LAW WITHOUT BORDERS: GLOBAL SOCIALIZATION AND THE ADOPTION OF POLICY FRAMEWORKS IN ECUADOR

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ABSTRACT OF DISSERTATION

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ABSTRACT

This dissertation examines the process by which globalization and transnational legal trends influence domestic law and policymaking in developing countries. Existing literature ascertains that global models predominantly shape policy choices around the world; this literature is mainly comparative and quantitative, excluding contextualized research on the processes of influence. This dissertation aims at contributing to this body of knowledge through a qualitative case study of two policies—Access to Information, and Tobacco Control—recently adopted by one developing nation, Ecuador. The dissertation starts from the argument that these laws originated at the global level, fleshing out the adoption process by testing hypotheses to determine if it was motivated by the global socialization of policymakers, by the internalization of the normative value of the laws, or by the imposition of legal reforms by outside actors.

Complementarily, it explores the role that globally-originated laws—such as these two—have in the promotion of domestic social change by advancing their normative contents. This portion of the dissertation draws on literature about the on-the-ground fate of the law, describing, first, the instrumental impacts of these statutes, and, second, probing into their symbolic effects by investigating the ways and the extent to which these laws have modified attitudes, and whether domestic actors have relied on them to advance their agendas and goals even in the absence of a strong domestic social foundation for their adoption.
DEDICATION

To Melissa, with whom I walked throughout these years and pages,
and with whom I hope to walk for many more.

To my family, who supported me from the distance
while I embarked on this project.
I wish to thank my advisor, Thomas Koenig, for his constant guidance, mentorship, and support, and for always making himself available to talk with me or read a new draft. I also wish to thank my two readers, Professors Michael Tolley and Richard Daynard, for their invaluable input and support. Also, a sincere thank you to professors who helped along the way by reading drafts and giving me input: Stephen Nathanson, Joan Fitzgerald, and Heather Hindman.

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Introduction: Studying the Global Diffusion of Policy Frameworks

The increased flow of ideas and information brought about by globalization impacts many aspects of our lives, from the diffusion of popular culture to our personal interactions. However, arguably, the global environment is also the stream from which state law and policy choices predominantly feed, sometimes with disregard of local context. Research into law and globalization explores the interface between global context and the law. It raises a variety of questions that go well beyond the similarities and differences between the legal traditions of the world, including, for example a) the multiplication and interaction of legal systems and levels of legality;\(^1\) b) the diffusion, transplant, and reception of law;\(^2\) c) the growing presence of supra-national governance and adjudicating bodies, transnational judicial dialogue, and universal jurisdiction;\(^3\) d) the redefinition of the role of the state forced by globalization;\(^4\) e) and the “myriad questions

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3 Relatively recent events such as Augusto Pinochet’s arrest in Britain and Yugoslav President Slobodan Milosevic’s trial at the International Criminal Court have brought interest towards universal jurisdiction and international criminal justice for crimes against humanity.

4 In the literature review below, I discuss the redefinition of the state brought about by globalization, and, specifically, the treatment that sociological neo-institutionalism gives to this phenomenon. This issue is of course fervently debated within political science in relation to the standard concept of sovereignty. See, for example, Goodhart, Michael. 2001. "Democracy, Globalization, and the Problem of the State." *Polity*
of space, place, boundaries, diasporas, migrations, and cultural and economic ‘intertwinedness’ of globalization” raised by anthropologists and sociologists.

As this non-exhaustive enumeration suggests, research into law and globalization brings into question traditional legal, social, and political categories. This rapid inventory also shows that the paths one can take to study the global diffusion of norms may vary drastically. In globalization, national or domestic law is, in reality, highly global in nature because law-sanctioning nation-states—which are, after all, large organizational structures—strive to conform to increasingly growing world-societal patterns and institutions, and they are influenced by the shared values of the world society. Domestic law no longer originates solely from local conditions and priorities. Rather, it is derived normatively and empirically from global models such as international guidelines contained in treaties and conventions, or benchmarks put forward by trans-national professional and technical networks,\(^5\) and it is mediated by global actors and institutions such as International Governmental Organizations (hereinafter, IGO) and International Non-Governmental Organizations (hereinafter INGO).\(^6\)


\(^6\) Gunther Teubner argues that, in fact, these networks are themselves sources of law in the current global world. They create their own rules which, even if not contained in bodies of law proper, they regulate relationships and have the general function of legal norms. Perhaps the best example of this global non-state law is the *lex mercatoria* which regulates trans-national commercial relations. See Teubner, Gunther, ed. 1997. Global law without a state Aldershot ; Brookfield, VT: Dartmouth Publishing.

\(^7\) The classical public/private and state/non-state distinctions have been persuasively questioned in modern legal and social thought. This project follows these challenges in the sense that it understands the creation and application of the law as highly mediated by private/non-state actors.
Under conditions of globalization, traditional conceptual boundaries in the law are blurred. Paul Schiff Berman⁸ argues for a shift in the focus in the study of international legal phenomena under conditions of globalization, making this enterprise truly interdisciplinary and looking for law beyond governmental institutions, territorial borders, and conventional frameworks of sovereignty. “In an earlier generation, scholars seeking to study law in the global stage focused on two types of normative systems: those promulgated by nation states (national) and those promulgated among nation states (international).”⁹ According to Berman, this legal universe had two guiding principles: a) law resides within the realms of official entities; b) law is a function of state sovereignty. Both principles have eroded under globalization. “[…] [S]cholars of international law have historically tended to ignore the multifaceted ways in which legal norms are disseminated, received, resisted, and imbibed “on the ground” in daily life, thereby missing much of the complexity of how law operates.”¹⁰

Another layer that is currently missing from research on the diffusion of regulatory frameworks is their dimension as domestic policies. Public policy theory, for its part, elaborates extensively on the contexts, factors, and determinants of public policy.¹¹ However, most theories of public policy assume that the context of policy is

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⁸ Supra note 5.
⁹ Ibid at 487.
¹⁰ Ibid at 492.
¹¹ Most well-established, standard policy theories are created to explain policymaking in developed countries, which are, in general, less influenced by global trends—rather, they are trend-setters. Therefore, such theories fail to see the policy process as internationally mediated. Earlier models such as the “stages heuristic” saw the policy process as a linear progression, including predictable stages, excluding the degree to which policies are dependent upon larger-scale factors. Later models, such as the “Advocacy Coalition Framework,” neglect the role of transnational coalitions of advocacy, which in the developing world today, are even more powerful than domestic advocacy networks. The “institutional rational choice” model focuses on the extent to which decisionmakers are concerned with advancing their own goals and with their domestic institutional affiliation, neglecting the extent to which they care about emulating global decisionmaking scripts. For a detailed discussion of these theories of public policy, see Sabatier, Paul A.
predominantly domestic; their theoretical frameworks are generally derived from the idea that nations are self-contained units. Drawing on sociological neo-institutionalism as a lens by which to think about the interface between law and globalization, this dissertation challenges this assumption, especially pertaining developing nations, where public policy is increasingly the result of international forces. Public policy, as the goal-oriented part of the law\textsuperscript{12} is, like the law in general, increasingly shaped by the larger international context.

Research into the global diffusion of law must also be mindful of the domestic application of norms because regulations are not exhausted or fulfilled with formal enactment. Arguments that globally-originated laws can not be effectively applied because they are ‘legal imports’ attempt to debilitate their social functions. Nevertheless, domestic laws directed to apply and fulfill either international treaties or customary law, or global values not contained in treaties, are relevant most of the time—even if they are not entirely or completely enforced—because they provide tools that can be used by domestic actors to advance their goals.

The majority of the literature on the failure of the law in Latin America inadvertently assumes an instrumental vision of the law,\textsuperscript{13} endlessly lamenting the great

\textsuperscript{12} See Chapter One infra for a more detailed discussion of the conceptual differences between law and policy, and for the treatment afforded to each in this paper.

\textsuperscript{13} Note that the literature about the effects and on-the-ground impacts of the law in Latin America is itself very thin. Latin American legal scholarship is pathologically formalistic. It discusses mostly doctrinal aspects of the law, ignoring the way the in which the law interacts with social environment—in other words, ignoring the way in which law interacts with the realm of what is real. If someone has taken interest in the real effects of the law in Latin America it has been political scientists, but, not surprisingly, only in connection to their realms of disciplinary interest, inter alia, democratic consolidation, governance, power, the rule of law, and the courts.
gap between legal validity and legal efficacy, or the gap between *de jure* and *de facto* legal reality, or the gap between law-in-the-books and law-on-the-ground. Without denying the gap between the law in the books and the law in the ground in Latin America, it is important to acknowledge that the law plays roles beyond its instrumental reach.

For example, the adoption of legislation to implement human rights treaties, even if not fully enforced, alters general perceptions and expectations, re-defining the universe of what is possible. Schultz and Gottlieb argue that the most important effect of progressive court-made policy is to modify the public perception of reality.\(^\text{14}\) Courts alter the political language; they make expectations possible and modify teleological preferences. Arguably, the same is true of progressive statutory law, especially in systems where this is the fundamental source of law. Even if statutes sometimes seem to be “too far ahead” of the popular will, they have symbolic, discursive, and social effects.

Therefore, it is important to investigate both the instrumental and non-instrumental effects of globally-originated norms. Sarat et. al. observe that, while understanding a shift in the spatial “place of law” in terms of nation-state sovereignty and jurisdiction under globalization, it is also important to look at the role that the law plays in society by providing categories by which social relations are constructed.\(^\text{15}\) In fact, Sarat calls for an integration of the chasm between instrumental and constitutive


sociolegal research, an approach that would seek to evaluate the impacts of the law both in its instrumental and discursive dimensions.\textsuperscript{16}

Following these ideas, this study aims to explore a) the way in which new regulatory frameworks are diffused globally in a process that challenges traditional legal categories and goes beyond purely legal phenomena, and b) the ways in which globally-originated policies matter domestically post-enactment as tools that can be harnessed by groups in domestic contexts, even in the face of low instrumental enforcement levels. The dissertation explores these questions through the comparative case study of public regulations to regulate tobacco products, and newly adopted access to public information policies in Ecuador.

Chapter One: Significance of Research

The relevance of this research project is twofold. First, this paper is relevant from a social-scientific, methodological standpoint. Second, it is also relevant from a social/political perspective because it contributes to the understanding of how regulatory frameworks disseminate globally. As following chapters reveal, there are a variety of conceptual frameworks that explain the global diffusion of regulatory frameworks, which are based on disciplines as diverse yet interconnected as international law, sociology, international relations and political science. These literatures deal predominantly with the global/local interface from the perspective of the global. Additionally, they focus more on results or outcomes—for example, whether an x statute is passed in y number of countries—than on the processes by which such policies are enacted.

This dissertation draws on sociological neo-institutionalism as a theoretical framework, and on its interdisciplinary application to law.¹⁷ Institutionalism makes the claim that local policy responds to global trends. Alternative views such as transnational legal process and constructivist international relations theories’ are concerned with local norm adoption as the last stage of the diffusion of international law, and they privilege the internalization of norms as the reason for their adoption. International relation’s realism sees the global diffusion of norms as moved by mere rationales of power and cost-benefit calculations.¹⁸ This paper aims at exploring the extent to which global

¹⁸ This tripartite classification of theories is synthesized by Goodman and Jinks, Ibid. See infra page 76 for a table offered by this authors to illustrate these categorization of theories.
socialization matters for the adoption of policy frameworks. It does so by investigating the process by which the two aforementioned laws were put in the books.

Investigating the process by which the cultural institutions of the world society shape the diffusion of policy frameworks and the way in which globally-derived norms perform on the ground is important because available knowledge relies too heavily on macro, comparative studies. This is the thrust of most if not all institutionalist research. The empirical studies reviewed in the following chapter support the theoretical assertion that world societal institutions account for trends in the enactment of regulations vis-à-vis competing explanations.

The result-oriented, quantitative, comparative methodology that dominates institutional research has been a necessary first step to support the claim that world society highly impacts the policies that nation-states adopt, independently of local context. However, a second step towards understanding how exactly the global society shapes context-specific regulatory environments is necessary in order to provide a more substantive content to this literature.

Neo-institutionalism contends that world societal discourses, trends and values guide state design and behavior around the world, and that decoupling (or lack of application) is expected because such policies are mostly ceremonial. However, we lack knowledge as to how exactly this process takes place, i.e., the channels by which world-level models and discourses are translated into local law. Referring to institutionalism’s project, Goodman and Jinks write: “This evidence demonstrates, at a high level of generality, that states respond to cultural forces. Less clear is how exactly this occurs.
The evidence described above does not document a specific causal pathway by which culture influences state action.™19

Thus far, the literature has neglected a detailed exploration into the processes by which international scripts impact domestic policies. “The result is [however] that causal processes by which systemic normative structures (constitutive, regulatory and prescriptive) affect behavior are mostly assumed rather than shown.”20 As Alvarez (discussing the same question in the context of why nations enter international treaties), puts it, “general accounts that purport to explain why states behave as they do are only of value when they are based on case studies grounded in the actions of particular state actors within particular states.”21

In other words, as Goodman and Jinks point out, the mostly comparative, longitudinal, and macro-quantitative studies in the institutionalist tradition focuses on results or impacts more than process. This result-oriented body of research has aimed, for the most part, at a) determining the high degree of correlation or association between “world society” or “world culture”22 and domestic policies or structures, and, b) demonstrating the low degree of correlation or association between the policies that nation-states adopt and their national social, economic, and/or cultural circumstances.23

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19 Ibid at 511.
There is agreement in the literature that there is a need to complement correlation of dependent and independent variables showing that world culture and environment shape domestic policies with qualitative work fleshing out the nature of such correlations. “[But] by simply counting the presence or absence of a policy, the theory cannot capture differences in 1) local conflicts surrounding reforms, 2) the processes of policy adoption, and 3) the interaction of global and local politics. Qualitative case studies are needed to flesh out the next logical development in neo-institutional theory—the role of local context in the international diffusion of policies.”

Further, very few studies explore the impact of global scripts at the domestic policy level. “Despite the complexities involved, some encouraging steps suggest a nascent trend toward examining the impact of the world polity at the sub-national level.” Evidently, studies on the impact of global scripts at the domestic level can take various forms. For instance, Boyle et. al., authors of some of the few qualitative institutionalist studies on the domestic impact of global scripts, call for uncovering their attitudinal effects on individuals: “While much research in the neo-institutional tradition demonstrates this link between international norms and national policies, there is virtually no research considering the subsequent diffusion of norms from the international/national levels to individual attitudes and behavior.”


A few other studies also turn towards the process by which global scripts diffuse. Carruthers and Halliday27 investigate the determining role of world society’s institutions over a specific field of public administration—insolvency regimes. Their methodological commitment shifts from the macro comparative to qualitative case studies. Their 2006 article is one of the first pieces of work to shift methods to explore the impact of world society in domestic public decision making. What is clear is that, while institutionalist literature persuasively finds correlation between world society’s influence and domestic policy outcomes, from a scientific standpoint it is necessary to complement it with investigations of the substance and nature of this process. This is what this dissertation attempts to do through the case study of two statutes recently adopted by a developing Latin American nation, Ecuador.

This dissertation aims, first, at contrasting propositions to determine whether socialization and the cultural forces of the world polity are stronger determinants behind the adoption of two recently-adopted policy frameworks in Ecuador vis-à-vis other mechanisms contained in the existing literature, especially coercion and persuasion. Next, this study will fill a gap in the literature by explaining, in a context-specific situation, how the process by which global institutional contents influence domestic policymakers takes place. Finally, mindful that policy frameworks are not exhausted with formal adoption, this dissertation aims at tracing the on-the-ground impacts of the two globally-derived regulatory frameworks on which this study focuses.

Chapter Two: Global Society, the Law, and Public Policy.

i. Sociology’s Neo-Institutionalism.

Research about the effects that globalization has on the law takes place from within various disciplinary perspectives. Theoretical and empirical explorations about globalization and the world system in general are myriad. Based on many disciplinary camps, they vary substantially on their paradigmatic approach to the broad phenomenon of globalization. For instance, some of them privilege culture while others pay more attention to power and politics.28

This dissertation does not attempt to track the many strands of globalization theory and empirical research; it picks up selectively on approaches that privilege variables and processes of interest to this project, namely, the way in which the global system embeds the nation state, and the way in which preferences generated at the global level influence policy decision-making at the domestic level, and, ultimately, the local application of such policies. Second, research about the way in which globalization relates to legal realities is itself diverse; obviously, an important part of it has been advanced by the international legal profession, while other by international relations and political science scholars.

28 For a comprehensive attempt to organize the broad topic of globalization, see Lechner, Frank and John Boli. 2004. The globalization reader. Malden, MA: Blackwell Pub. This authoritative Reader organizes the topic by introducing, first, normative debates about globalization and then by including the major attempts at theorizing globalization. It then organizes the topic around thematic issues such as Political Globalization (nation-states and the emerging transnational world order); Cultural Globalization (the media and fundamentalism); the Globalization of Social Problems (especially environmentalism); and Anti-Globalization movements.
An exploration of the impact of the global polity on legalization in developing countries crosses over a range of academic disciplines and paradigms, including, *inter alia*, international law, international relations, political science, sociology, and anthropology. It is clear that under conditions of globalization, legal realities are sharply redefined and traditional categories contested. Therefore, an interdisciplinary approach to the global diffusion of human rights is no longer a luxury, it is a necessity. Under globalization, for example, the distinction between the “westphalian duo,” international and domestic law, is no longer clean-cut, as the latter is increasingly a result of the influence of the former.

This chapter focuses on explaining the theory that dominantly inform this project, sociological neo-institutionalism. It discusses its central arguments, so that hypotheses can be generated in subsequent chapters. Chapter Three discusses theories that offer different and/or competing views of the interaction between the global environment, the law, and the global expansion of norms.

The law is the pathway by which states exercise their authority and advance their goals. The terms *law* and *policy* are sometimes used interchangeably in common law contexts, and their meanings are sometimes conflated. Conversely, in civil law traditions, the term “policy” is generally poorly understood and scarcely used. This misunderstanding is explained, in part, by linguistics. Civil or Continental legal traditions utilize two terms for law, “one that stresses the written law enacted by the

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legislature (*Gesetz, loi, ley, legge*), and a second that emphasizes that the law is a body of principles based on various sources (*Recht, droit, derecho, diritto*). This distinction is best expressed as the difference between the law as statutory law (the law laid down by the legislature) and the law as a set of principles that appeal to us by their intrinsic merit.”

The English language lacks this distinction. The word “law” means both things at the same time. However, the English language “compensates for this deficiency in part with a subtle concept of “policy”, difficult to express in Continental languages.” The term policy, which is somewhat equivalent to *Gesetz, loi, ley, and legge*, describes the realm of the instrumental goals of legality. Policy is the goal-oriented part of the law.

World polity theory or neo-institutionalist theory is generally concerned with how nations adopt *policies* that originate in the global environment. It cares about the goals, about the adoption of tools, mechanisms, and programs. Throughout this dissertation this theory is used to reflect on the way in which the global environment shapes both *the law* in general (*Recht, droit, derecho, diritto*) and *laws or policies* (*Gesetz, loi, ley, legge*) in particular, as the mechanisms by which nation-states exercise their authority.

World Polity theory originates out of sociological explorations about the relationship between formal organizational structures and institutional environments. It traces its origins to the sociology of organizations, and, within it, to sociological neo-institutionalism, which challenges standard explanations of structural organization as the

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30 Respectively, German, French, Spanish and Italian words.
31 Ibid.
33 Ibid. at 58.
result of functional and rational demands. A foundational essay, “The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields” argues that the reasons for rational bureaucratization identified by Weber might have shifted. Weber identified three causes for bureaucratization—competition among capitalist firms in the marketplace; competition among states, increasing rulers’ need to control their staff and citizenry; and bourgeois demands for equal protection under the law—of which the marketplace was the most important one. DiMaggio and Powell contend that “today, [however], structural change in organizations seems less and less driven by competition or by the need for efficiency. Instead […], bureaucratization and other forms of organizational change occur as the result of processes that make organizations more similar without necessarily making them more efficient."

In challenging classic theories of organizations and administration, institutionalism sees organizations as open systems, not as rational systems. If organizations—one among them the nation-state, as we will see next—in our days are not shaped by efficiency and rational goal-attainment, what variables may account for their structure, form and goals? Institutionalism argues that the environment in which organizations are embedded is the main driver for all of the above. Organizations are,

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37 Ibid at 64.  
therefore, outcomes of context and social structure. Institutionalism defines the social environment in which organizations are embedded as organizational fields. Thus, “bureaucratization and other forms of homogenization emerge […] out of the structuration of organizational fields.”

Organizational fields shape the normative goals and the identities of organizations existing within the field. “By organizational field we mean those organizations that, in the aggregate, constitute a recognized area of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar service or products,” i.e., the “totality of relevant actors.” Organizations are aware of other organizations, share information, and so on. Four elements play a role in defining the institutions that play a role in a given organizational fields: “an increase in the extent of interaction among organizations in the field; the emergence of sharply defined inter-organizational structures of domination and patterns of coalition; an increase in the information load with which organizations must contend; and the development of a mutual awareness among participants in a set of organizations that they are involved in a common enterprise.”

The role of institutions in any given environment is a foundational aspect of this theory. Scholarship about institutions abounds in the social sciences. In fact, abundancy and variation is sometimes so subtle that it is easy to “perceive the diversity as

39 Supra note 36 at 64.
40 Ibid.
41 Ibid.
42 Ibid. at 65.
Institutions are important for various disciplines—anthropology, economics, political science, psychology, and sociology—and in all of them they are differently understood. Institutions and institutionalization are central concepts in general sociology, and are usually understood “as an organized, established, procedure.” Institutionalism in organizational analysis defines institutions somewhat differently, and it also defines them differently than other disciplines or frameworks. As Finnemore writes, this paradigm defines institutions

“in very different ways than do rational-choice scholars or historical institutionalists, emphasizing the social and cognitive features of institutions rather than structural and constraining features. Incommensurable definitions mean that despite similarities in labeling, these approaches—all called institutionalist—have little in common. In fact, rational choice scholars working on positive theories of institutions or the new institutional economics are not institutionalists at all in the sociological sense (and vice versa).”

The theory that informs this project associates institutions with culture, that is, “with normative effects, ideas, conceptions, ‘preconscious understandings,’ myths, ritual, ideology, theories, or accounts.” Jepperson is critical of this view, arguing that aspects of culture itself may be more or less institutionalized. Nevertheless, the new institutionalism in organizational sociology rests upon a layered model of institutions as made up of three elements: 1. Meaning systems and related behavior patterns, which contain 2. Symbolic elements, including representational, constitutive and normative

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46 “For example, one might consider single parenting as a significant cultural pattern, but still not wish to represent it, at least yet, as a highly institutionalized one.” Supra note 44, at 150.
components, that are 3. Enforced by regulatory processes.\textsuperscript{47} This typology underscores institutions as meaning and symbolic systems, which amount to “cultural rules giving collective meaning and value to particular entities and activities, integrating them into the larger schemes.”\textsuperscript{48}

If institutions are so defined, what, then, is the connection between institutions and organizations? Here, the analysis focuses more on the effects of institutions not on particular organizations but on organizational environments. Meyer and Rowan argue that organizations shape their structural form according to models generalized in the field relevant to the organization, incorporating them more as more as \textit{myths} and \textit{ceremonies} rather than as truly functional rules. “Institutionalized products, services, techniques, policies, and programs function as powerful myths, and many organizations adopt them ceremonially.”\textsuperscript{49} Meyer and Rowan’s tagging of institutional contents as myths is not casual; in fact, it is used to depict the power of such contents regardless of their actual functional features. These “myths” have two main traits:

“First, they are rationalized and impersonal prescriptions that identify various social purposes as technical ones and specify in a rulelike way the appropriate means to pursue these technical purposes rationally. Second, they are highly institutionalized and thus in some measure beyond the discretion of any individual participant or organization. They must, therefore, be taken for granted as legitimate, apart from evaluations of their impact on work outcomes.”\textsuperscript{50}

\textsuperscript{47} Supra note 43 at 56.
\textsuperscript{50} \textit{Ibid.} at 44.
The legitimation aspect of institutional “myths” is especially relevant as an analytical tool throughout this paper. The role that these myths play in organizational legitimation and survival is fundamental. “The master proposition Meyer and Rowan advanced was that ‘independent of their productive efficiency, organizations which exist in highly elaborated institutional environments and succeed in becoming isomorphic with these environments gain the legitimacy and resources needed to survive.’”\(^\text{51}\)

Institutionalism as described here is not necessarily global or international in its scope. The analytical application of institutional environments to nation states—the core tenet of world polity theory—is discussed below. For now, suffice it to say that this theory argues that global scripts and rules are, in fact, coated by a seemingly unbreakable layer of legitimation, which supports and ultimately explains why they are strong policy determinants. The key idea here is that states—and the people that make decisions within state structures—are compelled to follow the ideational patterns contained in the environment in which they operate, namely, the world society. In other words, this theory argues that policymakers adopt policies because they feel the need to fit into the reference groups they compare themselves with, taking social influence and interaction to the global and state levels.

Within this theoretical framework, actorhood is largely determined by environment, and not vice versa. As discussed above, culture plays a fundamental role within institutionalist theory because it is the content of the global social structure that comprises the institutional environment in which organizations are embedded. In fact,

institutionalism’s “self described mission is to reclaim culture for macrosociology.”

For neo-institutionalism, social structure is global and broad.

Social theory and social research have classically subsumed society to the nation-state. Institutionalism cuts deeper, probing into the ways in which social structure matters globally, beyond the boundaries of nation states—in fact, seeing the nation-state as embedded in it. Thus, institutionalism, and world polity theory derived from it, is macrophenomenological. Culture contains and defines the institutions in which actors such as organizations and states are embedded. Institutionalism’s macrophenomenological view takes culture seriously. In so doing, it differentiates itself from microphenomenological arguments (discussed in more detail in the next chapter) that are sometimes extended to the global level, which “treat culture superficially, as flows of relatively arbitrary, expressive Western tastes in media products, fashion, art, or fast foods. They fail to appreciate sufficiently the substantive significance of culture and its organizational presence in world society.” An important question in this context is a rather obvious one: it is not states that act and make policy decisions, it is the individuals within them. “Neoinstitutionalists theorize that institutional logics provide scripts for constructing individuals’ identities and understandings about the world. These scripts provide the basis for the mental associations that individuals assign to particular actions, or the ‘tools’ that they find in their ‘cultural toolkit.’ Neoinstitutionalists expect individuals to use the logics of the international system if they are immersed in that

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system." In this respect, neo-institutionalism derives from classical sociological insights that individuals seek to adjust their behavior to what they perceive is the appropriate behavior in their social context or reference group. "... Policymakers emulate each other as a way to conform to shared norms and appear legitimate." Thus, policy outcomes are, to an important respect, the result of normative emulation by policymakers.

Quite reasonably, one may ask: Is there such a thing as a world culture that contains various institutions that shape, embed, and determine individual and state action? How should such an institutional cultural reality be understood? And more importantly, does it play a significant role as a variable shaping global and local action? Below, I discuss in more detail how world polity theory makes arguments about institutions and organizations at the global level. However, given that world polity theory relies heavily on culture at the macro level as an analytical foundation, it is first necessary to flesh out the concept of culture as it matters globally. This theory is not alone in this approach. Three other strands of theory also privilege cultural contents at the global scale.

ii. Alternative Views on Culture and the Global Context.

Here, it is not my intention to offer a deep account of the three alternative theoretical views. I only intend to acknowledge the fact that world polity's account of world society and global culture is not unchallenged, and to point out the major

54 Supra note 26 at 6. [citations omitted].
differences with other explanations. An important, and at times similar, account is advanced by Immanuel Wallerstein’s “world systems theory.” This framework focuses, in Marxian fashion, on economic infrastructure, seeing culture as the resulting, secondary superstructure. It takes a materialist stance. The world is an economic system, and global culture reflects the interests of groups.

World culture is, therefore, the byproduct of the capitalist world-system, a function of the dominance of economic, imperialistic powers—core nations imposing making their way as they pursue economic advantage. It is a “hierarchical ideology of ascribed privilege”\textsuperscript{57} It matters only to the extent to which it is part of the reproduction of a system. It is a reflection of the interests of groups, the ideology of its dominant constituents.

Evidently, under this view, world culture is not unified but fragmented, mainly because it is the result of imposition, a byproduct of economic domination, which creates a polarized world system. It is a “battleground” in and through which resistance to domination takes place. “Culture is both weapon of the powerful and tool of resistance of the weak.”\textsuperscript{58} In other words, “culture is ideology, serves interests, legitimates a system, and reflects underlying conflicts. In short, culture has an instrumental quality, and its dynamism derives from ‘deeper’ forces.

Reasoning within that tradition, world culture \textit{must} be the culture of capitalism.”\textsuperscript{59} This view is at odds with institutionalism, which, as explained above, sees culture as

\textsuperscript{57} Ibid. at 39.
\textsuperscript{58} Ibid. at 40.
\textsuperscript{59} Ibid. at 41.
constitutive, as cause rather than effect. Where Wallerstenians’ view is materialistic and economic, “the institutionalist’s structure is a cultural one; it is Western rationality and individualism that create states, markets, bureaucratic organizations, and, they would argue, capitalism itself.”

Another approach to culture in the global context is put forward by Roland Robertson. In his “Globalization: Social Theory and Global Culture,” he grappled with the issue of growing fundamentalisms in the age of globalization. He challenged responses that saw fundamentalisms as a turn away from the world and globalization, asserting that fundamentalisms—very frequent and present throughout the world—were not trying to withdraw from the wider world, but in fact they were joining a global discussion or ‘discourse’ about how to construct a new kind of world order. So, even if fundamentalists present themselves as opposed to global forces, “as storm troopers against a world culture they regard[ed] as the product of the evil West,” they are inadvertently enactors of world culture, because they constantly invoke globally diffused ideas. “One basic argument of many fundamentalists, namely the right to preserve the integrity of their own tradition, itself drew on a transnational idea—that peoples and societies are entitled to their particular identities, and indeed are expected to develop some form of cultural distinctiveness. Particularism is thus itself a result of universalization.” Robertson’s view shares with institutionalism the stance that culture is relevant, but “to him, culture is not so settled, not a collection of ready-made scripts. He

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60 Supra note 45 at 333.  
62 Ibid. at 166.  
63 Ibid. at 102.
regards world culture as more inherently contentious and globalization as more open ended.\textsuperscript{64}

Finally, the so-called macro-anthropological view provides another influential lens by which to look at culture globally. Arjun Appadurai’s influential book, “Modernity at Large: Cultural Dimensions of Globalization\textsuperscript{65} has played a decisive role in giving form to this approach. Under this view, world culture is still largely the result of “core” or “center” cultural contents, which asymmetrically flow to peripheries; nevertheless, such contents are not immutably and equally imposed in every corner of the world. Localities shape them and re-shape them as they adopt them. The “periphery talks back” in this process of negotiation. Global culture impacts different groups in different ways. In other words, this view “sees local cultures as changing and open to the outside world, treating ordinary people as active participants, analyzing the transnational as something that is produced in particular locales, and describing global standards as subject to multiple interpretations. . .\textsuperscript{66} For instance, macro-anthropologists argue that a notable channel of globalization, i.e., the mass media does not plainly impose itself and western contents as has been often simplistically asserted, but, rather, is itself a mechanism by which difference operates and finds spaces. Appadurai writes:

\begin{quote}
“the consumption of the mass media throughout the world often provokes resistance, irony, selectivity, and, in general, agency. Terrorists modeling themselves on Rambo-like figures (who have themselves generated a host of non-Western counterparts); housewives reading romances and soap operas as part of their efforts to construct their own lives; Muslim family gatherings listening to speeches by Islamic leaders on cassette tapes; domestic servants in
\end{quote}

\textsuperscript{64} Supra note 56 at 51.
\textsuperscript{66} Supra note 56 at 52.
south India taking packaged tours to Kashmir: these are all examples of the active way in which media are appropriated by people throughout the world.\textsuperscript{67}

In contrast with neo-institutionalists, macro anthropologists thus see world culture as a source of heterogeneity rather than homogeneity, and as the locus for the production and exchange of diversity globally rather than as a single structural scaffold produced by world society. Table 1. below summarizes these views.

Table 1. Differing perspectives on globalization and culture.

<table>
<thead>
<tr>
<th></th>
<th>Neo-Institutionalism</th>
<th>World-Systems Theory</th>
<th>Macro-Anthropology</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Culture</strong></td>
<td>- Global in scope.</td>
<td>- Ancillary</td>
<td>- Interaction between global and local cultural levels.</td>
</tr>
<tr>
<td></td>
<td>- Source of global homogeneity</td>
<td>- Result of capitalistic infrastructure</td>
<td>- Core to periphery</td>
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<tr>
<td></td>
<td>- Source of ready-made scripts</td>
<td>- Fragmented Imposition</td>
<td>- Source of heterogeneity</td>
</tr>
<tr>
<td></td>
<td>- Cause rather than effect.</td>
<td>- Ideology</td>
<td></td>
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<tr>
<td></td>
<td>- Deep social structure of a decentralized world-polity.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Actorhood and Identity</strong></td>
<td>- Identity as embedded</td>
<td>- Determined by power imposition.</td>
<td>- Negotiated in global/local spaces.</td>
</tr>
<tr>
<td></td>
<td>- Globally, not locally influenced.</td>
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<td></td>
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<tr>
<td></td>
<td>- Enactment of global scripts.</td>
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As mentioned above, this brief review of related frameworks for which social structure and its cultural contents—or institutions—matter is introduced as a way to help delineate and better understand, by comparing and contrasting, one of institutionalism’s important points: that macro social structure and its cultural contents are cause rather than effect. This means that, in contrast with the paradigms described above, neo-

\textsuperscript{67} Supra note 65 at 7.
institutionalism sees world culture as a deep social structure that determines and shapes global practices, as the source of a decentralized world polity that includes many players or actors—nation-states, governmental and non-governmental organizations, individuals—but that lacks a governing body. The world is, thus, an enactment of global culture, which determines the very identity and goals of its actors.

For neo-institutionalism, world culture is “a global, distinct, complex, and dynamic phenomenon… the globe-spanning culture of actual world society.” It contains “certain ideas and principles [that] are presented as globally relevant and valid, and are seen as such by those who absorb them.” World culture is global; it is “socially constructed and socially shared symbolism” constructed at the global level. It includes principled ideas that are strongly legitimated globally, and that include a rich variation of normative contents and goals.

World culture is distinct. In other words, it is not the result of the aggregation of many local cultural preferences. Clearly, this view of world culture as distinct creates a tension: if there is such a thing as a world culture, what about cultural diversity and the culture of local spaces? World culture theory does not argue that “world culture obliterates all others, supersedes the local, or makes the world one in the sense of being utterly similar.” The argument is that world culture interacts with local, particularistic cultural contents; both shape each other dynamically. “Actual cultural practices in particular places, as well as the thinking of particular individuals, are likely to exhibit

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68 Supra note 56 at 25.
69 Supra note 56 at 25.
70 Supra note 56 at 27.
mixtures of ‘world’ and more local symbolism.’” Lechner and Boli’s reference to Breidenbach and Zukrigl’s “Dance of Cultures: Cultural Identity in a Globalized World” is illustrative, as it fleshes out the idea that cultural globalization is a dynamic process, one that differentiates, makes available varying new options, goods, ideas, and lifestyles, but at the same time creates a common framework in which difference interacts.

World culture is complex; it is not a single, unified, harmonized entity. One typology sees world culture as having four faces: “the ‘Davos’ culture of free-market business and political elites, the ‘faculty club’ culture of progressive nongovernmental organizations, the popular culture of entertainment and consumption, and the new transnational movement culture.”

“We can see it emerging. . . in the work of globe-trotting Americans who consult for multinationals, monitor foreign elections, build a music television network, or spread the Gospel. Whether they work for the firm Porter Novelli or for the Carter Center, for MTV or Campus Crusade for Christ, these leaders share a vocabulary and a worldview. They envision a shrinking world bound to make progress through market competition and respect for diversity and human rights.”

World culture is also defined as having its own force and as an “active whole.” World cultural contents acquire their own momentum and force, and are transferred and institutionalized through several channels, including INGO and IGO. This aspect of world culture creates a natural tension with views that privilege human agency as a determinant of global social change rather than the naturally-spreading, independently-

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71 Supra note 56 at 26.
72 Supra note 56 at 36.
74 Supra note 56 at 33.
75 Supra note 56 at 26.
dynamic forces of world culture. This tension has been discussed persuasively by scholars interested in how transnational activists actually shape institutional arrangements through their purposive actions; it is discussed in more detail below.

The question of how globalization impacts the nation-state has received a lot of attention. One dimension through which globalization takes place is through the intensified international flow of goods, which is facilitated by a growing number of free market-promoting arrangements through bilateral, multilateral, and regional agreements between nations. Free trade, by definition, implies a secondary role for the state as regulating agency; a central tenet of free trade ideals is precisely that diffuse regulatory forces such as markets must replace states because they can more efficiently regulate fluctuating economies.\(^{76}\) Thus, some have announced the “eclipse” of the state in an era of globalization,\(^{77}\) or the “attenuation of the state” in globalization.\(^{78}\) Drawing on sociology’s institutionalism, Goodman and Jinks have also examined the challenge posed by globalization to one of the foundational defining features of the nation-state: sovereignty.\(^{79}\)

Even though these arguments hold a lot of truth, the main thrust of sociological neo-institutionalism is that all these accounts miss the significant ways in which

\(^{76}\) Debates about the regulatory functions of states domestically and internationally hinge on classical and contemporary arguments in political economy and political philosophy about the origins, nature, and justification of government. Paradigms vary in their commitment to central ideals, including the classical liberal perspective (Thomas Hobbes, John Locke, Adam Smith), the contemporary libertarian position (Robert Nozick), the radical position (Marx, Bernstein, Lenin), the conservative perspective (Milton Friedman), and the modern liberal position (John Rawls, John Maynard Keynes). For an inclusive (yet at times cursory) volume on these different views, see Clark, Barry Stewart. 1998. Political economy: a comparative approach. Westport, Conn.: Praeger.


globalization, through the legitimation of its institutional contents, actually relies on the state as a central yet institutionally embedded and defined actor. As Meyer et. al. (1997) write:

The enormous expansion of nation-state structures, bureaucracies, agendas, revenues, and regulatory capacities since World War II indicates that something is very wrong with analyses asserting that globalization diminishes the “sovereignty” of the nation-state. Globalization certainly poses new problems for states, but it also strengthens the world-cultural principle that nation-states are the primary actors charged with identifying and managing those problems on behalf of their societies. Expansion of the authority and responsibilities of states creates unwieldy and fragmented structures, perhaps, but not weakness. The modern state may have less autonomy than earlier but it clearly has more to do than earlier as well, and most states are capable of doing more now than they ever have been before. \(^{80}\) [citations omitted]

The idea that the state as an embedded actor still matters, and, consequently, that “it clearly has more to do than earlier as well,” has direct relevance on the mechanism by which states conduct their business: the law. Therefore, even if globalization makes possible an articulated civil society that is capable of assuming many of the challenges faced by individuals in the developing world, state-sanctioned law is still highly relevant because of the re-defined role of the state. The important question centers on how global interactions transform legal dynamics in all their dimensions, from creation to application.

The discussion that follows investigates this tension between globalization and the role of the state, and, by association, the role of state-sanctioned law. This relationship matters because, as mentioned from the outset, even on the face of myriad arguments that stress that the nation-state is losing ground in globalization, “no alternative has been effectively articulated and legitimated. The nation-state is still the preeminent form of

\(^{80}\) Supra note 53 at 156.
political organization and authority throughout the world today.”81 The authority of the nation-state is exercised precisely through the sanctioning of rules and norms that organize social life, and through the implementation of policies intended to further societal and instrumental goals.

iii. Global Society and the Nation-State.

Neo-institutionalism raises important questions about the role and place of the nation-state in a globalized world. Paradoxically, the world society depends on the nation-state as a carrier of its institutional contents, and minimizes the nation-state’s standing by recognizing the expanding role of civil society-based actors. If for institutionalism environments matter because they carry the rules, contents, and values—"the codified cultural constructions"82—in which actors are embedded, then world culture as discussed above is the last higher-order level of environmental reality. As such, it embeds a variety of actors, most notably nation-states. Not only does world culture influence states in their form and structure: it creates and justifies their very existence as the more clearly relevant unit of political organization today. Indeed, to underscore the fact that states themselves are created by the cultural environment that surrounds them, Meyer et. al.’s seminal piece “World Society and the Nation-State” invites the reader to imagine what would happen if a new island was suddenly discovered. What would happen to this territory and its people, they ask?

If an unknown society were “discovered” on a previously unknown island, it is clear that many changes would occur. A government would soon form,

82 Ibid at 16.
looking something like a modern state with many of the usual ministries and agencies. Official recognition by other states and admission to the United Nations would ensue. The society would be analyzed as an economy, with standard types of data, organizations, and policies for domestic and international transactions. Its people would be formally reorganized as citizens with many familiar rights, while certain categories of citizens—children, the elderly, the poor—would be granted special protection. Standard forms of discrimination, especially ethnic and gender based, would be discovered and decried. The population would be counted and classified in ways specified by world census models. Modern educational, medical, scientific, and family law institutions would be developed. All this would happen more rapidly, and with greater penetration to the level of daily life, in the present day than at any earlier time because world models applicable to the island society are more highly codified and publicized than ever before.\(^{83}\)

As this passage describes, in such a situation, the universalistic models pervasive in world society, or the “world level of social reality,” would very quickly cause a new state to emerge, one resembling the form of the surrounding organizational environment. World level social reality’s “diffuse functional models about actors, action, and presumed causal relations” would be applied almost automatically because they enjoy a strong consensus about their nature and value, and rest on claims of universal world applicability.\(^{84}\)

Nation-states are as influenced by the environment in which they are embedded as any other organization is. Therefore, just like a university defines itself and acts according to the priorities set forth in the relevant organizational field, nation states shape their structure, procedures, and goals according to their environment. Clearly, this argument gives high importance to the role of global social structure. The pull of models established in the global culture—whether the “Davos” culture or the “faculty club” culture, is significant and goes beyond the nation-state only, embedding other local actors

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\(^{83}\) Supra note 53 at 146.

\(^{84}\) Supra note 53 at 148.
that in turn mediate and influence the states. “Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life—business, politics, education, medicine, science, even the family and religion.”

Skepticism about its power to explain the ways in which states exercise their authority and the way in which local actors behave may reasonably arise. The main question that one may ask is how evidence of the alleged impact of world cultural forces and models may be collected in order to support the theory. How may hypotheses be generated and tested? Since the theory relies largely on culture, it would be reasonable to predict that support for its contentions may come in the form of ethnographies or thick descriptions, standard mechanisms of exploration in cultural analysis. Nevertheless, most of the research on world polity theory takes a different approach: it relies on quantitative data, and on comparative and longitudinal studies. Using sophisticated methods such as event history analysis and statistical regression, research in this paradigm has traced the force of culture by hypothesizing similarities across many nations and across time. The data-intensive approach used by world polity research has been an important innovation in tracing the force of cultural norms.

In this fashion, world polity theory has been persuasively supported beyond mere assertions that contemporary global-level models affecting many aspects of domestic government and lawmaking show a tendency towards homogeneity. This is to say, via data-intensive, quantitative studies, the world polity research program has brought institutionalist arguments—which, as mentioned above, are not global in nature—to bear.

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85 Supra note 53 at 145.
importance at the global level, and has tested hypotheses against competing theories. The result is that world polity theory better explains observed outcomes—such as similarities across state structure and behavior in the same periods of time—than competing theories.

iv. Tracing the impacts of the world society.

a) The Genesis of Institutional Research.

I now turn to discussing the existing empirical work supporting neo-institutional, world polity theory, and its account of the emergence and expansion of policy frameworks. World polity theory is largely inductively originated. Its theoretical contents were, to an important extent, derived from empirical observations, and not vice versa. This theory traces its roots to studies conducted in the 1970s by John Meyer and his colleagues, which found a high degree of similarity in education policies in various countries with dissimilar local contexts. Early papers developing this view were “The Effects of Education as an Institution,” “Innovation and Knowledge Use in American Public Education.” In the following years, institutional research grew rapidly and, “by 1985. . . the number of scholars intrigued by the effects of culture, ritual, ceremony, and higher-level structures on organizations had reached a sufficient mass for neo-institutional theory to be named and reified.”

86 For the best review of the roots and evolution of institutionalism and world polity theory see supra note 34, Chapter 1.
89 Supra note 34 at 12.
More recent studies in the area of education look at how primary and university-level education, including curricular contents and structural organization, have been highly shaped by global institutions, as defined above.\(^90\) In “World Expansion of Mass Education,”\(^91\) Meyer et. al. examine the expansion of mass education in 120 countries over a period of 110 years using regressions and event history analyses, finding that appearance of mass education in the countries studied increase sharply after World War II with the intensification of the nation-state model. The study explores the connection between the dependent variable (mass education) and the properties or features of national society (independent variables include urbanization, religion, independence, race, among others). The study finds that mass education became a fundamental feature of the nation-state in the post World War II context, and that the rate of entry into the world of mass education is only slightly affected by the conditions of domestic society, but is strongly affected by the structural location of a country in the world society: “countries that were linked to both elements of the nation-state system, with central authority validated by membership in or dependence on the world society and with some sort of principle of national formation present were much more likely to create mass education systems.”\(^92\)

Similarly, an exploration of University curricula throughout the world between 1895 and 1994 suggests that the way history was taught at the university level changed


\(^92\) *Ibid.* at 146.
according to identifiable patterns determined by the global social context: “As nations were embedded in functioning and interconnected social systems, what counted as history in university curricula fundamentally changed, and it did so in an orderly fashion. The teaching of history changed according to dominating definitions of “society”: “in the present case, we see that when ‘society’ was defined largely in the national terms of imagined community, the history curriculum depicted the mainly political evolution of singular nation-states from civilizational origins. When ‘society’ came to be defined in terms of a rationalized and differentiated social system, history shifted in focus.”

Beyond education, institutional researchers and their work on “higher-level” structures have expanded their focus and methodologies in the preceding decades. The account of fields—within and beyond the nation-state apparatus—influenced by globally-legitimated models or scripts goes on. Recent work focuses on various dimensions of organizational rationalization, expressed in the uniformization of various areas within organizations as an effect of the influence of global scripts. Some of these fields include: a) the diffusion of business education and the expansion of MBA and Business School programs; this is shown in a comparative and longitudinal study covering the period between 1881 and 1999. b) the global expansion of international quality production rules such as ISO 9000, which is linked to a global managerial culture and to international standardization; c) global expansion of standard rules for transparency in accountancy; d)
the expansion of corporate responsibility and of the idea of emphasizing the societal roles of corporations beyond profit-making; etc.\textsuperscript{95}

Globalization and the force of world society impacts private organizations such as businesses and non-for-profit entities as it impacts governmental bodies. A recent book examines how science has been established as a world institution, and the way in which a uniform scientific discourse has shaped various spheres of domestic governance and policy throughout the world and has been adopted regardless of its functional application in different contexts, this is, it has spread more as symbol and ritual than as an instrumental, goal-advancing tool. Thus, instructions on “how to produce economic development, how to raise and educate children, how to preserve health, which aspects of nature require protection and how to protect them, or how to manage organizations” are transferred from the developed world into developing nations. It is important to note that “these instructions typically do not take the form of commands at all. They are carried along by communities of scientists and experts and by organizations that offer technical assistance. . . They are influential because they are deeply grounded in the authority of science.”\textsuperscript{96}

Science influences state action and coats policy decisions with a layer of legitimacy. This is revealed, for instance, in the creation of Ministries of Science and Technology around the world, investigated through event history analysis in this volume,

\textsuperscript{95} Each of these subject areas is covered in an individual chapter in Drori, Gili S., John W. Meyer, and Hokyu Hwang, eds. 2006. “Globalization and organization : world society and organizational change.” vol. 9780199284542 (pbk.). Oxford ; New York :: Oxford University Press.

which reveals “quantitative descriptions of the life path of each nation-state as it develops and changes over time, especially with regard to the adoption of a new ministry.”\textsuperscript{97}

A similarly structured study traces the impact that world society has in the level of independence that states afford their central banks. In a cross-national study of 71 countries over the period of 10 years (between 1990 and 2000), Polillo and Guillén\textsuperscript{98} show that the independence given to central banks as setters of macroeconomic policy in many nations is not influenced by contextual domestic and political factors such as inflation rates and political turnover (high inflation and political turnover rates would allegedly be drivers for heightened central bank independence), but by the influence of world societal institutions such as international coercive pressures and the influence of bilateral trade agreements.\textsuperscript{99}

Another subject area investigated through the same theoretical and methodological tools is infrastructure reform.\textsuperscript{100} Unlike the research discussed above, which focuses on isomorphism or similar outcomes, this study explains variations in the adoption of neo-liberal infrastructure reform in terms of international variables rather than in terms of domestic, political, and economic context. Beyond emulation and mimicry of international scripts, this study includes the coercive force of international actors such as international organizations as part of the conceptualization of international influence. On the whole, despite these differences, the thrust of this study is that

\textsuperscript{97} Ibid at 129.
\textsuperscript{99} Ibid. at 1773.
infrastructure reform, generally explained in terms of domestic political economic variables, needs to include the role played by international forces and actors.

Yet an additional institution of the world society is environmental protection. The materialization of world culture is largely connected to the emergence of global problems, i.e., problems that transcend borders and affect people in different parts of the world equally. An exemplary world problem is environmental degradation. As should be common knowledge, this problem has motivated an enormous amount of action, organization and planning, expressed in the passing of myriad international environmental regulations, declarations, and conventions; the transnational organization of civil society to protect the environment; the creation of transnational institutions such as the UN-created World Commission on Environment and Development, etc. Schofer and Hironaka\textsuperscript{101} investigate the extent to which world societal environmental institutions affect outcomes. In focusing on outcomes, i.e., actual practical effects, this study distinguishes itself from those reviewed above, because those studies investigate the adoption of policies or plans, while this one is concerned with the impact that those policies or plans have after adoption, this is, whether they curb environmental degradation. This dissertation aims at accomplishing the same goal, this is, look at the two “stages” of policy—adoption and implementation—to learn how they reinforce each other, and to explore the way in which globally motivated norms fare on the ground.

b) The Global Society and Human Rights.

Human rights as principled norms are a fundamental part of global culture. Legal scholars and sociologists Ryan Goodman and Derek Jinks have recently offered a theoretical view on human rights regimes that cross-fertilizes international law and international relations scholarship with sociological neo-institutionalism. These authors’ first contribution brings sociology’s neo-institutionalism’s insights into debates about sovereignty, traditionally based within political science. They propose re-focusing sovereignty’s underlying assumption that states are purposive, self-directed actors. Their second contribution cross-fertilizes discussions about state behavior and human rights, traditionally based within International Relations and International Law, with sociology’s institutionalism. It aims at re-focusing debates about the power of international human rights law, providing a usually-neglected account of how states behave, how international human rights regimes operate, and ultimately, how such regimes may more effectively promote respect for human rights. They term this mechanism acculturation; its thrust is that more attention should be given to understanding how global social and cultural forces impact international human rights law and state behavior.

From the vantage point of neo-institutionalism as harnessed by Goodman and Jinks’ acculturation theory, the global environment is the locus in which human rights regimes operate. Consequently, acculturation theory submits that it is necessary to take seriously the role that the global social environment plays in shaping human rights regimes, so that human rights can be promoted more effectively.

In order to explain the expansion and enforceability of human rights regimes through the influence of the global social environment, acculturation draws on social

102 Supra note 79.
psychology to conceptualize the microprocesses by which global patterns influence state actors. The fundamental idea is that actors tend to act according to expectations and roles internalized by them, in order to minimize any “discomfort”.

Actors in several respects are driven to conform. These internal pressures include (1) social-psychological costs of nonconformity (such as dissonance associated with conduct that is inconsistent with an actor’s identity or social roles), and (2) social-psychological benefits of conforming to group norms and expectations (such as the “cognitive comfort” associated with both high social status and membership in a perceived “in-group”). Individuals are highly motivated to minimize this dissonance by either changing their behavior or finding ways to justify their past behavior. Therefore, there are internal pressures driving actors to act and think in ways consistent with the social roles and expectations internalized by such actors. An implication of this pressure is that, once actors internalize some role (or any other identity formation), they are impelled to act and think in ways consistent with the highly legitimated purposes and attributes of that role.\footnote{Supra note 17 at 640-641.}

The implication is that state actors in developing nations, including Ecuador, conform to roles, purposes, and contents originated in the global human rights movement because of the force of socializing. Up to this point, the adoption and implementation of international law instruments has been explained either by coercion (stronger nations imposing weaker nations to adopt international instruments) or persuasion (nations adopting international instruments because they believe in their normative value). However, Goodman and Jinks would argue, these two explanations are insufficient because they miss the important role of global socialization.

Elite actors in developing nations with colonial pasts feel or desire to feel a stronger connection with global centers than with the local village. Conforming to roles and normative preferences is essential to establishing and strengthening that connection. In this perspective, the social rationales of state action acquire special relevance.
In sum, Goodman and Jinks contend that acknowledging that state action is socially based and globally embedded must force a re-thinking of how to design international regimes so that they are more effective. For example, they suggest that more open access to international institutions—even for ‘rogue’ states—because, in providing states with membership in international institutions favors strengthens the social influence of such institutions.

Access to Information and Tobacco Control are themselves connected to the human rights discourse and movement, and they are increasingly recognized as emerging human rights. Access to information is implied in Article 19 of the International Covenant on Civil and Political Rights and Article 13 of the American Convention. However, current developments argue for its standing as an independent human right. Likewise, current developments argue for the declaration of the human right to tobacco control, a right deriving from the right to health and a clean environment.

Various studies within the neo-institutional tradition, which provide empirical grounding to Goodman and Jinks’ theory, document and explain the expansion of human rights norms as a result of the impacts of world-societal institutional forces. Women’s voting rights and actions taken to curb domestic violence have significantly been diffused

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104 Notably, the recent decision by the Inter-American Court of Human Rights (IACHR) in the case of Marcel Claude Reyes and Others v. Chile, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf (last visited 03.31.08). In this case, interpreting Article 13 of American Convention, the IACHR declared that everyone has a human right to obtain government information. A variety of international human rights organizations campaign for access to information as a Human Rights (See, for example, the website of Article 19, a British organization: http://www.article19.org/, last visited 3.30.08).

globally through international socialization, and made into domestic policies once they acquired legitimacy as human rights. Hawkins and Humes\textsuperscript{106} explore a recent shift in the way contemporary states see and deal with intra-family or domestic violence against women. Before the 1990s, this issue was seen as a private matter beyond the reach of state intervention. After the shift, states began to acknowledge this as a social problem that required intervention in the form of prevention, regulation, and support.

How did this change come about? Why were states willing, at a certain point in time, to intervene in a matter that had long been seen as beyond their reach? This study asks similar questions in regards to the public control of tobacco consumption in Ecuador and the new regulations on access to information, matters that had long been seen as pertaining to private and local cultural realms only, and that are now shifting with many governments (including the Ecuadorian) starting to put legislation in place. Hawkins and Humes’ study suggests that this change comes about as the result of a two-stage process that is guided, in the first phase, by domestic social movements. They describe this initial part of the process as follows:

In the first stage, activist groups often (but not always) communicate transnationally with like-minded activists and conceptualize new norms of appropriate state behavior. Working simultaneously at international and domestic levels, they begin a long process of persuading states and international organizations to create and implement new moral guidelines. Some states, which we label "leaders," adopt the proposed norms in national policy and legislation before the norm receives widespread international acceptance through international declarations, resolutions, or treaties. Although transnational communication among activists allows them to discuss their problems and strategies, the absence of clear international norms at this early stage ensures the primacy of domestic politics in determining which states will be leaders.\textsuperscript{107}


\textsuperscript{107}Ibid. at 241.
Domestic politics are important in the initial stage. On the contrary, the second stage is guided by norm cascades and international socialization:

In the second stage of norm acceptance or norm cascades, international socialization processes are more important than domestic activists, though domestic groups continue to play a role. (34) In this stage, a large number of states, which we label “followers,” implement the norm in similar ways in a relatively short time span. For socialization to occur, international norms should be defined in clear and specific ways, either in the statements and procedures of key international organizations or in interstate conventions and treaties.108

The first stage, as described by these authors, relies on domestic social movements and can be explained through social movement theory, while the second occurs through international socialization and norms cascades, and can be understood through international relations constructivist theories (the latter are discussed further in the “competing theories” chapter below.) The study of the recognition of women’s suffrage rights around the world finds a similar pattern. In a longitudinal study of 133 countries between 1890 to 1990, Ramirez, Soysal, and Shanahan109 find that in the last years of the 19th century and the early part of the 20th century, domestic politics and social movements were the most relevant leaders in the struggle for the acquisition of women’s rights. However, in the latter part of the 20th century, international linkages and connections became the most important drivers for the expansion and diffusion of these rights. Whereas the attainment of suffrage rights in the “leader” nations such as Finland was felt as a miracle and a major achievement, a hundred years later, adoption was a

108 Supra note 106 at 242.
natural result of the wide diffusion of this standard in widespread, global model of political citizenship. What is more, “authentic nation-statehood was predicated increasingly on adherence to this model, and the model itself was articulated increasingly by more nation-states, by international organizations, and by women's suffrage movements.”

The question of whether local attitudes and climate or international models are the dominant drivers for domestic policy has also found a good locus of investigation in anti-female-genital-cutting laws (FGC). Boyle and Preves\textsuperscript{111} focus on the question of why nations adopt anti-FGC policies, starting from the premise that an \textit{a priori} assumption that domestic conditions are the main policy drivers is an overstatement, especially for African and other developing countries, which are highly influenced by global models. The study of anti-FGC practices provides a useful way to explore the validity of this claim, for several reasons. First, this practice is evidently condemned by international human rights norms. Second, domestic attitudes towards this practice can be easily evaluated, and contrasted to the existence or absence of legislation banning the practice. The authors find that “the development of anti-FGC policies in countries where many individuals support the practice, the timing and character of national legal action directed against FGC, and the uniformity of political action all lend weight to the importance of international pressure in the adoption of anti-FGC policies.”

\textsuperscript{110} \textit{Ibid} at 743.
\textsuperscript{112} \textit{Ibid} at 730.
Subsequent studies by Boyle and others take a further step in the study of the connection between international human rights norms and domestic policies: they investigate how international or global norms are negotiated domestically. In so doing, these studies are some of the few that go beyond the extensively-researched contention that policies around the world resemble each other: They ask whether practices also resemble each other in different countries. “Local Conformity to International Norms: The Case of Female Genital Cutting” researches the conditions under which individual observance of international norms (such as anti-FGC norms) that have been made into domestic policy is more likely to occur, in a comparative case study of five African countries (Egypt, Kenya, Mali, Niger, and Sudan). It finds that, while structural factors such as access to electricity or an urban environment may impact whether people abide by this policy, exposure to channels that carry global scripts (such as education, college, mass media and employment) are more likely to influence both attitudes and behavior on FGC. In this sense, this study finds more support for neo-institutionalist theory than for development theory, which claims that a “modern” lifestyle will bring about observance with international norms.

Even though this study makes an important contribution in exploring qualitatively the conditions under which international human rights norms are applied domestically, it wrongly assumes that adopting policies that promote human rights is a useless effort unless these norms are fully observed and internalized by individuals. The authors write:

“Because the effectiveness of national policies ultimately depends on individual behavior change, until this shortcoming is addressed, the impact of global neoinstitutional theory is necessarily limited. For example, stringent...”

113 Supra note 26.
environmental laws are useless in a country where local organizations and individuals fail to bring their behavior into conformity with the laws. Likewise, giving women the right to vote is pointless in a country where local circumstances do not allow women to move about freely and independently.”

In part, this dissertation seeks to investigate whether passing progressive policies, such as Access to Information and Tobacco Control is pointless even if enforcement does not occur fully after adoption. The second part of this project focuses on this issue, hypothesizing that the laws matter even if poorly observed as discursive and mobilizing tools. In other words, the second part of this project seeks to investigate how policies matter even if they are adopted “top-down” and not as a result of domestic climate and pressure.

Finally, a similar study by Boyle and others conducts a probe into the actual political process by which anti-FGC are adopted in three countries (Egypt, Tanzania, and the United States), exploring whether the adoption of these policies generated conflict and opposition. Interestingly, conflict is, as in the case of Tanzania, mediated by recurrence to the global legitimacy of the norms, with their global standing and force lending support in a contested environment. Overall, the empirical research of access to information laws and smoking ban in Ecuador conducted in here trace these studies. In the first part, attention is given to the way in which global legal trends influence policymaking agendas and preferences, and to the conditions under which these norms were adopted, while in the second, attention is afforded to their on the ground impacts.

\[114\] Ibid at 6.
\[115\] Supra note 24.
v. Global Socialization and International Organizations.

In section iii above, I discussed neo-institutionalism’s contentions in relation to the role, position, and re-definition of the nation-state brought about by world societal institutional forces. “The world as we know it is a world of nation-states. Indeed, the world today embodies a global nation-state system, and contemporary nation-states are involved in a variety of power, exchange, and communicative relationships.”\textsuperscript{116} However, nation-states as units of political organization have clearly undergone important changes and faced significant challenges, discussed above.

As much as the world today is a world of nation-states, it is a world highly mediated by non-state organizations, both governmental and non-governmental. This subsection discusses neo institutional literature on such organizations’ role as sources and facilitators of world cultural contents, as the channels by which regulatory patterns emerging from the institutions of the world society are transferred, and, in general, as actors having a rapidly growing role in the world today—sometimes providing advice, knowledge and support to state bureaucracies, sometimes confronting and organizing individuals in struggles for rights and entitlements vis-à-vis the state.

An initial caveat is necessary. Not all international organizations are created equal nor do all organizations have similar roles in the diffusion of world cultural contents. According to the transnational power politics view discussed in more detail in Chapter Three below, while certain organizations work to create change through activism and organized action, other organizations actually operate to perpetrate extant schemes of

\textsuperscript{116} Supra note 81 at 1.
power distribution. Therefore, it is necessary to differentiate between organizations that oppose established structures and those that support them. Some of the former have conducted struggles for change such as the recognition of voting rights for women or the right to self-determination; these actions confront individuals against the state as the entity that sanctions and recognizes those rights. According to the transnational power politics view it is necessary to pay attention to how the civil society has organized across borders to advance equal rights for people who have traditionally been discriminated against—women, minorities, indigenous groups. Under this view, neo-institutionalism is problematic because it lumps all organizations together, ignoring power politics, through which the initial stage of norms emergence takes place. 117

Neo-institutionalism investigates primarily how world societal norms spread as social and legal rules once they have been recognized by a significant number of states (usually developed nations) and have been legitimated globally, leaving aside a more nuanced exploration of the power struggles by which those norms emerged in the first place. A large amount of neo institutional world polity literature pays attention to the role that a highly organized, purposive civil society plays in the process by which world societal trends are dispersed. It sees it as the milieu in which states are embedded. International organizations, notably INGO, are significant channels through which the fabric of world society is woven. They define goals, define what is normal, they “teach norms;” they provide policy advice for agenda setting and action; they create a web by which world society’s institutions transcend borders; they act as cultural mediators, ‘translating’ world societal norms into a familiar ‘language’ in domestic contexts.

117 See supra note 45 and infra note 147.
“Embeddedness in the modern world society takes various forms, revealing the multiple channels through which normative or institutional influences transpire. Most obviously, the modern world society is anchored within a web of international organizations. . . interaction with them results in greater exposure to the legitimated rationalized models of social action. . . Networking with international organizations has been shown to influence a variety of corporate and national governance-related practices from compliance with ISO regulations […] to expansion of governmental responsibilities […] to legal initiatives toward governmental transparency […]”\[118\] [citations omitted]

INGO thus play a central role in spreading the institutions of world society. They act as “moral entrepreneurs”\[119\] and as “teachers of norms”\[120\] and they “set the normative expectations, celebrate the normal, and denounce the deviant. Embeddedness in this global web of organizations, and hence in the world culture that they create [,] nests a country in global scripts and models.”\[121\]

INGO in general have a fundamental role as constituting elements of the fabric that makes up the world society. Boli and Thomas\[122\] investigate this role in a study of thousands of organizations across myriad issue-areas. This work has served as the springboard for subsequent specific and thematic research on the work of INGOs, discussed below. The study of INGOs holds high revealing power about the constituting features of world society. “Like all polities, the world polity is constituted by a distinct culture—a set of fundamental principles and models, mainly ontological and cognitive in


\[121\] *Supra* note 118 at 222.

character, defining the nature and purposes of social actors and action. Like all culture, world culture becomes embedded in social organization, especially in organizations operating at the global level.”

Boli and Thomas’s study traces the growth of INGOs (defined as organizations that have international membership) between 1875 and 1973, using data for 6,000 from the Union of International Associations Yearbook. The analysis of the structural aims of these organizations, paired with their international nature, lends support to the argument that INGOs are relevant actors in the process of producing and especially spreading world cultural contents. The fact that myriad INGO see the world as their frame of action is a strong indicator of how INGOs contribute to the strengthening of a world polity.

INGOs are key actors in the emergence of human rights regimes. They provide advice to states and IGOs like the United Nations formally and informally. Thousands of them have consultative status with UN Agencies and provide information to states. Through their work, they enshrine the values that have become central to world society: universalism, individualism, voluntaristic authority, rational progress, and world citizenship. INGOs influence nation states in myriad issues, including technical standardization, rules of war, population policy, the status of women, and nature and the environment. Further, INGOs agglutinate individuals and experts internationally, adding their own assets—such as credentials, professional standing and expertise, and

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123 Ibid. at 172.
124 Ibid. at 179.
125 Ibid. at 180-182.
126 Ibid. at 184-186.
organizational position—in order to derive authority and legitimacy in the global scale.\textsuperscript{127} Thus, INGOs and their members “are incorporations of the virtually unchallengeable authority, prestige, and value associated with their respective domains.”\textsuperscript{128}

Further research in the same vein examines specific issue areas in which NGO and INGO contribute to shaping global institutional contents. In the area of governmental transparency and rationalized governance, research has shown that international organizations, both governmental and nongovernmental, play an important part in the process towards improved access to government information, especially in transitional or newly established democracies. Some studies take a narrow view, seeing the role of organizations only in instrumental terms. In this vein, Grigorescu\textsuperscript{129} sees international organizations as important because they facilitate the flow of information, thus creating pressure for governments to become more transparent and pass access to information legislation. Also, international organizations create this effect because they are able to collect and organize large amounts of information from governments. This author argues “that one of the principal causes of change in domestic transparency (although not the only one) is currently […] related to the role of international organizations as alternative sources of information.”\textsuperscript{130}

Other work explores the function of INGOs and IGOs in a less instrumental fashion; it sees organizations as more than facilitators or compilers of information: it sees them as agents creating a global culture of transparent governance, which is then diffused

\textsuperscript{127} Ibid. at 287.  
\textsuperscript{128} Ibid. at 284.  
\textsuperscript{130} Ibid. at 645.
through various channels, including IGOs and INGOs themselves. This culture privileges rationalizing models that “stress orderly, impersonal, rule-based, and merit-based administration.” In this study, the authors examine factors that have an impact on domestic or national processes towards rationalization and organized governance by conducting a comparative study of 79 countries over a period of 17 years (between 1985 and 2002). Following a similar methodological approach as the various studies discussed above, they explore the relation between domestic conditions such as a country’s political system (measured as the scale of institutional democracy), a country’s economic development (measured as gross domestic product per capita), trade relations a country maintains with other nations (measured as total imports and exports as a proportion of gross domestic product), a country’s national science and higher education system, etc (independent variables) and changes towards rational, technical public administration (dependent or outcome variable).

Like the studies discussed above, Drori et. al.’s piece aims at showing that embeddedness in the global system is a stronger determinant of a nation’s governance design than domestic conditions. Embeddedness is determined, among other things, by the degree of economic and political development, indicated by whether nations are members in the OECD (Organization of Economic Cooperation and Development), which includes the 30 richest countries in the world. “In this sense, it is globalization, or the interaction with world society through embeddedness in global trade, in global organizational ties, and in global logics, that affects the expansion of rationalized

131 Supra note 118 at 206.
Embeddedness is also defined by the connection that states have with INGOs and IGOs, which provide knowledge, advising, and support geared towards improving governance.

INGOs and IGOs are also important enactors of world cultural directives, thresholds, and programs to advance health. In fact, research argues that the protection of health has consolidated itself as an organizational field (in the terms discussed above). Health protection around the world is linked to the human rights discourse under the influence of which, in the latter part of the twentieth century, generalized understanding of health have shifted from charity to actual entitlements or rights of every individuals. Using what is by now standard institutional research methodology, these authors investigate both the evolution of health protection as a conceptual matter, and the function of IGOs and INGOs in shaping this evolution. This piece, however, does not attempt to establish correlations between world societal scripts and domestic change. The aims of this article are solely descriptive; nevertheless, longitudinal description of the field is also useful as grounds or interpretation “reveals a compelling tale of the globalization of health.”

Following Boli and Thomas’s methodology, this piece relies on data contained in the Yearbook of International Organizations, which compiles and classifies information about international organizations by subject area, goals, and activities. From this dataset, the study extracts around 2640 health organizations, from which it takes a

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132 Supra note 118 at 220.
134 Ibid at 204.
135 Supra note 118.
random sample constituting 10 percent of the population (264 health organizations). Description of the evolution of the health field globally is based on the creation of organizations across time; the goals and objectives of these organizations; the secular or religious discourse of the organizations; the members, etc. From these variables, a description of the themes and discursive framework used by organizations in the sample emerges, showing identifiable patterns of similarity over the same periods of time, suggesting that they were following emerging global trends about the best way to address health. Clearly, in addition to the presence of INGOs, the World Health Organization since its founding in 1948, has been at the forefront of a conception of health as a social concern.

World polity theory also explains the expansion and diffusion of human rights where accounts based on power and state imposition are insufficient. INGOs are fundamental in the organization of the civil society in an articulated human rights movement. INGOs provide the locus by which individuals can participate in transnational movements. Therefore, an effective way to measure individual participation and support for a movement—such as the human rights movement—is to look at memberships in INGOs. Tsutsui and Wotipka’s\textsuperscript{136} study traces this phenomenon by examining individual membership in international human rights organizations globally. It connects participation and membership on INGO to domestic contextual variables, such as openness of the political system, and to the extent of exposure or existence of “linkages” to the global society. It finds that countries with more open political systems

and more linkages have the highest memberships in human rights INGOs: developed
countries lead the pack in membership, but the numbers in developing countries are
increasing. What this research suggests is that macro social structures such as the world
polity impact domestic and individual levels. This is the central idea that the first part of
this project investigates: whether linkages and exposure to global institutions are drivers
behind two recent progressive laws in Ecuador.

Enmeshed with the role of INGOs in the modern world society is the activity of
IGO. In institutional terms, as much as INGO, IGO are in a position of both producers of
world societal ideologies and contents and actors embedded in it. Nevertheless, there are
several fundamental distinctions between IGO and INGO. First, IGO are established
through an agreement among the governments of sovereign states. IGO, the most
notable of which is the United Nations, have, in many cases, regulatory powers and are
supposed to coerce nation-states into desirable behaviors. Admittedly, the coercive role
of IGOs is sometimes diminished by power imbalances and their ultimate lack of a truly
effective and independent monopoly of force—they are not a higher type of state.

Their role is more as the loci in which institutional world polity contents originate
and the fibers through which they spread. In other words, while other theories—
especially neorealist theory—would diminish the place of IGO because of its coercive
deficits, world polity theory sees their preeminence as shapers of state behavior through
their social, institutional role. In other words, while IGOs may not always be able to

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137 Supra note 81 at 30.
138 Examples of the difficulty that IGO have implementing their decisions abound. Even international
adjudicating bodies such as human rights courts lack the ability to see their decisions through, especially
when those decisions involve powerful states.
directly constrain powerful states, their power is expressed with a force that is more significant than direct coercion—the force of social influence and legitimation of appropriate modes of action and structure. “By examining international organizations as a dynamic institutionalizing mechanism by which world cultural themes are brought to bear on nation-state structures, ideologies, and practices, we may be able to add to our understanding of how the transnational context operates to shape and define states in significant ways, and contributing substantially to isomorphism in institutional arrangements in the modern world system.”

In summary, neo-institutionalism’s claim in relation to the role of INGO and IGOs is that they are extremely relevant globally as the channels by which human rights are established. Reinforcing each other, they work to advance shared goals and they produce isomorphism in policies around the world. The theory contends that isomorphism (or similar policy outcomes) is not the result of imposition, but the result of a process by which goals are made legitimate and important globally, largely through the work of international organizations, which also constitute the environment in which national policymakers are embedded.

As mentioned in Chapter 1 above, this dissertation examines this theoretical framework vis-à-vis competing ones, and it fills a gap by offering a qualitative case study which examines the process by which local policymaking is shaped by transnational policy trends. As following Chapters show, part of the research addresses precisely the role of IGO and INGO in institutionalizing the need for regulations in these realms, and giving regulatory initiatives a robust layer of legitimacy. In other words, the chapters that

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139 Supra note 81 at 29.
follow probe into the extent to which “world polity definitions, rules, and principles [are] encoded in the prescriptions elaborated by international organizations for nation-state practice”\textsuperscript{140} influence said nation-state policy choices vis-à-vis competing explanations.

Access to information originates to an important degree from a growing transnational concern about governmental transparency and rationalized governance. Additionally, as mentioned above, it is a value increasingly advanced by the human rights movement. Likewise, the smoking ban recently passed in Ecuador is part of a growing transnational movement to regulate tobacco products, now nested within the World Health Organization, and enshrined in its Framework Convention on Tobacco Control. This movement is also recently ushering the emergence of a derivative human right to tobacco control, linking it to the right to health and related social rights.

\textsuperscript{140} Supra note 81 at 27.
Chapter Three: Competing Theories on the Global Expansion of Norms.

The preceding chapter elaborates on the fundamental tenets of neo-institutionalism and acculturation’s propositions about the way in which the global environment and its institutional contents affect lawmaking agendas in developing nations by transferring policy scripts or models to states and decision makers around the world. As discussed above, the global expansion of policy frameworks takes place across various policy subject-matters. This chapter discusses the following alternative or competing views on the expansion and application of policy frameworks: a) international relations realist theory; b) international relations’ constructivist theories and international law; c) Other ancillary related views, including microphenomenology, microrealism, and “palace wars.”

i. International Relations’ Realism

As the preceding paragraphs discussed, world polity theory is macrophenomenological in nature, i.e., it affords utter relevance to the large-scale, global social structure and its contents as determinants of actorhood. A very well-established theory challenged by neo-institutionalism is a standard International Relations theory, neorealism, which is microrealist in nature.¹⁴¹

Central tenets of this school of thought are that states are rational actors moving rationally to maximize outcomes. It can be summed up in the following statements: 1. The most basic motive driving states is survival. States want to maintain their sovereignty.

2. To that end, they think strategically, which presumes that they are unitary, rational, purposive actors. 3. Given that at the international level there is not a superior authority, this system is anarchic. 4. They possess some offensive military capability that gives them the possibility to hurt and possibly destroy each other. 5. States can never be certain about the intentions of other states.

The most relevant features of states under neo-realism are their irrationality and ability to make calculations for their behavior, and that states will make such cost-benefit decisions under the coercion of other, more powerful states. Coercion may be in the form of force, but more commonly it adopts the form of economic and trade sanctions. For example, Ecuador’s accelerated adoption of the 1998 Intellectual Property Law came as a result of pressure exerted by the United States and by international obligations acquired with the World Trade Organization in exchange for access to a world market with benefits in trade tariffs.

Before the 1998 Law was passed, Ecuador had a variety of separate intellectual property (IP) statutes which did not protect these rights to the standards required by the United States. Consequently, the U.S, through its embassy in Ecuador, pressured the Ecuadorian government—then under the interim term of Fabián Alarcón—to ratify and sign a bi-lateral IP treaty with higher standards, threatening to remove trade preferences afforded by the existing Andean Trade Preferences Act (ATPA). Additionally, Ecuador had entered into the WTO in 1995 virtually without any negotiation of terms and obligations, and without reserving its right to delay the application of the Trade Related Aspects of Intellectual Property Law Agreement (TRIPS), in part because it needed
access to the multilateral trade benefits acquired as a WTO member. The result was the adoption of the 1998 IP Law, which appeased the U.S. and allowed Ecuador to begin complying with the execution aspects of the TRIPS.142

As this example shows, for neorealism, rational calculation of interests matters more for the adoption of laws than other variables such as culture and cognitive forces. As Meyer et. al. write, under the logic of neo-realism, “state action reflects inherent needs and interests; culture is largely irrelevant, though it may be invoked to explain particular, often historically rooted patterns of policy or behavior. In any case, culture is only local or national, not global.”143 The key difference is that neorealism depends on independent actorhood whereas world polity sees the state as dependent and defined by social and cultural context. Neorealism attempts to explain how states act vis-à-vis other states in the international context. Nevertheless, the implications of this theory matter beyond state-to-state relations (which are not the central focus in this dissertation). Neorealism is relevant in the context of this project because it sees the state as self-determined rather than embedded.

Were this project to derive hypotheses from this competing theory, they would have radically different contents. As Chapter Five will discuss in detail, this dissertation hypothesizes that tobacco control and access to information regulations were adopted by the state of Ecuador because of the force of global cultural models in which these two norms emerged, which provided them with taken for granted legitimacy. Neorealist-based hypotheses would pose that calculations of self interest were the drivers behind the

142 Interviews with Benigno Sotomayor and Antonio Cobo, Quito, August 2007.
143 Supra note 53 at 146.
adoption of the new access to information law and the anti-smoking regulation. They would pose that Ecuador faced serious losses if these laws were not passed and that, therefore, they were adopted as a result of a rational cost-benefit calculation. These losses could have come in the form of sanctions, reduction in foreign aid and/or international lending. Neorealist-based hypotheses would be rejected after empirical research because no coercive force was exerted by other states (or transnational organizations with “teeth,” such as the various lending institutions on whose financing Ecuador’s budget largely depends upon).

ii. Constructivism and Transnational Legal Process.

It is rather recently that international relations theory in general and constructivist theory in particular have turned their gaze towards the importance of social norms, culture, “and other social features of political life.” Nevertheless, in exploring how compliance with international rules that originate at the global level occurs, constructivist theory shares a similar nature with sociological institutionalism, reviewed above. The most important similarity is that both privilege social context and social structure as determinants of state behavior, going beyond black letter legal considerations. Nevertheless, they use this analytical standpoint for different ends. IR constructivism is concerned with advancing international regimes and international rules, and the way in which such regimes and rules become effective in different contexts. On the other hand, sociology’s institutionalism concentrates more on uniformization in different corners of the world brought about by global social forces, the cultural contents of the world society. In other words, the focus of the constructivism is more on norms as regulatory means—

144 Supra note 45 at 325.
and how to maximize the normative relevance of such means —whereas institutionalism focuses on observed similar policy outcomes—and how to account for these puzzling similarities.

International relations scholar Martha Finnemore’s constructivist approach resembles institutionalist ontology: "We cannot understand what states want without understanding the international social structure of which they are a part. States are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world. States are socialized to want certain things by the international society in which they and the people in them live." (emphasis is mine). From a constructivist perspective, international structure is determined by the international distribution of ideas. “Shared ideas, expectations, and beliefs about appropriate behavior are what give the world structure, order, and

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145 A significant portion of International Relations theory and research is concerned with the conditions under which states comply with international law. This literature, known as International Law Compliance (ILC), which shares efforts with international law, aims to bring an empirical approach to assessing compliance and state behavior vis-à-vis international law. ILC relies conceptually, as the name suggests, on compliance, which is defined as “a state of conformity or identity between an actor’s behavior and a specified rule.” (Raustiala, Kal and Anne-Marie Slaughter. 2003. "International Law, International Relations and Compliance," in Handbook of international relations, edited by T. R. a. B. A. S. Walter Carlsnaes, eds. London, Thousand Oaks, Calif.: Sage pp. 538). Based on these conceptual grounds, several contemporary ILC studies have attempted to measure quantitatively the impacts of international norms on state behavior, some of them treating compliance as a dependent or outcome variable, and the international legal system as independent variable. Some of these studies are Hathaway, Oona. 2002. "Do Human Rights Treaties Make a Difference?" Yale Law Journal 111.; Cassel, Douglass. 2001. "Does International Human Rights Law Make a Difference?" Chicago Journal of International Law 121.; Keith, Linda Camp. 1999. "The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?" Journal of Peace Research 36.; Simmons, Beth A. 2000. "International Law and State Behavior: Commitment and Compliance in International Monetary Affairs." Political Science Review 94. For an annotated bibliography of ILC research, see Bradford, William. 2004, "International Legal Compliance: Surveying the Discipline", Retrieved (http://law.bepress.com/cgi/viewcontent.cgi?article=1787&context=expresso). (last visited 3/2/07). For an account of the collaboration between international relations and international law on the subject of compliance, see Hathaway, Oona Anne and Harold Hongju Koh. 2005. Foundations of international law and politics. New York, N.Y: Foundation Press.

stability." \(^{147}\) Nevertheless, an important point of departure is that constructivism assumes that the way in which global institutions shape state decision and policy is through persuasion about the value and legitimacy of international standards. For instance, Franck’s approach relies on the idea that international rules will be observed because they are perceived as legitimate by those who apply them. \(^{148}\)

Other important recent constructivist work has investigated the way in which global principled ideas such as human rights emerge and operate globally and domestically. Keck and Sikkink look at the way in which transnational networks of activists and advocates influence local action and actors to ultimately shape state behavior. \(^{149}\) This research on issue-networks challenges institutionalism in one fundamental way: \(^{150}\) it sees “international society [as] the site of diffusion of world culture—a process that itself constitutes the characteristics of states. The vehicles of diffusion become global intergovernmental and nongovernmental organizations, but neither the sources of global cultural norms nor the processes through which those norms evolve are adequately specified” \(^{151}\) (emphasis is mine). In other words, the criticism is leveled on the grounds that world society theory sees INGOs and IOs as “enactors of basic principles of the world culture: universalism, individualism, rational voluntaristic authority, human purposes, and world citizenship; [but] there is thus no meaningful


\(^{150}\) Marta Finnemore elaborates on the relationship between world society theory and transnational power politics theories in her review of three neo-institutionalist books. *See supra* note 45.

\(^{151}\) *Supra* note 149 at 210.
distinction between those transnational actors espousing norms that reinforce existing institutional power relations and those that challenge them."\textsuperscript{152} [emphasis is mine].

In spite of the deep disparity between their view about transnational actors, these two positions are not irreconcilable. The difference may turn out to be merely one of temporal focus rather than one of the phenomena of interest. With its emphasis on the struggle for emerging values and rights, international power politics is concerned more on the initial phase of those principled ideas, this is, stage in which activists and advocates fight to advance such principled ideas. Keck and Sikkink clearly spell out this distinction:

\textquote{The early battles to gain the vote for women were fought tooth and nail country by country, and success came very slowly. This history does not look at all like the natural process of cultural change suggested by the polity theorists. But after a critical mass of countries adopted women suffrage, it was naturalized as an essential attribute of the modern state, and many countries granted women the vote even without the pressure of domestic women’s movements. . . These sociologists have focused theoretically on the second part of the process of change, when norms acquire a ‘taken for granted quality’ and states adopt them without any political pressures from domestic polities. Thus they privilege explanations of change that highlight the influence of world culture. We explore the earlier stages of norm emergence and adoption, characterized by intense domestic and international struggles over meaning and policy, and thus tend to privilege explanations that highlight human agency and indeterminacy.}\textsuperscript{153}

This theoretical distinction is fundamental for this paper, which aims at exploring whether the domestic statutes this project focuses on—access to information and tobacco control regulations—which are already well-established in world society and have acquired a “taken for granted quality,” were enacted as a result of their global preeminence, and through the socializing influence of world cultural forces rather than

\textsuperscript{152} \textit{Ibid.}
\textsuperscript{153} \textit{Ibid} at 211.
only as a result of legal obligations. Note that, in a way, the status of these norms internationally is assumed because this paper does not conduct an exploration of the struggle of transnational and domestic actors to institutionalize these norms at the domestic level—the emergence stage. Indirectly, this project rests on such an approach, because the norms studied here became widely institutionalized internationally through the work of advocates and activists in developed nations and across the world\textsuperscript{154} and were adopted in Ecuador in the absence of visible or significant domestic activism. Guaranteeing access to public information has become a fundamental human right, enshrined in international treaties and conventions (see below), while regulating tobacco has become a public health priority and, more recently, a human right itself.

Constructivist literature thus shares a focus with sociological neo-institutionalism in that it is interested in the contextual conditions for the diffusion and application of norms internationally. Precisely because world polity theory focuses on the force that global social environments have on state action, its insights can shed new light on discussions about state action that rest solely upon concepts of power and somewhat reductivist Westphalian state-to-state relations. Therefore, beyond disagreements about the origin and diffusion of change domestically and globally—which, as pointed out above, are not really conceptual differences, but differences of temporal focus—both perspectives share a concern for the expansion of frameworks in the global context.

\textsuperscript{154} As the discussion on institutionalism in Chapter One shows, many global norms that are part of the global polity originate in the developed world. The same is true for the ban of smoking in public places; this struggle waged by advocates, activists, and lawyers took place mostly in the developed world, especially the United States. As Peter Berger writes: “Of course, Americans are not the only globalizers, but they do have a disproportionate influence: world culture is ‘heavily American both in origin and content,’” cited in Lechner, Frank J. and John Boli, \textit{supra} note 56 at 33.
One constructivist view theorizes that the functionality of international human rights norms is determined by the process of socialization of these norms at the domestic level. These authors offer an explanation that they term the “spiral model” of norms socialization, which includes three processes by which international norms bear force: a) functional adaptation or strategic bargaining; b) moral consciousness-raising, argumentation, dialogue, and persuasion; and c) institutionalization and habitualization. The thrust of this model is that international human rights norms are truly effective once they have been internalized at the domestic level. The process of internalization is a moral process of sorts: it depends on “moral consciousness-raising,” persuasion, and argumentative discourse. For norms to be internalized and become part of identities and behavior and ultimately become institutionalized and habitualized at the domestic level, actors must first be persuaded of their moral righteousness.

In this respect, this constructivist approach differs from sociological neo-institutionalism in that institutionalism does not afford importance to the normative grounds of international institutional contents and the trends they trigger. Institutionalism’s account of the influence of international society is not based on moral contents or legitimacy, but on the force exerted by social context. The process, as theorized by institutionalism, is not one of argumentative normative discourse, but one of norm emulation and mimicry. Under the institutionalist framework, state policy adoption is more the staging and performance of “myth and ceremony” rather than a contended process of moral internalization. Sociological institutionalism sees “action as the

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enactment of broad institutional scripts rather than a matter of internally generated and autonomous choice, motivation, and purpose” (emphasis is mine). Constructivism assumes the internalization of norms and their value in the adopting actor; target actors adopt norms after they are exposed to them and convinced of their normative value. In other words, the key difference is that constructivism sees individuals and states as capable of making decisions on evaluative grounds, whereas institutionalism sees them as enactors of ready-made ‘mythical’ or ‘ceremonial’ practices. “... We find it problematic [...] when [individuals] [...] invoke and rely on cultural accounts to define their actions as matters of individual choice and decision, filled with individual motives and perceptions. ...”

Other somewhat similar work also explains how international norms work in order to understand why they matter. Harold Koh’s work, constructivist in nature, argues that international law operates through a process by which “public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.” Professor Koh’s scholarship starts largely from a different vantage point: vindicate international law and demonstrate how it matters.

Transnational legal process connects international and domestic arenas and sees them as complementing and interdependent. For example, for international law to ultimately be effective, it must be internalized and made into law domestically, it must

156 Supra note 48 at 13.  
157 Ibid.  
involve more actors than just state bureaucrats, and it must transcend or transpire borders and contexts. For the last two frameworks (spiral model and transnational legal process), the effectiveness of international norms is dependent upon their transformation into domestic rules. The implication is that this work assumes the efficacy of domestic law. Clearly, though, domestic law is far from absolutely efficacious in developing countries. However, it makes sense to rely on internal legalization as a measure of efficacy even if domestic law is not fully applied because the law matters in ways beyond application and enforcement.

As the preceding discussion reveals, constructivist international relations work has significant similarities with institutionalism and acculturation. However, there are also important differences. Given that world polity theory sees the world as more than “networks or systems of economic and political interaction”\(^{159}\) it cuts deeper than theories that reduce global analysis to dynamics of state economic and political power (realism). At the same time, it offers a different explanation than the one put forward by constructivist theory, which privileges the legitimacy of norms and a process of moral argumentation and persuasion.

Institutionalism and acculturation rely on the force of societal prescriptions produced in the world polity, the social structure in which states are embedded, and through which institutional contents are transferred by processes of emulation and mimicry. Internalization about the value of international norms is not necessary under acculturation. Socialization exerts its force without moral commitment. Just like individuals are influenced by their surrounding group, and act without actively

\(^{159}\) Supra note 115 at 2.
interrogating the value of the social forces they follow, states through their officials follow international patterns in the absence of moral commitment. This project intends to investigate this important difference, testing hypotheses to determine whether socialization rather than internalization mattered more for the adoption of the access to information law and the smoking ban. Note that this position does not imply that, in being socially derived, human rights norms are \textit{a priori} destined to fail in their application domestically. It merely suggests that the global social context of human rights norms in developing countries must be afforded more attention.

As mentioned above,\textsuperscript{160} this three-pronged categorization of the mechanisms by which state action is influenced, which this dissertation follows, is advanced by Goodman and Jinks. I reproduce here the table they offer to illustrate their categorization:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Basis of Influence} & \textbf{Coercion} & \textbf{Persuasion} & \textbf{Acculturation} \\
\hline
Interest & Congruence with Values & Social Expectations & Cultural Identity \\
\hline
Instrumentalism & Active Assessment of the Validity of a Rule & Social role & Social Status \\
\hline
Material Rewards and punishment & Framing & Social rewards and punishment (shaming, shunning, back-patting) & Mimicry \\
\hline
Material Rewards and punishment & Cuing to think harder & Cognitive costs and benefits (orthodoxy, dissonance) & \\
\hline
Material Rewards and punishment & Convincing & \\
\hline
Material Rewards and punishment & Teaching & \\
\hline
Result & Compliance & Acceptance & Conformity \\
\hline
\end{tabular}
\caption{Three Mechanisms of Social Influence on States. (Reproduced from Goodman and Jinks, 2004, pp. 665.)}
\end{table}

\textsuperscript{160} \textit{Supra} note 18.
iv. Ancillary Frameworks: Microphenomenology, Macrolealism, and “Palace Wars.”

Other alternative theories were mentioned above and require some further specification. I do not offer an elaborate discussion of these frameworks, as some of them, being classical theories, have been discussed extensively elsewhere, and others make minor contributions to the themes explored in this paper. The first alternative view, which shares with institutionalism the prominence afforded to social structure and cultural contents as determinants of actorhood, is microphenomenological in nature. In other words, much like world polity theory, it sees the state as embedded in a social, cultural environment. However, a key difference is that this view sees only local social and cultural systems as influential, dismissing or at least ignoring the significance and force of world societal culture. By contrast, world polity theory’s project is to uncover the decisive force of global social forces and to reclaim them as important explaining factors for state behavior and design throughout the world.

The classic book by Peter Berger and Thomas Luckmann, “The Social Construction of Reality,” addressing the problem of the social origins of knowledge, introduced the idea that knowledge is constructed socially, i.e., by the interactions of individuals who reinforce conceptions about reality. This process produces the institutionalization of cultural contents, which then are reproduced and internalized in social interaction. In this sense, this classic view “gives greater heed to culture’s

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meaning-generating properties and cognitive import.”¹⁶² Nevertheless, this position limits the social construction and institutionalization of cultural contents to local interaction and context. In so doing, it fails to account for such institutionalization on a larger scale, namely, the global level. “These approaches miss the essential elements of the cultural dimension of world society—the cognitive and ontological models of reality that specify the nature, purposes, technology, sovereignty, control, and resources of nation-states and other actors.”¹⁶³ In other words, neo-institutionalism relies on the same theoretical standpoint—that social context gives rise to institutions that in turn influence individuals—but it takes it to the global scale.

Microphenomenological theories would generate different hypotheses about state action and lawmaking. In the context of this dissertation, hypotheses derived from this theory would argue that access to information and tobacco control statutes were adopted in response to local social forces which directly socialized and influenced policymakers towards seeing these regulations as necessary. This dissertation casts hypotheses at variance with these ones, i.e., that these regulations responded to global models and that lawmakers adopted them because they saw them as legitimate and appropriate because they were globally accepted, and because global and transnational actors influenced their decision-making process.

Another competing view, explained above within the discussion of world culture, is macrorealist world-system theory.¹⁶⁴ Suffice it to say here that this theory is

¹⁶² Supra note 53 at 149.
¹⁶³ Ibid.
materialistic and sees culture and social forces as ancillary. Given its focus on economic forces as the drivers of worldwide action, it would predict outcomes at variance with world polity. As Meyer et. al write, this framework sees “the nation-state as the creature of worldwide systems of economic or political power, exchange, and competition. The nation-state is less a bounded actor, more the occupant of a role defined by world economic and political/military competition. Culture, most often seen as self-serving hegemonic ideology or repressive false consciousness, is of only marginal interest; money and force, power and interests, are the engines of global change.”

Macrolealist-informed hypotheses would be quite different in the context of this project. They would contend that the access to information law and the ban on smoking in public places came as a result of global economic power and domination forces, exerted through world markets dominated by large and wealthy corporate actors. These hypotheses would be entirely rejected empirically because, in fact, these laws run against worldwide economic domination forces. This is clearly made evident in the case of the tobacco control law, which regulates the activity of a multinational tobacco corporation. Therefore, macrolealist theory has no explanatory power in connection to this regulation. To a lesser extent, the same is true of the access to information law, in the sense that norms that enshrine and promote rights pose challenges to free market forces which,
according to macrorealism, are the loci in which global economic powers exert their domination.166

Another approach to explaining the adoption of laws in developing nations is to examine whether they are motivated and driven by power differentials both at the originating end as well as at the receiving end of the reforms. This way of thinking about legal reforms seeks to bring the contextual soil of law into the analysis of internationally promoted legal reforms.

International think tanks, NGOs, consultants, and their networks, have for decades strived to improve the living conditions throughout the developing world. Some of these efforts have focused on the role of legal institutions. The ‘law and development’ movement in Latin America, which for over four decades has seen the improvement of the rule of law as a \textit{sine qua non} condition for better governance and economic development, has repeatedly neglected important contextual conditions that determine the success or failure of legal reforms.

166 The relationship between rights and market efficiencies was explored by Okun, Arthur. 1975. \textit{Equality and efficiency, the big tradeoff}, Washington D.C: The Brookings Institution. In this essay, Okun examines how rights and market efficiency are at odds with each other. This tension is derived from the differing nature between “rights and dollars.” Rights are, by definition, inefficient, because they run counter to core efficiency-promoting elements: rights are acquired for free; they are non-tradable (they can’t be bought and sold, even if individuals are willing to sell them—one can not sell one’s right to free speech or one’s right to vote even if one wants to); they aren’t granted as rewards to ability or accomplishment; they are not used as incentives, etc. Therefore, by creating or granting a right, by necessity some inefficiency is created. The relationship between rights and efficiency is a recurring issue in policymaking, where a balance between the promotion of values enshrined in rights and the promotion of economic efficiency must be accomplished. For example, the promotion of the right to health by banning smoking in public places gets in the way of market efficiency, because the regulation has the potential to diminish the consumption and demand for cigarettes. Nevertheless, the loss created by this regulation is deemed to be smaller than the benefit, namely, a population without health and respiratory problems.
A collaboration between Dezalay and Garth (French and American scholars, respectively) seeks to bring political context into the legal reform equation. Politics matter both because of social class and power issues. Understood in that way, the context of the law matters in developing nations. The law—and legal reforms—is an important forum in which groups assert their control over state structures. The law is shaped and done in the law faculty, which reflects extant distributions of power, wealth, influence, and so on. The fate of legal reforms is highly determined by struggles between factions at the domestic levels. This is what the authors call “palace wars.” Thus, local ‘palace wars’ become internationalized when they exert influence on whether a legal reform originating from abroad will go forward or not.

Likewise, ‘palace wars’ matter in the developed world as well, where many of the legal reforms implemented in the developing world originate. The best example are policies in the United States during the cold war, which were shaped to wage this ideological war, and were diffused internationally through American foreign policy and programs.

Overall, the important point that Dezalay and Garth raise is that domestic struggles between groups vying to maintain their positions of power largely influence law and policy adoption, which is used to link actors to international actors, thus providing the local players with added legitimacy. This theory is political in nature, seeing the implementation of laws and policies as political instruments. While many policies are used by groups to serve their own political ends, this view may not hold explanatory

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power for the adoption of various policies that actually are counterproductive politically, or have no important political effect. The view that calls for increasing attention towards political battles is silent about this significant portion of laws and policies. For instance, guaranteeing access to information by legal mandate is not a reform that serves any relevant political goal or ventilates in a significant manner any “palace war” between groups. The same is true for the tobacco control law. Nevertheless, these policies are adopted increasingly adopted around the world.
Chapter Four: Global Origin, Local Application.

The preceding chapters discussed neo-institutionalist literature, empirical and theoretical, as a framework to understand and study the global expansion of policy frameworks; they also offered a review of alternative frameworks. An exploration of the mechanisms by which regulatory frameworks are adopted in developing nations like Ecuador is especially relevant because, as these theories pose, lawmaking is increasingly a response to global social and legal patterns rather than domestic context, trends which predominantly originate from developed nations. Broadly, the various literatures discussed above are concerned with the questions of why and how norms and policies, including human rights laws, are put “in the books.” Subsequent chapters will attempt to ground these theories and test their validity through the case study of the two aforementioned statutes.

i. Global Law and Domestic Social Change.

This chapter deals with the issue of the on the ground implementation of the law in general, and, in particular, of the two statutes in which this dissertation focuses. Investigating the on-the-ground application of globally-originated policy is relevant because these statutes are ultimately tools to promote social change. In general, common law systems, especially the American legal tradition, are more responsive, both in theory and practice, to the connection between the law and social change. In contrast, continental legal traditions, especially in Latin America, tend to maintain a view of the legal system in formalistic, positivist terms. This deeply engrained view diminishes the social change capabilities of the law. Formalism dominates the rules and practice of the
interpretation of the law to specific cases; as a result, the social change capabilities of the law are hindered.

The question of the application of norms to specific cases has been for years the subject of much heated debate, and common law and continental traditions still differ largely on where they stand. Montesquieu famously declared that “the judge is the mouthpiece of the law”; some years later, Justice Marshall of the U.S Supreme Court stated that “judicial power is never exercised to give effect to the will of the judge.” What is, then, the role of judges in applying the law? Are judges supposed to simply plug the facts into an existing law (be it precedent or statutory law), and extract a logical conclusion? In other words, is the task of administering justice a mere syllogism, in which the major premise is the law, the minor premise the facts, and the conclusion the decision? This is the central tenet of formalist jurisprudence, which argues that the law is a series of first principles laid down for application to future cases. Lawyers and judges must reason deductively, from general rule to specific conclusions.  

In Continental systems like Ecuador’s, in which the major source of law is statutory and not precedential, formalism is more widely accepted and judges are, in fact, supposed to be “the mouthpiece of the law.” Judicial power must not be exercised to implement the will of the judge, but to implement the original will and intent of legislators. In contrast, in the American legal tradition, the formalist views of Chief

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Justice Marshall were later strongly questioned from within the bench of the Supreme Court itself, in a set of ideas that gave rise to American Legal Realism, which does not view the law as autonomous or independent from the personal preferences, background, and value-system of those who enforce it, i.e., judges. As Justice Cardozo argued back in 1921, the law is a malleable instrument that allows judges to mold vague terms to justify an outcome that they consider to be just.\footnote{Cardozo, Benjamin N. 1921. \textit{The Nature of the Judicial Process}. New Haven: Yale University Press: Yale University Press.} Admittedly, this position has a natural law flavor, as it implies that judges must apply their own good reason and judgment to reach fair conclusions. This position acknowledges that the law is replete with general and abstract concepts, and it is up to judges to decide the extent of their application in particular cases. Evidently, this operation requires a lot more than a simple syllogism or a clear-cut deductive process of reasoning. The task of deciding what is just requires judges to take into account the facts, with all their nuances, and compels them to apply their own best conception of what a just outcome should be.

Overall, the dominance of formalistic and originalist interpretation hinders the social change impact of progressive statutes. This issue is especially salient in developing countries with colonial pasts, in which poverty, unequal access to economic gain, elitist distributions of power, and corruption—to name just a few—are widespread and long-felt social problems. Paradoxically, it is in these highly socially problematic social contexts that legal thought and practice are more formalistic, and in which the law is less a tool for social change.\footnote{Admittedly, up to a point, the claim that law has not served as an instrument for social change in Latin America is a generalization. Clearly, this function of the law has varied according to contextual variables,
During the first part of the 20th century, American legal realism was at the forefront of the debate about the social change role of the law. Realist jurisprudence’s contribution to a contextualized, goal-oriented conception of the law transformed legal practice in the United States. “By attacking the classical conception of the law with its assumptions about the independent and objective movement from pre-existing rights to decisions in specific cases, realists opened a way for a vision of law as policy, a vision in which law could and should be guided by pragmatic and/or utilitarian considerations” [citations omitted]. American legal realism introduced a vision of the law as a mechanism for social policy and change. This renewed vision of the law also called for increased awareness of the on the ground application of the law: “by exposing the difference between law on the books and law in action realists established the need to approach law making and adjudication strategically with an eye toward difficulties in implementation”

Above, I discussed the linguistic reasons why the term public policy—widely used in common law traditions—is foreign in civil law traditions, where it is replaced by the word ley, legge, or gesetz. In general, though, the more pervasive view of the law as policy in the United States and other common law countries is, at least in part, due not especially the presence or absence of dictatorial rule. The important point is that discussions and applications of the law to social change are weaker than in the American context. For a brief review of the law and social change in Chile, see Sierra, Lucas, “Law, social change and lawyers in Chile: From the shrillness of the 60s to the silence of today”, unpublished paper, available at http://islandia.law.yale.edu/sela/sierrae.pdf (last visited 04/24/2007).


174 Ibid.
only to linguistic distinctions, but also to an underlying idea about the law as instrument, a less idealized conception of the law.

The American conception of the legal system as a goal-oriented mechanism, more than just the forum to solve conflicts between parties, crosses over legislative and judicial instances of power. In the legislative branch, this conception of the law re-focuses a view of statutes as more than bodies of regulation introduced to address a problem *ex post*. Statutes are planning mechanisms, the channels by which public action strategies are adopted.

This conception also seeps into the judicial branch, where the decision of individual cases serves to set nationwide policies on specific issues. Further, in the American context, both branches engage in a constant and intense dialogue in which policies are ultimately defined. For instance, if Congress enacts a statute to protect the environment, this statute may be challenged in the judicial branch, which may choose to change its effects through interpretation.\footnote{For a discussion on the inter-branch lawmaking process in the United States, see Miller, Mark C. and Jeb Barnes, eds. 2004. "Making policy, making law : an interbranch perspective ". Washington, D.C. :: Georgetown University Press.} Heated public debates are also common regarding the role of Courts as ushers of social change, debates that touch on political fibers, and which have produced conservative criticisms of what they have termed ‘judicial activism.’\footnote{See, for instance, “Does the Supreme Court Matter? An exchange on the significance of the courts in the achievement of civil rights”, Gene B. Sperling and Cass. R. Sunstein, The American Prospect, 01/01/91, available at \url{http://www.prospect.org/web/page ww?section=root&name=ViewPrint&articleId=5304} (last visited 4/25/07). In this debate, Sunstein argues that “reliance on courts diverts political energies and resources from democratic channels.” On the contrary, Sperling reasons that courts and the legislature energize each other. In my opinion, the problem with the former argument is that it sees political energies and resources as finite; from this perspective, forces for change are in a zero-sum game: one’s growth means a reduction of the other, and vice versa. It seems, however, that resources and energies are neither...}
as limited or ‘constrained,’ because of the limited nature of constitutional rights, the limits of judicial independence, and the problems with implementation of progressive judicial decisions.\textsuperscript{177} Up to a point, these constraints are undeniably right; however, it is also true that in the American context, as other authors have argued, the courts are and have been effective policymakers, and arguments that rely on a measurement of the influence of courts in producing social change suffer, at a minimum, from methodological problems.\textsuperscript{178}

Debates about policymaking in the American context are, in part, the result of the legacy of realism and its contextualized, non-idealistic view of the law and the legal system, and the potential of the law as a vehicle for change. Later incarnations of American realism, especially the Law and Society movement since the 1960s, have maintained such optimism about the legal system as a goal-serving mechanism.

Such a conceptualization is also reflected in international regimes, which are largely fueled by conceptions about the law generated in developed nations. The global human rights movement, for example, is an instance of the connection between legal institutions and social change. Human rights law and institutions provide an effective vehicle for change, challenging unjust social conditions ranging from discrimination and unequal political participation (civil and political rights) to access to resources and opportunities (economic and social rights). Binding human rights treaties promote

finite nor are in a zero-sum game. More litigation does not necessarily mean less democratic participation. In fact, it could easily be argued that litigation can actually energize democratic involvement, attracting new people and resources into the participatory process. In this sense, Sperling’s “they energize each other” argument seems to be a better account of the judiciary-legislative dialogue.

\textsuperscript{177} Rosenberg, Gerald N. 1991. \textit{The hollow hope: can courts bring about social change?} / Gerald N. Rosenberg. Chicago :: University of Chicago.

transparency and access to public information as a fundamental right. International directives to promote health, such as the WHO Framework Convention on Tobacco Control, set both rules and general goals to eliminate the problem of tobacco. International laws and directives originate in the global context; they result from international conventions attended by transnational professional elites, individuals who already share into a global culture of transnationalism. “Global human rights reformers [on the other hand] are typically rooted in a transnational legal culture remote from the myriad local social situations in which human rights are violated”179 The transnational legal culture incorporates a vision of the law—international and domestic—as a pathway for domestic change.

Analyses of the on the ground application of globally-originated policies must also be mindful of the process by which such laws or models put in the books. Whether a domestic law was passed purely by the exposure of lawmakers to the transnational legal culture, or whether it was adopted with participation of domestic actors and movements, should influence its on the ground function. This connection is addressed in this paper, by analyzing both stages, adoption and implementation, through the study of the two mentioned statutes.

In this respect, institutionalism’s main assertion is that nations around the world adopt policies (or laws) because this is a way to legitimize themselves in the global social context, and because of the socialization of policymakers. Institutions established globally embed and motivate the actions of states and policymakers, who adopt policies

because of the social influence of their environment—as myth and ceremony—rather than because of contextual drivers or careful policy analysis and research. The extensive empirical literature provides evidence for this claim by showing the great extent to which isomorphism exists around the world: nations of different developmental levels, cultural backgrounds, legal traditions, and so on, seem to implement similar policies over the same periods of time, in the absence of imposition or force, and without any apparent internalization about the validity, appropriateness, or applicability of such policies.

Given that nations follow policy trends because of the force of their organizational environments, it is not surprising, institutionalism argues, that many of such policies fail on the ground. The theory terms this “decoupling,” defined as the difference between formal models and observable practices, which is measured in instrumental terms. Decoupling exists and, moreover, is expected because the adoption of constitutions, treaties, and laws does not fulfill functional goals; it is merely a ceremony by which nation-states express their attuning to globally legitimized models. “Impoverished countries routinely establish universities producing overqualified personnel, national planning agencies writing unrealistic five-year plans, national airlines that require heavy subsidization, and freeways leading nowhere—forms of “development” that are functionally quite irrational.”¹⁸⁰ Further, decoupling exists because world culture is itself conflicting and eclectic: it includes many contradicting principles and normative commitments (such as liberty/equality). “World culture contains

¹⁸⁰ *Supra* note 53 at 156.
a good many variants of the dominant models, which leads to the eclectic adoption of conflicting principles.” \footnote{Supra note 53 at 154.}

This concept elegantly complements the theory and supports its logic. Nevertheless, institutionalist research has not really undertaken the study of decoupling. In other words, decoupling is assumed more than shown empirically, or is a logical effect deriving from the fact that policies are motivated by the force of global social environments. Admittedly, this limitation also has its origins in the methodological barriers to forcefully documenting decoupling around the world. While it is a lot easier—in the sense that it is less resource-intensive—to document equal outcomes in policies around the world (countries either adopted policies or they did not), it is much more difficult to investigate their on-the-ground application. In depth case studies are the only pathway to researching whether globally derived laws are efficacious on the ground.

International relations constructivist theories, for their part, see the implementation of domestic laws (or policies) as the last step in the ‘norms cascade’ by which international law asserts itself, or as a building block of a dynamic ‘transnational legal process.’ This literature also bypasses by and large an examination of the application of domestic laws that are adopted either to implement international treaty law, or that are inspired and motivated by the work of international organizations and regimes. Constructivist literature is content with equating the adoption of domestic laws to full applicability of international law. Clearly, as experience in many developing countries including Ecuador indicates, domestic laws are not always fully applied. However, the
idea that the law in developing nations is not efficacious has also become a generalized assumption more than an empirically shown matter.

Research about the on the ground implementation of globally motivated laws is necessary. Is institutionalism right in assuming that decoupling exists? Should ‘norms cascades’ and ‘transnational legal process’ rely so heavily on the domestic legal order to carry out the normative contents of international standards? These are, in part, the questions that the second part of this paper asks, complementing the first set of questions regarding the process by which access to information law and smoking ban were put in the books.

Claims about the socialization of laws lend themselves to various interpretations. Institutionalism views the institutional, social motivation of laws as the source of their ultimate inapplicability. Therefore, it is vital to investigate the extent to which the claim that globally-motivated laws are bound to be inapplicable because of their ceremonial origin holds true, or whether other variables determine the successful implementation of regulations. At the same time, however, the socialization of norms can also be interpreted as a significant mechanism of influence for the promotion of values contained in international regimes such as human rights. This is what Goodman and Jinks propose, arguing that increased socialization at the international level can actually promote human rights.¹⁸²

¹⁸² The authors support this assertion by examining how socialization may positively impact the application of human rights through the design of three regime characteristics a) conditional membership; b) precision of obligations, and c) implementation. Supra note 17.
While this paper focuses mostly on the mechanisms by which policy is influenced in Ecuador, that is, the driving forces behind the adoption of regulatory frameworks in Ecuador, it also considers the fate of these two laws after their enactment, by exploring the way in which two of these norms are applied on the ground. The literature described in preceding chapters leads to the prediction that, if socialization is a dominant driving force for the adoption of these two laws—over internalization through discursive argumentation—low applicability is to be expected. While the dissertation does not attempt to conduct an in-depth evaluation about the application of these policies, it does investigate this stage as a strategy to determine if alleged global origins are decisive post-enactment. In other words, a query about actual application is conducted as a way to fully understand the question about the globalization of law. Paradoxically, a more grounded grasp of how global forces impact law and policy in Ecuador calls for an analysis of their local fates.

How must an inquiry about the on the ground application of globally derived norms be conducted? What theoretical views should illuminate such an investigation? An evaluation of the application of globally-derived laws must be aware of the different ways in which laws matter on the ground, this is, of the various forms in which norms and laws “live” in social and regulatory contexts. There are two important, interconnected sources of literature in this respect: a) Public Policy Implementation Literature, and b) Sociolegal literature. Both strands have in common that they rely on the scientific inquiry of legal phenomena. I turn to discussing these frameworks.
ii. Law as Policy: Implementing Globally-Derived Statutes.

Many policy frameworks include both a declarative and a programmatic dimension. The declarative layer acknowledges values or rights that are recognized as important and therefore need to be protected. The programmatic dimension sets mechanisms to ensure that the normative aspects of a policy are attained. For example, the two policy frameworks in which this dissertation focuses include a declarative aspect that sees access to information and tobacco control as important values and, as discussed above, as emerging human rights. These declarative contents must be implemented through positive state action, such as controlling the manufacturing, advertising, and consumption of tobacco products (tobacco control statute), and organizing, publicizing and making information available promptly (access to information statutes).

The implementation of public programs or plan has been studied by a prong of public policy literature that arose out of concerns that policy programs, no matter how elegant their design, can be threatened and ultimately invalidated when put in practice. Implementation literature has undergone three main stages. Pressman and Wildavsky’s 1973 book ushered policy implementation studies as an independent field of inquiry.
Up to that point, it was generally assumed that political and legal mandates were followed by technical implementation. The process was seen as linear and quite simple. Pressman and Wildavsky’s now classic study showed that the reality was a lot more complex. Thus, the new attention to implementation underscored the importance and utter power of lower bureaucratic levels in implementing policies. If Pressman and Wildavsky’s study is revealing of the American context, it serves as an even stronger reminder of the problems associated with implementation in the weaker governmental bureaucratic structures of the developing world.

The second generation of policy implementation studies, a reaction to the first, was divided among two perspectives that later became to be known as top-down and bottom-up schools of policy implementation. The former see successful implementation as dependent upon the appropriateness of a centralized, authoritative decision, emphasizing the hierarchical process by which a high-level decision is followed through. In contrast, bottom-uppers see implementation as highly determined by the ‘microlevel’ behavior rather than the ‘macrolevel’ decisions. Patterns of behavior and idiosyncrasies of people involved in actual implementation matter. Thus, “bottom-uppers argue that the goals, strategies, activities, and contacts of the actors involved in the microimplementation process must be understood in order to understand

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implementation. It is at the microlevel that policy directly affects people.”¹⁸⁸ Not surprisingly, the third generation of implementation literature called for integrating these two perspectives as much as possible. Sabatier’s idea of ‘forward mapping’ and ‘backward mapping’ is an effort to maintain awareness of both centralized, macrolevel determinants of policy while at the same time keeping an eye on the incentives and behavior determinants of implementers, as both levels are interdependent.¹⁸⁹

Standard policy theory assumes that policies are mostly national or domestic, and that they are designed and implemented within domestic boundaries. A more recent development in the policy implementation literature pays heed to the increasing international nature of policymaking. This literature emerged predominantly out of the context of the European Union, where an increasing amount of legislation is designed internationally and applied by various countries at the same time. This literature has much in common with the international relations literature discussed in the preceding chapter, even though it has a different program and methodology. To an extent, though, the central question is the same: what determines whether a given nation will successfully follow or implement an internationally created rule or policy program?

Initial studies of the domestic implementation of international policy adopted a top-down perspective, seeing successful implementation as dependent upon “clearly worded provisions, effective administrative organization and streamlined legislative

procedures at the national level." Thus, successful implementation was, under this view, a function of technical appropriateness in centrally-generated policies.

Recognition of the importance of contextual conditions and practices involved in the domestic implementation of international policy came as a useful expansion of the exclusively technical view. Thus, policy implementation was seen to be successful or unsuccessful depending on the distance, gap, or “misfit” between the “traditional way of doing things” in a given national context and the structures of internationally derived policies.

This position was later correctly questioned on the grounds that it saw domestic actors as “guardians of the status quo, as the shield protecting national legal-administrative traditions.” Domestic administrative traditions or practices are not an unchangeable set of easily identifiable traits. To an important degree, they are the result of cultural beliefs and practices which are themselves fluid and which are not ‘pure’ in the sense that they are influenced by structural and political forces. Contemporary anthropological work has moved in this direction, arguing against the traditional, essentialized view of culture that persists in seeing it as a static, “consensual,

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interconnected system of beliefs and values,”¹⁹³ and which is usually used to create a false tension between it and transnational regulatory frameworks.

This critique gave rise to a more nuanced analysis of domestic implementation of international policies, which draws on political science’s comparative politics literature. The thrust of this perspective is that domestic implementation must be analyzed beyond a simplistic evaluation of the fit between domestic practices (which are themselves not so easy to evaluate) and international policies, but should take a larger view at political processes and the role played by a variety of actors such as interest groups.¹⁹⁴

iii. Contemporary Law and Society Scholarship.

Law and society literature, as discussed above, originated largely out of the American legal realism of the early twentieth century. It relies on a similar optimism for social change through legal institutions, and it underscores the need to inform the legal universe with the empirical knowledge of the social sciences.¹⁹⁵ Law and society research is now very diverse, and some portions of it are similar to policy analysis proper. Here, I focus on sociolegal literature concerned with the on-the-ground impact of the law,

¹⁹³ Supra note 179 at 6.
¹⁹⁵ The focus and content of law and society has, in recent years, lost these two defining features, especially in the American context, due to the ‘decline of the social’ in the American context. The agenda of law and society research is now more varied and is not preoccupied only with informing government and policy with social knowledge. See Sarat, Austin. 2004a. The Blackwell companion to law and society. Malden, MA Blackwell Pub, Sarat, Austin. 2004b. "Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship." in The Blackwell Companion to Law and Society, edited by A. Sarat. Malden, MA: Blackwell Publishers. See also Trubek, David. 1990. "Back to the Future: The Short, Happy Life of the Law and Society Movement." Florida State University Law Review 18.
where sociolegal scholarship is divided among two main currents: the instrumental and the constitutive views.

The instrumental approach originated with the Law and Society movement itself in the 1960s. Early sociolegal scholarship derived from a deep disillusionment caused by the futility of purely doctrinal legal discussions. The first law and society studies directed their attention towards exploring the application of law “on the ground,” going beyond “in the books,” formalistic legal scholarship. However, these studies focus only on measuring “the impact of legal rules and assesses the gap between law on the books and law in action.”196 Some of these studies attempt to “identify where law is present and where it is not, where law is used and where it is ignored, where law is effective and where it is ineffective.”197

The constitutive approach to law and society argues that the instrumental framework is insufficient because, even when the law is “never invoked, alluded to, or even consciously much thought about [it] has been such a key element in the constitution of productive relations that it is difficult to see the value. . . of trying to describe those relations apart from law.”198 Further, instrumentalism “produces a distorted picture of the role of law in everyday life. By focusing on law as a discrete tool, or on the efforts of

law to change behavior, instrumentalism diverts attention from the deep, often invisible, but pervasive effect of legal concepts on social practices.”

Sociolegal constitutive research is paralleled within policy studies by interpretive policy research, which differs from textbook policy implementation. It pays heed to the symbolic meaning of public policies as a relevant part of policy outcomes. Therefore, policymakers must be mindful of how policies are interpreted by target populations as such interpretation will impact policy implementation. In Ecuador, law and society research—whether instrumental or constitutive—is almost absent. This part of this paper is an effort to turn the gaze of Ecuadorian legal academy towards the examination of the ways in which law interacts with its social environment.

The idea of applicability behind the concept of decoupling also has its own limitations: it sees the application of laws or policies solely on instrumental terms. Admittedly, the creation of a governmental agency that is subsequently deprived of funding or expertise is a mere formal act leading to no functional or instrumental effects. However, the adoption of a law that guarantees rights to information may have significant effects that occur before or independently of enforcement. Further, even the creation of agencies may have ripple effects despite poor bureaucratic performance. This would

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201 A quick look at the titles of books or articles published in journals reveals the doctrinaire, positivist approach of most legal scholarship.
support the argument that the creation of agencies charged with curbing corruption and overseeing the application of the access to information law, is in itself a favorable step against corruption, even if such agency’s performance is not entirely adequate. The role of the empirical research that follows is precisely to provide evidence for this otherwise unfounded claim about the impacts of these two laws and policies.

These competing views on the evaluation of the impact of laws and policies inform the second part of this dissertation. While the second part of this paper does not intend to test the explanatory power of any of these competing views, it is mindful of the nuances that these frameworks bring to the evaluation of the on the ground impact of the access to information law and the smoking ban in Ecuador. For instance, this part of the dissertation does not conduct a narrow instrumental assessment of the enforcement of these laws because such an assessment may not reveal the various levels of impact that these laws have. Likewise, it does not center exclusively on uncovering the interpretive or constitutive effects of these two laws because it is not the intention of this research to conduct the deep ethnography that such investigation would require.

What this part of the paper merely does is examine, in an exploratory fashion, the lives of these laws after their enactment, illuminating such examination with the perspectives provided by the literatures discussed above. Admittedly, this approach achieves a more holistic analysis as the cost of a neat, tight investigation including only a few variables. Nevertheless, the goal of the second part of this paper is to complement the investigation about the local adoption of globally originated norms, and is conducted to observe how global trends interact with local action and social change. Future
research may conduct more precise implementation assessments drawing on any of the bodies of knowledge discussed above.
Chapter Five: Research Methodology

The two main issues this project explores are a) the process by which the global social environment and its institutions operate in the diffusion and adoption of policy frameworks, and b) the local, on the ground application of globally-originated laws and their interaction with domestic action and social change. To explore these two broad questions, this dissertation adopts a comparative case study methodology, looking at two statutes recently adopted by the state of Ecuador. This section lays down the methodological approach, explaining, first, the overall methodological design, and detailing the design for each case study.

The proposed study will adopt the case-study methodology to explore these issues. As mentioned above, discussions about the fruitfulness of the case study as a social research methodology have been around for several decades. The biggest drawback of the case study is its low degree of external validity or generalizability. On the other hand, the most important benefit of the case study is that it allows for in depth, rich, and detailed exploration, explication, and/or description of phenomena. The fundamental drawback of case studies is generally overcome because case studies are not intended to generalize findings to populations: case studies are not samples. Therefore, the form of generalization in case studies is not statistical but analytical. This is, case studies aim at generalizing their findings to theory.

Further, as Chapter One argued, this dissertation

aims at filling a gap in the literature, which is to date mostly macro-quantitative. Additionally, this methodological approach provides the best fit between research design and type of questions asked, namely, how norms that originate outside the domestic context were adopted in Ecuador, and the fate of these laws on the ground. The lack of control that the researcher has over the behavioral events under study justify a case-study methodology.

An important challenge with case studies is finding the appropriate design. Other research methods have developed a menu of standard designs from which researchers can chose according to their needs. For example, some quasi-experimental designs include the randomized two-group design, the pre-test post-test two-group design, the Solomon four-group design, etc. Given the nature of case studies, ready made designs are not available. Therefore researchers must develop their design according to their needs and goals.

This project is structured around a revelatory case. Neither Ecuador nor the two laws in which this study focuses is a critical case or an extreme or unique case. Nevertheless, the country chosen is revelatory for the following reasons: a) Ecuador is, at least conceptually, a modern, liberal democracy in the making, with a colonial past; b) It is a developing country that holds no salient position of power in the global arena; c) Historically, it has been generally welcoming or receptive of international legal trends.

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All these conditions make it a fit case to study the process by which international norms diffuse and are adopted by developing nations with similar structural conditions. Even though this study’s findings will not allow for scientific generalization, they will be relevant beyond the Ecuadorian context because they will provide the basis for inferences about how way post-colonial, internationally-sympathetic, newly established democracies in the developing world are influenced by global trends, and the way these global contents are negotiated locally.

The parameters used to choose the statutes in which this study will focus—Access to Information Law and Tobacco control Law—are: a) Time: both legal norms have been recently sanctioned by Ecuadorian lawmakers, which makes it possible to explore their process of adoption; b) Global positioning: both legal norms deal with issues that are highly developed in the world society through rights discourses (access to information); the work and intervention of international governmental and nongovernmental organizations (the United Nations, the Organization of American States, the World Health Organization), and international regulations (International Covenant on Civil and Political Rights (article 19), the Inter-American Convention on Human Rights (article 13), and the more recent World Health Organization’s Framework Convention on Tobacco Control.); c) Subject-matter: both legal norms advance the protection of basic rights of individuals, namely, the right to health, right to tobacco control, and the right to access public information, and they promote socially and politically desirable behaviors.

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206 In general, Ecuador has entered into most major international regulations on issues including trade, environmental protection, telecommunications, etc.
Admittedly, a wealth of legislation and policies beyond the two laws studied here are global in their origin and have triggered legislation throughout Latin America in the last decades. Ecuador is a country in which, by Constitutional mandate, international treaties are directly applicable after ratification. That globalization affects law because of the growing amount of international legislation is fairly obvious. This project is interested in the process and mechanisms by which global influence actually takes place, testing the explanations offered by institutionalism and acculturation (that norms are adopted as myth and ceremony, by the force wielded by socialization) against competing views, especially those of constructivist international relations and international law, which privilege internalization and moral coincidence rather than just socialization.

In order to explore how the world polity influences the adoption of domestic laws, this study starts from a premise, and then asks one research question connected to it. The premise is stated as follows: the two laws studied here were originated globally through the work of INGO, IGO, and its highly professionalized, technical networks. The Transparency and Access to Information Statute is connected to a transnational movement advocating for transparency. Furthermore, this law bears connection to the global “governance” model which, as mentioned in the first chapter, has also been

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207 For example, the consumer protection model, as part of which tobacco control regulations were introduced, is prevalent throughout the world. Most developed nations have consumer protection legislation in place. This trend has been followed by many countries in the developing world, including many Latin American nations. Countries that not only have passed consumer protection legislation, but have operative consumer protection agencies, include Ecuador, Argentina, Brasil, Chile, Costa Rica, El Salvador, Guatemala, Honduras, México, Nicaragua, Panamá, Perú. Another global script that has prompted new laws throughout Latin America is commonly tagged “judicial reform.” The World Bank and other donor organizations have funded “judicial reform” projects in more than two dozen developing countries during the past years, favoring especially the accusatorial, common law criminal procedure system. And see Messick, Richard E. 1999. "Judicial Reform and Economic Development: A Survey of the Issues." Pp. 117-136 in The World Bank Research Observer, vol. 14.. In Latin America, Bolivia, Chile, El Salvador, Guatemala and Panamá have recently migrated to the accusatorial system.
researched and documented elsewhere. The global model related to the ban on smoking also arises from the purposive action of INGO, IGO, international networks of technicians and politicians, and so on. Finally, it is also connected to one specific instrument, the Framework Convention on Tobacco Control, and to the emerging human right to tobacco control.

The research question is: What was the process by which these statutes were adopted? In other words, what were the motivations and rationales that lead to the adoption of these statutes? This question is explanatory in nature rather than descriptive or exploratory. I intend to test four inter-related hypotheses. First, that the issues addressed by these laws were not perceived by policymakers as problems that needed to be addressed [HYPOTHESIS 1]. Second, that these statutes were adopted because lawmakers were socialized by transnational actors, their social reference groups: IGO, specifically the World Health Organization and the Organization of American States; INGO, specifically, Health and Anti-tobacco organizations, and Human Rights Organizations, and locally-based, internationally-influenced actors and NGO, rather than because they internalize the value of these norms [HYPOTHESIS 2]. Third, that these two statutes were passed as a result of a need to conform to global institutional contents and following world-societal models, not responding to local or domestic demands for change (they were adopted as “myth and ceremony”) nor as a result of international imposition [HYPOTHESIS 3]. Finally, that these two laws were passed not in response to technical assessments or policy research justifying their adoption [HYPOTHESIS 4].

209 See infra Chapter 7.
In summary, the thrust of these hypotheses is to determine whether socialization of policymakers into the institutional contents of the world polity matters more than actual internalization of the value of the norms, contextual demands, imposition, and/or policy studies or research. Allegedly, the process of socialization would mobilize policymakers into accepting and adopting international scripts, through the mediation of key individuals that “translate” international scripts into frameworks of ideas that can readily be understood and accepted by local actors. Predictably, most policymakers are positioned closer to the global cultural context because of their background—they speak a second language, have been educated abroad, or come from an upper middle-class and urban background. Note that, even though the question attempts to provide an explanation about the motivations behind the adoption of these two globally-derived statutes, it is at the same time descriptive of this process because it offers a description of the mechanisms by which local decision makers are influenced by world societal priorities.

The constructs included in the above hypotheses that require further definition (they are not self-evident), are operationally defined as follows. *Global institutional contents* is defined, following neo-institutionalism, as norms and values that emerge in a cultural context, in this case, the global or world society. *Domestic or local demands* is defined as the existence (or lack thereof) of organized, goal-oriented activism demanding that these reforms be implemented. *International, world-societal models and discourses* is defined as the “human rights,” “governance” and “health” models described above. *Influence* exerted by international discourses and organizations is defined as direct contact between domestic policymakers and international agents of socialization,
including, but not limited to, participation in training sessions, symposia, conferences, and traveling for specific skill-development seminars provided by international organizations to advance these policies.

All these constructs have a degree of indeterminacy. Therefore, during the data-gathering stage, flexibility will be maintained so that unforeseen, additional definitions of the constructs can be added as they become evident. The unit of analysis of the study is limited to the two policies mentioned above, i.e., transparency and access to information and tobacco control regulations, and, ultimately, to the groups of individuals responsible for the adoption of these policies, this is, political leaders and representatives, analysts, and technical staff of governmental and nongovernmental agencies involved.

This part of the study will use interviews and archival evidence as sources of data. Archives will be reviewed first. The national congress keeps transcripts of its sessions, which are open and available to the public at the congressional archive; these transcripts include, among other things, debates in connection to proposed laws. Reviewing the archives before conducting interviews will allow me to obtain accurate information about the arguments put forward by congressmen and women in favor (or against) the policies. Are arguments supporting this legislation grounded on its normative value, do they reflect internalization of such normative contents, or are they based on an inclination to conform to global social trends? These data will have high revelatory power as to whether the hypotheses put forward above are supported. They will also allow me to frame questions for subsequent interviews informed by the content of documentary information.
This approach will also be taken as a measure to strengthen the study’s reliability and construct validity. These data will provide a mechanism to corroborate the data collected through subsequent interviews with individual actors, and will allow the researcher to have an additional measure of the phenomenon under study, namely, the impact of world societal models on domestic decision makers (construct validity). After reading the archives, the following subjects will be interviewed: In regard to the transparency and access to information law, I will interview: a) Actors centrally involved in pushing for the adoption of this statute, such as directors and members of NGO, INGO, research institutions, and academics. b) Technical staff and analysts in such organizations, involved in producing reports about the proposed law; c) If possible, key members of the National Congress who voted for the passing of this law.

In connection to the consumer protection law, which recently was amended to ban smoking in public places, I will interview: a) Leaders and directors of the “Tribuna Ecuatoriana de Consumidores y Usuarios (Ecuadorian Tribune of Consumers and users), an important NGO that advances the interests of consumers, which was involved in pushing for the legislation b) Members of organizations that provided comments and participated in the adoption of the statute; c) Members of public health institutions; d) representatives of the tobacco industry.

The purpose of this data-collection mechanism is to reveal, in a qualitative fashion, the process by which these policies were adopted. To this end, focused interviews will be conducted in which I will follow a pattern of questions or themes designed to obtain a description into the origins of their adherence to these policies. For
example, some of the questions may ask interviewees to explain how they first became familiar with the policy concepts included in the reforms; the contexts in which this happened; their reactions to the proposed reforms, etc. A degree of flexibility during the course of the interviews will be maintained so that interviewees can reveal information they think is important in connection to the research project. I expect to interview, overall, around ten individuals in connection to each policy area, this is, a total of twenty individuals. Note that I choose not to rely on surveys as a data-collection mechanism because the purpose of the research is to reveal the processes by which decision makers embraced and promoted policies that had been previously absent in the local context.

The analysis of the data gathered through these two mechanisms is defined by the theoretical propositions on which the study is based, and is geared toward testing the accuracy of the four hypotheses put forward earlier. If the interviews and archival data show that public officials and policymakers did not have a clear idea about the problems or realities that these laws were meant to address, that they did not perceive these issues as problematic, that they were influenced by international actors, that they did not internalize and acknowledge the need to pass these laws, and that they were adopted in the absence of policy reports or analyses, all four hypotheses will be fully supported. They will be partially supported if, for example, lawmakers did not see these issues as problematic, but they were presented with evidence and analyses pointing out that laws were needed to regulate them. Finally, they will be entirely rejected if lawmakers were aware and convinced that laws were required and locally generated analyses called for legislative action. Overall, this part of the study predicts that the lawmaking process is “ceremonial” in the sense that it responds to a tendency to move policymaking in the
direction of global trends, and because policymakers speak to global audiences as their reference group.

The thesis stated above is that access to information and the smoking ban trace their origin to global currents that build on the action of transnational actors and organizations, which are imbued by a strong understanding of norms as mechanisms of social change. INGO and IGO break ground on several issue-areas by putting forward principles, directives, and conventions that are meant to address a variety of social problems. As a way to complement research on the process by which global norms seep into domestic regulatory environments, this dissertation also looks at the ‘life’ of the two statutes post-adoption. Therefore, the second portion of the empirical research is meant to explore the question of how globally originated norms, once enacted into domestic law, interact in the domestic social and political environment to bring about the change they are intended to bring.

This section of the project is not explanatory but merely exploratory and descriptive, i.e., I do not intend to test hypotheses in connection to the application of these two laws. What I intend to do in this section is explore and describe the force, both instrumental and symbolic, that these two laws have had on the ground. This section shares with early realist thought and contemporary law and society work on the belief that the law is an instrument for social change. However, it acknowledges that, in a globalized world, the law is increasingly a mechanism by which global change seeps into domestic settings. In other words, the law is a pathway by which transnational movements play a role in domestic social change. Therefore, the question that remains is
whether laws that are intended to implement global standards and goals actually have an impact once they are put in the books.

As mentioned above this section is first informed by sociolegal scholarship, which is divided among two main camps in the investigation of the on the ground application of the law, the instrumental and the constitutive views. Following Sarat and Kearns, who call for sociolegal work to go “beyond the great divide,” this part of the dissertation is mindful of these two views in sociolegal research. I will first attempt to evaluate both the instrumental effects of these statutes by investigating the enforcement and application of these two regulations. However, I will also investigate how these laws matter beyond their enforcement. To be sure, even if un-enforced, they may re-define the realm of what is possible and create ready-made tools to advance and organize political action and social activism.

Second, following the dialogue within policy implementation literature, this section acknowledges that policy is increasingly international in nature, and that an examination of internationally originated policies must not be restricted to the evaluation of the fit between domestic practices and international policies, but should analyze the dynamics by which various actors with differing interests intervene in the implementation of the law. Also, interpretive implementation literature highlighting the symbolic importance of public policies—which has a similar nature as constitutive sociolegal literature— informs this part of the paper.

\(^{210}\) Supra note 196.
The following mechanisms of data collection will be used for this part of the dissertation:  a) I will interview the authorities in charge of enforcement and application of the laws, to get at sense of their instrumental impact. I will first interview key officials of the Tribuna de Consumidores y Usuarios to obtain data on the application of the access to information law. Next, I will interview officials at the Ministerio de Salud Pública and other entities charged with the application and enforcement of the anti-smoking ban, and gather data about the levels of enforcement of the law, and about the application of the penalties established in the law.  b) I will explore if actors have used these laws to advance their agendas, or if organizations and groups were formed after the adoption of these laws in order to promote the values enshrined in them (which would show that the laws were effective in mobilizing actors of social change). This cluster of interviews is aimed at uncovering the discursive and social effects of the laws, trying to expose the degree to which the laws have altered expectations and energized a social concern for these issues. The subjects I will contact at this stage are not specifically enunciated here precisely because this will be an exploratory exercise, in which I will follow a snowball process in which I expect individuals to refer me to other actors.  c) I will next interview members of NGO that participate in the promotion or the application of both laws. To my knowledge, there are a number of organizations that conduct educational and diffusion programs to promote access to information. I will contact the people in charge of these organizations and programs to gather first-hand data about the degree to which these laws are effective mechanisms or non-observed declarations.  d) I will interview representatives of other interested actors, notably, the tobacco industry (for the case of the anti-smoking law), in order to describe their role in the application of these regulation.
e) Finally I will investigate if these two laws have motivated any litigation or judicial actions, including actions in the administrative and civil courts.

Given that this part of the dissertation is not explanatory but exploratory and descriptive, there is no data analysis involved. Regarding the instrumental or enforcement aspects of the application of these laws, there are two possible results: either penalties are established for breach of the legal obligations, or they are not. The symbolic, constitutive, and social impacts of the laws will be interpreted as a whole and through the perspectives provided by the literature described above.
Chapter Six. Access to Information in Ecuador.

Before conducting the field research for this project, I developed a set of parameters to guide me through the data collection and data analysis stages, put forward in the preceding Chapter. Those parameters originated, first, from the theoretical views that inform this dissertation, which, in turn, gave shape to the questions and methodological tools that would be applied to answer them. A point of departure was the function that this project would attempt to fulfill within the existing literature it draws upon. It became clear from the start that most of that literature across sociology, international law, and international relations was predominantly macro-quantitative, comparative, and/or pitched at high levels of abstraction. As explained in Chapter One, repeatedly, authors within the literatures reviewed underscored the need for context-specific case studies exploring the interface between global environments and domestic lawmaking.

Having defined the methodological approach and design that would guide me through the empirical process, I set out to gather the data. I did this between May and August, 2007. I traveled to Ecuador, the place that I had chosen as the site of the case study. The Ecuadorian experience does not represent an extreme, critical, and/or extreme case. This choice was defined by the closeness I have to the Ecuadorian context as a lawyer trained and licensed to practice in Ecuador. This put me in a unique position to conduct the field research, both because I am familiar with the policy reforms under study and with the Ecuadorian social and legal system in general. Further, I was in the position to approach potential interviewees directly, some of whom I knew from my
previous legal practice, or to use references and contacts from networks with which I was already familiar.

Before conducting the interviews,\(^{211}\) I obtained approval for the project from the Institutional Review Board (IRB) at Northeastern University. The questionnaires were evaluated for their contents and type of questions. I prepared both an “unsigned consent form” and a “signed consent form,” which I then presented to each interviewee before conducting the interview. These forms clearly explain the purposes of the study, the reasons why the person is being asked to participate in it, the risks, if any, that participating in the study will create for the subjects, etc. Given the subject matter of the research project, the application for approval went through expedited review, and only a few comments were made by the IRB official at Northeastern University.

The choice of subjects for the interviews included, in the first stage, individuals and actors that had had a publicly known role in the adoption and application of the three statutes on which this project focuses. Once I contacted these actors, I followed a snowball approach, i.e., I contacted other actors to which my original interviewees referred me. This greatly facilitated the choice of subjects for subsequent interviews. Further, contacting a person I did not know with an introduction from a previous interviewee proved to be essential to obtaining their agreement to participate in the research project.

Throughout the process, I saw a marked distinction between the attitude displayed by independent professionals, members of NGO and public interest organizations, on the

\(^{211}\) See Appendix A below for a list of questions used.
one hand, and politicians on the other. The latter had little to no interest in participating in a research project, presumably caught in the dynamics of fast-paced, everyday political negotiations.  

Beyond interviews as a data-collection mode, I also relied on a different mean of data collection, i.e., archival data. I relied on Congressional Archives that include transcriptions of the debates for the adoption of these laws. The records of these debates revealed the positions and arguments put forward by the congressmen I unsuccessfully tried to contact. Nevertheless, beyond what these official records revealed, the most important source of data came from behind-the-scenes narrations of actors that were involved in the adoption of these laws, notably stakeholders such as NGO.

In addition to these two data-collection mechanisms, I also relied on judicial databases containing decisions of a variety of courts. The intent of this approach was to uncover the on-the-ground application of these norms by determining if they had been used as the legal basis for domestic litigation. This was especially true for the case of the Access to Information Law, a law that, unlike the other, declared a fundamental right and also set forth a procedural mechanism for its protection.

i. Towards an Access to Information Law in Ecuador.

Anyone vaguely familiar with the lawmaking process knows that the law is not made in an airtight environment. On the contrary, the lawmaking process is largely influenced by stakeholders and a variety of political actors. Legal education and research in Ecuador tends to be highly formalistic, emphasizing, inter alia, the stages of the

212 Several representatives and former representatives that I tried to contact repeatedly never returned calls.
lawmaking process, the intervening institutions, and the requirements for a vote to go through. In other words, this approach prioritizes the somewhat repetitive study of the Constitutional and legal rules that determine how a law is made and when it becomes valid—the lawmaking process as it exists on paper.

While an understanding of the institutional and legal channels by which rules are sanctioned is necessary in legal scholarship, it certainly does not provide a sufficient depiction of the reality of the lawmaking process. Practices are far more nuanced, intricate, and unpredictable than the clean-cut landscape of legal rules. After all, the complexity of the behavioral greatly outweighs that of the normative; the what is surpasses the what ought to be. Formalistic, doctrinary, or purely normative legal frameworks—dominant in Ecuadorian legal education and practice—a miss the behavioral aspects of legal reality. What Merryman et. al. wrote back in the 1970s about legal scholarship in Latin America still holds true: “Legal scholarship was, as much of it still is, primarily concerned with doctrine; it was qualitative and practical or philosophical and normative. Law was perceived primarily as a body of rules.” Law is, in fact, much more than a body of rules. Early studies in law gained much from adopting a behavioral, social scientific approach to law. This is evidenced by the growing vitality of behavioral studies of law, especially in the United States, where a variety of empirical legal journals have been created in recent years.

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213 This is also true beyond Ecuador. For example, a few decades ago, acknowledging the formalistic bent of legal education in Chile, a collaboration of scholars created the “Chile Law Program, in which the Stanford Law School supported Chilean law deans and professors in their efforts to reform chilean legal education and research.” (John Henry Merryman, Slade: A Memoir, in Friedman, Lawrence Meir and Rogelio Pérez-Perdomo, eds. 2003. Legal culture in the age of globalization : Latin America and Latin Europe Stanford, Calif.: Stanford University Press. pp. 499).

214 Ibid at 502.
Beyond law, the so-called behavioral revolution in related disciplines also shifted the focus of research from institutions to actors. “This practice arguably reached a zenith during the behavioral revolution in political science, which challenged the existing focus on formal institutions and concentrated on the determinants of the behavior of individual political actors, such as how judges, members of Congress, and individual citizens vote […] Behavioralism remains a dominant perspective, especially in the field of judicial politics.” Arguably, a parallelism can be drawn between the behavioral revolution in political science and the increased behavioral interest in legal scholarship in the United States. Nevertheless, the so-called behavioral revolution, up to this day, has not taken root in Latin American legal scholarship, which is still highly doctrinal in nature. This research project is a modest attempt at conducting behavioral research of law in the Ecuadorian context; it aims at shifting the focus from rules and institutions to actors and their behavior. It relies on one-to-one, open ended interviews; the subjects I interviewed are actors from different sectors who, in one way or another, had a role in the adoption of the access to information law.

The following sections are based on 12 in-depth interviews I conducted in Quito during the summer of 2007. The individuals I interviewed included independent lawyers, heads of NGO, law professors, and the director of a major newspaper. In different roles and positions, they were all key actors in the adoption of the Access to Information Law in 2004. Currently, some of them are still working the implementation and application of the law, while others have moved to other issues. The same is true for the organizations they represent or represented. What follows attempts to provide a picture of their role in

\[215\] Jeb Barnes and Mark Miller, “Putting the Pieces Together: American Lawmaking from an Interbranch Perspective”, in Miller, Mark C and Jeb Barnes, supra note 175 at 3.
the adoption of this statute, their connection to the global environment, and their interactions. I hope that this qualitative depiction of actorhood will ultimately provide support for one of the theories on which this project is grounded, or that it will at least show how they interact and explain portions of the Ecuadorian legal environment.

The *Ley Orgánica de Transparencia y Acceso a la Información Pública* (Access to Information Statue, or Access to Information Act, or Access to Information Law) was passed by the Ecuadorian Congress as an “organic law” in May of 2004. The text of the statute has five main sections. The first part (Articles 1 to 4) declares the principles of access to information on which the law rests. The second part (Articles 5 to 16) is definitional in nature, providing specific technical definitions of terms, and establishing the obligations public entities bear for the application of the law. The third section (Articles 17 and 18) establishes the exceptions limiting access to public information. Sections four, five, and six (Articles 19 to 23) establish administrative and judicial procedural matters.

It is not the purpose of this paper to conduct a technical analysis of the contents of the Access to Information Law. In fact, as mentioned in the preceding paragraphs, this paper’s thrust is precisely to *exclude* or *go beyond* a technical-legal analysis of the law. Such normative analyses and discussions about specific points of law abound in the

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216 The Ecuadorian Constitution (Article 142) determines that there are two types of laws: “organic” and “ordinary” laws. The former are higher-order laws: they rule the organization and activities of the State in general; the organization of political parties, the exercise of political rights, and the electoral system; and the guarantees for fundamental rights and their procedural protection (Art. 142). Due to their nature, they require an “absolute majority” vote as a condition for their adoption, i.e., fifty per cent plus one of the vote (Article 74 of the Internal Bylaws of the Legislative Branch). The full text of the Constitution is available at the Political Database of the Americas, [http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html](http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html) (last visited 8/2407).

Ecuadorian legal environment; they are the task that predominantly occupies legal scholarship. A point of departure for this paper is that what is lacking is a behavioral, empirical analysis of the actors and conditions that lead to legal production, connecting it to social scientific theoretical streams to attempt causal explanations for otherwise perplexing legal outcomes.218

a) Actors

As mentioned above, the objective of this research project is to uncover the process behind the adoption of this globally-originated law. Two prominent actors involved in the adoption of the law have written and published their memoirs about this process, valuable accounts of the dynamics by which the Access to Information Law came into existence.219 This dissertation’s contribution is to connect and analyze such processes under the light of theories reviewed in the first part of this paper, in order to ascertain which of the competing hypotheses is supported.220 In other words, this project is interested in the process of adoption of the Access to Information Law as a case study

218 Admittedly, such analyses are predominantly the business of other social science disciplines, especially political science and sociology, or interdisciplinary sociolegal work. However, these traditions have only had a weak presence in the Ecuadorian academic environment.


220 The hypotheses were put forward in the “Methodology” section above. They are: First, that the issues addressed by these laws were not perceived by policymakers as problems that needed to be addressed [HYPOTHESIS 1]. Second, that these statutes were adopted because lawmakers were socialized by transnational actors, their social reference groups: IGO, specifically the World Health Organization and the Organization of American States; INGO, specifically, Health and Anti-tobacco organizations, and Human Rights Organizations, and locally-based, internationally-influenced actors and NGO, rather than because they internalize the value of these norms [HYPOTHESIS 2]. Third, that these two statutes were passed as a result of a need to conform to global institutional contents and following world-societal models, not responding to local or domestic demands for change (they were adopted as “myth and ceremony”) nor as a result of international imposition [HYPOTHESIS 3]. Finally, that these two laws were passed not in response to technical assessments or policy research justifying their adoption [HYPOTHESIS 4].
revealing the force exerted—probably inadvertently—by world societal institutions. Additionally, the analysis offered here is also concerned with the transnational diffusion of frameworks and ideas and the receding role and diminishing position of the nation-state globally and domestically.

One of the initial questions I asked my interviewees was how the process that culminated in the adoption of the Access to Information Law in 2004 got started. A common thread in all the responses I recorded was that this process was set off by two different actors within the civil society: a) NGO; b) A prominent newspaper, Diario Hoy, member of the National Association of Newspapers (AEDEP, Asociación Ecuatoriana de Editores de Periódicos). Additionally, one congressman, Juan José Pons, brought a bill on the same subject.221

A revealing trait about the nature of this process is that the civil society, not entities within the state or legislators, was the motor and point of origin for the adoption of this law. One could intuitively assume that, the Commission for the Civic Control of Corruption, a government agency that was created via presidential decree No. 107-A in March 4, 1997, would have been a leader in pushing for the adoption of this statute. However, the empirical research reveals that the channels through which the law became valid were mostly civil society-based.

The two fronts that originally moved for the adoption of the Access to Information Law acted independently. In the case of the AEDEP, its leadership on this process was one bit happenstance, another bit planned action: “Taking advantage of the

221 Two other congressmen brought additional projects later in the process, i.e., after the first congressional debate for the approval of the law.
occasion of the Twentieth Anniversary of Diario Hoy, based on the experience of Mexico, and, specifically, on the experience of one of the States in Mexico, and their breakthroughs in the approval of a Transparency and Access of Information Law, I thought that it would be a good idea to present President Gustavo Noboa the idea of an Access to Information law for Ecuador. I did so, and I got him to agree publicly, in Diario Hoy’s twentieth anniversary commemoratory events, to start the motions for the adoption of such law. He agreed in the event of 7 June 2002 to do so.”

For their part, several NGO began, independently, to bring the idea of an Access to Information Law for Ecuador to the public forum back in 2002. Two large organizations, Corporación Latinoamericana para el Desarrollo (CLD), and Friedrich Ebert/Instituto Latinoamericano de Investigaciones Sociales (ILDIS), had originally begun to entertain the idea of an Access to Information Law for Ecuador. CLD, a now-dissolved organization, had been previously appointed as the Ecuadorian Chapter of Transparency International, and, as such, adopted the idea of an Access to Information Law as a mechanism to promote transparency. Finally, Friedrich Ebert/Instituto Latinoamericano de Investigaciones Sociales had entertained the idea of an Access to Information model through its Latin American Media Project.

After some autonomous action on the subject, they agreed to put together a single front for this purpose, the Coalition for Access to Information (Coalición de

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222 Interview with Jaime Mantilla, President of Diario Hoy, July 2007.
223 Interview with Andrés Tobar, ex-member of CLD, June 2007.
224 Interview with Raquel Escobar, ex-Director of the Friedrich Ebert Latin American Media Project and Ex-Coordinator of the Coalition for Access to Information, June 2007.
Organizaciones Civiles por el Acceso a la Información Pública en el Ecuador\textsuperscript{225}. The Coalición Acceso grouped the two aforementioned organizations, plus four additional ones: Ecuadorian Center for Environmental Law (Centro Ecuatoriano de Derecho Ambiental, CEDA\textsuperscript{226}); Participación Ciudadana, an organization working for the promotion of citizen engagement in democracy and transparency,\textsuperscript{227} the Law Clinics of the Catholic University of Ecuador; and Fundación Futuro Latinoamericano.\textsuperscript{228}

Even though the Coalition had been created previously, its activities picked up through the funding of Fundación Esquel’s Justice and Society Fund, an agency that provides grants for projects to improve democracy and transparency,\textsuperscript{229} whose ex-director, human rights expert Farith Simon, had been sympathetic to the idea of an Access to Information Law.\textsuperscript{230} The Coalition Project had as its main goal to strengthen mechanisms for transparency in Ecuador, by providing citizens with tools to obtain public information and demand accountability from the public sector. To this end, the project included six components: a) Inter-institutional coordination; b) Communications; c) Legal services/public information requests; d) socialization for the approval of the Access to Information Law; e) Training and sustainability. I briefly explain each component, giving special attention to parts d) and e).

The first component of the USAID-funded project meant that a person would be hired full time to act as the coordinator of all the member organizations. This was

\textsuperscript{225} For more on the Coalition, see its webpage http://www.coalicionacceso.org/contenido/lacoalicion/historia.htm (last visited 8/17/07).
\textsuperscript{226} http://www.ceda.org.ec/ (last visited 8/17/07).
\textsuperscript{227} http://www.participacionciudadana.org (last visited 8/17/07)
\textsuperscript{228} http://www.ffla.net (last visited 8/17/07)
\textsuperscript{229} See their webpage at http://www.fondodemocracia.org/ (last visite 8/17/07).
\textsuperscript{230} Interview with Farith Simon, Ex-Director of Justice and Society Fund, July 2007.
relevant because it provided the Coalition with a sense of cohesion, and it gave it presence as a new organization itself. The first coordinator appointed was Raquel Escobar, who up to that point had been the ex-Director of the Friedrich Ebert Latin American Media Project. In a true cooperation member organizations, FFLA housed the Coordinatorship and Friedrich Ebert provided the infrastructure (computers, furniture, etc) for this office to get set up.

The second aspect of this newly created front was communicational. It was clear to all the member organizations that a communicational strategy, both internal (i.e., among member organizations) and external (i.e., toward society at large) was required. to fulfill the latter, the Coalition organized a strategy to inform the civil society about the right to access to information and what it meant, and to provide fora for the civil society to debate access to information. In the end, the Coalition produced a report of the fulfillment of the right to information.

During the process for the adoption of the statute, the coalition also published a variety of articles in several media explaining the need of a Law guaranteeing this right.

The next field of action undertaken by the Coalition involved the application of legal actions to request public information, once the law had been adopted. One of the member organizations, the Law Clinics of the Catholic University of Ecuador, directed by Ramiro Avila, was in charge of monitoring the fulfillment of this right by filing

strategic requests for information, and taking them to the courts when necessary. I will also return to the results of this monitoring effort later in this paper, when discussing the instrumental application of the Law.

A fundamental part of the project was component d), i.e., socialization and lobbying for the adoption of the law. The members of the coalition—a group comprising some of the largest NGO in Quito and the nation—played a crucial role in the diffusion of the framework of an Access to Information Law. The Coalition organized various workshops to which national and international experts were invited, in which the contents of a draft law were debated. Some of its members, independently, did likewise. As part of this component, the Coalition played a role as a true “merchant of ideas,” introducing the concept of Access to Information as a right in a milieu in which various actors were simply not aware of it, and had no real motivation to educate themselves about the importance of this right.

The Coalition’s next front of action was related to the former, including ambitious training programs and the publication of materials to educate actors about the need for the Statute. The Coalition hosted workshops for public officials and civil society leaders, and published Guides for the application of the Law aimed at common citizens. The workshops and trainings for public officials included a wide range of public institutions: within the executive branch, it reached the National Council of Telecommunications,

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234 Bonilla Soria, Paúl, “Manual Para el Uso de la Ley Orgánica de Acceso a la Información Pública”, 2005. On file with author. This is an inclusive and highly didactic document, accessible and easy to use.
Women’s National Council, the Internal Revenue Service, the Presidency of Ecuador’s Legal Department, the National Archives, and the Connectivity Commission. It also reached a variety of entities that, via resolutions and decrees, produce a wide universe of regulations that become applicable like regular laws, including the Ministries of Economy, Environment, and Education; the Banks, Corporations, and Telecommunications Superintendencies; Municipalities of Quito, Guayaquil, and Orellana; Provincial Concils of Quito, Guayaquil, and Orellana; the Attorney General’s Office, and the Supreme Electoral Tribunal. Finally, it spread to Control Entities, such as the Judiciary’s Council (control and administrative body for the judicial branch); the Constitutional Tribunal; the General Prosecutor’s Office; Ombudsman; Attorney General’s Office, and General Controller’s Office.235

The Coalition project also published a book entitled “La Promoción del Derecho de Acceso a la Información Pública en el Ecuador,”236 which included articles by Marco Navas (Friedrich Ebert/Instituto Latinoamericano de Investigaciones Sociales), Farith Simon (Fundación Esquel), and Ramiro Avila (Catholic University Law Clinics). This book constituted another effort to discuss the legal-technical aspects of the Ecuadorian Access to Information Law, and to disseminate the tools that it makes available to any citizen as a mechanism to guarantee free expression. This book had the support of USAID (through Fundación Esquel’s Fondo Justicia y Sociedad), UNESCO, and Friedrich Ebert.

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Parallel to the work of the Coalition on the subject, CLD put together a “Workgroup on Access to Public Information” whose purpose was to invite public and private organizations to debate a draft for an Access to Information Law, and to design a strategy for the approval of the law in the National Congress. “We began with a series of debates in which the different drafts were analyzed. In one such event, the project brought by Congressman Juan José Pons was debated, and all the participants, including Congressman Pons’s advisor realized that a bill had to be technically prepared and required a lot of work.”

Several public agencies agreed to join the group on the invitation of the NGO initiative, including the General Controller’s Office, General Prosecutor’s Office, Attorney General’s Office, Ministry of Defense, National Security Council, Commission for the Civic Control of Corruption, Constitutional Tribunal, Consumer’s Protection Tribune, among others. It is remarkable that, in the absence of a civil society-based initiative, these various governmental agencies would have not otherwise met to discuss the contents, principles, and limitations of a proposal for an Access to Information Law, given the lack of connectivity and communication between governmental agencies with diverse mandates.

The workgroup did indeed put forward valuable recommendations for a draft Access to Information Law, which were included in a Base Document for the First Congressional Round of Debates on the issue. Beyond providing a forum for the

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237 Interview with Christian Bahamonde, ex-executive director of CLD, June 2007  
239 Id. at 54.
discussion of the contents of the law, this civil society-based workgroup also served the function of unifying existing draft proposals, and providing them with deeper legal-technical content. The process of adoption of the Access to Information law exemplifies the role that NGO play in facilitating an inclusive debate leading to the adoption of a human-rights promoting law, which did not exist in the adoption of the anti-smoking law.

Both the Coalition and CLD’s workgroup also led additional efforts to disseminate and ‘sell’ the idea of access to public information as a legal framework, and to get various policymakers on board. One such important event was a regional forum, put together by the Coalition and sponsored by USAID’s anti-corruption project Sí Se Puede, entitled “Access to Public Information: Exercising a Fundamental Right” (El Acceso a la Información Pública: El Ejercicio de un Derecho Fundamental.), which took place at Universidad Andina Simón Bolívar. This forum was a two day long event that convened panelists from Argentina, Ecuador, Estados Unidos, El Salvador, México, Perú and Paraguay, who presented on their national experiences and progress towards a more effective protection of the right to access public information. Through this international event, the Coalition was able to get important actors on board, including the Armed Forces and the ombudsman. Events like this not only contributed to the diffusion of the idea, but also gave the process an added level of legitimacy, credibility, and importance. When a group of international experts convene to discuss an issue, it automatically becomes one that requires national attention. In this sense, organizing global events is not only positive because such events are an opportunity to exchange knowledge and experiences; it also has the added value of coating an issue with a layer of relevance, credibility, and preeminence.
b) Process.

By Constitutional decree, Ecuadorian citizens have the right to bring draft bills to the legislature.\(^{240}\) However, this constitutional right is hard to exercise because of the requirement of a large amount of signatures needed to bring a bill to the legislature. In practice, citizens and civil organizations\(^{241}\) interested in specific legislation are forced to muster the support of one or more members of the legislature. In the case of the Access to Information Law, the real challenge was not getting a member of the Congress to bring a bill for the Law, because Congressman Pons, with the support of his party, had already done it (at a later stage in the process, for the second round of debates for the adoption of the law, two other members of the Congress had also brought their own projects), and the President of Ecuador, who had adopted the proposal of the AEDEP, had done accordingly. The real challenge, therefore, laid in strategizing to assure a favorable vote, and articulating and coordinating these projects to assure that their contents were technically fit. It is in these two inter-connected realms that the work of the Coalition and its members was significant.

Legislative duties at the National Congress are organized around 18 Specialized Legislative Commissions, which are integrated by around six Congressmen and

\(^{240}\) Article 26, Ecuadorian Constitution, 1998, supra note 216. In order to file law projects directly, a motion must be supported by one fourth of one percent of the total number of citizens registered in the electoral census (Article 146).

\(^{241}\) It is a common mistake to equate the “civil society” to “civil society organizations.” The latter are usually the most effective way in which the civil society acts, because they organize and articulate ideas and projects. Nevertheless, they are not the civil society itself nor do they embody or fully represent the civil society. Ramiro Avila makes this distinction in connection to the Access to Information Law. See Supra note 219 at 40.
According to Article 150 of the Ecuadorian Constitution, the President of the Congress must send any bill to the “corresponding” Specialized Commission, this correspondence being established, one can assume, according to the content of the proposed bill. Nevertheless, legislative day-to-day practice largely differs from this Constitutional rule. Other factors, such as the integration of this or that commission, largely influence the workload that each commission undertakes, and not all commissions have equal overall weight and influence. Specialized Commissions are in charge of drafting a report that must serve as a basis for the first round of debates.

Also by Constitutional decree, citizens and citizen organizations may provide any Specialized Commission studying a bill with their points of view. To do so, they need no other requirement than having interest in the adoption of the bill; citizens may also provide their opinion if they feel that the bill may in any way affect their rights. (Article 150).

The legislative process for the adoption of laws includes two rounds of debates. The first debate takes place with the basis of the draft report prepared by any of the Specialized Commissions, which makes a recommendation that the Congress should approve a bill. Then the bill returns to the Commission for it to incorporate the comments made during the first round of debates. Afterward, the bill goes back to the floor for the second round of debate, in which it must be approved, modified, or denied.

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242 These Specialized Commissions have been somewhat randomly created through time, responding to political pressures and interests more than to a strictly technical division of legislative labor. As a result, the Specialized Commissions are organized haphazardly without any unifying parameters. Therefore, it is not surprising that there are Specialized Commissions on such disparate topics as Amazonic Issues (Issues pertaining to the Amazon Region), Manabita Issues (Issues pertaining to the Province of Manabí), Indigenous Issues, Civil and Criminal Issues, to name but a few.
Finally, the bill is sent to the President of Ecuador, who, acting as co-legislator, approves or puts forward objections.\textsuperscript{243} Given that the Access to Information Law was categorized as an organic law, it required an ‘absolute majority,’ this is, fifty per cent plus one of the total number of votes.

The process for the adoption of laws, as set forth in paper, seems rather obvious and clean cut, its double-debate structure aimed at assuring serious, thorough, and thoughtful consideration of proposed bills. Nevertheless, in a Congress with a high number of political parties, in which political factions coalitions get organized and re-organized from one day to the next, making law is a very unpredictable business. For instance, it occurs frequently that between the first round of debates and the next the support for a bill has vanished because of a new political alignment.

This highly erratic legislative landscape affected the Coalition’s strategy to attain the adoption of the law. Note that the Coalition executed its strategy lawfully, i.e., exercising the privilege set forth in Article 150 of the Constitution, according to which citizens or citizen organizations can approach any Specialized Commission to offer their points of view. Despite this provision, participation of the Coalition and its members was viewed negatively by some members of Congress.\textsuperscript{244}

For the first round of debates, the Coalition moved to unify the two existing projects. “Our strategy aimed at unifying the draft bills, and choosing the Commission to which the draft should be brought. There was a draft law that had been filed by

\textsuperscript{243} Articles 150 to 154 of the Ecuadorian Constitution, \textit{supra} note 216.
\textsuperscript{244} “One Congressman publicly stated that we [the Coalition] were being nosy” [because of the Coalition’s participation in the Congressional debates.] Avila, Ramiro, \textit{supra} note 219 at 40.
Congressman Pons at the Civil and Criminal Commission, and the AEDEP project had been brought to the Public Affairs and Universalization of Social Security Commission. Both Commissions had discussed both projects separately. We intervened and called them to unify the discussion of the project, and we decided on pursuing the project at the Public Affairs and Universalization of Social Security Commission, especially because the Civil and Criminal Commission usually has a workload five or six times larger than the rest.”

It is noteworthy that a civil society-based Coalition intervened to articulate and unify two bills for the same topic, making it easier for the integrated bill to obtain the support it required. The Coalition mediated an agreement between the parties that had originally brought proposals. “What we did was reach an agreement between AEDEP and Congressman Pons, for them to unify their bills. The members of the Public Affairs Commission were also persuaded to support this agreement.” For this purposes, the Coalition hired a lawyer, José Villena, to act as a full time lobbyist. Christian Bahamonde of CLD also acted as a bridge between Coalition and Congressmen. The Coalition performed the task of a glue of sorts, bringing together an otherwise disjointed, non-communicative legislative process.

In the end, this strategic choice turned out to be effective. “The workgroup presented the Public Affairs [and Universalization of Social Security] Commission with a draft report to be used in the first congressional round of debates, which was positively received and which was used as the basis for the report that ultimately was brought to the

245 Supra note 237.
246 Ibid.
Congress plenary session in July 2003.” \textsuperscript{247} In the end, the report drafted by the Public Affairs Commission was positively received at the congressional debate. “The report that we worked on was fully supported by the members of the Public Affairs Commission. We reached a true consensus within the Commission. The Law was approved in the first round of debates, with a text pretty similar to the one that had been proposed by the Public Affairs Commission.” \textsuperscript{248} This was a success for the Coalition and its work. However, things did not go as smoothly for the second round of debates. “Given to an unfortunate timing situation, and to other legislative priorities, it was not possible to bring the bill to the second debate on the same year. This greatly troubled the process because a Congressional election came shortly afterward.” \textsuperscript{249}

The backdrop changed drastically for the second round of debates. The Coalition lost almost entirely political consensus and agreement about the contents of the law that it had mustered in its role as friend of the legislature in the first round of debates. “The environment and the political arrangements changed. We had a new President and a new Congress. All the members of Congress with which we had worked, educated, and trained about the importance of the Law were gone. To this change in congressional membership, an additional problem was added: two of the newly elected Congressmen had an interest in the issue of Access to Information, but from their own perspective: Ramiro Rivera of the Popular Democracy and Luis Almeida of the Social Christian Party. This was a problem because they had their own drafts, which were not in agreement with the one that had been produced through the extended process of participation and

\textsuperscript{247} Ibid.
\textsuperscript{248} Ibid.
\textsuperscript{249} Ibid.
research that was conducted in the workgroup. This meant that, assuring a technically appropriate, thoughtful Law required incorporating their projects to the one contained in the Public Affairs first-debate report.”

The civil society Coalition, in its role of socializing agent and consensus seeker bona fide third party, started over again, discussing, comparing, and contrasting the new proposals. Even though these two new proposals were mostly adequate, work was needed to create a new, harmonized report for the second round of debates. “We did the technical work of contrasting the two new drafts, comparing them article by article to find their differences and to identify ways in which they could be harmonized. One major point of disagreement grew regarding the obligation for private foundations to disclose information when they handle public monies. There was a division between the Social Christian faction because one of its members, Congressman Pedro Valverde, who had links to certain Foundations that operate with public funds, was drastically opposed to this requirement. On the other hand, Congressman Almeida and his advisors, whose project had better legal-technical grounds—but did not include the obligation for private foundations to reveal information—saw this requirement as reasonable. This became a very sensitive issue; in fact, this issue became more sensitive than, for instance, exceptions to disclosure of information for military and security reasons.”

At the same time that this issue became problematic, another change in backdrop at another front, the AEDEP, also negatively impacted the conformation of a bill draft on the basis of a consensus reached by all parties involved. A new person was appointed as AEDEP’s director; he happened to have links with a Social Christian party (he was the

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250 Ibid.
son of a Social Christian congressman). This resulted in AEDEP’s withdrawal of support for the project that had been agreed upon earlier in the process, especially because of the issue of disclosure of information for private entities. After this change in its directorship, AEDEP never again talked or participated in the process pushed by the Coalition.

The Coalition still moved forward to put together a draft based on discussion and technical assessment of the merits of the project. Congressman Almeida had filed his proposal with the Civil and Criminal Commission. Again, agreeing on what Commission to use as a channel for the project required time and effort. In the end, agreement was reached that it was best to go through the Public Affairs commission, for two reasons: a) the Civil and Criminal Commission, as mentioned above, has a workload significantly larger than the rest of commissions, and b) the coalition, during its work preparing the report for the first round of debates, had already worked with this Commission, and knew its Secretary, Juan Carlos Calvache, closely. Therefore, even though after the election of the new congress this Commission had new members, knowing the Secretary (a permanent employee not removed upon election of new representatives) allowed the Coalition to keep an active participation on the day to day work of the Commission. With this in mind, the Coalition brought to this commission the report that resulted from merging, as much as possible, the bills proposed by the other two Congressmen, hoping that this proposal would be used by the Commission as the report for the second round of congressional debates.

The civil society Coalition was confident that the Commission would adopt this proposal, because it was the only one that was based on rigorous analysis and
exchange.\textsuperscript{251} For its part, members of the Commission assured the Coalition that they supported and embraced this proposal. As often within the Congress, things turned out to be quite different. There was, as several members of the Coalition call it\textsuperscript{252}, ‘treason’ from the part of the Commission. First, members of the Coalition and its lobbyists were never officially informed of the date in which discussion of the proposed bill for an Access to Public Information Act was going to be discussed on the Congressional floor. Apparently there were interests bent in cutting the civil society coalition out of the loop. The Coalition, however, managed to have people—friends or acquaintances—within the Congress to daily update them on the ‘order of the day,’ i.e., the issues that were put on the agenda daily by the President of the Congress. When the then President of Congress, Ramiro Landázuri, put the discussion of the bill in the agenda, members of the Coalition were notified by their whistleblowers.

It was then that the Coalition realized that ‘treason’ had had a second chapter: the text of the report—the basis for the floor debate—had been considerably modified and cut down by the Public Affairs Commission. The original proposal, as prepared by the Coalition, which gathered and harmonized the contents of the other two bills, had 48 articles. “It seemed that articles had been removed by the Commission without any apparent legal-technical justification. It seemed that the ‘mutilation’ of the bill was done the night before.”\textsuperscript{253} The former connection within the Commission, its Secretary Juan Carlos Calvache, had failed the Coalition’s lobbyists with whom he had worked closely

\textsuperscript{251} Congresional Commissions are the ones in charge of drafting the reports for the floor debates.
\textsuperscript{252} Supra notes 224 and 237.
\textsuperscript{253} Supra note 237.
during the drafting of the first-debate report. Apparently, the Secretary was prevented by the new Commissioners from allowing the Coalition to take part in the new drafting.

When the Coalition realized that the bill that was going to be discussed on the floor—which its lobbyists saw only the same day the bill was put on the ‘order of the day’—had been drastically modified, it moved quickly to stop the debate. After all, most times, no law is better than a bad law. The bill that was included in the Public Affairs Commission report was clearly a poor law. It seems that interests within the Congress wanted to adopt this insufficient, poorly planned Act so as to fulfill the formal requirement to pass Access to Public Information legislation, but without any intent of having an Act that would actually work and fulfill the principles behind Access to Public Information.

On that same day, the Coalition exerted pressure to stop the debate. One of the member organizations, ILDIS/Friedrich Ebert, had close ties with the then President of Congress, Guillermo Landázuri (Izquierda Democrática, a left-to-center political party). They contacted him and explained the importance of preventing the debate from happening. Additionally, some other members of the Coalition had a close relationship with some of Pachakutic’s (a leftist, indigenous-based political party) representatives, and managed to get one of them to bring a motion to reschedule the debate for a different date. That motion went through, and the debate was adjourned for a week after. This postponement bought the Coalition precious time in which its lobbyists contacted
representatives directly to try to introduce reforms to the proposed bill aimed at restoring the contents it had had originally.  

In those three days, members of the Coalition met strategically with various representatives. “In these meetings, we tried to explain to them what were the shortcomings and problems of the proposed bill.” Some representatives had an especially open attitude towards the advice of the Coalition. “Pachakutic representatives Guamán and García placed a crucial role because they were receptive to our arguments and realized that the proposed bill had in fact been cut down drastically. They filed observations to the cut-down version—representatives are the only ones that can file written observations to a proposed bill—and in those observations they introduced the changes we advised them were needed.” In this fashion, some modifications to the Public Affairs Commission’s ill-drafted bill were introduced during the short days until the new date for the debate.

Beyond having an adequate report to ground the debates, the next great challenge the civil society Coalition faced was harnessing the required number of votes to approve an ‘organic law.’ The Congress convened to debate the Access to Public Information Act one week later, with a proposed bill that had been improved, to the extent possible, via the observations filed by a few sympathetic, progressive representatives. Members of the Coalition were on the Congressional floor closely watching the events of the day. The

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254 Ibid.
255 Ibid. In later paragraphs, I revisit the role of the civil society, and, specifically, the Coalition for Access to Information, as a key socializing agent by which the concepts and principles of access to information were transferred from the global environment to local lawmakers.
256 Ibid.
discussions began, as mandated by law, from the basis of the Commission’s report. The next and last chance to introduce changes to the bill would on-the-go, during the debate.

“We were present in the Congressional floor, talking to the representatives, trying to explain to them the importance of this and that observation. In a way, we became de facto advisers to the representatives, who were not always aware of the contents and purpose of the proposed law.”257 This process reveals the ins and outs of lawmaking, where most representatives are only vaguely familiar with a bill—if familiar at all—and they cast votes based only on party preference.

It is striking that Coalition lobbyists realized right at the time of the debate that most of the representatives had not the slightest idea about what an access to public information act was. “No one ever bothers to read the report submitted by the pertinent Commission. Either they fully trust the Commission, or they just don’t care enough to read submitted bills. The Secretary and the President file the report, and the rest of representatives only voted following their block. Those who truly knew what the bill meant were the exception.”258 This situation is not only striking; it is almost comical. “During the debates, one of our lobbyists, Marco Navas, approached a certain representative on the floor to secure his support. He quickly realized that the representative did not have any idea about the bill; clearly, he hadn’t read or even looked at the report. Marco Navas talked to him for five minutes and basically explained to him what this bill was all about, convincing him to support it. The representative became

257 Ibid.
258 Ibid.
sympathetic to the idea. He quickly took the floor and he repeated almost verbatim what Marco Navas had told him.”

In this case, a civil-society group adopted, through its own agency, the role of educator of otherwise poorly-informed representatives. “One of the limitations of trying to modify a bill on the fly, the day of the debate, is that new articles can not be introduced. Changes can only be made by modifying articles included in the bill brought by the Commission. In the end, the resulting Access to Public Information Act was the result of changes made last minute, by modifying existing articles, not including new ones. Even though it may be hard to believe, crucial articles of the law were made last minute.”

The members of the coalition approached different representatives while the debate was going on. “I saw how Ramiro Avila (from the Law Clinics of the Catholic University) and Marco Navas (from ILDIS/Friedrich Ebert) literally educated and persuaded representatives quickly about required changes, and about the Act in general, because some of them really had no idea about what this law meant and why it was needed.” In the end, the necessary votes were harnessed, and the Act was passed. Through these efforts, the bill, as proposed by the Public Affairs Commission, was somewhat fixed and improved, but it still has some important shortcomings.

The next challenge was obtaining the Presidential approval for the Law. As mentioned above, the Ecuadorian Constitution determines that the President acts as co-legislator, either by introducing modification to a Law, or by rejecting parts of it or its entirety. This was a great challenge for the Coalition, because the President that had

\*\*259 Supra note 224.
\*\*260 Ibid.
\*\*261 Ibid.
supported an Access to Public Information Act, Gustavo Noboa, was no longer in power. He had been replaced by Lucio Gutiérrez, who as a Colonel in the Military, in January 21 of 2000 had attempted a coup d'état against President Mahuad, and had failed. He was later elected President in 2003 after adopting a populist style, and based on the popularity he achieved as the leader of the failed 2000 Coup d'état. Gutiérrez’s anti-democratic past, added to myriad nepotism and corruption scandals in which his government was trapped, indicated that he would hardly support an Access to Public Information Act. In fact, he was no sympathetic to this legislation. However, some junctural events helped to overcome the Gutiérrez hurdle in the approval of the Act.

In June 2004, the Organization of American States’s General Assembly (OAS) had its Thirty-Fourth Regular Session in Quito. As host country, the government of Ecuador set the topics for discussion in the agenda. Gutiérrez, in populist fashion, had been maintaining an anti-corruption discourse—even though his government was the most corrupt government after Abdalá Bucaram’s in 1997. “Thus, he suggested for the OAS General Assembly to deal with corruption issues. However, since apparently no one within his government knew much about anti-corruption schemes, he requested groups within the civil society to act as technical advisors for the government of Ecuador on anti-corruption. In this context, we were able to persuade Gutiérrez to endorse the Access to Public Information Act. This junctural events made it possible for us to ‘sell the idea’ of access to public information to Gutiérrez.”262 And additionally, these events made it possible for the Coalition to work with the President’s legal advisers about the law. As mentioned above, the President has enormous power as co-legislator. However,

262 Supra note 237.
what happens very commonly is that the Executive power is not involved in the process of drafting a bill and then debating it. When a bill is approved by the Congress, and it goes to the executive for approval or veto, most of times the executive power does not have much of a clue about the contents of a law, especially if it is technical. In some cases, approval is motivated by political agreements and interests. In others, a few changes are introduced somewhat randomly and without technical analysis, and good statutes are usually damaged not because of ill intentions, but because of technical expertise. In this case, the civil society Coalition, again, had to act as an educator to policymakers, by meeting with the President’s legal advisers and explaining to them the importance of the law, the reason for its contents, and so on. At last, the executive power approved the text of the Access to Public Information Act.

The process was not over yet. The next stage was the approval of the bylaws or regulations for the application of the law. The same technical group that had worked drafting the law was kept, and a similar, inclusive process was followed. “We worked with various institutions—including the military, government institutions, municipalities—and we discussed all the fine details for the application of the law. We drafted a body of regulations that included 140 articles and was very inclusive, dealing with a variety of specific regulations to fulfill the application of the Act, including the format institutions would have to follow to publicize their information, budgets that should be allocated to organizing and cataloguing information, etc.”

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263 Ibid.
According to the Ecuadorian Constitution, regulations must be adopted by the President of Ecuador, without contradicting them or modifying the law. However, in practice, there is always room to adopt regulations that, through excessive detail and legal intricacies, end up modifying the law they are supposed to apply. The process of adopting the regulations for the application of the Access to Public Information Act ended up being more contentious than expected. Regulations can be an effective way to trump a law because they draw a lot less attention than the approval of the law itself. Therefore, groups opposed to a statute may go along with its approval because opposing it would be politically costly and would produce unnecessary wear out. However, they may use the regulations as a way to render the law ineffective or applicable.

The Coalition, which had established a close relationship with the executive power’s legal advisers during the adoption of the law, had worked an agreement with the executive for the approval of the regulations. However, the set of regulations proposed by the Coalition encountered a series of attacks. The AEDEP itself, through a well-known television journalist, Carlos Vera, argued that the civil society groups were trying to debilitate the law with the proposed regulations. This argument took force, and the approval of the regulations by the executive was brought to a halt. The executive’s legal department began to compose their own regulations.

Then another set of junctural events stroke. Gutiérrez managed to get his political faction in Congress to oust the Supreme Court of Justice, which had been given, according to the Constitution drafted in 1998, for-life tenure. Gutiérrez’s authoritarian inclinations drove him to threaten an institution—the Supreme Court—that had been

264 Supra note 216.
reformed and was showing signs of increasing recovery. This authoritarian breach of the Constitution was a fatal mistake of Gutiérrez’s. It triggered a wave of political opposition and citizen mobilization, which ultimately ended in Gutiérrez’s removal on April 20, 2005.

Gutiérrez made every last effort to cling to power. One such strategic move was the approval of the Access to Public Information regulations. In a breakfast meeting session with international press, he announced that he was going to approve the regulations to the Access to Public Information Act because he supported transparency and anti-corruption. Clearly, he wanted to portray himself before the world as a pro-transparency President to salvage his image. Clearly, these efforts came too late and were too weak, because the world already saw him as the President who, through obscure dealings and breach of the Constitution, had ousted the Supreme Court and the Constitutional Tribunal. And, more importantly, these efforts had almost no impact in stopping the people on the streets from demanding Gutiérrez’s removal.

Regulations approved in this fashion did not incorporate the results of all the work facilitated by the Coalition, which included feedback from and dialogue with a variety of public and private actors. There was still the need for a better set of regulations that would guarantee a more effective application of the law. The civil society-based Coalition was not ready to abandon its task so close to the goal. Its final action in the process of adoption of this legislation was a set of reforms to the regulations that had been approved by Gutiérrez. The Coalition obtained these reforms from Alfredo Palacio, who had been appointed President after Gutiérrez’s removal. Palacio started his interim

\[^{265} Supra\] note 237.
tenure with a democratic re-construction discourse, which was highly popular after the outrageous constitutional breach orchestrated by Gutiérrez. He was, therefore, open to dialogue with the civil society and to reforms for better governance and transparency. In this context, the Coalition was able to approach him to obtain reforms to the regulations that had been approved by his predecessor. These reforms included some of the material that had been produced by the Coalition.

This detailed description of the process by which the Access to Public Information and its Regulations were adopted has a common thread: this was a process significantly led by civil society organizations and, specifically, by a coalition comprising those organizations into one single force. Bills for an Access to Information Act were also brought by representatives within the National Congress. However, these proposals were in most cases brought in isolation and they lacked a serious, inclusive process of discussion about what a good statute should include. The description of the process underscores that the role of the civil society was to transfer information, create fora for discussion, offer technical advice, and, in general, make the lawmaking process a richer, more democratic process.

Why where civil society organizations in a position to act as facilitators in the legislative process? I argue here that these organizations performed these functions because of their relation vis-à-vis global currents and trends. Above I mentioned that there was a very long legislative delay between the time when Ecuador entered international agreements that already included the right to access public information and the adoption of this internal legislation. I suggest here that this delay may find its causes
in the fact that access to public information did not become a priority globally until more recently. Therefore, even though principles and concepts were already included in international treaties, they did not become fully operational and justiciable locally until a global movement—fueled by the creation of global organizations, funding, research, and a distinctive discourse—was consolidated.

It was a global movement that put access to public information in lawmaking agendas around the world, including Ecuador. The channel by which the global current with all its technical array and knowledgebase was internalized at the local level was, to an important degree, civil society organizations. Access to Public Information as a legislative priority did not emerge locally; it entered the agenda slowly through the action of these globally connected—and in most cases globally funded—organizations. Graph 1 below synthesizes the process and actors.
c) Global-Local Links.

At this point, one might reasonably ask: why should a group of civil society organizations act as adviser and facilitator in the legislative process? Shouldn’t the Congress itself make sure that the lawmaking process is inclusive, democratic and grounded on research? Institutions that make law should have the capabilities to assure that making law is not only a matter of following formal voting requirements, but a genuine, technically supported democratic exercise.

This is, however, far from true in the Ecuadorian context, and in many other developing countries. The Congress does not have any technical department devoted to
conducting research about adequate legal frameworks. Bills are brought by representatives, who are not qualified technicians, they are politicians. Nowhere in the lawmaking process do bills go through a technical group or department in charge of examining their legal contents. If there is any study and analysis of bills, it is done by the Congressional Commissions which, again, are integrated by politicians and not researchers or scholars. True, representatives have “asesores” (advisors), who are supposedly in charge of doing the legal work. Some asesores are better than others, so the level of analysis varies. However, the bottom line is that institution itself does not have a technical department. “Other Congresses in the world have research teams. On this there are many experiences.”

This vacuum is sometimes filled by external actors, although this is not always the case. This depends squarely on whether there are such actors interested enough in an issue to fund and sponsor research and consultation processes for bills. That was the case, for example, of the Bill for Indigenous Justice, which was drafted and researched by scholars within Universidad Andina and other independent experts as part of a project sponsored by “ProJusticia,” (a unit within the Ecuadorian Supreme Court charged with the mandate of improving the justice system by managing resources obtained from bilateral and multilateral agreements between Ecuador and donor agencies267) and funded by the International Development Bank. This project included a broad dialogue over a yearlong period, to which stakeholders, notably representatives of indigenous peoples from all over the nation, were invited. This project made it possible for the bill to be democratically and inclusively drafted, drawing on the experiences and needs of

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266 Supra note 237.
267 See http://projusticia.org.ec/ (last visited 09/07/07)
indigenous groups themselves. In addition to the bill, the project produced a book, Justicia Indígena en el Ecuador, written by the experts that coordinated the Project.

Similarly to the Bill for Indigenous Justice, Access to Public Information Act was significantly if not entirely driven by external, civil-society based actors. It was those actors that got the wheels spinning about the need of such a law to begin with. As a rule, all civil society organizations involved received input—financial and intellectual—from their international counterparts.

Saying that NGO acted as links in the chain connecting the local lawmaking agenda with global currents is not just a figure of speech. Financially, all the organizations striving for the Access to Public Information Bill were supported by international funding. CLD, one of the leading organizations, which did work on the issue even before the Coalition for Access to Public Information was put together, was the Ecuadorian chapter of Transparency International. As such, it received a wide array of information, including the idea that a statute like this was needed. CLD had also been working for several years implementing a variety of governance and judicial system projects, with funding for various international agencies and NGO.

From its inception, this organization was attentive to global currents and established international connections. “Pertaining the Access to Public Information Law, we drew heavily from materials and intellectual resources offered by Article 19, a British Organization promoting the human right to free expression.” Further, CLD was

269 Supra note 223. For the work of Article 19 NGO, see http://www.article19.org/ (last visited 09.07.07).
attentive to similar processes that had already happened in other Latin American countries, especially Mexico. “Mexico was way ahead of us in access to public information. The SECODAM\textsuperscript{270} had been the leader in charge of promoting legislation, and we followed their experiences”.\textsuperscript{271} CLD was also inspired by similar processes in Argentina.

The same is the case of ILDIS/Friedrich Ebert, the other local NGO which initially championed this legislation. ILDIS is a locally incorporated NGO “belonging to German Foundation Friedrich Ebert (FES) . . . whose headquarters are located in Bonn, Germany.”\textsuperscript{272} As the Ecuadorian chapter of FES, ILDIS receives funding and support from it. ILDIS’s work areas are organized around FES’s principles of action, inspired by German social-democratic ideals. As such, ILDIS is a local organization with an especially acute global positioning. Its global nature also placed it at the forefront of access to public information legislation in Ecuador. The ex-director of ILDIS is Alberto Acosta, a left-leaning economist (now a prominent figure in Rafael Correa’s government, and the President of the National Assembly), educated in Europe. As mentioned above, ILDIS was also part of FES’s Latin American Media Project. In this project, the issue of Access to Public Information was vital from the perspective of journalists, whose work is commonly highly obstructed by hermetic public institutions. Journalists are a group benefiting greatly from this kind of legislation because it makes it easier for them to gather information they require for their reporting.

\textsuperscript{270} SECODAM, Secretaría de Contraloría y Desarrollo Administrativo, is the comptroller’s agency in Mexico, which championed transparency and anti-corruption programs, including access to public information legislation.

\textsuperscript{271} Supra note 223.

\textsuperscript{272} \url{http://www.ildis.org.ec/public/ildis.do} (last visited 09/07/07)
Other organizations that took part in the process also had strong international connections. Participación Ciudadana is an Ecuadorian NGO funded by César Montúfar, an Ecuadorian citizen who received his doctoral degree in Political Sciences in the United States. This organization is one of USAID’s partners in Ecuador for the implementation of projects in its ‘Democracy’ issue area (other partners include Chemonics International and ARD Inc). Participación Ciudadana receives most of its funding—about a million dollars per term—from USAID. Participación Ciudadana’s agenda is also shaped by USAID’s democracy and transparency principles, and its participation in the promotion of the Access to Information Act was part of the fulfillment of these organizational goals.

The next major organization behind this process was Fundación Esquel’s Justice and Society Fund. Like Participación Ciudadana, Fundación Esquel also receives a significant portion of its funding from USAID; it is also one of its domestic partners. The Justice and Society Fund is entirely underwritten by USAID, and it manages USAID funds granted for the execution of projects by local NGO. The ex-director of the Fund, Farith Simon, is an Ecuadorian lawyer who received a master’s degree in Children’s Law in Spain, and has worked in various human rights cases litigated internationally.

The Coalition’s next member organization was also highly attuned to transnational legislation currents. The Ecuadorian Center for Environmental Law is one of the only environmental law NGO in Ecuador. It has partnerships and receives funding

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273 See http://ecuador.usaid.gov/portal/content/view/51/71/ (last visited 09/07/07).
from a variety of major international foundations and governmental organizations, including the MacArthur Foundation, the Organization of American States, The Nature Conservancy, USAID, United Nations Development Program (UNDP), World Wildlife Fund (WWF), Sociedad Peruana de Derecho Ambiental, Instituto Colombiano de Derecho Ambiental, Iniciativa de Acceso México, British Government, World Resources Institute.\(^{275}\)

The Law Clinics of the Catholic University also have a highly global positioning. First, the University and its Law School are themselves affiliated with Catholic Universities around the world. The Law School is one of the traditionally dominant law education centers in the country, and it maintains a wide variety of academic programs with other law schools in Latin America and beyond. Besides the evident international connections of the Law School, the director of the Law Clinics—who was a key player in the adoption and application of the Access to Public Information Act both as an activist and as a scholar writing on the issue of access to information—received his LL.M from Columbia University in New York. He is a well-known international human rights practitioner, and he provided the Access to Information movement with a lot of its intellectual grounds.

Finally, Fundación Futuro Latinoamericano (FFLA) is one of the major NGO in Quito and in Ecuador. It is 14 years old, and it has an important presence in the development field in the country. FFLA has three general development programs, including a Program on Prevention and Management of Environmental and Social

\(^{275}\) CEDA’s partnership and financial information is available at [http://www.ceda.org.ec/descargas/administracion/Memoria%20CEDA%202006.pdf](http://www.ceda.org.ec/descargas/administracion/Memoria%20CEDA%202006.pdf) (last visited 09/10/07).
Conflicts, and Program on Sustainable Development Policy. The last program is undefined, giving the organization the chance to work on various issues as it sees fit. FFLA belongs to international networks, notable, The World Conservation Union (UICN), “the world’s largest and most important conservation network . . . [which] brings together 83 states, 110 government agencies, more than 800 non-governmental organizations (NGOs), and some 10,000 scientists and experts from 181 countries in a unique worldwide partnership . . . The World Conservation Union is a multicultural, multilingual organization with 1100 staff located in 40 countries. Its headquarters are in Gland, Switzerland.”

Other trans-national networks of which FFLA is a member are the Grupo Zapallar (which it helped launch), which discusses the trade-environment link from a Latin American perspective. This network agglutinates “more than 40 people in South America, members of the private sector, Commerce, Environment, and International Relations Ministries, environmental organizations, research institutes, [and] international organizations […].” FFLA is also a member of the regional Grupo de Lima, which was created in 2004 as a “south American network of experts on environmental/social conflict management.”

In addition to its international and regional networks, FFLA works with myriad partners in Chile, Argentina, Uruguay, Costa Rica, Colombia, United States, Brasil, Perú, Bolivia, Switzerland, and Canada. Such partners include, to name just a few,

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278 Ibid.
Conservation International, Centro de Derechos Humanos y Ambiente, Fundación Getulio Vargas, International Center for Trade and Sustainable Development, United Nations Environmental Program (UNEP), World Wildlife Fund, and a variety of Universities in these countries.\footnote{See http://www.ffla.net/index.php?option=com_content&task=view&id=45&Itemid=99 (last visited 09/10/07)}

Finally, FFLA receives funding from innumerable foundations, International Governmental Organizations, and Governmental Agencies nationally and internationally. Among the latter, FFLA’s donors include the Swiss Agency for Cooperation and Development, the Inter-American Development Bank, the World Bank, Compton Foundation, Andean Development Corporation, USAID, Ford Foundation, World Health Organization, GTZ, to name a few.

This narration of the international or transnational links of the NGO that were members of the Coalition for Access to Public Information supports the idea that these organizations acted as very effective links between Ecuador’s policymakers and international policy currents. States as members of the international community have their own channels by which they establish international relations. However, those diplomatic, state-to-state relations are conducted through official channels and regulated by diplomatic rules. What I am identifying here is the informal, non-official mechanisms by which policy is transferred from the global arena—not only from one state to the next—into local policymaking agendas.

Beyond international links of the major NGO that make up the Coalition, the Coalition Project itself was entirely underwritten by USAID, which not only is linked to
global policy trends, it is a real trend-setter when it comes to policy and development programs. USAID’s funding areas determine the direction of substantial policy and development programs in the countries in which it operates. In Ecuador, its funding for democracy, transparency, and rule of law programs has greatly shaped what local organizations do in this subject areas. The initial cost of the Coalition Project was $87,237, $50,000 of which came from the Justice and Society fund, which manages USAID money, and $37,237 of which was underwritten by the other participating organizations. Originally, the project had a period of one year, although it was renewed after its completion. In addition to USAID’s funding for the Coalition project, the American Embassy and USAID directly provided funds for the adoption and implementation of the Access to Information Law through a project it called “Sí Se Puede.”

Even though these NGO acted as key ‘merchants of ideas’ by promoting the need for a statute like the one that was ultimately adopted, it is worth mentioning the other channels by which these happened. One of them was the Diario Hoy which, as discussed above, ‘sold’ the idea of the need for this legislation to the then president of Ecuador, Gustavo Noboa. Diario Hoy director’s interest in this issue sparkled from his connections with other Latin American newspapers, especially those in México. “For many years, we have had connections with Latin American newspapers and with the Mexican experience through the Latin American Press Association.” According to Diario Hoy’s director, he got interested in this type of law not only because of its benefits for journalists and his

\[280\] Grant for the Project “Access to Public Information as a Tool for Improving Transparency in Ecuador,” on file with author.
\[281\] Supra note 222.
newspaper, but also as a tool for the promotion of transparency. “I don’t see this legislation as benefiting only or most importantly journalists and newspapers. Drawing on the experiences in Mexico, I realized that it was an effective transparency mechanism, and it is important that it is made available to each and every citizen, not only journalists.”

Finally, it was mentioned that first one representative, Juan José Pons, and later, during the second round of debates, two more, Ramiro Rivera and Luis Almeida, brought bills for an Access to Public Information Act. In a way, the presence of these bills may seem to diminish the accuracy of the claim set forth here—that NGO within the civil society transferred ideas and acted as legal entrepreneurs for access to public information. Nevertheless, bills brought by these three representatives were either a) superficially linked to an access to information international knowledge base and information sharing network, and originated in casual or temporary international links; b) or brought by isolated individuals having a more substantial international experience on the topic.

The bill brought first, by Juan José Pons, belongs to the first category. He brought the bill based on a visit he made to Sinaloa in México. “In the preamble to the bill he drafted, it was mentioned that he brought this bill inspired by an event to which he had been invited in Sinaloa. He then came back, used the Sinaloan law as a model, changed a few things to it, and presented it as a bill at the one of the Congressional Commissions.” In this case, this representative traveled to a conference or event

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282 Ibid.
283 It was impossible to contact Juan José Pons because he is now out of the country. He fled after a series of political scandals that ended in his prosecution.
284 Supra note 222.
abroad, picked up the idea, superficially adapted it to the Ecuadorian context, and a bill was made. There was no sustained exchange of ideas, or continued support from international experts or organizations.

The other two bills, brought by Ramiro Rivera and Luis Almeida, can be placed in the second category. This is evident from the fact that the technical aspects of these two bills was better.\textsuperscript{285} “We are not sure where Rivera’s bill came from. In the case of Luis Almeida, he had an advisor, Luis Sosa, who was interested in the issue, and who had studied it in Spain. He was the one who was behind the ideas; the project was good. It was a different model to the one prevailing in Latin America, it was influenced by European ideas of transparency.”\textsuperscript{286} Graph 2 below illustrates the relationship between local organizations and transnational organizations giving them support.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{relationship.png}
\end{figure}

\textsuperscript{285} Comparative Document of the three bills, Civil Society Workgroup on Public Information. On file with author.

\textsuperscript{286} Supra note 237.


d) Supported Results.

The description conducted in the previous pages has fleshed out the process by which the Access to Public Information Act was adopted. The following points emerge as important from such description: a) The process was predominantly driven by organizations within the civil society, not by state entities or public officials; b) Those organizations invested a considerable amount of effort, funds, and research in the promotion of the statute, disseminating the idea of access to public information; c) The organizations involved, which integrated a single front for this purpose, were the largest NGO in the nation, the ones with the most international connections, and that all of them receive funding and ideological support from large transnational networks.

I now turn to analyzing the role of these organizations in light of the three sets or theories reviewed in the first part of this dissertation. Those theories address the question of whether public policy priorities are diffused internationally by way of persuasion—true commitment and support of the normative contents of specific policies—or by socialization, a form of incomplete persuasion in which lawmakers are exposed to policy ideas and support them without necessarily believing or caring about their principles, or, finally, by imposition of any form from the global community, especially from state-to-state relations.

The hypotheses guiding this study, set forth above, pose questions about which explanation better applies to each case in this comparative case study. Those hypotheses are: First, that the issues addressed by these laws were not perceived by policymakers as problems that needed to be addressed [HYPOTHESIS 1]. Second, that these statutes
were adopted because lawmakers were socialized by transnational actors, their social reference groups: IGO, specifically the World Health Organization and the Organization of American States; INGO, specifically, Health and Anti-tobacco organizations, and Human Rights Organizations, and locally-based, internationally-influenced actors and NGO, rather than because they internalize the value of these norms [HYPOTHESIS 2].

Third, that these two statutes were passed as a result of a need to conform to global institutional contents and following world-societal models, not responding to local or domestic demands for change (they were adopted as “myth and ceremony”) nor as a result of international imposition [HYPOTHESIS 3]. Finally, that these two laws were passed not in response to technical assessments or policy research justifying their adoption [HYPOTHESIS 4].

Drawing on the description offered above, the “sticks” explanation, i.e., that the Access to Public Information Act was adopted by some form of international imposition, contained in Hypotheses 3, can be discarded from the outset. It is evident that there was no form of imposition by other more powerful states for Ecuador to adopt this law, or by powerful IGOs. In fact, the central point that can be made drawing on the previous analysis is that this law now exists precisely because of non-governmental, non-official, informal channels of informational and economic support.

The other two frameworks hold more explanatory power for the adoption of this statute. The backbone of the persuasion framework reviewed above is that relevant actors within states hold a true commitment to the value of these norms. The result is that states diligently respect international norms. This outcome requires more than lip service
to the value of norms and more than the adoption of international treaties to attain a good international image. It requires true commitment to the values embraced by norms, whether international or domestic.

Before the aggressive campaigns carried out by NGO, lack of accessibility to public information was not perceived as a problem by lawmakers and public officials, for two reasons (Hypothesis 1). First, people in positions of power—such as lawmakers or public officials—most likely do not have a hard time obtaining information they need because they can navigate their networks and get what they need. Second, the local culture of *compadrazgo*, i.e., the belief that friends or *compadres* must do each other favors, is an informal channel by which people get hold of information. People in positions of power thus enjoy a double advantage: their privileged networks are usually willing to help them because of the prevailing culture of *compadrazgo*.

In this context, lawmakers were not aware of the difficulty that most common citizens have obtaining public records. This assertion is also supported by the fact that the three lawmakers that did file bills for an Access to Public Information Act did so because of isolated connections with other countries in which similar legislation had already been enacted (an invitation to Mexico to Juan José Pons), or because one of their advisers, Luis Almeida, had studied issues related to transparency and access to information in Spain. Precisely, the activities conducted by globally connected NGO aimed at making it evident for public officials that this was—and still is—a serious problem for common citizens. Therefore, hypothesis 1 is supported.
Did a true commitment to the principles of this law drive its adoption or simply the socialization of relevant actors and their exposure to access to information as a global current? The data presented in the previous section show that the adoption of this statute was significantly driven by the work of NGO. Lawmakers were in fact socialized by transnational actors. Nevertheless, those transnational actors turned out to be globally connected, local NGO.

As the data show, such major NGO socialized policymakers by organizing workshops, international meetings, by inviting specific public officials to discuss the contents of the law, etc. Without NGO acting as the connecting fiber between various government officials and as catalysts through the congressional process, this statute perhaps would not have been adopted, or it would have been adopted later, or it have been adopted with poor technical contents. In this sense, globally aware NGO were, in fact, the ‘merchants of ideas’ who put this issue as a priority in the lawmaking agenda. Global patterns entered the local environment via the work of NGO. Hence, hypothesis 2 is supported.

The next question is whether NGO in their role as global socializing agents succeeded. Did lawmakers and other officials in power ultimately support this law because of a genuine concern to effectively guarantee this right; or did they lend their support because it was an issue that was legitimized internationally and transferred by legitimate socializing agents, and therefore could not be ignored—adopting a law on this

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As the data also shows, three lawmakers and a newspaper also introduced projects for a statute of this kind. Nevertheless, their efforts were isolated, and their role ended up being secondary throughout the process. Diario Hoy, being a newspaper, helped to publicize the need for such a law. However, the efforts lead by NGO made it possible to link all these initiatives—including Diario Hoy’s—and to conduct a sustained process of analysis and information exchange.
matter was the *appropriate thing to do*? This question is at the core of Hypothesis 3. A superficial analysis may suggest that this legislation was supported because after intense socializing and educational efforts, individuals in power came out seeing this as a serious problem, and with a true commitment to solving it.

However, data gathered suggest this was not the case. The experience within the national congress, described above, shows that only a few representatives were aware of what the law itself meant, much less knew its specific contents. Most representatives did not know what the law was about; as the data described above shows, they simply followed the directives given by lobbyists who verbally told them that most countries in the world have legislations of this sort and that it was necessary to secure a similar law for our country.

What this means is that there was no genuine process of internalization of the value of this law, with the exception of a few cases. Most representatives (the law was supported by unanimity, this is, by over 80 votes) backed this act because it gathered momentum in the public sphere in general, because they had heard about it as an anti-corruption mechanism from the press and from important conferences that had taken place in major cities in the nation, and because they thought it gave them a good public image. “I think that only with a few exceptions, they did not have much awareness of the issue […] The dominant attitude was lack of knowledge of the issue; many of them sensed that supporting it would bring them a good public image.”

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288 Written interview with Marco Navas, Professor of Law at Catholic University of Quito, and former coordinator of Access to Information Projects at ILDIS and FES.
Not even the three representatives that submitted the bills had a strong concern for the values promoted by the law or a strong commitment to addressing the substantive issue. “The most important bill, filed by Juan José Pons, was copied from a Mexican Law.” Representatives’ success is measured, in part, by the number of bills they submit during their term. Quantity matters more than anything else. Those who submit a lot of bills are deemed to be successful; vice versa, those who submit a small number of bills are reputed ineffective. This matters especially during electoral times because representatives can ‘brag’ about having promoted X or Y law.

Certain laws are sexier than others: laws against corruption, for example, are very popular. Therefore, a lot of career politicians care about this type of legislation for instrumental reasons, i.e., not because they have a true concern for the problem, but because it is a popular thing to promote in electoral terms. “In this case, bringing a bill for an Access to Public Information Act was a great opportunity for legislator Pons, because it did not require much effort—he drew on the Mexican model—and it was clearly a law that would earn him points.” Representatives see legislative windows of opportunity and take advantage of them. This was a particularly good window of opportunity because the issue was beginning to receive public attention as a result of the work of NGO and Diario Hoy. Finally, evidence that this particular legislator did not have a serious commitment to the problem of lack of access to information is found in his career as a politician. He was involved in corruption scandals and eventually had to flee the country.

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289 Ibid.
290 Supra note 237.
This evidence shows that Hypothesis 3 is supported. In other words, the adoption of this domestic statute did not respond to a) a state-level concern for the permanent violation of the right to access public information; b) a true commitment by lawmakers and public officials to the values and rights promoted by the statute. Socialization, an incomplete form of internalization, better explains the adoption of this statute. Policymakers supported this legislation in a Congressional period in which there had been little agreement for a variety of other laws because the issue had gathered enough public momentum and legitimacy, and because NGO had build a strong basis of support through workshops, publications, and media efforts.

The analysis conducted drawing on the data shows that three related hypotheses are supported. Each of these inter-connected hypotheses lays a block for the construction of an explanation that articulates the constructs included in each hypothesis. Such structure includes, first, the idea that Ecuadorian policymakers did not see the difficulty that common citizens have to obtain public information as a problem that required a policy response. If they did not see this as an issue requiring response, why did this statute receive unanimous support?

The confirmation of the other 3 hypotheses offers an articulated explanation that can be phrased as follows: this legislation, which had acquired global preeminence and had previously been adopted by a large number of other countries, including many Latin American nations, seeped into the Ecuadorian domestic policymaking agenda through the socialization of locally incorporated, globally connected NGO. Because they have global connections and support, these NGO acquire an important degree of legitimacy and
technical respectability. Therefore, they become reference groups and referent points for lawmakers who, most of the times, lack significant technical knowledge or substantial networks of support. In this context, when major NGO socialize and present ideas to policymakers, the latter are inclined to support them. However, support does not necessarily mean true commitment to the substance and values of those ideas or legal frameworks; it is merely the result of the accumulation of the prior elements, i.e., globally legitimated legal frameworks that seep into the domestic environment through (also) globally legitimated organizations become the appropriate regulations to support regardless of their actual contents or nature.

The adoption of the statute is also connected to the increased action of various organizations acting within the human rights framework. Not all rights within the human rights structure have received the same amount of attention or fulfillment. The advancement of specific rights occurs piecemeal. With time, derivative rights begin to emerge. Organizations are created whose entire mandate is to protect one single right. Exchange of information and support increases, and more and more countries specialize their respect for human rights. This is the case of access to information. Even though this right was implied in international obligations established decades ago, it did not translate into effective protection via domestic legislation until it became, itself and independently, a global priority and until it became institutionalized internationally. Once this happened, policies to guarantee access to information begun to seep into domestic regulatory systems.

ii. Access to Information Post-Enactment.
Up to this point, I have discussed the process by which this globally-derived statute was put in the books in Ecuador. The preceding part probes into how this policy was adopted, showing how socialization by a strong globally-connected NGO sector mattered importantly. This section examines the connection between the global origin of this local statute and its on the ground application. It does not constitute an independent study of how these statute was applied on the ground; it is intended to reflect on this paper’s theme, i.e., the connection between domestic lawmaking and global cultural and institutional currents. This section is not explanatory but exploratory and descriptive. It is used as an opportunity for an informed reflection about globalization and its impact on lawmaking in Ecuador and similarly situated developing environments.

The previous section aimed at testing hypotheses about the process by which the Access to Information Act was adopted. The data provided support for three of the four hypotheses. The explanation for the adoption of that statute, based on the hypotheses that were supported, was phrased as follows:

“[The Access to Information Act], which had acquired global preeminence and had previously been adopted by a large number of other countries, including many Latin American nations, seeped into the Ecuadorian domestic policymaking agenda through the socialization of locally incorporated, globally connected NGO. Because they have global connections and support, NGO acquire an important degree of legitimacy and technical respectability. Therefore, they become reference groups and referent points for lawmakers who, most of the times, lack significant technical knowledge or substantial networks of support. In this context, when major NGO socialize and present ideas to
policymakers, the latter are inclined to supporting them. However, support does not necessarily mean true commitment to the substance and values of those ideas or legal frameworks; it is merely the result of the accumulation of the prior elements, i.e., globally legitimated legal frameworks that seep into the domestic environment through (also) globally legitimated organizations become the appropriate thing to support regardless of their actual contents or nature.”

What are the impacts that this explanation has for the on the ground application of the law? In other words, is there a connection between the motivations for the adoption of this law and its application? I now turn to exploring, based on the literature reviewed in Chapter Four, whether the global origin and ceremonial adoption of this statute may have had an effect on its application.

The review section in Chapter Four engages a variety of literatures examining the role of the law as an instrument for social change, which trace their roots to American Legal realism. Realism’s great contribution was to underscore the idea that the law goes beyond solving and regulating individual controversies and relations respectively: it matters as an instrument for social planning. International regimes such as human rights are aimed at achieving and fulfilling values and societal goals based on natural rights. Their ultimate purpose goes beyond the declarative: ultimately, human rights exist to achieve effective change and improve people’s lives. They are instruments for social change.

Sociology’s neo-institutionalism argues that global currents result in the adoption of similar laws and policies by many countries in the world. However, given that those
policies are enacted to conform to transnational trends, it is predicted that their actual impact will be low. This is what this theory calls decoupling. As I wrote above, according to this theory, “decoupling exists and, moreover, is expected because the adoption of constitutions, treaties, and laws does not fulfill functional goals; it is merely a ceremony by which nation-states express their attuning to globally legitimized models.”

Before answering the question of whether there is a connection between the global origin and ceremonial domestic adoption of a law and its on the ground failure, one must first determine if such failure exists, and why. Several conceptual elements offered by the policy implementation and sociolegal theories reviewed above offer lenses through which the application of a law can be evaluated. Drawing on lenses offered by both currents of literature, I next discuss the question of whether the Act is actually enforced, applied, or observed by its subjects. I first draw on policy implementation literature to evaluate the application of this Act.

A conceptual clarification is in order. In preceding sections, I touched on the distinction between policy and law, noting that in different legal traditions, these terms have varying implications. As explained above, policy is the goal-oriented part of the law; it has to do with the instrumental goals of legality. This last concept can also have an additional level of refinement. Governmental goals can be achieved through the execution of programs or plans, or merely by adopting rules that aim at modifying behavior but which do not require the completion of programs or plans. Within the policy implementation literature, policy is related almost always with the latter. For
example, if the Ministry of Public Works sets out to build a new road, the whole plan to carry out this project is a public policy that must be implemented.

The case studied here, the Access to Information Act, includes both definitional levels. One aspect of it is a governmental policy in the sense that it aims at changing the behavior of government employees and private entities. It also sets out rules that strive to have an impact on the behavior of the public in general by making available institutional channels for its benefit. A second component of this law also sets out a governmental plan or program proper by which information must be disseminated in an organized way by every public institution, requiring the completion of various specific steps by public institutions.  

The sociolegal literature, for its part, privileges law over policy because it has no concern with the implementation of governmental programs (strict conception of policy), but with the application and enforcement of legal rules in general. The subsections that follow are mindful of these conceptual distinctions both within the policy literature and between it and the sociolegal literature, all of which relate differently to different aspects of the Act and how it is applied on the ground.

a) Post-Enactment Withdrawal.

Before the growth of policy implementation studies as an independent field of inquiry, the implementation of public policies was seen as the logical, natural outcome of a technically produced policy mandate. Policies were designed by experts, and then they were executed by those in charge of applying them. This was a very linear, minimalist

291 Ley Orgánica de Transparencia y Acceso a la Información Pública, Article 7. Supra note 291.
model that largely ignored the enormous behavioralist element in the implementation of public policy. It was challenged more than three decades ago by Pressman and Wildavsky’s study of implementation of federal programs in Oakland. These authors argued that great policies which aim at achieving great goals can fail at the face of implementing them. Their conceptual framework defined implementation as different from the initial conditions, understood as the contents of a policy: Implementation is what comes next, the ability to follow through once those conditions have been created. Some common causes for the failure of implementation identified by these authors are usually ordinary, and involve high number of actors and perspectives, technical problems, complex chains of reciprocal interaction, and wrong theories behind the policy.

Pressman and Wildavsky’s framework explains the failure of specific government programs including the construction of public works. However, it is also useful to reflect about the application of the Access to Information Act because this statute includes a variety of actions that governmental agencies have to take to guarantee this right. The first important insight that can be drawn from original implementation literature—not only Pressman and Wildavsky’s work—is that it is important to think about what comes after the adoption of a policy mandate. This point may seem overly obvious. It is not. The implementation perspective harshly reminds us that the multiplicity of actors and the complexity of coordinating efforts is a greater challenge to a policy’s success than its initial design.

In this case, one of the problems experienced in the application of the Access to Information Act is that some of those organizations involved in its adoption decreased
their efforts after the Act was passed. This interruption of efforts after the adoption of the mandate may be motivated precisely by a lack of acknowledgement of the implementation phase, which is perhaps the hardest. For some actors, once the legislative mandate was accomplished, it was not necessary to continue working on the issue. This is evidenced by the fact that the Coalition itself lost momentum and funding, and is currently under funded. While withdrawal may originate in assigning lesser importance to the implementation of the Act, it may also have a different explanation.

b) From Top-down to microlevel application.

Another important strand of policy implementation literature reviewed above argues that implementation problems are caused by deficiencies in the design of the policy itself; this is the so-called top-down paradigm. As the name indicates, for this model, initial design matters because afterward things are followed up through a hierarchical process. In this case, organizations that withdrew their work on the issue saw that they were no longer needed because once the policy mandate was given by lawmakers, the rest was a matter of applying it through already established bureaucratic channels. The Act’s seventh article, for many considered the fundamental article of the Law, sets out specific actions that government institutions must take to guarantee access to this right, which are further specified in the regulations. From the top-down perspective adopted, albeit unconsciously by some actors, implementation will come in time when different departments follow hierarchical orders to carry out the obligations set forth in the Act.

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292 Interview with Orlando Pérez, current coordinator of the Civil Society Organization Coalition for Access to Information in Ecuador.
For other actors, the opposite is true: they realize that ‘microlevel’ behavior rather than the ‘macrolevel’ in which policies are designed is more important. The microlevel involves idiosyncrasies and patterns of behavior of people involved in the implementation of a statute, which must be understood if one is going to understand implementation. This view has similarities with the one arguing that policy implementation is a variable dependent upon the gap or misfit between the “traditional way of doing things” in a domestic context, and the contents and mandates of internationally derived policies.

Actors involved in the implementation of the Access to Information Act have learned that the micro level of behavior, the “traditional way of doing things” has, in fact, been an impediment for the successful implementation of the Law. “There are a great number of public employees who, to put it is simply, do not like to give out information they have because they feel its theirs, or because they feel it’s their small sphere of power. It is hard for them to make a transition from seeing information as public, not as theirs.”293

In other words, a very real barrier exists in how public employees behave, see themselves, and understand their roles and responsibilities. “We have trained more than one thousand people throughout the country. From my experience in these trainings, public employees do not like the law because they are afraid of losing their small share of power. It is very hard to break that culture of ‘closedness’ that prevails among public

293 Interview with María del Carmen Lara who is in charge of monitoring the application of Article 7 of the Act as part of CLD’s implementation program.
employees.” 294 As mentioned above, a prevailing culture of *compadrazgo* interacts with these beliefs, and the result is that only people that have friends or *compadres* inside public institutions can obtain information. Changing this requires short of modifying generalized beliefs and cultural practices.

Those changes, however, are possible. First, as current anthropological thought has pointed out, the dominant, essentialized view of culture which sees it as an unchangeable set of values, norms, and behaviors is simply false. Culture changes and cultural practices can be modified. Second, as subsequent policy work reviewed above has noted, domestic actors are not “guardians of the status quo nor the shield protecting legal-administrative traditions.” 295 Dominant administrative practices are not ‘pure’ and unchangeable.

Most of the work to implement the Act conducted by some of the NGO involved in its adoption was aimed towards workshops with public employees. “We have conducted an aggressive campaign with workshops and trainings for public officials in municipalities, ministries, and other public departments in order to try to modify the very closed cultural attitude towards facilitating public information. We realized that the law was only the beginning, and without training and workshops, no change was ever going to occur.” 296

This insight is telling of how difficult it is to achieve behavioral change as a result of legal reforms. Even though laws do not make behavioral and cultural change happen

294 Interview with Amelia Ribadeneira, Fundación Esquel’s representative at the Coalition.
295 Supra note 192.
296 Supra note 294.
instantly, at a minimum they provide frameworks for promoting such change. To fully understand this idea, it is useful to think in the following terms: attaining changes in common practices that people have through a legal reform is difficult, even if the reform includes sanctions and penalties for breaches. However, it would be impossible to even begin talking about modifying such practices without the framework provided by a law. It is hard to modify the belief held by public employees and officials that information is theirs and not public, and that they have to provide that information to anyone who requests it via the channels established by law, not only to their friends or as a personal favor. But it would be unthinkable to even begin to talk about changing these beliefs and practices without a legal framework that determines that such changes are desirable and needed. This is, ultimately, the normative function of this particular law—understanding normative as the realm of values: it sets forth values, practices, and beliefs that are desirable; it gives values a level of desirability by legalizing them, and it provides tools for their full realization. So it is not that adopting the law is not an effective mechanism to change entrenched practices. Changing generalized practices that infringe on rights is difficult, period. Legal reforms are the start not the end point for that change. Without those reforms and policy mandates, change can not even start to happen.

Sanctions are made available by the law. In fact, harsh sanctions are established. Penalties for denying, either partially or entirely, information that has been duly requested include a) Fines in an amount equal to the monthly salary due to the employee that does not provide the information; b) Temporary removal from their position for the period of 30 days, without salary during that period; c) Removal from the position if, after a fine has been imposed, the employee persists in his/her denial of information.
Additionally, legal representatives of private entities having public information (for example, in the case of private companies performing contracts for the government or acting under a concession) that deny it upon request will be fined between $100 and $500 for each day after a judicial order has been given asking them to provide the information. (Article 25, Access to Public Information Act).

What has so far been the effect of these sanctions? In practice, they are rarely applied either because the interested parties hardly ever persist in filing the judicial actions established by the law, or because the judicial system is too slow to ever reach a point in which a sanction is imposed. For the sanctions to be imposed, the affected parties must file and exhaust the “access to information claim” established in Article 22, a judicial action that must be filed at any civil trial court. As it is common with judicial claims in Ecuador, they are slow. After the judicial claim, sanctions must be imposed by the “respective authorities or nominating entities.” These administrative authorities are also unlikely to impose sanctions against their own employees. The result is that not one single penalty included in the Act has been applied since its adoption in 2004.297 Their impact as a deterrent or a motivator for behavioral change is still low.

One portion of the work performed aggressively by the NGO whose participation on the issue did not stop after the adoption of the law preempted the application of sanctions going a step back in the process, this is, by conducting extensive trainings and workshops throughout the country. These trainings had as general objectives to “promote a culture of access to public information in Ecuador, both within citizens and the

297 Interview with Ramiro Avila, Profesor of Law, Universidad Andina Simón Bolívar.
government.” More specifically, they aimed at “structuring a training program on access to public information, whose contents may provide public employees with specific changes they need to incorporate in order to comply with the Act.”

This work was performed both by the organizations independently and by the coalition. As mentioned above, this was the last component of the Coalition’s mandate, both before and after the adoption of the law. Trainings and workshops for public officials stretched to many institutions, mentioned above, including institutions within the three branches of government. Trainings generally included a conceptual element in which basic concepts about Access to Information were explained. Drawing on that basis, they spelled out what each public employee could do to effectively implement those concepts in their work.

The question that set off this section was whether the Act has had on the ground impact and application as a way to reflect on whether there is a connection between the global origin and ceremonial adoption of the law and its application. The trainings and workshops conducted by civil society organizations that were heavily funded by international agencies and governments aimed precisely at improving the application of the law by modifying engrained cultural and administrative practices. It is striking that no real monitoring or evaluation of the actual effects of those trainings and workshops exists. As a result, it is impossible to determine the extent to which those efforts facilitated the application of the law.

299 Supra note 294.
300 Supra note 224.
A strong component of development practices is monitoring and evaluation which allow to determine whether efforts are yielding desired results. In this case, money was spent, workshops were conducted, but no evaluation of the extent to which such workshops and trainings actually modified attitudes, beliefs, and behaviors was ever conducted. When I asked the current director of the Coalition why these important components had been overlooked, he said that one reason was limited funding, which forced organizations to focus their efforts on carrying out the trainings but not evaluating their impacts afterward.\textsuperscript{301}

c) Petitions and legal claims.

An indirect form of evaluation of the impact of trainings and workshops came from a different prong of work carried out by some of the Coalition’s NGO: actual petitions for public information filed by one of the Coalition’s member organizations, and monitoring of the fulfillment of Article 7 of the Act. This prong was implemented by the Law Clinics of the Catholic University of Ecuador. Additionally, CLD through a different yet complementary strategy, also aimed at determining, the instrumental impact of the Law.

The review of sociolegal literature offered above explains the two major frameworks for thinking about the impact of law and regulation. One important stream of that literature includes empirical studies focusing on assessing the impact of legal rules on actual behaviors and trying to determine where the law is used or where it is ignored.

\textsuperscript{301} Supra note 292. Mr. Pérez explained to me that minor evaluations to test concept retention were conducted at the end of each training in the form of small quizzes on the main concepts explained during training. However, no comprehensive monitoring and evaluation of the trainings’ impacts was conducted afterward.
Without explicitly relying on this theoretical and empirical framework, the work carried out by CLD and the Law Clinics of the Catholic University has attempted to evaluate such instrumental effects of the Act.

The former has focused specifically on measuring the impacts of Article 7 of the Act each year after the law was passed. Article 7 mandates that public institutions should make available a variety of information on their websites, providing guidelines for the format and contents of the websites. It also sets deadlines for the completion of this duty. CLD, an organization affiliated with the Coalition, created a system to measure and give a quantitative score to the level of compliance attained by a variety of public institutions comply with Article 7.

The first monitoring instrument includes a four-point Likert scale, in which 0 indicates no compliance, and 3 indicates perfect compliance. An evaluation of compliance was conducted for 96 institutions across various informational requirements spelled out specifically by Article 7 of the act. A subsequent, more detailed evaluation carried out in 2007, created an index to evaluate compliance with Article 7 and it included more institutions (three hundred), separating them into the following categories:

a) Ministries, b) Provincial Councils; c) Provincial Governments; d) Municipalities; e) Municipal Service Providers; f) Universities (public and private) and the Judicial Branch; g) Political Parties and Movements; h) a variety of thematic, smaller-scale institutions; i) and Power Companies.302

302 “Indice de Transparencia y Acceso a la Información Publica.” CLD, Quito, 2007. This index is published as independent sections at [http://www.coalicionacceso.org/index_archivos/Page892.htm](http://www.coalicionacceso.org/index_archivos/Page892.htm). The
The study first determines whether the institutions have a web page. “Of 1172 entities included in the study, only 271 have a web page, which amounts to 23.1%. . .”303 It then evaluates, by assigning points to each requirement set by the Act, each institution independently. The results of this evaluation are not encouraging. For example: “Of the 15 ministries [included in the evaluation], only one fully complies with items included in Article 7 of the Act. . . The average score reached by Ministries is 87.9 out of 186 possible points. . . More than half of the Ministries do not reach 50% of the compliance margin. . .”304 The same is true for Provincial Governments: “8 out of the 22 Provincial Governments do not have a Web page, which amounts to 36.3% . . . The average score reached by Provincial Governments is 63.35 points out of 192 possible points, which is 32.9% . . . Ten out of the 13 Provincial Governments that do have a web page do not comply even with half the items spelled out in Article 7 of the Act . . . Provincial Governments are charged with delivering 80% of services delivered directly to citizens; this low results show that there is little concern about accountability towards the population. . .”305 The list goes on. Most o the institutions evaluated show low compliance levels.

The Index’s general conclusions show that general compliance and application levels throughout the nation for most institutions covered in the evaluation are low. “Citizens do not have real access to public information . . . The evaluation of Web pages yielded worrisome results . . . no institution publishes in its webpage all the information

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303 Ibid at 14.
304 Ibid at 20.
305 Ibid at 26.
required by the Act. Ninety seven institutions do not have a webpage . . . of the 303 institutions monitored, only 2 reach a 100% rating . . . lack of compliance by institutions [in general] is evident.\textsuperscript{306} This index is the most inclusive and extensive evaluation of the impact of the law. However, note that it is circumscribed only to Article 7, which sets the requirements for publication of information on websites.

The other effort to evaluate on the ground impacts of the law was carried out by the Law Clinics of the Catholic University. The clinics filed 22 petitions to different institutions as a way to determine whether they were complying with the law. This form of evaluation was also focused on results, and is ultimately the most effective way to measure the outcomes of the Act. However, the results of this compliance evaluation mechanism are not conclusive because they are not based on a representative sample. It appears that the institutions were chosen somewhat arbitrarily; no randomization method was applied to construct a sample, and, in general, there is no sampling design.\textsuperscript{307} Nevertheless, the component’s goals are not to generalize results to an entire population—all institutions regulated by the Act. The aim of the component is merely to offer a flavor of the state of compliance by requesting information somewhat randomly.

Of the 22 petitions filed, only 3 were given a favorable response, while 19 were denied. Most of them were given a ‘tacit denial,’ which means that no response was ever received (the act set forth a time limit of ten days to respond to the petition, which can be extended five more days in case of petitions that require more time). The three petitions

\textsuperscript{306} Ibid at 56.
that received a favorable response, i.e., the information requested was provided within the term set forth by the law, requested information about the budget allocated to the Program for School Food during 2005; the availability of a specific medicine in the public maternity hospital; and the files of a *habeas corpus* filed in 1985 (it’s not mentioned if the *habeas corpus* was denied or granted back in 1985). The 19 petitions that were not favorably processed include issues as varied as information about oil exploitation prospects within Yasuní National Park (Ministry of Energy and Mining); bilateral agreements reached by Ecuador and the United States on copyright law (Ministry of International Affairs); budgeting and expenditures for the Referendum and for the Presidency of Ecuador’s informational campaigns (Ministry of Economics and Finance), 308 among others. These results show that the level of application of the Act in various institutions is low. As mentioned above, even though these results can not be generalized to the entire population, but they are useful because they provide examples of the negligible compliance showed by institutions.

**d) Discursive and Symbolic effects.**

These outcomes are not, however, the only relevant aspects about the Act’s application. In other words, ascertaining whether the Act has been successfully applied on the ground requires going beyond a yes/no, binary logical process by which a law or policy can be declared successful or failed. The instrumental assessments explained above provide objective, cold measurements—which include scores and rankings and numbers of petitions granted or denied—of the on the ground application of the act.

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308 *Supra* note 297.
As the other strand of sociolegal thought reviewed suggests, regulations or policy programs may have other layers of relevance beyond their instrumental or direct implementation. These aspects have to do mostly with discursive, symbolic, and empowerment effects. In fact, constitutive sociolegal work sees instrumental evaluations as insufficient and even misleading: “By focusing on law as a discrete tool, or on the efforts of law to change behavior, instrumentalism diverts attention from the deep, often invisible, but pervasive effect of legal concepts on social practices.”

Somewhat similarly, interpretive policy literature is attentive to how policies are interpreted by target populations, and warns against dismissing this impacts or effects of policies or regulations.

None of the organizations that have participated in the adoption and application of the law have explicitly evaluated non-instrumental, less-tangible impacts of the Act. This is not surprising. After all, what people usually want is figures, numbers, and facts. Public and actors involved in the application of the law want criteria that can be measured objectively in order to determine whether the regulation has been successful. In this case, such criteria are best exemplified by the quantitative Access to Information Index, which has gone to great lengths to measure compliance with Article 7 of the Act.

While it is important not to dismiss the need for quantifiable, objective measurements, it is important not to lose sight of the fact that regulations matter beyond their factual application. Further, the Access to Public Information Act itself is not an easy subject for instrumental measurements because a significant part of it is

309 Supra note 196 at 50.
310 See Supra note 200.
declarative—this is, it sets forth principles and underscores the importance of rights. Therefore, a narrow evaluation of the impact of the Act to the application of Article 7 misses its impacts to a significant degree.

How can the non-instrumental impacts of the Act be determined? Precisely because of the nature of these types of outcomes, obtaining an accurate measurement is more complicated than gathering figures and indexes. Getting a full picture of the non-tangible impact of a national Act could be done in several ways, for example, conducting a national-level evaluation of public opinion, or an ethnographic, qualitative inquiry into the ways in which the regulation has modified people’s beliefs and subjective experiences, or conducting a longitudinal public opinion study of how people see themselves vis-à-vis the state and government authorities before and after the adoption of the Act.

As pointed out above, this part of this paper merely intends to suggest possible ways in which the Act may have impacted its target audiences, and is based more on examples than on scientific evaluations. The first way in which the Act has had an effect beyond its instrumental application is by providing activist groups and individuals with a vocabulary and discursive tool they did not have available. A fundamental part of the work of activists and public-interest oriented organizations is to follow and monitor State activity. Perhaps the best example is organizations and individuals working for the environment.

In Ecuador, environmental protection is a key and contentious issue because the country has an extraordinary natural endowment, in the form of amazing biodiversity, natural resources such as minerals and oil, and extremely rich and delicate ecosystems.
Conservation of these assets has collided frontally with developmental programs and with social problems. An example of the first case is oil extraction and exploitation, which in the past has come at a high cost for the rainforest ecosystem, where the majority of the oil reserves lie. An example of the second takes place constantly in the Galápagos Islands, one of the most biodiverse places on earth. Conserving the pristine Galápagos ecosystem usually means that local dwellers can not rely on various activities for their subsistence, including fishing of certain species or at given locations.

In this context, the effectiveness of work performed by environmentalists is typically dependent upon their ability to know whether the government intends to sign an oil exploitation contract with a foreign company, or the way in which the exploitation of resources or endangered species in Galápagos will be regulated. A current struggle waged by environmentalists is opposing the concession for the exploitation of oil to the Brazilian state oil company, Petrobrás, in the Yasuní National Park. The process has thus far been marked by secrecy, and organizations and individuals have struggled to obtain information about when contracts will be granted, on what terms, with what restrictions, etc.

Before the adoption of the law, individuals and organizations trying to obtain information about these negotiations were in an awkward position. First, they had to rely on informal channels, especially networks of friends or compadres to obtain any information, which was a way to feed and reinforce corrupt practices. Second, they were seen by governmental institutions as nosy activists interfering in the normal conduction of business. Two recent widely-publicized issues have been the regulation of the exploitation of shark fins and 'pepinos de mar' in the Islands. Environmentalists fiercely opposed both, in a struggle marked by the power imbalance between the civil society and the state.
of public affairs. Finally, the information itself was seen as a governmental matter, and there was no reason to make it publicly available.

Despite the low instrumental applicability of the Act, it is undeniable that it has modified this state of affairs. Thanks to the Act, environmental organizations and individuals demanding to see the terms of an oil concession contract are no longer deemed to be green, snoopy, problematic activists. Or, if they are, no one would publicly say so. The Act has made it politically incorrect to dismiss the citizenry as nosy and inadequate for demanding higher participation and knowledge of public affairs. So even if public officials think this, they are now hard-pressed to make such statements.

Way before the adoption of the Act, the national Constitution already included an article guaranteeing the right to access public information (“The state will guarantee the right to access sources of information,” declares Article 81 of the Constitution), and the Inter-American Human Rights Convention and the International Covenant on Civil and Political Rights, ratified by Ecuador many years ago, already included provisions that implied this right, which were directly applicable and justiciable. However, it was not until the adoption of the Act in 2004 that the issue of access to public information came into the public forum and, likewise, it was not until the Act was adopted that both public officials and the public in general begun to see their mutual perceptions and entitlements differently.

In this sense, the Act has modified the public discourse, language, and perceptions much more effectively than the Constitution or the directly applicable international norms. This may be related to the fact that the Act, being a law and not a higher-order legal
instrument, is seen as having more force. Also, the act includes sanctions—which, as mentioned above, have not yet been applied at all—and procedural regulations for claims. Interestingly, even though the act has been so far almost no more effective (in instrumental terms) than the Constitution and International treaties protecting the right to access public information, its non-tangible, discursive effects have been far more significant.

A recurrent theme discussed in the literature review section of this dissertation is whether the law can serve as an instrument for social change. Comparatively, this has been explored more deeply both theoretically and empirically in Common Law systems, especially the United States, than in Continental systems. From American Legal Realism, to the Law and Society Movement, to debates about the role of ‘activist courts,’ much attention has been given to how the legal apparatus can modify public beliefs and practices. The transnational legal culture from which these policy frameworks originate is imbued with a vision of norms as pathways for achieving social change internationally and domestically.

The two paradigms explained above serve as lenses through which to think about or evaluate such social impact of norms, including the Access to Public Information Act. The instrumental evaluation, discussed above, seems to suggest that not any significant amount of change has been accomplished by the adoption of the Act. However, if one takes into account the discussion about the discursive and empowerment effects of the Act, a different conclusion emerges: it is easy to see that the Act has served as a social change mechanism above and beyond its limited enforcement or instrumental effects.
Even though this level of impact is seldom ignored or diminished vis-à-vis objective, hard measurements, it is equally or more relevant in the process of modifying behaviors and attitudes.

**e. A Final Note: A failed On-line Survey.**

Even though the dissertation proposal did not include conducting a survey about public perceptions about the regulation in question—that would have required a whole separate study—when I was in the process of gathering the data for this section, I decided to attempt to investigate whether, after its adoption and the extensive education campaigns conducted by the civil society, the Act had had an impact in public opinion and behavior. I envisioned a simple survey that would, in an exploratory fashion, attempt to measure the extent to which the Act had been a driver for attitudinal changes regarding access to public information rights, both within public employees, the public in general, and NGOs.

Specifically, I thought that, first, it would be useful to determine if and how the Act had impacted the behavior and self-identity of public employees as guardians of public information, and, second, to explore whether the public in general had acquired consciousness about their rights and their applicability. Finally, as a tool to explore whether those that come in contact with public entities more often—law practitioners—had begun to rely on the institutional channels set forth by the Act instead of informal channels such as friendships and favors.
The best way to measure the attitudinal impacts of the Act would have been to conduct a longitudinal, “before and after” survey, in which attitudes would have been evaluated, recorded and analyzed before the adoption of the law, and the same would be done after the adoption of the law, using the same group of subjects. However, this option was not available in this case, because the law was adopted in 2004. Therefore, the survey had to rely on subjects’ memory to describe whether perception had changed after the adoption of the law.

Given the limited resources and time I had available, I decided that an online survey would be simplest, most cost-effective mechanism would be an online survey. I briefly researched techniques for online surveys, and put together an online questionnaire using a basic online surveying tool, Survey Monkey.\textsuperscript{312} I tested the questionnaire with a group of six people who agreed to take it online and provide feedback on the clarity of the questions.

Afterwards, I opened the ‘collectors,’ and sent out email invitations to complete the survey to the public through a ‘listserv’ that has over two thousand members known as ‘Debate Educación.’ The invitations had a short paragraph describing the purpose of the survey, measures taken to protect privacy, and they ended by providing the link for the Survey Monkey web page with the questionnaire. After sending out the emails, I left the survey open for a month, sending one reminder after two weeks. I only received one response.

\textsuperscript{312} www.surveymonkey.com
Additionally, I sent out an invitation to complete the questionnaire to law practitioners I knew. These invitations were more personal and explained in more detail the context of the research. I received eleven responses from these invitations, sorted in a different ‘collector.’ Overall, from this experience I learned that online surveying is still a insipient research tool in contexts in which the public and even professionals rely less on computers and the internet for their daily work. For illustrative purposes only, I report here the answers gathered from the dozen responses I received.

The first few questions aimed at finding whether the public’s awareness about transparency and access to information had increased or decreased in recent years, and whether such a change was due to the existence of the Act and the tools it made available. 64.7% answered that their awareness had increased, but only 11.8% linked this change to the existence of new legal tools. At the same time, all the respondents reported that they know of the Act, and 70% said that they have had the need to obtain public information for professional purposes. Of those, almost all—69.2%—reported they only used the channels created by the law as opposed to asking a ‘favor’ from someone they knew within the institution holding the information they required or using any other means such as corruption. Interestingly, almost all of those petitioners—62.5%—were successful in obtaining the information they required. Quite contradictorily, though, 73.3% of all respondents said that they think that the way public information is handled by public institutions has not changed after the adoption of the Act, and that the behavior and attitude of public employees in regard to providing information has not changed.

314 The results of this reduced Online Survey are included in Appendix B for illustrative purposes.
Chapter Seven: Tobacco Control in Ecuador.

i. Has the Legal Internationalization of Tobacco Control Come Full Circle?

This case study focuses on recently adopted tobacco control legislation in Ecuador. It draws upon the same theories examined in Chapters Two to Five, and follows the same methodology as the preceding case study; it pursues the same objectives and relies on the same sources of data. The purpose of replicating the same approach comparatively, applying it to a different policy subject-matter, is to determine whether the same conditions are at play in the adoption and application of globally-derived norms, so that the process and mechanisms of diffusion of such norms can be clarified. Further, this case study also explores the on the ground application of tobacco control legislation as a way to better understand whether the process by which a statute is put in the books impacts its subsequent regulatory power.

For several decades, there has been uncontestable scientific consensus that tobacco products and second-hand tobacco smoke pose a risk to human health. Governments, International Governmental Organizations (IGO), International and Local Non-Governmental Policy and Advocacy Organizations (NGO), and individuals have

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moved to regulate the production, advertising, and sale of tobacco products. Initial regulatory efforts adopted a public health approach, and were undertaken mostly in developed nations. This pattern confirms the views held by the transnational power politics framework, according to which organizations act purposely to oppose power structures, economic and political. This also constitutes the first stage in the emergence and posterior diffusion of subject-specific legislation.

The first wave of tobacco regulations in developed nations in the seventies and eighties had the unintended consequence that the handful of transnational tobacco corporations expanded their operations around the world, targeting developing countries whose populations offered new, unexploited markets. The southbound migration of big tobacco transformed the nature and scale of tobacco into a global problem, one calling for global-scale responses. Back in 1998, Dr. Gro Harlem Brundtland, former Director-General of WHO, declared that “tobacco control cannot succeed solely through the efforts of individual governments, national NGOs and media advocates. We need an international response to an international problem […].”

That response is well underway. It came to fruition in 2003 with the adoption by the World Health Assembly, the World Health Organization’s legislative body, of the

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316 Tobacco poses an enormous threat to public health because it is the largest cause of preventable and premature death, and it places unnecessary burdens on public health systems. Tobacco kills more people than AIDS, legal drugs, illegal drugs, road accidents, murder, and suicide combined. Cigarettes kill half of all lifetime users. See World Health Organization, Tobacco Free Initiative, ‘The Tobacco Atlas,’ Section 9, ‘Deaths,’ available at http://www.who.int/tobacco/en/atlas11.pdf (last visited 01/15/08).

317 See supra note 149.

318 It could also be argued that tobacco corporations seek to expand their markets globally regardless of the situation in their home markets. Regardless of the cause, the result is the same: tobacco corporations permanently expand their operations worldwide.

Framework Convention on Tobacco Control (hereinafter, FCTC), the first international treaty on the issue, which entered into force in February 27, 2005, and which has 152 parties to date. Before and after adoption of the FCTC, the WHO has been at the center of the growing global movement of tobacco control. Its prioritization of the issue, its role as facilitator of knowledge and expertise, and so on, helped catapult the global movement on tobacco control.

More recently, a new paradigm on global tobacco control has begun to emerge: it is grounded on international human rights. This approach poses that the transnational production, marketing, and sale of tobacco violates fundamental human rights, especially in the developing world, and, therefore, can be forcefully challenged through an international human rights law-based approach. The emergence of a derivative human right to tobacco control is also due to the coordinated participation of organizations, scholars, and activists. In coming years, one can predict a growing amount of international litigation around tobacco control—there are already a few cases—and the emergence of a body of jurisprudence on the issue. This process, catalyzed by globally connected individuals and organizations, will predictably give rise to a strengthened world societal regulatory pattern.

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321 Ibid.
Nevertheless, these regulatory efforts face an important challenge: the vested interests of the tobacco industry. Tobacco corporations have historically responded to regulatory efforts in developed nations by opposing, blocking, or modifying preventative tobacco-control policies. \(^{322}\) Calls to take anti-tobacco efforts global sprung from the factual observation that municipal regulations, especially in developing nations with weak regulatory environments, could not, on their own, outweigh the enormous power of large tobacco conglomerates. \(^{323}\) One of the core goals of the internationalization of tobacco control is to offer support to developing nations in their efforts to regulate the tobacco industry. A recurrent subject of the Framework Convention on Tobacco Control (hereinafter, FCTC) is global cooperation among state parties, INGO and NGO. \(^{324}\) In fact, the FCTC goes on to warn about threats to local anti-tobacco policy efforts by stating that “in setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.”\(^{325}\)

Globalizing tobacco control by strengthening and extending global support networks, and by sanctioning international regulations on the matter, was advocated as a more effective way to address a problem of gigantic proportions. \(^{326}\) To be sure, the

\(^{322}\) For example, the industry attempted to block the EC’s directive on tobacco by influencing the highest levels of European politics. In the U.S. alone, tobacco companies have given 35 million in contributions to candidates since 1995. See supra note 320, Section 19, ‘Politics,’ available at http://www.who.int/tobacco/en/atlas24.pdf (last visited 01/15/08).

\(^{323}\) See, e.g., Kenyon R. Stebbins, ‘Transnational Tobacco Companies and Health in Underdeveloped Countries: Recommendations for Avoiding a Smoking Epidemic,’ 30 Social Science and Medicine, 1990.

\(^{324}\) See, e.g., the text of the following parts of the FCTC: Preamble; Article 4.3; Article 5 paragraphs 4, 5 and 6; Articles 21, 22, and 23 (Part VII).

\(^{325}\) Article 5.3, FCTC, supra note 315.

\(^{326}\) Prior to the drafting and adoption of the FCTC, WHO put together initiatives—such as the Tobacco or Health Program, created in the early nineties—to provide support to member developing states in passing tobacco control legislation. The multilateral, regulatory approach adopted with the FCTC in 2003 came as a way to back these efforts with international law. WHO initially hesitated to use its constitutional mandate
emergence of a global anti-tobacco movement has helped raise awareness in developing nations about tobacco’s imminent and future threats to public health—and more recently, as a threat to human rights—and has transformed tobacco’s standing in many developing countries’ public eye from a soft issue about which developed, over-regulated nations are making a fuss, into an urgent, literally vital policy priority.

After several years of the internationalization of tobacco control, and at a juncture in which tobacco control strategies experience the emergence of a new, rights-based paradigm, there is a need to probe into the subsequent domestic regulatory experience in developing nations. I argue here, drawing on evidence provided by the case study of one Latin American developing nation, Ecuador, that legal internationalization of tobacco control is a necessary but not sufficient approach.

International regulations that materialized as a result of the globalization of tobacco control must be fully implemented domestically to be effective. Successful implementation is threatened in environments in which governments and legislatures are scarcely professionalized, lack information and research, and are highly influenced by corruption. Additionally, in many developing nations, the civil society is only weakly

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327 Discussions on the fruitfulness of the case study as a research design abound. See Chapter Five above for a justification of this research approach. Also, see supra footnotes 202-204.
328 On the question of International Law’s power to impact the domestic regulatory environment, see the references cited supra footnotes 141, 145, 155, 158.
329 For data and reports on corruption in developing Latin American countries, see, e.g., Latin American Public Opinion Project, at http://www.vanderbilt.edu/lapop/ (last visited 01/14/08).
articulated and does not have resources to effectively act against the overwhelming power of transnational tobacco corporations.\footnote{Transnational tobacco corporations are among the most powerful corporations in the world. Philip Morris, the largest tobacco corporation, had sales of $47 billion in 1999. \textit{See supra} note 316, Section 14, ‘Tobacco Companies,’ available at \url{http://www.who.int/tobacco/en/atlas18.pdf} (last visited 01/15/08).}

An international anti-tobacco approach still faces many of the challenges that threatened the anti-tobacco movement in developed nations in its pre-global stage. With a projected annual mortality of 7 million people between 2025 and 2030 in developing countries, compared to a projected mortality of 3 million in developed nations for the same time period,\footnote{\textit{See supra} note 316, Section 9, ‘Deaths,’ available at \url{http://www.who.int/tobacco/en/atlas11.pdf} (last visited 01/15/08).} more attention and resources should be directed toward the domestic implementation phase of international anti-tobacco legislation in developing nations, or else the international legalization of tobacco control may ultimately not materialize itself into effective local tobacco-control policies.

\section*{ii. Tobacco Control Legislation: The Ecuadorian Experience.}

The case study that follows probes into the process of adoption of recent tobacco control legislation in Ecuador. Relying on interviews, legal, and archival data, it suggests that the deficient regulatory outcomes were influenced by a) tobacco industry involvement; b) poor governmental policy capabilities and legislative disinformation; and c) weak civil society involvement.

Ecuador signed the FCTC in March 22, 2004 and ratified it in July 31, 2006.\footnote{Ratification was published in \textit{Registro Oficial} (Official Gazette) No. 324 July, 31 2006.} With the ratification of the FCTC came the commitment to develop and implement
comprehensive domestic policies for tobacco control. The ‘Ley Orgánica Reformatoria a la Ley Orgánica de Defensa al Consumidor,’ (Organic Law that Amends the Existing Organic Consumer Protection Law, hereafter, amendment to the LODC, or LODC amendment) also known as Anti-Tobacco law, was passed in 14 September, 2006, allegedly with the purpose of regulating tobacco and implementing the FCTC in Ecuador.

It is easy to construe the September, 2006 LODC amendment as an accomplishment in the fight against tobacco in Ecuador. Legalization is an easily accessible, hard indicator. However, a more qualitative evaluation reveals that the legalization process’ deficient outcomes were influenced by a lack of information and resources, industry involvement, and weak civil society participation.

In Ecuador, about 87 per cent of the tobacco market is dominated by Philip Morris (hereafter, PM), the largest transnational tobacco corporation in the world, through its locally incorporated companies, Tabacalera Andina S.A. (“TANASA); Industrias del Tabaco, Alimentos, y Bebidas S.A. (“ITABSA”); and Proveedora Ecuatoriana S.A (“PROESA”). Prior to the September, 2006 LODC amendment, PM had already been heavily involved in tobacco policymaking. In March, 2006, the executive

333 See infra for a more detailed discussion about Organic Laws in the Ecuadorian legal system. For now, suffice it to say that Organic Laws are higher-order laws that require an ‘absolute majority’ of the vote (fifty per cent plus one of the parliamentary vote). The Organic Law for Consumer Protection, Law No. 21, was published in Registro Oficial No. 116 of July 10, 2000.

334 Law No. 54, published in Official Gazette No. 356, September 14, 2006. The Preamble of the Amendment states that “the World Health Assembly […] approved the Framework Convention on Tobacco Control […] therefore it is Ecuador’s obligation to adopt directives to defend and protect future generations [from tobacco].” Amendment to the LODC, September 14, 2006, published in the Registro Oficial No. 356.

335 Interview with Dr. Carlos Salvador, President of the Comité Inter-institucional de Lucha Contra el Tabaco (Inter-Institutional Committee for the Fight Against Tobacco), and President of the Ecuadorian Academy of Medicine, Quito, August, 2, 2007.
power passed a *decreto presidencial* (presidential decree)\(^{336}\) which set forth a *Reglamento a la Ley Orgánica de Defensa al Consumidor* (Regulation to the existing LODC, hereinafter, LODC Regulation).\(^{337}\)

The text for the LODC Regulation was submitted to the President’s attention by the Ministry of Industry and Commerce, MICIP. PM was directly involved in the drafting of the Regulation with the MICIP. In the words of PM’s Corporate Affairs Manager, Avelina Pérez, “[…] we participated actively in the drafting of the *Reglamento* with the MICIP. We did so because we believe that it is better to be a part of the regulatory process.”\(^{338}\) The resulting Regulation did not modify in any substantial manner its prior 2001 predecessor as far as advertising is concerned—for example, it did not include sanctions and enforcement mechanisms.\(^{339}\) Additionally, the already existing prohibition from smoking in public places was kept as mere rhetoric, as it continued to allow venues in the hospitality industry the choice to ban smoking, and it upheld ventilated smoking zones.\(^{340}\) In private workplaces, it also deferred to employers and

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\(^{337}\) Article 171 number 5 of the Ecuadorian Constitution, *supra* note 216, grants the President of Ecuador the power to adopt *Reglamentos* (Regulations) on different subject matters via presidential decrees. These co-legislative powers given to the President (*facultades reglamentarias*) challenge the democratic lawmaking process, as often in the Regulations the text and spirit of the law can be nullified without any democratic participation. *See, e.g.*, García de Enterría, Eduardo et. al. 2000. *Curso de Derecho Administrativo*. Madrid: Civitas.

\(^{338}\) Interview with Avelina Perez, Corporate Affairs Manager, ITABSA S.A, Quito, July 18, 2007.

\(^{339}\) The 2001 Regulation to the LODC introduced restrictions on tobacco (and alcohol) TV, radio, and billboard advertising, emphasizing restrictions to isolate children from such advertising. *Decreto Ejecutivo* 1314, published in *Registro Oficial* No. 287 of March 19, 2001. These limitations did not particularly hinder industry activity, as they were replaced by other promotional approaches, in the same fashion as in the United States after the 1998 Master Settlement Agreement. While data is not available for Ecuador, in the U.S., in the year following the Agreement, the U.S Federal Trade Commission reported an increase in tobacco advertising expenditures.

\(^{340}\) WHO’s ‘Policy Recommendations for Protection from Exposure to Second-Hand Tobacco Smoke,’ relying on a vast array of scientific evidence, advise against maintaining smoking zones, against ventilation as a replacement for a smoke-free environment, and against voluntary compliance policies. Available at
employees to determine a smoking policy. Finally misleading labeling strategies such as ‘milds’ and ‘lights’ were also expressly upheld.

Commenting on the text of the Regulation, Dr. Carlos Salvador, President of the Comité Inter-institucional de Lucha Contra el Tabaco, CILA\(^ {341}\) (Inter-institutional Committee for the Fight Against Tobacco) and President of the Ecuadorian Academy of Medicine, wrote that the Regulation “included measures that give the appearance of restricting tobacco, but that do not accomplish anything in reality,” and that “it is clear that this so-called Reform has been done exclusively because of the pressure of the tobacco industry, and to satisfy its interests.”\(^ {342}\) Additionally, in the words of María José Troya, Executive Director of the Tribuna Ecuatoriana de Consumidores y Usuarios (Ecuadorian Tribune for Consumers and Users), “PM had such power that they were able to exert influence at the Presidential level for the adoption of the Regulation.”\(^ {343}\)

After the Regulation was passed (March 2006), PM proceeded to further buffer potential FCTC impact by pursuing reform of a higher-level legal body, an *organic law*. The Ecuadorian Constitution determines that there are two types of laws: “organic” and “ordinary” laws.\(^ {344}\) The former are higher-order laws: they rule the organization and activities of the State in general; the organization of political parties, the exercise of political rights, and the electoral system; and the guarantees for fundamental rights and their procedural protection. Due to their nature, they require an “absolute majority” vote

\(^{341}\) See *infra* for a more detailed analysis of CILA’s role throughout the process.

\(^{342}\) Letter to María José Troya, Executive Director of the Ecuadorian Tribune for Consumers and Users, April 4, 2006.

\(^{343}\) Interview with María José Troya, Executive Director of the Ecuadorian Tribune for Consumers and Users, Quito, July 25, 2007.

\(^{344}\) Article 142 of the Constitution of Ecuador, *supra* note 216.
as a condition for their adoption, i.e., fifty per cent plus one of the vote.\textsuperscript{345} Therefore, having an organic law that introduced only minor and ineffective tobacco control policies was the most effective way to buffer FCTC impact, because it locked such deficient regulations from future amendment.

It was a brilliant incremental policy strategy adopted by PM. With the Regulation (a lower-level regulatory body, passed by the executive power) in place, the road was made easier for PM to pursue higher-order legislation based on the “consistency” argument. In other words, insufficient regulations on tobacco-control were introduced via presidential decree, away from public debate at the Congress. Afterwards, it was a matter of arguing that consistency was required in tobacco control, and that therefore the organic law needed to agree with the existing Regulation. “We are not afraid of regulations, we think they are necessary. We are afraid of inconsistency.”\textsuperscript{346}

The bill to amend the Organic Law for Consumer Protection was introduced by Pascual Del Cioppo, a congressman and member of the Social Christian Party, which has historically had strong ties to the business sector. Allegedly, PM worked with Congressman Del Cioppo to introduce the bill, who brought it on their behalf.\textsuperscript{347} The text of the bill introduced by Congressman del Cioppo is extremely simplistic and incomplete, including one single article that simply prohibits smoking in public places.\textsuperscript{348} Part of the

\begin{footnotes}
\footnote{\textit{Ibid}, Article 143. The same rule is set forth in Article 74 of the Internal Regulations of the Legislative Branch.}
\footnote{\textit{Supra} note 338.}
\footnote{\textit{Supra} note 335. Dr. Patricio Jácome, \textit{infra} note 349, makes the same argument.}
\footnote{\textit{Proyecto de Reforma a la ley Orgánica de Defensa al Consumidor (Bill to Amend the Organic Law for Consumer Protection)}, filed by Pascual del Cioppo, Quito, March 7, 2005. Available electronically at http://apps.congreso.gov.ec/proleg/publico/proyecto.asp?serial=1558&codigo=26-604&de=04/05/2006&hasta=04/05/2006 (last visited 01/10/08). Such prohibition had already been introduced in 2001 by the first version of the LODC Regulation, and was never enforced.}
\end{footnotes}
approach was to pursue the regulations as a reform to the existing Organic Consumer Protection Law, because, as mentioned above, after adopted, they were locked by the absolute majority rule.\textsuperscript{349} It is also striking that two other bills which had been filed earlier by other representatives, and which incorporated more exhaustive regulations—including rules on advertising, ingredient disclosures, sales to minors, and manufacturing and commercialization permits—that were to be introduced in other laws, never went forward.\textsuperscript{350}

Pascual del Cioppo’s bill was assigned to the Consumer Protection Commission. PM approached the members of the Commission directly. “We met with Alfredo Castro Patiño, then President of the Commission, and with its members, on a permanent basis. This was the part that involved the most intense work. We collaborated with the Commission constantly. It was an open collaboration, we worked with them in their offices.”\textsuperscript{351} During the Congressional debates, Castro Patiño openly stated in several occasions that “. . . so it happens that this law was drafted through consensus with tobacco makers, with companies that make cigarettes in this country; they agree with the law […] I repeat again, all this law was done through consensus with tobacco makers […] it was this Commission’s idea, together with tobacco makers—and hear this clearly, because it is important—to put in place all this strong regulations, yes sir, regulations that

\textsuperscript{349} Interview with Dr. Patricio Jácome, focal point for Tobacco Control in the Ministry of Public Health, and delegate of the Health Director General to the CILA. Quito, July 3, 2007.

\textsuperscript{350} These two other bills were introduced by representatives Segundo Serrano Serrano and Silvana Ibarra Castillo. See Segundo Serrano Serrano’s intervention at the Second Debate (first part) for the Bill to Reform the LODC, Ecuadorian National Congress’ Archive, Acta 25-275, at pp. 49, available electronically at http://apps.congreso.gov.ec/proleg/publico/proyecto.asp?serial=1558&codigo=26-604&de=04/05/2006&hasta=04/05/2006 (last visited 01/10/08). \textit{See also infra} note 357 and \textit{supra} note 242 explaining legislative commissions structure and power.

\textsuperscript{351} \textit{Supra} note 338.
are not easy, they are hard.”352 After over a year of the laws’ existence and almost null enforcement, one is left to wonder who these regulations are hard for.

PM’s lobby was not limited to the drafting commission. “I met with about 60 representatives. They all knew me by name. We went to the plenary floor debates every day. We were a part of the process.”353 Such was ITABSA’s influence in the process that the President of the Commission for the Defense of Consumers, Alfredo Castro Patiño, submitted a letter to the President of the Congress to correct the report that would serve as the basis for the second round of debates. The corrections that were to be introduced were those suggested by ITABSA. Castro Patiño wrote: “On May 17, 2006, I submitted to you the Report for the second and definitive debate on the bill to amend the Organic Consumer Protection Law. Because such Report omitted the comments set forth by ITABSA, I hereby submit to you the new Report which includes such comments.”354

Throughout the legislative process, paradoxically, the FCTC seemed to have been used by the industry to its advantage. Piggy-back riding on the normative discourse provided by the treaty, the industry claimed that, in fact, it was necessary to control tobacco through domestic policies, and that it favored regulation. This discourse provided it with an aura of self-regulatory good will, and it allowed the industry to openly approach representatives because of its stance that it, too, wanted tobacco policies, but it wanted consistency with the previous Regulation. The fifty one votes in Congress

353 Supra note 338.
required to pass the Organic Law reforming the original LODC were mustered in part because legislators supported the goals advanced by the FCTC, and because they saw that the industry itself supported regulations.\footnote{Transcripts of Congressional Debates, infra note 348.}

However, even though representatives supported the idea of controlling tobacco in general,\footnote{Representative’s interventions usually state that tobacco is bad for health and that it should be controlled. They rely entirely on anecdote, and, simply put, they are clueless as to how to translate that normative position into effective policy. See, in general, Transcripts of Congressional floor debates, supra note 348.} no one really took a good look at the FCTC vis-a-vis the reform being introduced to realize that the latter’s substantive regulations where meager compared to standards set by the treaty.\footnote{It is a well-known fact that representatives are often unaware of the contents of technical or subject-specific bills, and generally vote as mandated by party directives. Reports that serve as the basis for floor debates are drafted by one of the eighteen specialized commissions. These Specialized Commissions have been somewhat randomly created through time, responding to political pressures and interests rather than to a technical division of legislative labor. Political rather than technical factors, such as the integration of commissions, largely influence which commission examines a bill, and not all commissions have equal overall weight and influence in pushing a bill forward.} Further, except for two or three representatives—Marcelo Dotti, Carlos Kure Montes, and Ramiro Izurieta Dillon—the majority did not have the slightest idea of what tobacco control regulations should do, and simply followed the punish-the-smoker-through-fines scheme introduced by the industry-influenced bill. The bulk of the debates in its various sessions centers around the amounts that should be levied as fines against individuals smoking in public places, instead of debating a prohibition for 100% smoke free-environments, or how to set forth a simple but effective enforcement system.\footnote{Supra note 348.}

For their part, the public health governmental sector and civil society organizations were not adequately organized to counteract the industry’s subtle and effective strategy. There was a tobacco-control organization, the Comité Inter-
institucional de Lucha Contra el Tabaco, CILA (Inter-institutional Committee for the Fight Against Tobacco), which was comprised by the Ministry of Public Health, the Red Cross, the Ecuadorian Tribune for Consumers and Users, and members of the civil society devoted to tobacco control.

However, the CILA was weak, and lacked resources and information. It didn’t have permanent technical and lobbying staff, and its members, were, and still are, full time officials in the Ministry of Health, the Red Cross, or the Tribune for Consumers and Users. As a result, the CILA wasn’t able to effectively counteract the organized, purposive actions of the tobacco industry. The President of the CILA, Dr. Carlos Salvador, was a pulmonologist with a busy private practice and many other professional commitments. “The CILA was not aware that the Consumer Commission was working on a draft amendment for the Consumer Protection Law. The tobacco industry brought the bill and worked the draft within the Congress.”359 Dr. Salvador further argues that “the tobacco industry moved the reform forward in a surreptitious manner, as they always do. . . In fact, the amendment was based on recommendations furnished by TANASA, ITABSA, and PROESA (Philip Morris’s Ecuadorian subsidiaries) to the Consumer Protection Commission.”360

iii. Results and Analysis

359 Supra note 335.
360 Ibid. ITABSA did issue proposals or recommendations for legal reform on tobacco control. For example, a report written in 2005, after the FCTC had been signed by Ecuador, but prior to its ratification, includes an extensive set of recommendations for future reforms. In this proposal, ITABSA relies on the “consistency” and “predictability” argument to support a variety of regulations that appear to be restrictive, but that in general aim at protecting the industry from competition. “Proposal for Integral Regulations on Tobacco Products,” TANASA, ITABSA, and PROESA. July 25, 2005. On file with author.
As mentioned above, this case study set out to determine whether the same hypotheses tested in the preceding case are supported. In turn, those hypotheses aimed at showing whether acculturation as a mechanism of state persuasion accounted for the adoption of these policy frameworks. Based on the empirical evidence collected shown in the preceding pages, this sub-section will discuss whether such hypotheses were supported and if acculturation and socialization can account for the recent adoption of tobacco control policies in Ecuador.

The hypotheses set forth in Chapter Five aimed at providing answers to these questions. Results differing from those found in the preceding case study were found here because of various different variables that were at play in the process. First, the issue of tobacco control was only mildly perceived by policymakers as a problem that needed to be addressed (Hypothesis 1). The congressional debates reveal that if representatives were aware of the problems caused by tobacco, it was only through anecdotal or individual observations. In other words, they did not have a solid, evidence-grounded perception that tobacco poses in fact a serious public health risk and must be effectively regulated.

The interviews conducted with individuals close to the policy-adoption process reveal that, with very few exceptions, policymakers did not really have familiarity with the serious public health implications of tobacco products. Overall, archival and interview data yield support to the assertion that in the domestic context of Ecuador, policymakers did not really see this as a problem that needed to be addressed seriously. The research shows that the bill for the 2006 *Ley Orgánica Reformatoria a la Ley*
Orgánica de Defensa al Consumidor,’ (Organic Law that Amends the Existing Organic Consumer Protection Law, was extremely simplistic (only one article) and did not set forth any substantial regulations to promote tobacco control. As previous paragraphs explain, reliable individuals close to the process, such as the President of the Ecuadorian Academy of Medicine and President of the Inter-institutional Committee for the Fight Against Tobacco (CILA), argue that this bill was introduced by a congressman to promote the interests of the tobacco industry. Likewise, the previous Reglamento a la Ley Orgánica de Defensa al Consumidor (Regulation to the existing LODC) was also adopted as a result of tobacco industry involvement.

What this entails is that state officials and lawmakers, charged with leading the protection of rights and the public interest, not only did not see tobacco control as an issue in need of better regulations, but also were used to provide the tobacco industry with the appearance of regulatory presence, when, in reality, such regulations were, quite pertinently, only a ‘smokescreen.’

Accordingly, the research reported above also shows that the hypothesis that submitted that that transnational actors socialize and expose policymakers to global policy frameworks, and, by the force of their legitimating actions, propel policymakers to adopt such regulations, was not supported (Hypothesis 2). As the preceding section shows, such transnational actors had only a secondary participation in the adoption of these regulations. The WHO through its regional office, the Pan-American Health Organization (PAHO), provided only secondary support and advice. Further, locally-based civil society organizations were almost absent and had little influence in pushing
for efficient tobacco control legislation. This, paired to an extremely weak civil-society sector, resulted in very minor and untimely involvement in the adoption of tobacco control policies. This left the sphere of influence almost entirely open to the tobacco industry, which advocated for its own interests. What the research found was that the industry importantly influenced the outcome of the regulations to diminish their impacts. In this sense, this policy was influenced and promoted not by uninterested socializing agents; quite the contrary, it was subtly thwarted by an organized, informed, and powerful actor with vested interests.

The third hypothesis proposed that this statute was passed as a result of a need to conform to global institutional contents and following world-societal models, not responding to local or domestic demands for change, nor as a result of international imposition. As mentioned above, local demands for the adoption of tobacco control policies were only minor. As reported, the CILA, which comprised governmental public health agencies and anti-tobacco civil society individuals and organizations, was not adequately funded and organized. Again, this left the road open for the tobacco industry to promote regulations according to its interests. Nevertheless, interestingly, the tobacco industry did capitalize on the need to conform to world-societal models and trends, using it subtly to its advantage. As the congressional debates reveal, some representatives cited a global trend on tobacco control and the FCTC. However, they did not realize that the statute they were passing did very little to effectively protect public health from the risks posed by tobacco.
State-to-state imposition was not at play here. In other cases, the United States government has moved to persuade other nations to interrupt protectionist regulations aimed at controlling market influence of American tobacco corporations, threatening sanctions. The research conducted here shows that such influence did not exist. Nor was there a form of soft imposition by the powerful corporate group Philip Morris. What the research shows is that this corporate group acted through subtle influencing mechanisms, adopting for itself the discourse that tobacco products regulations in Ecuador are necessary, like in other countries. In this sense, this corporate group influenced the state of Ecuador precisely through the mechanism of socialization to advance its interests.

The last hypothesis posited that this Statute was passed not on the basis of policy research showing that an urgent need existed to regulate tobacco products. The data gathered demonstrate that the only ‘studies’ or ‘research-like’ information used for the congressional debates came from the industry itself, and, again aimed more at coating the proposed bill with a layer of legitimacy and credibility. The purpose of this hypothesis is to show that global acculturation matters more for policy decisions than evidence-based thinking. Again, in this case, the confirmation of this hypothesis means only that the socialization or influence which took place was conducted by an important third actor, the tobacco industry, for its own purposes.

This case shows that the domestic regulation of tobacco in developing nations, which takes place in connection with a transnational movement on the subject, faces important challenges that may render it ineffective. The presence of purposive, well-
organized actors can significantly slant the outcome of the regulatory process without force or imposition.

Consequently, this research shows that stronger support by other governments, IGO, and INGO is needed when policies that collide with the interests of powerful non-state actors are at stake. When the support of such sectors is scarce or too sporadic—like WHO’s and Ecuador’s local NGO sector participation in the passing of this Act—resulting regulations do not advance their normative values. More sustained assistance—for instance, technical and financial assistance to hire professional lobbyists and experts—would have allowed for better legislation.

It is noteworthy that initiatives to increase support provided to domestic tobacco control legislation in Ecuador have recently grown. The newly created Fundación Ecuatoriana de la Salud Respiratoria, FESAR (Ecuadorian Foundation for Respiratory Health) receives financial support from the Global Fund and technical assistance from Canada’s Ministry of Health and the Canadian Lung Association. The FESAR has now permanent staff and offices, and coordinates sustained tobacco control actions. It has put together a series of workshops and conferences, out of which emerged, in May 2007, the Alianza Ecuatoriana Antitabaco (Anti-tobacco Ecuadorian Alliance), which is larger than CILA. The alliance is also currently outreaching to obtain support from other sources, such as the Bloomberg initiative. Its first task is to file a proposal for a reform to

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361 A variety of transnationally-originated laws may represent a threat to various powerful non-state actors, especially business conglomerates. Some examples are environmental regulations that impose regulations on extractive-industry activities; policies that protect the interests and rights of borrowers vis-à-vis the financial sector, etc.

362 Interview with Silvia Charcopa, National Coordinator of the Fundación Ecuatoriana de la Salud Respiratoria, FESAR (Ecuadorian Foundation for Respiratory Health), Quito, September 28, 2007.
the September, 2006 LODC, seizing the opportunity afforded by the currently ongoing Asamblea Nacional Constituyente (Constituent National Assembly), which is charged with the mandate of restructuring the institutional framework of the state and of writing a new Constitution.

iv. Tobacco Control Post Enactment

After the Congress approved the law, it was submitted to the President of Ecuador for his approval or objections, according to Article 153 of the Constitution. At this point, the CILA attempted to introduce modifications by offering the President of Ecuador comments on the law. Nevertheless, these efforts were too little too late. They only suggested minor changes, and only some of those changes were introduced by the President. Perhaps the most important suggestion had to do with enforcement of the prohibition against smoking in public places. CILA proposed that ventilated smoking zones be replaced by 100% smoke free environments both in public places and the workplace, and that fines for those breaching the prohibition be levied against owners of establishments, not only against smokers, as the law had it. The president did not pick up on this recommendation, centering his veto on the amounts of fines that should be levied against those who smoke in public places. As a result, the law only fines smokers violating this prohibition, which renders it entirely unenforceable.

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364 The draft law approved by the Congress in the second debate established fines of US$50. In his veto, the President, Alfredo Palacio, through the Acting President, Vice-President Alejandro Serrano, modified this amount to US$1000. The debate thus centered on a secondary issue, the amount of fines, drawing attention away from the relevant question, the subject of the punishment. See “Veto Parcial a la Ley Anti-Tabaco es Drástico” (Drastic Partial Veto to Anti-Tobacco Law), Diario Hoy, August 9, 2006, available at http://www.hoy.com.ec/NoticiaNue.asp?row_id=242113 (last visited 01/08/08); “Congreso Analizará Veto
The text of the Law as approved does little to advance anti-tobacco regulations as set forth by the FCTC. As mentioned above, it includes a rather convoluted, unenforceable prohibition to smoking in public places which does not effectively protect non-smokers from second-hand smoke, setting forth a long list of venues ranging from sports facilities to cinemas to office buildings, but excluding public ‘centers of nocturnal diversion,’ i.e., the hospitality industry. Second, it mandates that warnings must displayed on tobacco packages, but not in a rotating manner, and it makes such warnings only 40% of the package’s display area (while the FCTC recommends 50%). Third, it includes fines to businesses selling cigarettes to children, and business closures for recidivists, but it does not create an agency charged with levying and enforcing sanctions. For all enforcement matters, it remits to Article 84 of the existing LODC, which determines that sanctions will be handled by jueces de contravenciones (misdemeanor judges), who have no training or capabilities to enforce smoking regulations. Finally, it charges the Ministry of Education and Culture, in collaboration with the Ministry of Public Health, to implement programs and plans for tobacco education and prevention. The law is silent on regulations of contents of tobacco products; tobacco product disclosures; tobacco advertising, promotion and sponsorship; tobacco dependence and cessation; and the illicit trade of tobacco products. As argued above, all these substantive shortcomings are due to a combination of poor legislative capabilities, weak civil society involvement, and tobacco industry involvement.


Even though aspects of the law related to smoking in public places and to exposure to second-hand smoke were destined to be unenforceable from the outset, it is worth mentioning that it has generated a small amount of voluntary compliance. In the months following its publication, shopping centers, hospitals, and some office buildings in the main cities banned smoking in their facilities.\textsuperscript{366} This shows that the public sympathizes with regulations to prevent second-hand tobacco exposure. To date, there are no official evaluations of the applicability of the law.\textsuperscript{367} The statute did not create an agency charged with its enforcement and follow-up.\textsuperscript{368}

\begin{itemize}
\item \textsuperscript{366} Ibid.
\item \textsuperscript{367} Supra note 338.
\item \textsuperscript{368} An important recommendation issued by WHO is to design strong and simple enforcement systems, allocating resources for the purpose. See supra note 343.
\end{itemize}
Chapter Eight: Conclusions and Recommendations.

This dissertation started from the premise that globalization drastically re-define legal categories and phenomena, making it necessary to re-focus research on law and globalization beyond traditional disciplinary lines. Where a purely legal account of globalization and law would explain it by calling attention to increasing legal internationalization through the growing influence of international treaties, conventions, declarations, and institutions—an explanation that confounds outcome with cause—an interdisciplinary approach calls for looking at the various causes why transnational legal trends set in and why state after state adopts global policy models.

Drawing on neo-institutionalism, this dissertation turned its gaze towards the role that global social and cultural forces have on the adoption of regulatory frameworks. This theory submits that the consolidation of a global polity with its very own cultural forces embeds and gives form to policy frameworks on a variety of subject matters. In other words, it sees their consolidation and regulatory force as socially determined and shaped, rather than drawn by imposition or coercion, as realist views would have it, or by persuasion or internalization, as posed by constructivist views.

Further, the expansion of global regulatory models creates a growing convergence of domestic or municipal regulations both in form and substance, which comes about as states adopt similar laws and regulations regardless of their intentions to implement them and without knowledge of their contents. This dissertation attempted to determine whether such state behavior resulting in regulatory convergence is a consequence of the global-level socialization that propels the growth of global models in the first place.
Domestic policies passed as a result of the influence of transnational regulatory trends are thus reinforced and motivated by the force of the global cultural forces of the world polity. They are the result of rationalizing, uniformizing, normative positions. Their regulatory relevance—whether states do something to abide by norms that emerge and consolidate themselves in the global polity—should thus be accounted for in connection to the same explanation—the role of global-level socialization.

Informed by these theoretical views, this dissertation conducted a comparative case study that focused on the adoption of two domestic policies—Access to Public Information and Tobacco Control—enacted by one developing Latin American nation, Ecuador. The research started from the assumption that these subject-specific regulations originate at the global level. It set out to investigate the nature of the process by which Ecuadorian policymakers adopted legislation to implement and fulfill such globally-originated regulatory mandates. The research had as its purpose to reveal whether institutionalism, as defined in the introductory chapters, was the dominating mechanism of diffusion and consolidation vis-à-vis the competing mechanisms of coercion and persuasion, and how exactly such mechanism operated.

The research found that in the first regulatory sphere, socialization was the most important determinant for the adoption of legislation. It found that domestic policymakers had only an basic idea that legislation needed to be adopted to address the problems of lack of access to information. In the second regulatory sphere, lack of socialization left space open for a third interested actor—the tobacco industry—to advance its interests. While the lack of perception by policymakers that access to public
information required regulation was an advantage for the socialization by locally-based, globally-influenced civil society organizations, in the case of the Tobacco Control statute it turned out to provide a space for interference by a self-interested third-party. In this sense, socialization as a mechanism of diffusion and adoption of policy frameworks works normally in the absence of well-organized, funded and articulated self-interested actors. When such actors are at play, a stronger counterbalance by way of increased socialization is needed.

The comparative case studies also show that IGO and INGO have a fundamental role in the adoption of regulations because they are the key socializing agents who translate global regulatory concepts for a local audience. However, such role is only fully capitalized when their support and involvement is channeled through local NGO. The Access to Information Statute was brought almost entirely by local NGO that were significantly if not completely supported both financially and technically by IGO (UNDP, Inter-American Development Bank, USAID, etc) and INGO (Transparency International, Frederich Ebert). In contrast, the experience with the tobacco control act shows that when international organizations act directly in the absence of a strong locally-based sector, their role is almost nil, which also leaves the way open for self-interested actors to pursue their agendas.

Channeling international organizations’ technical and financial resources through local organizations is all around a stronger strategy to influence states for the adoption of effective domestic policies. First, if locally-based NGO are able to hire technicians and professionals, they provide sustainability and continuity to the process. At the same time,
the credibility of locally-incorporated organizations is increased if they declare that they are supported and connected to international groups and organizations. Finally, local organizations staffed by trained local professionals are able to better navigate the local setting because they can read the cultural context and environment.

In this sense, they are able to ‘translate’ globally-originated ideas and regulations so that they can persuasively speak to local actors. In the access to information study, it was such combination of global/local that proved useful. Workshops were organized by local organizations, lead by well-known local professionals. At the same time, those workshops were given credibility and legitimacy by being supported by international organization and hosting international experts. In contrast, with the tobacco regulations, PAHO did not work through a cohesive local civil society sector, and efforts were not sustained. This left a ‘vacuum’ in which the lack of professionalism of the National Congress with its many chaotic commissions and the involvement of the tobacco industry paired to produce inadequate legislation.

The coercive force of states or international organizations was not the dominant explanation or rationale for the adoption of these domestic legislation or for its fulfillment. According to this view, both regulations would have been adopted because of imposition by external actors. The Access to Information Statute came in the absence of any form of coercion by international bodies or other states. In fact, the statute was adopted when at the global level, a transparency and access to information movement got momentum, models for local legislation emerged and were shared, and international organizations began working on the issue aggressively. In other words, the Act was
passed when access to information became a global institution in the world society, and agents imbued with its values and tools transferred these regulatory contents to local policymakers.

The anti-tobacco law was passed only a few months after the ratification of the FCTC. In this case, the dramatically short period that elapsed between the ratification of the FCTC and the enactment of domestic legislation can be explained because tobacco control has recently become a world societal institution, followed by more and more states in the global polity, and because the tobacco industry, piggy-back riding on the global preeminence acquired by the tobacco control movement, was quick to promote legislation that would be as least damaging as possible to its interests.

In connection to the above conclusion, even if global socialization is indeed a strong determinant of domestic policy adoption, it can be harnessed both to advance progressive transnational regulations, or to oppose them. The case studies show that socialization and the inclination to conform to global trends in regulation importantly influence lawmakers in developing countries. The entire process leading to the adoption of the Access to Information Statute—from filing the bill to providing technical assistance to advising and lobbying—was lead by globally-supported local NGO. In contrast, the Tobacco Control Act was captured by the tobacco industry which subtly harnessed the same mechanisms of social influence to its advantage. This is, however, different from overt coercion or imposition: it is a subtler way in which powerful non-state actors influence policy decisions to favor their interests.
This dissertation also investigated, in an exploratory fashion, the application of these statutes as a way to reflect about the connection between their globally-motivated enactment and the subsequent local implementation and enforcement or lack thereof. Both case studies initially confirm the perception that many transnationally-derived policies are not fully enforced in domestic contexts. Regulations contained in the Access to Information Act are still largely ignored. Article seven of the Act—setting forth disclosure obligation for public and private institutions to organize and make available information to the public—is only beginning to be followed. Declarative articles setting forth the rights of citizens to request and obtain public information through official channels require short of modifying deeply-rooted social practices. Finally, sanctions established by the law have not been enforced at all to date. The same is true for tobacco control regulations: there is no real enforcement. The only signs of application are voluntary measures taken by hospitals and shopping centers.

Nevertheless, the research showed that both statutes provided momentum and legitimacy to individuals and organizations to advance their substantive agendas. Before the statutes, such actors were mostly ignored, and their views were seen as extreme or out of touch. With the adoption of the statutes, activists acquired legitimacy and their discourse became more persuasive. In the Access to Information case, campaigns and individual requests are beginning to be taken more seriously. In the tobacco control case, even if the statute is unenforced, it has helped frame tobacco as a serious public health issue and not as a ‘soft’ matter without need of regulation.
Bibliography


APPENDIX A: INTERVIEW QUESTIONS

As the methodology section explained, this dissertation drew on two main sources of data, interviews and archives. I reproduce here the model interview used when talking to subjects. The Institutional Review Board at Northeastern University approved this questionnaire, and consent forms were signed by interviewees. The questions are transcribed as they were posed (in Spanish). As explained in the methodology section, these questions were mostly open ended and they were used only as guiding points throughout the conversations.

Introducción:

Más que discutir sobre el aspecto técnico-jurídico de la ley, me interesa saber sobre su proceso de adopción, es decir, sobre el contexto social que llevó a la adopción de estas regulaciones.

1. Desde su posición en la adopción de esta norma, pudo usted percibir si había demandas locales para cambio adoptar esta norma?

2. Se percibía la falta de una regulación al respecto como un serio problema?

3. Cómo empezó el proceso para la adopción de la ley?

4. Por quién fue liderado?

5. Cuál fue su rol en la adopción de esta normativa?

6. Cree que los legisladores vieron a esta ley como necesaria? O la adoptaron siguiendo corrientes que les fueron dadas desde fuera?

7. Hubo estudios de políticas basados en investigación justificando la adopción de esta normativa?
8. Hizo/hicieron usted/es seguimiento sobre la aplicación de la ley?

9. En qué forma ha tenido impacto esta normativa sobre discursos y acciones?
### APPENDIX B: SURVEY RESULTS

#### Percepciones sobre la Transparencia y el Acceso a la Información en el Ecuador

<table>
<thead>
<tr>
<th>1. ¿Está de acuerdo en continuar y participar en esta encuesta?</th>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sí. Estoy de acuerdo con los términos y deseo continuar.</td>
<td></td>
<td>100.0%</td>
<td>17</td>
</tr>
<tr>
<td>No. (Será dirigido automáticamente fuera de la encuesta)</td>
<td></td>
<td>0.0%</td>
<td>0</td>
</tr>
</tbody>
</table>

answered question 17

skipped question 1

<table>
<thead>
<tr>
<th>2. ¿Diría usted que su preocupación por asuntos relacionados con la lucha contra la corrupción y la transparencia ha aumentado o disminuido en los últimos dos años?</th>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ha aumentado mucho</td>
<td></td>
<td>64.7%</td>
<td>11</td>
</tr>
<tr>
<td>Ha aumentado</td>
<td></td>
<td>35.3%</td>
<td>6</td>
</tr>
<tr>
<td>No ha cambiado</td>
<td></td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Ha disminuido</td>
<td></td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Ha disminuido mucho</td>
<td></td>
<td>0.0%</td>
<td>0</td>
</tr>
</tbody>
</table>

answered question 17

skipped question 1
3. Si su preocupación ha aumentado o disminuido, diría usted que este cambio se debe a:

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cambios en la situación política en el país</td>
<td>52.9%</td>
<td>9</td>
</tr>
<tr>
<td>Cambios en su interés personal hacia cosas públicas en general</td>
<td>41.2%</td>
<td>7</td>
</tr>
<tr>
<td>La disponibilidad de nuevas herramientas legales</td>
<td>11.8%</td>
<td>2</td>
</tr>
<tr>
<td>Otras razones (por favor especifique)</td>
<td>5.9%</td>
<td>1</td>
</tr>
</tbody>
</table>

answered question 17

skipped question 1

4. Ha necesitado usted conseguir información pública de cualquier entidad estatal en los últimos dos años?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Si</td>
<td>82.4%</td>
<td>14</td>
</tr>
<tr>
<td>No (será dirigido automáticamente a la pregunta 6)</td>
<td>17.7%</td>
<td>3</td>
</tr>
</tbody>
</table>

answered question 17

skipped question 1

5. Cuando usted tuvo necesidad de conseguir información pública de cualquier entidad estatal, usted

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pidió un favor a un amigo dentro de la institución.</td>
<td>23.1%</td>
<td>3</td>
</tr>
<tr>
<td>Presentó una petición impersonal siguiendo canales institucionales.</td>
<td>69.2%</td>
<td>9</td>
</tr>
<tr>
<td>Amenazó o amedrentó a funcionarios públicos.</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Pagó o soborno a alguien para obtener la información.</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Otras (por favor especifique)</td>
<td>23.1%</td>
<td>3</td>
</tr>
</tbody>
</table>

answered question 13

skipped question 5
6. ¿Ha oído usted de la Ley de Acceso a la Información Pública (LOTAIP)? Sabe cuál es la función de esta ley?

<table>
<thead>
<tr>
<th>Respuesta</th>
<th>Porcentaje</th>
<th>Contador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sí</td>
<td>100.0%</td>
<td>17</td>
</tr>
<tr>
<td>No (será dirigido automáticamente a la pregunta 14)</td>
<td>0.0%</td>
<td>0</td>
</tr>
</tbody>
</table>

answered question 17
skipped question 1

7. Desde la vigencia de esta ley, ¿alrededor de cuántas veces ha solicitado información pública a cargo de entidades estatales aplicando los procedimientos previstos en la LOTAIP?

<table>
<thead>
<tr>
<th>Respuesta</th>
<th>Porcentaje</th>
<th>Contador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ninguna (será dirigido a la pregunta 8 directamente)</td>
<td>37.5%</td>
<td>6</td>
</tr>
<tr>
<td>De 0 a 2</td>
<td>25.0%</td>
<td>4</td>
</tr>
<tr>
<td>De 2 a 4</td>
<td>12.5%</td>
<td>2</td>
</tr>
<tr>
<td>De 4 a 6</td>
<td>6.3%</td>
<td>1</td>
</tr>
<tr>
<td>Más de 6</td>
<td>18.8%</td>
<td>3</td>
</tr>
</tbody>
</table>

answered question 16
skipped question 2

8. ¿Con qué fines ha hecho usted estas peticiones?

<table>
<thead>
<tr>
<th>Respuesta</th>
<th>Porcentaje</th>
<th>Contador</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personales</td>
<td>0.0%</td>
<td>0</td>
</tr>
<tr>
<td>Profesionales</td>
<td>70.0%</td>
<td>7</td>
</tr>
<tr>
<td>Otros (por favor especifique)</td>
<td>30.0%</td>
<td>3</td>
</tr>
</tbody>
</table>

answered question 10
skipped question 8
9. ¿Tuvo éxito en sus solicitudes?

<table>
<thead>
<tr>
<th>Response</th>
<th>Percent</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sí</td>
<td>50.0%</td>
<td>4</td>
</tr>
<tr>
<td>No</td>
<td>42.6%</td>
<td>5</td>
</tr>
</tbody>
</table>

answered question 8
skipped question 10

10. ¿Diría usted que, desde la vigencia de la LOTAIP, al pedir información pública usted

<table>
<thead>
<tr>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.0%</td>
</tr>
<tr>
<td>35.7%</td>
</tr>
<tr>
<td>64.3%</td>
</tr>
</tbody>
</table>

answered question 14
skipped question 4

11. En general, diría que la transparencia en el Ecuador ha mejorado, empeorado, o se ha mantenido igual desde que se aprobó la LOTAIP?

<table>
<thead>
<tr>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>0.0%</td>
</tr>
<tr>
<td>33.3%</td>
</tr>
<tr>
<td>66.7%</td>
</tr>
<tr>
<td>0.0%</td>
</tr>
<tr>
<td>0.0%</td>
</tr>
</tbody>
</table>

answered question 15
skipped question 3
<table>
<thead>
<tr>
<th>12. Diría usted que, gracias a la vigencia de la LOTAIP, la forma en la que las entidades estatales manejan la información ha cambiado?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Response</strong></td>
</tr>
<tr>
<td>Sí</td>
</tr>
<tr>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>13. En su opinión, cuál de los siguientes enunciados mejor describe la forma en la que las entidades y funcionarios públicos manejan la información a su cargo después de la aprobación de la LOTAIP?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Response</strong></td>
</tr>
<tr>
<td>Los funcionarios y entidades públicas actúan con mayor transparencia y apertura.</td>
</tr>
<tr>
<td>Los funcionarios y entidades públicas no han cambiado su comportamiento y actitud.</td>
</tr>
<tr>
<td>Los funcionarios y entidades públicas actúan con menor transparencia y apertura.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>14. ¿Cuál es su ocupación o profesión?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Response Count</strong></td>
</tr>
<tr>
<td>14</td>
</tr>
</tbody>
</table>

| answered question | 15 |
| skipped question | 3 |