 (1996).

46. Sundahl, *supra* note 39, at 345–46.

UNIDROIT requested a background report, collected data through a widely-distributed questionnaire,[47] and created a Restricted Exploratory Working Group to establish the economic benefits of a treaty.[48] Once the future economic benefits were substantiated, UNIDROIT formed a Study Group comprised of "a blend of the world's major legal systems and geographic regions"[49]—including industry representatives—to create the first draft of the treaty.[50] Thereafter, the Study Group or sub-committees of the Study Group met in 1993, 1995, and 1996 to start drafting the treaty.[51] During this period the Study Group focused on creating a treaty that encompassed the disparate components of the mobile equipment industry, including aircraft, aircraft engines, mobile oil rigs, containers, railway rolling stock, registered ships, and space assets.[52] While the Study Group was developing the treaty, an Aviation Working Group (AWG) comprised of industry representatives[53] was formed. The International Civil Aviation Organization (ICAO) and the International Air Transport Association (IATA) also became involved.[54]

In 1996, treaty negotiations hit a critical juncture which threatened the future of the treaty. However, the AWG and IATA worked together to find a solution forward—the industry-specific supplement to a base treaty.[55] In January 1997, AWG, IATA, and ICAO branched off to create an aviation treaty supplement called the Aircraft Protocol while UNIDROIT continued to work on the "umbrella" convention.[56] The new intent of the treaty drafters was to create a whole new kind of treaty: the "Convention plus Protocols" approach.[57] The Convention and Aircraft Protocol is comprised of three components. First, it created "a new type of international financier's interest that will be recognized in all states that are parties."[58] Second, the treaty created an international registry (IR) for financiers to register their interests to ensure priority over later-in-time interests.[59] Lastly, the treaty established remedies for financiers if the borrower defaults.[60] To date, the

47. Equipment suppliers, buyers, financiers, and governmental agencies of several countries were questioned on their interest in a treaty that standardized secure transactions for mobile equipment. The questionnaire was in three parts: Part 1 dealt with commercial issues, Part II with legal concerns and logistics of the then proposed project, and Part III was blank space available for individual comments. *See* UNIDROIT, *International Regulation of Aspects of Security Interests in Mobile Equipment: Questionnaire*, 1, 3 UNIDROIT Study LXXII-Doc.2 (Dec. 1989).

48. Sundahl, *supra* note 39, at 348.

49. Stanford, *supra* note 45, at 274.

50. Sundahl, *supra* note 39, at 349. The study group was formed in 1992. Stanford, *supra* note 45, at 276.

51. Stanford, *supra* note 45, at 274, 276.

52. *Id.* at 276.

53. Industry representatives included "organizations involved in the sale, financing, and use of commercial aircraft." Cuming, *supra* note 40, at 1094. The Aviation Working Group was co-chaired by The Boeing Company and Airbus. Sundahl, *supra* note 39, at 350.

54. Sundahl, *supra* note 39, at 350. The IATA represented 265 airlines. *Id.*

55. Lorne Clark, *The 2001 Cape Town Convention on International Interests in Mobile Equipment and Aircraft Equipment Protocol: Internationalizing Asset-Based Financing Principles for the Acquisition of Aircraft and Engines,* 69 J. AIR L. & COM. 3, 5–6 (2004).

56. *Id.*

57. *Id.* at 5.

58. International Civil Aviation Organization, *The International Registry After 10 Years—Civil Aviation's Great Success Story*, A39-WP/422 LE/14, § 2.4 (Sept. 13, 2016).

59. *Id.*

60. *Id.*

Aircraft Protocol and Convention has 82 members,[61] and protocols addressing rail, space, mining, agricultural and construction equipment are under development, waiting for ratification.[62]

E. Bottom-Up Lawmaking: Soft International Law

International law, unlike domestic laws, can be "'harder' or 'softer' [in] legal character."[63] While the exact nature of international law remains contested, hard international law is generally understood to "refer[] to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."[64] In contrast, "[t]he realm of 'soft law' begins once legal arrangement[s] are weakened along one or more of the dimensions of obligations, precision, and delegation."[65] Hard and soft international law can be defined in binary terms; however, when approaching international law from an "ex ante negotiation perspective" it is better to think of hard law as if it were like domestic law and to think of all other steps in the international lawmaking process as if they exist somewhere on a sliding scale—from soft law to hard binding international law.[66]

Bottom-up international soft law creation is "rooted in the informal—in spontaneous, unchoreographed processes and soft, practice-based rules . . . [and] remains largely undiscovered as an alternative path to law."[67] The elements of bottom-up soft lawmaking include: (1) "a close-knit, homogeneous group" acting on behalf of a public industry (2) whose norms or group practices become codified technical rules.[68] (3) The technical rules are defined by substantive law and accompanying interpretations along with remedial norms. (4) The codified technical rules are created or appropriated and managed by an institutional home. Often the remedial norms include reputation as a self-enforcement mechanism: "reputational standing orders behavior within closed, homogeneous communities"[69] (5) Lastly, bottom-up lawmaking creates soft law through a "gentlemen's agreement."[70]

Bottom-up soft lawmaking is the natural evolution of industry practices that spread from one organization to another until a specialized industry has established naturally harmonized business practices.[71] The goal of bottom-up soft lawmaking is to make inter-

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61. Convention on International Interests in Mobile Equipment, *supra* note 40.

62. *See Rail Protocol*, *Space Protocol*, and *MAC Protocol*, *supra* note 40.

63. Gregory C. Shaffer and Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 714 (2010).

64. *Id.* at 712, 714–15.

65. *Id.* at 715.

66. *Id.*

67. Janet Koven Levit, *A Bottom-Up Approach to International Law Making: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 126, 130 (2005). Professor Levit coined the term "bottom-up lawmaking" to refer "to a process whereby discrete groups of transnational practitioners translate their practices and customs into code-like rules that ultimately harden into law." *Id.* at 129, n.7.

68. *Id.* at 168–71.

69. *Id.* at 172.

70. *Id.* at 173.

71. Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 IND. J. GLOB. LEGAL STUD. 49, 55 (2008).

industry transactions easier.[72] However, bottom-up lawmaking always ends in hard law—usually, once the harmonized business practices are so ingrained in a community that the community adopts the custom as law.[73]

F. International Law Compliance

Treaty compliance is notoriously difficult to determine and theorists often make proclamations on the topic based on beliefs[74] rather than quantitative data.[75] The field of treaty compliance is saturated with theories of why States comply with treaties, but the study of for-profit business compliance—third-party compliance—is far less studied.[76] Third-party compliance, however, is essential to the success of numerous treaties[77] that address human rights, the environment, global health, and financial regulations.[78] Indeed, some scholars argue that treaty success is more dependent on third-party compliance than on State compliance.[79] One small-scale empirical study suggests that only 51% of international financial transparency firms comply with international laws[80] and informing businesses of the relevant international laws does not increase compliance.[81]

The persuasion treaty theory attempts to fill the grey area between public (State) and private international law by arguing that private sector treaty compliance needs to be regulated to increase the probability of treaty success.[82] The persuasion treaty theory argues that treaty compliance can be enhanced by urging the private sector to create objectives that align with the goals of a treaty by creating new regulatory methods that "put[] corporate choices in the public eye."[83]

G. Measuring Success of the Cape Town Treaty

There is evidence of growing acceptance of and compliance with the Cape Town Treaty.[84] When the Cape Town Treaty entered into force in 2006 there were only eight signatories; today the treaty has 82 signatories including the European Union.[85] The AWG has created the Cape Town Convention Compliance Index (the Index) which tracks and publishes information on State compliance based on a scoring formula.[86] The goal of

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72. *Id.*

73. *Id.* at 56.

74. For example, see *supra* note 16 citing Louis Henkin.

75. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 177 (1993).

76. *See generally* Melissa Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63 (2013) (calling for study and theory development for treaties targeting the interests of third-parties) [hereinafter Durkee, *Persuasion Treaties*]. Professor Melissa Durkee has labeled treaties that bind States' behavior as "resolution treaties" and treaties that bind third-parties as "persuasion treaties." *Id.* at 67–68.

77. *Id.* at 70.

78. Baradaran et al., *supra* note 1, at 761.

79. *Id.* at 747.

80. Financial Action Task Force (FATF), U.N. Convention Against Transnational Organized Crime (UNTOC) 766–79.

81. Baradaran et al., *supra* note 1, at 750–51.

82. Durkee, *Persuasion Treaties*, *supra* note 76, at 70.

83. *Id.* at 71.

84. *See generally* International Civil Aviation Organization, *supra* note 58.

85. *Convention on International Interests in Mobile Equipment*, *supra* note 40.

86. *See generally Cape Town Convention Compliance Index*, AVIATION WORKING GRP., http://awg.aero/wp-content/uploads/2019/10/CTC-Compliance-Index-Website-updated-October-2019.pdf

the Index is to incentivize compliance and provide risk assessment.[87] This index currently categorizes eight States as having "very high" compliance, six States as having "high" compliance, seventeen States as having "medium" compliance, and dozens of other States with "low" or unrecorded compliance scores.[88] One element that contributes to the compliance score is the use of the international registry (IR) system required by Article 16 of the Cape Town Convention (the base treaty).[89] The use of the IR in both registering equipment and searching for registered equipment has been increasing highlighting "a growing level of activity in the aviation financing market."[90]

III. ANALYSIS

The Cape Town Treaty is an example of a novel form of treaty creation that punctures the exclusivity of the Westphalian treaty-making model. The Cape Town Treaty is an example of a private-public, bottom-up treaty-making model. The traditional bottom-up lawmaking model results in soft law which is only adopted into hard law after becoming industry custom. However, Part III.A of this Note proposes that the same elements of bottom-up lawmaking were present in the Cape Town Treaty when the initial goal of the treaty was to create binding international law. Part III.B outlines how bottom-up treaty creation naturally enhances corporate compliance according to the persuasion treaty theory. In naming a theoretical framework for an alternative model of international law, this Note aims to contribute to the growing body of work arguing that the Westphalian international lawmaking model is just one of numerous models that should be used in the future.[91] This Note further argues that this alternative lawmaking model would likely enhance private sector compliance.

A. The Cape Town Treaty and the Conventions Plus Protocol: Bottom-up Treaty-making

While international lawmaking has traditionally been the exclusive domain of the sovereign State, there is no question that corporations are indirectly involved in treaty creation.[92] The Westphalian model does not address major issues facing international treaty-making such as "treaty law's inability to respond to the deep embeddedness of business entities in the process of treaty production."[93] This section provides evidence that the Cape Town Treaty is an example of bottom-up treaty-making by overlaying the elements of Koven Levit's bottom-up soft law creation theory. These elements include

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[https://perma.cc/W9B5-FP2D]. A full methodological explanation published by the Aviation Working Group can be found at: https://ctc-compliance-index.awg.aero/CTC%20Compliance%20Index%20-%20 Methodology.pdf [https://perma.cc/U6BC-QFYE].

87. *Cape Town Convention Compliance Index,* AVIATION WORKING GRP., https://ctc-compliance-index.awg.aero/index [https://perma.cc/998P-FF2M].

88. *Id.*

89. Convention on International Interests in Mobile Equipment, Nov. 16, 2001, 2307 U.N.T.S. 41137–41149.

90. International Civil Aviation Organization, *The International Registry After 10 Years—Civil Aviation's Great Success Story*, *supra* note 58, at A-2, A-3.

91. *See* Durkee, *Persuasion Treaties*, *supra* note 76, at 65 ("Responding to recent treaty failure, the literature asks whether, in a world in which the private sector wields substantial global influence, the traditional state-based tools of international law are adequate to coordinate global conduct.").

92. Durkee, *Business of Treaties, supra* note 3, at 266.

93. *Id.* at 267.

(1) group homogeneity, (2) industry norms evolving into technical rules, (3) technical rules becoming substantive law, codified remediation, and legal interpretations (4) an institutional treaty home and (5) soft-law creation with the facts of the Cape Town Treaty formation. The result is bottom-up treaty-making which brings non-state actors' involvement in treaty formation out of the shadows and onto the public stage.

1. Industry Specialists

The first element of the traditional bottom-up lawmaking theory provides that the treaty-creating group consists of "a close-knit, homogenous group" that acts on behalf of an industry.[94] Examples of homogenous groups include the Banking Commission (75 members) and the Berne Union (54 credit insurers) who identify themselves as a part of their community.[95] The groups are close-knit because they interact both within and outside of formal meetings and are linked through the technicalities of their industry.[96] The AWG clearly meets this element.

The basic idea of the Cape Town Treaty was conceptualized by UNIDROIT and the Canadian government.[97] Because creating a treaty in this manner had previously proved impossible, the parties began by surveying the potential target audience of the proposed treaty. Not only did the survey elicit information directly from equipment suppliers, buyers, financiers, and governmental agencies,[98] but upon the decision to commence on the task of treaty creation, the parties created the Study Group.[99] The Study Group was comprised of governmental representatives from common and civil law jurisdictions as well as representatives from the mobile equipment industry.[100] The conceptualization of the treaty otherwise occurred in the traditional manner, but from the outset, industry was included.[101] This initial divergence eventually led to the development of the Convention plus Protocols approach which was formulated by a "close-knit, homogenous group"—individuals representing the airline industry.[102] The Conventions plus Protocols was a novel idea and could not have been created without the AWG. The AWG was comprised of representatives from Airbus, Boeing, and other industry representatives by invitation.[103] Unlike the Study Group, the AWG was comprised of industry representatives only—establishing the AWG as a "close-knit, homogenous" group.

2. Industry Norms Becoming Technical Rules

The next element of bottom-up treaty-making provides that industry norms evolve into the technical rules of the treaty. The AWG created a protocol that weaves together

94. Koven Levit, *supra* note 67, at 167–71.
95. *Id.* at 168.
96. *Id.*
97. Stanford, *supra* note 45, at 274.
98. UNIDROIT Study LXXII-Doc.2, *supra* note 47, at 3.
99. Stanford, *supra* note 45, at 274.
100. Sundahl, *supra* note 39, at 342 n.7.
101. *See generally* UNIDROIT Study LXXII-Doc.2, *supra* note 47.
102. Encompassing the members of AWG and the IATA.
103. *History of AWG*, AVIATION WORKING GRP., http://www.awg.aero/inside-awg/history-of-awg/ [https://perma.cc/6FF9-8T6Q].

different industry norms from both common and civil law[104] "to facilitate the availability and reduce the costs of aviation credit"[105] through a new international standard that replaces all preexisting domestic law.[106] The international norms created by the Cape Town Treaty are not mere suggestions that might over time develop into hard law but are instead designed to create "hard" treaty law. Creating hard law was in fact a requirement for continued negotiations during the development of the treaty—"We [the AWG and IATA] have argued that 'hard' commercially oriented rules are required."[107] These rules were codified in the "Protocol to the Convention on International Interests in Mobile Equipment of Matters Specific to Aircraft Equipment."[108] The unique structure of the Cape Town Treaty—Conventions plus Protocol model—facilitated the creation of bottom-up treaty law within the current State-focused international law model.

3. A Closed Legal System, Outlined Procedure, and Remediation Tools

The third element of bottom-up treaty-making provides that the technical rules are encoded in a closed legal system that outlines procedure and provides for remediation. A closed legal system is "a self-sufficient and self-executing legal system which includes not only substantive rules but also the processes necessary to interpret them—allowing the rules to maintain a practical, self-correcting course."[109] In this context, "[a] self-executing system is one in which those who make the substantive law also interpret and enforce the substantive law."[110]

A closed legal system along with procedure and remedial tools are clearly set out in the Convention on International Interests in Mobile Equipment (the Convention) and the Aviation Protocol. The Convention establishes general requirements for all mobile equipment[111] and is binding for States that have ratified and signed the Convention.[112] Chapter I defines the scope of application and outlines the general provisions including the relationship between the Convention and the Protocols. Chapter III outlines default remedies. The international registration system and its protocols are codified in Chapters IV and V. And Chapter XIII outlines how the Convention interacts with other treaties.[113] The Aviation Protocol also contains the elements of a closed legal system. Chapter I establishes the scope of application and general provisions including defining "aircraft objects," outlining who can enter into a contract for an aircraft object, and a choice of law provision. Chapter II provides for remedies as well as for instructions for de-registration

104. Cuming, *supra* note 40, at 1099 n.30.

105. A.W.G. & I.A.T.A., *Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment and Preliminary Draft Protocol to the Preliminary Draft UNIDROIT Convention on International Interests in Mobile Equipment on matters Specific to Aircraft Equipment*, at 2, ICAO Ref. LSC/ME/2-WP/5.

106. Mooney, *supra* note 3, at 454.

107. A.W.G. & I.A.T.A., *supra* note 105, at 2.

108. *Protocol to the Convention on International Interests in Mobile Equipment of Matters Specific to Aircraft Equipment*, Nov. 16, 2001, https://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf [https://perma.cc/YHX7-V4DK].

109. Koven Levit, *supra* note 67, at 171.

110. *Id.* at 172.

111. *See generally Convention on International Interests in Mobile Equipment*, *supra* note 40 (setting forth the general requirements for mobile equipment).

112. *Id.* at Chapter XIV Article 47.

113. *See generally Convention on International Interests in Mobile Equipment*, *supra* note 40.

from the IR. Importantly, Chapter III outlines the IR's authority and rules.[114] The Convention and Aviation protocol establishes substantive law through the chapters outlining the scope of agreements, general provisions, and remedies as well as procedural law by outlining how the Convention interacts with other treaties and by providing steps to de-register from the IR in the Aviation Protocol.[115]

4. An Institutional Home

The next element provides that an institutional home "manag[es] the substantive rules" that "facilitate[s] information exchange communication, and collaboration among group members."[116] The Aviation Protocol established an institutional home in Chapter III of the Protocol—The International Registry of Mobile Assets[117]—which manages the substantive rules of the Treaty.[118] The IR is run by Aviareto, a not-for-profit company.[119]

Aviareto's Board of Directors[120] is advised by the International Registry Advisory Board ("IRAB").[121] Apart from running the IR, Aviareto and the IRAB facilitate the continued exchange of ideas.[122] The director of the Aviareto board is Rob Cowan, who has authored numerous publications about the Cape Town Treaty.[123] The Chair of the IRAB is Jeffrey Wool, who has been involved with the Cape Town Treaty since its inception.[124] Jeffrey Wool is also the Secretary General of the AWG,[125] which has evolved to become a non-for-profit entity representing 40 companies with interests in the air industry.[126] The close ties between the IR, IRAB, and the AWG demonstrates that the Cape Town Treaty created an institutional home that has continued to facilitate the exchange of information between industry members.

5. Self-executing Treaty to Create Soft Law

The Cape Town Treaty does not fulfill the last element of being self-executing. As a

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114. *Protocol to the Convention on International Interests in Mobile Equipment of Matters Specific to Aircraft Equipment*, *supra* note 108.

115. *See generally Convention on International Interests in Mobile Equipment*, *supra* note 40; *Protocol to the Convention on International Interests in Mobile Equipment of Matters Specific to Aircraft Equipment*, *supra* note 108.

116. Koven Levit, *supra* note 67, at 170.

117. The International Registry of Mobile Assets can be found here: https://www.internationalregistry.aero/ir-web/ [https://perma.cc/56RV-BJ9M].

118. *Protocol to the Convention on International Interests in Mobile Equipment of Matters Specific to Aircraft Equipment*, *supra* note 108, at Chapter III.

119. International Civil Aviation Organization, *supra* note 58, at A-3.

120. *Aviareto Board*, AVIARETO, https://www.aviareto.aero/governance/board-of-directors/ [https://perma.cc/J4B5-QJAW].

121. *International Registry Advisory Board*, AVIARETO, https://www.aviareto.aero/governance/international-registry-advisory-board/ [https://perma.cc/4Q3X-VE2T].

122. For example, the IRAB and Aviareto recently worked together to create the newest model of the IR (Generation II). *Id.*

123. *Aviareto Board*, *supra* note 120.

124. *International Registry Advisory Board*, *supra* note 121.

125. *Organizational Structure*, AVIATION WORKING GRP., http://www.awg.aero/inside-awg/organizational-structure/ [https://perma.cc/U3FJ-UK8R].

126. *See generally Members*, AVIATION WORKING GRP., http://www.awg.aero/inside-awg/members/ [https://perma.cc/3YNL-FEGC].

result, it did not create soft law. However, this Note proposes that the essential elements of bottom-up lawmaking have been fulfilled by the Cape Town Treaty. Bottom-up lawmaking is the "antithesis" of top-down state-centric lawmaking.[127] Industry specialists create rules and remedies while facilitating continued discussion for the future of the industry. As discussed, the Cape Town Treaty shares these characteristics, with the only divergence being the immediate creation of hard law. The Cape Town Treaty indeed fits within the Westphalian model, however, all soft lawmaking does when it eventually becomes hard law. What is truly unique about soft lawmaking is the degree of involvement of industry and the focus on solving industry problems with industry-formulated solutions. This model brings the private sector out of the treaty-making shadows and forces the international community to evaluate the state-centric model.

While bottom-up lawmaking offers an alternative theory to top-down state-run lawmaking, there are some factors to be wary of. For example, homogeneous groups that are usually involved in developing the practice-based rules can be secretive—defying the notion of democratic lawmaking—and are often comprised of powerful individuals from the global north.[128] The bottom-up model also risks encoding into international law some of the gender and racial biases held by whichever industry the group represents.[129] The bottom-up model might also have a limited scope, more applicable to industry-specific regulation treaties rather than to interdisciplinary treaties, with their varied and discordant interest groups.[130]

B. The Cape Town Treaty and the Persuasion Treaty Theory: Enhancing Bottom-up treaty-making

According to the Persuasion Treaty Theory, one of the best ways to enhance treaty compliance by the private sector is to facilitate a vested interest through regulation, accountability, and decision-making transparency. This section argues that the Cape Town Treaty naturally achieved these goals through the bottom-up treaty-making model. The following section outlines the main elements of the Persuasion Treaty Theory—(1) new regulatory methods, (2) voluntarily putting corporate choices in the public eye, and (3) the publication of corporate choices—and explores how the Cape Town Treaty complies.

1. Creating New Regulatory Methods

Through new regulatory methods, the private sector can create goals that align with a treaty to enhance compliance. The Cape Town Treaty was in a unique position to accomplish this because one of its central objectives was to create an international registry for mobile materials—an objective aligned with the goals of the private sector.[131] While not all treaties have such a singular objective, most treaties are accompanied by regulation. The unique bottom-up model of the Cape Town treaty meant that when the regulation was put into place many corporations were economically incentivized to

127. Koven Levit, *supra* note 71, at 49, 56.
128. Koven Levit, *supra* note 67, at 194–95.
129. *Id.* at 196–97.
130. *Id.* at 168.
131. International Civil Aviation Organization, *supra* note 58 at § 2.

participate.[132] The aircraft registry has made it easier and cheaper to secure financing;[133] therefore, the private sector is more likely to comply.

2. Putting Corporate Choices in the Public Eye

The Persuasion Treaty Theory also recommends corporate accountability by putting choices in the public eye. The Cape Town Treaty has excelled at meeting this goal. Not only was transparency one of the most important aspects of the Cape Town Convention, but transparency was the main issue at the heart of the treaty. The Cape Town Convention Academic Project has published hundreds of working papers pertaining to the Cape Town Convention, all of which can be found in the searchable electronic database called the Repository.[134] The aviation registry is also accessible online.[135] Additionally, the Cape Town Treaty has created The Cape Town Convention Journal, an "international review of the law and practice arising from the Cape Town Convention . . . [which] seeks to assist scholars, practicing lawyers, judges and other government officials and industry by providing information on and education about the treaty."[136]

Lack of treaty transparency is one of the reasons treaty negotiations fail.[137] For example, the Trans Pacific Partnership (TPP), the massive multilateral economic treaty negotiated among a host of Pacific Rim nations during the 2010s, failed in part because of an "environment of deep secrecy."[138] Because of the secrecy, there were fears that "actors like Monsanto and Philip Morris may be privileged at the expense of both the public and State sovereignty."[139] While it is believed that private sector involvement in

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132. Clark, *supra* note 55, at 15 (highlighting the Economic Impact Assessment which estimated that "effective implementation" of the Cape Town Treaty could save the airline industry billions).

> Effective implementation is defined as including all actions necessary to ensure that the treaty provision will be strictly and reliably enforced by national courts and the establishment, efficient operation and appropriate regulation of an international registry system in which property instruments in aircraft and engines will be recorded, thus determining their priority in a fully transparent manner.

Id. (citation omitted).

133. Nettie Downs, *Taking Flight from Cape Town: Increasing Access to Aircraft Financing,* 35 U. PA. J. INT'L L. 863, 891 (2014).

134. *See Repository*, CAPE TOWN CONVENTION ACADEMIC PROJECT, https://ctcap.org/repository/ [https://perma.cc/ZGS3-9KQ5] ("The documents consist of legal texts; developmental and legislative documents from before, during, and after the diplomatic conferences; international registry materials; national documents relating to the implementation of the CTC").

135. *See generally* INTERNATIONAL REGISTRY OF MOBILE ASSETS, https://www.internationalregistry.aero/ir-web/ [https://perma.cc/7CSW-L86G].

136. *About the Journal*, CAPE TOWN CONVENTION J., https://ctcjournal.net/index.php/ctcj/about [https://perma.cc/BN95-MTGW]. The home page of the journal can be accessed here: https://ctcjournal.net/index.php/ctcj/index [https://perma.cc/DK3F-T5FG].

137. *See* Charles M. Roslof, *What TPP Missed: Meaningful Transparency,* DIFF (Feb. 11, 2016), https://diff.wikimedia.org/2016/02/11/tpp-missed-meaningful-transparency/ [https://perma.cc/G9YK-PD3F] (noting one of the reasons the TPP failed was due to a lack of transparency during trade negotiations).

138. Durkee, *Business of Treaties, supra* note 3, at 303–04. The TPP was reborn as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in March 2018 and has been ratified by a majority of members. The CPTPP entered into force Dec. 30, 2018. *See* James McBride et al., *What's Next for the Trans-Pacific Partnership (TPP)?*, COUNCIL ON FOREIGN RELS. (Sept. 20, 2021), cfr.org/backgrounder/what-trans-pacific-partnership-tpp [https://perma.cc/L892-6T8Y].

139. Durkee, *Business of Treaties, supra* note 3, at 303–04.

the formation of the TPP was less than the private sector involvement in the Cape Town treaty, "critics worry that industry involvement in the TPP may demonstrate private sector involvement at its worst."[140] U.S. Trade Representatives did provide a high-quality, easy to understand analysis of the TPP, but it was only published after the TPP text was finalized.[141] A genuine dedication to transparency would have resulted in publications and analysis at each stage of treaty formation—as was seen in the formation of the Cape Town Treaty.[142]

While the Cape Town treaty was conceived for the purpose of creating an industry-standard through transparent regulation, there are unique aspects of the treaty that illuminate best practices moving forward. The publication of hundreds of working papers and a centralized source of aggregated peer-reviewed articles should be the new industry standard, particularly in bottom-up treaty-making.

3. Publicizing Corporate Choices

Publicizing corporate choices through transnational litigation, corporate responsibility measures, and public information campaigns are the last elements of the Persuasion Treaty Theory.[143] The threat of litigation could harm the status of required licenses or threaten a company's social standing. Litigation could also result in backlash from shareholders. Therefore, publicizing corporate choices is a wise transparency safeguard against bad social or legal optics.[144] The Cape Town Treaty has taken steps to publicize State compliance through the Cape Town Compliance Index.[145] While the Index does offer transparency, the degree of information available to those outside the industry is limited and only available on the State level. It is notable, however, that the AWG created the Index and this novel transparency database that measures compliance in a holistic manner, providing an incentive for increased compliance.[146]

The last two elements of the persuasion treaty theory, putting corporate choices in the public eye and publicizing corporate choices, can be categorized as transparency mechanisms. Transparency is difficult to define and largely excluded from international law scholarship.[147] While transparency is highly valued in western society, individuals should be wary because "just as in economics 'more information does not always produce markets that are more efficient', data [information resulting from transparency] that is made available is not necessarily information that can be used directly by consumers."[148] Furthermore, there is a heightened risk of disinformation campaigns, data manipulation, and information overload when information is carelessly dumped on the internet.[149] While many called for greater transparency during the TPP negotiations, it has been acknowledged that "[s]imply dumping the TPP text on the public [] would not

140. *Id.* at 305.
141. Roslof, *supra* note 137.
142. *Id.*
143. Durkee, *Persuasion Treaties*, *supra* note 76, at 71.
144. *Id.* at 127.
145. *Cape Town Convention Compliance Index*, *supra* note 87.
146. *Id.*
147. Andrea Bianchi, *On Power and Illusion: The Concept of Transparency in International Law*, *in* TRANSPARENCY IN INTERNATIONAL LAW 1, 6–7 (Andrea Bianchi & Anne Peters eds., 2014).
148. *Id.* at 10.
149. *Id.* at 10–11.

[have made] the process transparent." Instead, it is important for the public to receive and understand information through "meaningful transparency."[150] Therefore, employing meaningful transparency is a crux of the persuasion treaty theory.

The Cape Town Treaty which utilized the protocol plus framework exemplifies an "enhanced bottom-up treaty-making" model. This enhanced bottom-up model encompasses the elements of both the bottom-up treaty-making model and the persuasion treaty theory, allowing for greater public sector involvement and accountability in treaty formation and compliance.

IV. RECOMMENDATIONS

Breaking the nation State's monopoly on treaty-making authority could enhance non-State actor treaty compliance. When such treaty-making incorporates the three precepts of the persuasion treaty theory—creating incentives for non-State actors to participate, bringing the private sector out from under the shadows cast by multilateral treaties, and publicizing non-state actor treaty compliance—non-state actor compliance with the newly-created international law could be greatly enhanced, as evinced by the Cape Town Treaty's success. For this reason, and in spite of serious reservations about deep private sector involvement in treaty-making,[151] this Note recommends the following: (A) the bottom-up treaty formation model that incorporates the persuasion treaty theory elements should be widely utilized in the development of treaties, and (B) private sector treaty compliance should be studied through both qualitative and quantitative analyses.

A. Future Implementation: Applying Bottom-up Treaty-making

This section proposes that a bottom-up treaty-making model that incorporates the persuasion treaty theory elements should be applied to all treaties that require third-party compliance. The persuasion treaty theory suggests that third-party compliance is essential for the formation of different types of treaties—contract, legislation-like, aspirational, and constitution-like treaties—including those that address human rights, the environment, global health, financial regulations, and more.[152] However, it may be difficult to apply the bottom-up model to all these types of treaties as there are so many vested actors. Indeed, the bottom-up theory suggests that "a more classic top-down approach may present the greatest promise for mediating difference and generating law" in aspirational type treaty-making.[153] However, without further study, this statement is premature. Therefore, a systematic approach to applying the bottom-up persuasion treaty theory in the creation of new treaties should be employed.

Implementing the bottom-up international treaty-making model during the drafting of specific industry-regulation treaties (e.g., financial regulation treaties) should be the first step in applying the bottom-up model. The Cape Town Convention is an example of

150. Roslof, *supra* note 137.

151. Exemplified by the TPP *supra* section III(A)(2).

152. Baradaran et al., *supra* note 1, at 761.

153. Koven Levit, *supra* note 67, at 167–72. Aspirational treaty making "may set goals for international society, for example, the Kellogg-Briand Pact of 1928, which renounced 'war as an instrument of national policy.'" INTERNATIONAL LAW, *supra* note 5, at 14.

an industry-regulation treaty successfully utilizing this model. The next step should be applying the bottom-up model with the Convention Plus Protocol approach to aspirational treaty-making. There could be some drawbacks to extensively utilizing the Convention plus Protocol approach. It could be argued that an extensive web of Convention plus Protocol treaties could be an even more convoluted system than the current treaty system. However, the Cape Town Treaty does not allow reservations[154]—a common practice in all traditional treaty-making.[155] Arguably, a web of treaties riddled with reservations is no worse than a system of Convention plus Protocol treaties. And if the Convention plus Protocol treaty leads to better third-party compliance, then the bottom-up-treaty-making model will be far superior for aspirational treaties even if it increases treaty complexity. Therefore, implementing the bottom-up-treaty-making model in all treaties with a third-party interest would likely be beneficial.

B. Future Study: Quantitative Third-Party Compliance Analysis

Studying the effectiveness of treaties is notoriously difficult, not least of all because "effectiveness" can be defined in numerous ways.[156] However, this section proposes that attempting to quantify public sector treaty compliance would be just one tool that enhances a multidimensional understanding of treaties. Furthermore, understanding what kind of treaty is least likely to elicit third-party compliance will help inform what type of treaty will most benefit from the bottom-up-treaty-making model.

Because quantitative analysis in this area is so difficult, there have been a few compliance studies.[157] The studies that have been published tend to be skewed due to selection bias.[158] While there is a general need for more studies in this area, the next generation of studies should include a focus on the compliance of aspirational treaties. Aspirational treaties focus on the goals of States and NGOs; however, private sector compliance is required for aspirations to be met. Therefore, studying third-party compliance with treaties such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is an essential component to understanding the degree to which bottom-up-treaty-making should be utilized in aspirational treaties.

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154. *See generally* Thomas Traschler, *The Significance of the Qualifying Declarations under the Cape Town Convention,* 24 UNIF. L. REV. 42, 45–46 (2019) (explaining that while reservations are excluded from the treaty, declarations are permitted to allow for flexibility in the ratification process). According to the Vienna Convention a reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties, May 23, 1969, U.N. No. 18232, Part I, Art. 2 (1)(*d*).

155. *See* Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon,* 14 SANTA CLARA J. INT'L L. 363, 364 (2016) (explaining that "[t]he ability to add conditions to a treaty likely increases the number of States willing to join a treaty . . . . However, the use of conditions also has the potential to undermine the integrity of the treaty by allowing States to opt out of important legal obligations.").

156. W. Bradnee Chambers, *Towards an Improved Understanding of Legal Effectiveness of International Environmental Treaties,* 16 GEO. INT'L ENV'T L. REV. 501, 501 (2004).

157. *See generally* Baradaran et al., *supra* note 1, at 743; Chayes & Chayes, *supra* note 75, at 176–77.

158. Baradaran et al., *supra* note 1, at 776–80.

V. CONCLUSION

The Cape Town Treaty is evidence that treaty compliance can be enhanced when the treaty-making process includes carefully channeled input from the private sector. The Convention Plus treaty model is a form of bottom-up hard lawmaking that naturally incorporates the persuasion treaty theory. This form of treaty-making demonstrates that legal inclusivity of the private sector could lead to greater treaty compliance while also retaining compatibility with the current Westphalian international law system.