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The Consent Problem in International Law

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### Author

Guzman, Andrew

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# **THE CONSENT PROBLEM IN INTERNATIONAL LAW**

Andrew Guzman  
Professor of Law  
Berkeley Law School  
[aguzman@law.berkeley.edu](mailto:aguzman@law.berkeley.edu)

## Abstract

International law is built on the foundation of state consent. A state's legal obligations are overwhelmingly – some would say exclusively – based on its consent to be bound. This focus on consent offers maximal protection to individual states. If a country feels that a proposed change to international law does not serve its interests, it can avoid that change by withholding its agreement. This commitment to consent preserves the power of states, but it also creates a serious problem for the international system. Because any state can object to any proposed rule of international law, only changes that benefit every single affected state can be adopted. This creates a cumbersome status quo bias. Though legal reforms that would lead to a loss of well-being are avoided, so are reforms that would increase well-being for most but not all states.

This Article challenges the conventional view of consent. It argues that our existing commitment to consent is excessive and that better outcomes would result from greater use of non-consensual forms of international law. Though consent has an important role to play, we cannot address the world's greatest problems unless we are prepared to overcome the problem it creates – the consent problem.

International law has developed a variety of ways to live with the consent problem. These include the granting of concessions by supporters of change to opponents thereof, customary international law, and to the United Nations Security Council. None of these, however, provide a sufficient counterweight to the consent problem.

There are also strategies employed to work around the consent problem, mostly through the use of soft law. In particular, the international system has developed a plethora of international organizations and international tribunals that generate soft law. As currently used and perceived by the international legal system, states, and commentators, these soft law strategies are helpful, but insufficiently so. We could achieve better results within the system by expanding our acceptance of the soft law promulgated by these bodies and raising the expectation of compliance placed on states. This move toward greater support for non-consensual soft law would help to overcome the consent problem, and represent a step in the right direction for the international system.



# THE CONSENT PROBLEM IN INTERNATIONAL LAW

Andrew T. Guzman\*

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## I. INTRODUCTION

It is often said that international law is based on the notion of state consent.<sup>1</sup> Indeed, many of the most important international law scholars of the last 60 years have gone further and

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\* Professor of Law, Berkeley Law School. I owe thanks to Katerina Linos, Kal Raustiala, and John Yoo for helpful conversations and comments on earlier drafts. Oliver Jull and Niki Nabavi Nouri provided excellent research assistance.

<sup>1</sup> Anthony Aust, *HANDBOOK OF INTERNATIONAL LAW* 4 (2005) (“[International Law] is based on the consent (express or implied) of states.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4 (6 ed. 1995) (“the general consent of states creates general rules of application”); James Leslie Brierly, *THE LAW OF NATIONS: AN INTRODUCTION TO THE MODERN LAW OF PEACE*, 51 - 54 (1963) (states obey international law because they have consented to it); Louis Henkin, *INTERNATIONAL LAW: POLITICS AND VALUES* 28 (1995) (“No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it.”); Malgosia A. Fitzmaurice, *Third Parties and the Law of Treaties* 6 *MAX PLANCK Y.B. U.N.L.* 37, 38 (the principle of reciprocity remains the governing norm in the creation of international legal obligations); Laurence R. Helfer, *Nonconsensual*

asserted that without consent international law cannot bind a state.<sup>2</sup> This last statement clearly goes too far and cannot be defended against a fair assessment of the doctrine of international law, but it emphasizes the fundamental role that consent plays in the international legal system. Simply put, modern international law is built on a foundation of state consent.

In an era of pressing global challenges, however, this commitment to consent represents a double-edged sword. On the one hand, consent protects the interests of states and supports notions of sovereign equality. On the other hand, it functions as a barrier to effective cooperation in a world of vastly divergent priorities and concerns. A requirement of consent creates a powerful status quo bias that frustrates many attempts to solve global problems.

Consent's central role in the international legal order is easy to understand. Within our decentralized and anarchic international system, the state remains the most important political unit. States act on behalf of their populations, enter into international agreements, claim exclusive control over their territory, and exert a monopoly over the use of force within their boundaries. They jealously guard their power over what happens within their borders. States also decide which international obligations will be complied with and which will be breached. More than any other unit, states control both the content and meaning of international law. It is a short step from these observations to the conclusion that states can or should be bound only with their consent or, somewhat more accurately, that changes to international law require consent.

This Article challenges broadly held contemporary views on the merit of consent. The normative implications of our consent-centric approach to international law have not been adequately addressed and, in my view, are not well understood. In this Article, I

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*International Lawmaking*, 2008 ILL. L. REV. 71, 72 (2008) ("For centuries, the international legal system has been premised on the bedrock understanding that states must consent to the creation of international law."); Duncan B. Hollis, *Why Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L LAW 137 (2005) ("Notwithstanding criticism of Article 38 and state consent, most international lawyers rely on them as international law's operating framework."); Restat 3d of the Foreign Relations Law of the U.S., Introduction to Part I, Chapter 1, 18 (1987) ("Modern international law is rooted in acceptance by states which constitute the system."); but see Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL LAW DECISIONS 9-10 (Stephen Schwebel ed., 1971) (citing eleven other possible sources of international obligation).

<sup>2</sup> Louis Henkin, *International Law: Politics, Values, and Functions*, 216 RECUEIL DES COURS D'ACADEMIE DE DROIT INT'L 9, 27 (1989) ("[A] state is not subject to any external authority unless it has voluntarily consented to such authority."); Antonio Cassese, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986) ("Ever since the beginning of the international community...law was brought into being by the very [s]tates which were to be bound by it... [] there was complete coincidence of law-makers and law-addressees"); S.S. "*Lotus*" (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) ("The rules of law binding upon States . . . emanate from their own free will."); Barcelona Traction, 1970 I.C.J. Reports 3, 47 ("here as elsewhere, a body of rules could only have developed with the consent of those concerned."); Nicaragua (Merits and Judgment) [1986] I.C.J. Reports 14, 135 (Merits, Judgment) ("in international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise."); Gennadii Mikhailovich Danilenko, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 7 (1993).

demonstrate that our commitment to consent is a major problem for today's international legal system. To be sure, consent is important to the functioning of the system, and any deviation from it must be carried out with care, but consent can also cripple efforts to use international law as a tool to help solve some of the world's largest problems. We live in a world of many states with wildly divergent priorities and concerns. We also live in a world with nuclear weapons, a warming climate, vanishing fisheries, grinding poverty, and countless other problems whose solutions require a high level of cooperation among states. Unless we change how we view the role of consent, it will be almost impossible to address these problems.<sup>3</sup>

The Consent Problem affects virtually all efforts at international cooperation. It is important, however, to acknowledge one conspicuous exception. The European Union (EU) has created a structure that gets around at least a large part of that problem. The EU represents perhaps the single greatest example of international cooperation on political, social, and economic issues the world has ever seen. This cooperative effort would have been impossible without a solution to the consent problem. The solution took the form of significant delegation of authority to European institutions, including the European Commission, the Council of the European Union, and the European Parliament. This delegation, which among other things allows some decisions to take place even over the objections of individual states, has allowed the European project to move forward. Because Europe has addressed the consent problem, the points made in this Article do not apply with nearly as much force to the EU as they do to other international relationships.

The Article proceeds as follows. The next part examines the benefits that consent delivers to the international system. These benefits are real and important – one would certainly not want to simply ignore the views of states, after all – but I argue that they are perhaps not as important as is commonly thought. Part III evaluates the consequences of the consent requirement for efforts to achieve international cooperation. It explains how the powerful status quo bias of that requirement frustrates many desirable forms of cooperation and defeats many efforts to achieve better outcomes. Part IV surveys the forms of non-consensual international law currently available, including those that rely on soft law norms rather than hard law. Though there are several distinct ways in which the requirement of consent has been compromised, these all occur at the margins of international cooperation and a much too weak to overcome the consent problem in most

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<sup>3</sup> I am not the first to note the impact of consent on the international system. Some observers have, for example, argued that the system is moving toward a less consensual system and toward a majoritarian one. T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1992 (2004); Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L LEGAL THEORY 39, 51 (2005). Others have focused on specific areas of international law where consent plays a smaller (though still central) role. Malgosia Fitzmaurice, *Third parties and the Law of Treaties*, 6 MAX PLANCK YB UNL 37 (2002); Holning Lau, *Comment, Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495 (2005). This article's perspective on consent differs from that of the existing literature because it views consent as a central challenge that often impedes the task of problem-solving.

circumstances. They are simply not powerful or flexible enough.<sup>4</sup> If we hope to resolve the most pressing issues facing the world today, we will have to find additional ways to overcome the conservatism of consent. Part V considers how, in light of the consent problem and the limited ways states have to avoid that problem, we should move forward. Surveying the options, it concludes that the best short-term solution is for the international system to embrace and promote the non-consensual soft law norms promulgated by international tribunal and international organizations. Though this would not fully address the status quo bias created by our obsession with consent, it would be a step in the right direction.

## II. WHY REQUIRE CONSENT?

Some of the drawbacks of requiring consent are easy to identify. For example, generating consent is a slow, difficult, and cumbersome process.<sup>5</sup> It creates endless bottlenecks, provides many veto points, and invites strategic hold-out behavior, all of which make agreement more difficult. Even when it is achieved, consent is often reached only by weakening the content of an agreement.<sup>6</sup> “The prevailing practice of seeking consensus or near-unanimity to adopt a convention has not only led to drawn-out negotiations, but also to highly ambiguous or empty provisions, undermining what is needed to ensure the establishment of an effective international legal regime.”<sup>7</sup>

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<sup>4</sup> It has to be noted at the outset that even when international law requires consent, there are plenty of other ways in which states attempt to influence each other. A state might offer foreign aid in exchange for political support, it might threaten to retaliate if another state refuses to cooperate, or it might attempt to influence the behavior of other states in any number of other ways. This is the stuff of international relations, and it takes place alongside and intertwined with the international legal system. There is no clear line separating “law” from “politics,” and the former does not exist apart from the latter. Nevertheless, I choose to focus on international law because, while the absence of international law does not mean the absence of international interaction or even international rules, it does establish background rules of permissiveness. States can do as they wish, as long as they do not violate a rule of international law. *S.S. “Lotus” (Fra. v. Turk.)*, 1927, P.C.I.J. (Ser. A), No. 10, 18. Thus, for example, an upriver state can pollute a river without violating a rule of international law. It is only if the states enter into some form of international agreement that this behavior might be prohibited. (More generally, customary international law, general principles of law, and *jus cogens* norms may also constrain behavior). The downriver state can, of course, try to bribe, cajole, coerce, and shame the upriver state into changing its behavior, but having the legal entitlement to pollute gives the upriver state a stronger negotiating position – it is able to pollute unless it is persuaded to do otherwise. *See Treaty Between the United States and Great Britain Relating to Boundary Waters between the United States and Canada*, Jan. 11, 1909, 36 Stat. 2449 (hereinafter “Boundary Waters Treaty”). In other words, though the rights provided by international law are rarely immutable, they can have a major effect on outcomes.

<sup>5</sup> Geoffrey Palmer, *New Ways to Make Environmental Law*, 86 AM. J. INT’L L. 259, 259 (1992).

<sup>6</sup> Andrew T. Guzman, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY*, 172-73 (2008).

<sup>7</sup> Eric Rosand, *The Security Council as ‘Global legislator:’ Ultra vires or Ultra Innovative?*, 28 FORDHAM INT’L L.J. 542, 575-76 (2005). While in the nineteenth and early twentieth centuries, conference decisions on issues of substance were taken by unanimity, now, except where states can agree on a majority-voting rule, all that is required for the adoption of a rule at an international convention is consensus. As Cassese points out, “Consensus is different from *unaninimity*, for in the latter case there exists full agreement on a given text and in addition the general consent is underscored by a vote.” Cassese, *supra* at 196, cited in Robbie Sabel, *PROCEDURE AT INTERNATIONAL CONFERENCES*, 312-316 (2006).



These problems both reduce the likelihood that states will enter into agreements that solve difficult common problems and increase the costs involved when such agreements are completed. Making matters worse, the growing complexity of the international system means that achieving agreement is increasingly difficult. The greatest danger is that effective solutions to the many of the world's most serious challenges may be inconsistent with our current commitment to consent.

The English author, G.K. Chesterton once said, "Don't ever take down a fence unless you know why it was put up."<sup>8</sup> This is good advice that applies to any critique of consent in international law. There are powerful reasons to prefer that states consent to the international law that binds them. Before launching into a more detailed discussion of the problems associated with consent, then, it is important to consider why the norm exists in the first place.

The case for a consent-based system of international law is based on our understanding of the role of the state in the global system and consists of three key arguments. First, consent is said to encourage compliance with the rules of international law. Second, consent is thought to increase the legitimacy of the system. Third, consent protects against harmful changes to the rules of international law. Though these arguments cannot be dismissed out of hand, they are ultimately not strong enough to justify the existing blanket requirement of state consent to international law rules. I consider each in turn.

## 1. Consent and Compliance

The signature feature of international law is the lack of coercive enforcement.<sup>9</sup> This reality makes compliance with international law a matter of constant concern.<sup>10</sup> Imposing rules on states without their consent create the risk that the rules will be ignored. The consent requirement promises to reduce the frequency of non-compliance by limiting international law rules to those that states have agreed to accept. Unanimity ensures, at a minimum, that every affected state prefers the new arrangement to the available alternatives.

There is something to this argument, but less than it initially seems. First, why should we care if some rules are largely ignored? Consent may increase the overall level of compliance, but it does so by changing the content of international law. There would be perfect compliance with international law if the only rule were that people must breathe in

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<sup>8</sup> Gilbert Keith Chesterton, *HERETICS*, (Filiquarian Publishing 2007)(1905)

<sup>9</sup> There are some rare exceptions to this statement. Most importantly the Security Council has the authority under the UN Charter to authorize the use of force for the purpose of maintaining international peace and security. *See infra IV.C*, UN Charter, art. 42. Even these authorizations, however, rely on individual states to take action. The Security Council itself has no enforcement arm, and it can only "authorize" the use of force. It cannot order it. The rarity of authorizations of use of force by the Security Council illustrates the very limited sense in which this represents an exception to the statement that no coercive force exists to compel compliance with international law.

<sup>10</sup> See Guzman (2008), *supra* note 6.

oxygen and breathe out carbon dioxide, but surely a high rate of compliance is not what we are trying to achieve.

A rule that fails to achieve perfect compliance may nevertheless generate some “compliance-pull” and change the behavior of some states. A good rule with imperfect compliance would still move the international system closer to the preferred outcome. In other words, incomplete compliance with a desirable rule is better than not having the rule at all. By way of example, consider the international law prohibition of war crimes. War crimes are a common feature of war. Indeed, one would be hard-pressed to find a significant conflict that did not feature war crimes. Despite this highly imperfect level of compliance, the prohibition is both desirable and effective if it causes a reduction in the number of war crimes committed. Less than perfect compliance is not a good reason to eliminate the rule.

Furthermore, even if we were to care about the overall level of compliance with international law, it is not obvious that non-consensual rules will fare dramatically worse than the consensual alternative. A state that does not consent to a rule may still be persuaded to comply if the consequences of non-compliance are sufficiently unattractive. When faced with pressure from the international community, states change their behavior. For example, states that lose a case before the World Trade Organization’s dispute resolution body comply with that decision in the large majority of cases. This compliance comes about despite the fact that they would not have consented to the result, as evidenced by their decision to litigate the issue.

Nor does the consent of a state to a rule ensure compliance. Giving consent does not eliminate a state’s incentives to violate the law or necessarily increase the compliance-pull of the rule. When developing countries agreed to the Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement, for example, they did so because it was a necessary condition for membership in the WTO. Most of these countries would have preferred to live without the TRIPs obligations and, predictably, compliance with the TRIPs Agreement has been a major issue.<sup>11</sup>

Even when a state consents to a rule and is willing to comply, its position may change over time. For example, Iran became a member of the Nuclear Non-Proliferation Treaty in 1968 and North Korea did so in 1985. North Korea withdrew from the treaty as of April 10, 2003. As for Iran, it may be regretting its membership now that it seems interested in developing its nuclear capabilities.<sup>12</sup> For both countries, consent to the treaty was achieved, but the agreement ultimately failed to prevent their pursuit of nuclear weapons.

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<sup>11</sup> See *infra* Part III.A.

<sup>12</sup> Iran continues to pursue a nuclear weapons program as part of its strategic objective to drive the United States out of the region and weaken its local allegiances, Eric S. Edelman et al., *The Dangers of NATO a Nuclear Iran*, FOREIGN AFFAIRS, February 1, 2011, available at NewsBank, 134FCF3CDFB8ED08 (arguing for a more assertive U.S. military posture in the region to counter Iranian nuclear ambitions).

Overall, consent is a highly imperfect proxy for state willingness to comply with legal rules. Commitments made by states are often a form of exchange in which each state agrees to comply only because it receives a reciprocal promise from the other state. That states have consented does not ensure that they wish to or will comply. Examples abound, including the prohibition on the use of force, many multilateral environmental agreements, human rights commitments, investment agreements, and more.<sup>13</sup>

## 2. Legitimacy and Consent

A rule made without the consent of affected states faces legitimacy problems that speak to both the desirability and practicability of non-consensual rules.<sup>14</sup> Stated simply, a rule that is judged illegitimate may also be undesirable as a normative matter. In other words, legitimacy may serve as a stand-in for good rule-making.<sup>15</sup>

There are many ways to define legitimacy, but one common approach is to focus on the process by which rules are created. This is true of Thomas Franck's "legitimacy theory" as well as what Jutta Brunnee and Stephen Toope have recently called "criteria of legality."<sup>16</sup> An additional benefit of good process is that the process itself may generate support for the rule.<sup>17</sup>

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<sup>13</sup> Some international commitments are supported by reciprocity – each state complies only as long as the other state does so, and this reality motivates both to honor their commitments. Reciprocity can create a strong and stable arrangement, and is visible in many international trade agreements, some arms control agreements, and so on. This sort of reciprocity is more likely to be present when states have consented to a rule. See Guzman (2008), *supra* note 6, at 42-45.

<sup>14</sup> To be sure, there is something slightly circular in this argument. To a significant degree the reluctance of states to surrender their commitment to consent that undermines the legitimacy of non-consensual rule-making.

<sup>15</sup> To the extent states' willingness to comply is related to a rule's perceived legitimacy, unanimity may increase the legitimacy of a rule and so improve the likelihood of compliance. See Thomas Franck, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). This is simply another version of the compliance problem above. As long as states can be provided with sufficient incentive to comply they will do so, whether or not they have consented to the rule or, for that matter, view the rule as legitimate. It should be added that in some circumstances consent and legitimacy may actually work against one another. Where an existing rule has ceased to serve the interests of most states, our commitment to unanimity makes changes to that rule difficult. If this dissatisfied majority is unable to change the rule because the minority refuses to consent, the existing rule may be perceived as less legitimate than the would-be alternative.

<sup>16</sup> Jutta Brunnee & Stephen J. Toope, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

<sup>17</sup> This is a view that can be labeled "constructivist." The notion is that legitimacy encouraged some form of internalization of norms. See Thomas M. Franck (1995), *supra* note 15.

I wish to focus on the possibility that better process can serve as a sort of filter to block harmful rules. Take, for example, Franck's familiar indicators of legitimacy: determinacy,<sup>18</sup> symbolic validation,<sup>19</sup> coherence,<sup>20</sup> and adherence.<sup>21</sup> At least the first two of these increase the likelihood that a rule will serve the interests of the governed. Determinacy allows those affected to know the meaning of a rule and so gives them greater opportunity to voice any concerns or objections. Symbolic validation includes evidence that authority is being exercised "in accordance with right process."<sup>22</sup> These procedural features give potential opponents of a proposed rule an opportunity to object and so makes it less likely that a bad rule will be adopted. If states that stand to lose from a rule have no opportunity to voice their concerns, the international community as a whole will have less opportunity to evaluate its merits, making it more likely that a bad rule will be implemented.

Fairness and good process encourage a more thorough vetting of proposed rules, making a focus on these issues (forgive the pun) legitimate. Any move toward non-consensual rule-making must at least pause to consider them. But one should not take this point too far. There is no reason to think that unanimity is a necessary condition to achieve legitimacy. It is reasonable to inquire into the legitimacy of any proposed non-consensual process, but it goes too far to say that all such processes are per se illegitimate. Indeed, most observers would agree that a rule requiring unanimity is illegitimate in many – probably most – governance contexts. Requiring unanimity for domestic legislation, for example, would be rightly thought to give too much power to small groups – it is undemocratic. Demanding unanimity would also create an enormous bias in favor of the status quo even when superior alternatives are available. This too might be described as illegitimate.

Concern about legitimacy, then, is certainly not enough to justify an unyielding commitment to consent. Not only is it possible to develop legitimate non-consensual governance systems, it is hard to think of many such systems (other than international law) that both rely on consent and are considered legitimate. Legitimacy and consensus may be inconsistent. In the domestic context, of course, law is based on majoritarian rules, not unanimity, and legitimacy flows from the democratic process rather than from consensus. The same is true of local governments, condo associations, student councils, and just about every other form of governance that most people encounter.

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<sup>18</sup> Determinacy refers to the extent to which a meaning is transparent through its reference text, for example the meaning of a rule through the language of law. Franck (1995), *supra* note 15, at 30-46.

<sup>19</sup> Symbolic validation refers to the rule's ability to communicate or signal authority, *id.*

<sup>20</sup> Coherence refers to the degree to which the rule is applied coherently and consistently, *id.*

<sup>21</sup> Adherence is the relationship between a primary rule of obligation and the secondary rules governing its creation, interpretation and application, *id.*

<sup>22</sup> *Id.* at 25-46. See also Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 705-711 and Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990), esp. Ch. 2.

Some forms of delegated law-making exist in the international system, but they are exceedingly rare. The EU is the most obvious international entity with such authority.<sup>23</sup> The Security Council also has authority to create binding rules through a voting system, though that authority is highly constrained, as discussed below.<sup>24</sup> More common among states is a weaker form of delegated authority that permits the creation of non-binding legal or quasi-legal norms. This most typically takes the form of a delegation of authority to an international body that is empowered to act in some way, but that lacks the power to create binding international law. The United Nations General Assembly is a well-known example of this form of delegation. It is able to make resolutions by majority vote, but those resolutions do not constitute binding international law.<sup>25</sup> There are countless international organizations and other international entities with similar delegated authority and both the scope of authority and the influence of these bodies vary widely from one to the other.<sup>26</sup> These are considered in more detail in Part IV.D. For now, I only want to point out that delegation to such international entities represents a different and less demanding form of consent. Though they normally lack the power to create binding international law, such institutions offer states a tool to try to reduce the effect of the consent problem.

International tribunals carry out another form of non-consensual rule-making that is often considered legitimate. Such tribunals operate with some form of consent from states, but that consent is often provided in advance of a specific dispute. The decisions of such tribunals are routinely considered to clarify legal obligations and influence future tribunals.<sup>27</sup> At the WTO, for example, the decisions of panels and the Appellate Body represent binding pronouncements on the legality of the disputed trade measure and

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<sup>23</sup> See *supra* Part I.

<sup>24</sup> See *infra* Part IV.C.4.

<sup>25</sup> General Assembly resolutions can contribute to customary international law and may at times even be enough to tip a legal norm into the status of CIL. There is no consensus on exactly how and when General Assembly resolutions act in this way, but there is universal agreement that such resolutions are not, by themselves and without more, binding international law. To the extent the United Nations has the power to create binding international law, it is the Security Council that does so.

<sup>26</sup> For a good discussion of international organizations, see Jose E. Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005).

<sup>27</sup> See *infra* Part IV.E; Karen J. Alter, *Delegation to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 *LAW. & CONTEMP. PROBS.* 37 (2008). Alter argues most states follow the rulings of international tribunals because of the tribunals in providing an authoritative interpretation of the law and because the potential resort to sanctions through an enforcement mechanism systematically increases compliance with legal rulings, citing *infra* at 74 to Franck, (1990) *supra* at note 15; Louis Henkin, *HOW NATIONS BEHAVE* (1968); Abram Chayes & Antonia Handler Chayes, *THE NEW SOVEREIGNTY* (1995); Harold Hong Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997). See also Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 *PENN L. REV.* 171 (2008); Andrew T. Guzman & Jennifer Landside, *THE MYTH OF INTERNATIONAL DELEGATION*, 96 *CAL. L. REV.* 1693 (2008); Eric Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *CAL. L. REV.* 1(2005); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273 (1997). See generally Symposium, *The Law and Politics of International Delegation*, 71 *LAW. & CONTEMP. PROBS.* (2008).

impose an obligation on losing defendants to comply with the ruling of the dispute settlement organs.<sup>28</sup> These institutions are discussed in Part IV.E.

Delegated rule-making and dispute resolution both feature a form of consent. Participating parties consent to the procedural rules by which decisions are made and legitimacy can be found in this form of consent. The same strategy reduces the impact of the consent problem because it allows individual rules to be created over the objection of some states. States have taken advantage of this middle-ground between consent and decision-making by creating institutions and practices that rely on the delegated consent of states. When one examines the practice of states, however, it is clear that states consent to delegated decision-making with great reluctance.<sup>29</sup> For this reason, delegation provides only modest relief from the consent problem.

### 3. Welfare and Consent

The third justification for requiring the consent of states for the creation of international rules is more functional than either a desire to encourage compliance or a perceived connection between consent and legitimacy, though it does have a connection to the above legitimacy discussion.

If states are not required to agree to the rules that affect them, they cannot be confident that those rules will serve their interests. A requirement of state consent protects against international legal rules that do more harm than good. Unanimity signals, as nearly as anything can, that all states believe a proposed rule to be in their interest.<sup>30</sup> This is the best evidence we can hope for that a rule will increase global well-being.<sup>31</sup> Consent, then,

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<sup>28</sup> See John Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109 (2004) and Warren F. Schwartz and Alan Sykes, *The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization*, 31 J. LEGAL STUD. 179 (2002). Schwartz and Sykes argue that losing defendants have a choice between compliance with the panel or Appellate Body ruling and accepting the "suspension of concessions" (i.e., trade sanctions) against them by the complainant. For the argument advanced here, it is not necessary to take sides in this debate. Everyone agrees that the judicial organs of the WTO are able to affect the rights and obligations of the parties to a dispute even though the parties have not given contemporaneous consent.

<sup>29</sup> Guzman & Landslide, *supra* at note 27. There may be good reasons for such reluctance – there are risks in such delegation as I discuss throughout the Article.

<sup>30</sup> A requirement of consent cannot, of course, protect a state from agreements to which that state is not a party. For example, the member states of the Organization of the Petroleum Exporting Countries (OPEC) have consented to the practices of that organization and benefit from them. Most other states, however, are harmed by the existence of this cartel. Because OPEC operates without seeking the consent of this second group of states, the latter are not protected by the consent requirement.

<sup>31</sup> If domestic governments fail to represent the interests of their population the consent of a state need not signal that a rule is good for the people of the country. This is a serious problem that plagues international law. Absent a willingness to inquire into the functioning of domestic governments, however, the international system has no choice but to accept the authority of domestic governments to represent the interests of their citizens. The study of diplomacy has long been understood to involve the pursuit of some objective ascertainable political values encompassed by the principle of *raison d'état*. This assumption was as questionable in mid-seventeenth century France as it is in today's complex interdependent state system. A

protects states and the international system from changes that will reduce the joint welfare of states.<sup>32</sup>

The relationship between consent and state welfare is the central topic of Part III.A, so a full development of the matter will wait until then. For now, it is enough to point out that providing such a robust protection against welfare-reducing international law comes at a large cost. A requirement of consent also defeats many forms of international law that are welfare enhancing. So while a relaxation of the consensus requirement would risk the adoption of rules that reduce global welfare, it would also open the door to many welfare-increasing rules that are currently frustrated by the requirement of consent<sup>33</sup>. Another way to describe the same reality is to observe that the unanimity requirement creates an extremely conservative regime with a powerful preference for the status quo. There is no reason to think that the current focus on consent strikes the right balance between avoiding the development of harmful rules and allowing the development of beneficial ones.

### III. STATES DO IT BY CONSENSUS

#### A. THE CONSENT PROBLEM

When states consider a solution to a common problem, they have to consider two distinct effects. The first consequence of a successful negotiation, which might be called the efficiency effect, changes the total benefits the states enjoy. So, for example, if states agree to end a violent conflict, they benefit because there are fewer deaths, less destruction of property, and less dislocation of people. We are concerned here with the benefit to the states taken as a group rather than individually. When this measure of benefits increases we say that there has been an increase in efficiency or, more colloquially, an increase in the “size of the pie.”

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key assumption to conventional rational analysis of international affairs is that states are rational actors interested in maximizing the welfare of its citizens. In some circumstances a decision may be the consequence of a bargain conducted by groups with very different interests rather than as some single unitary actor, Michael Nicholson, *RATIONALITY AND THE ANALYSIS OF INTERNATIONAL CONFLICT* 56 (1992). Distortions in rational decision-making based on a unitary actor model are highlighted, for example, by the literature on public choice (see Jack L. Goldsmith and Eric A. Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005)) and two level (domestic/international) games (see Kenneth W. Abbott, *Enriching Rational Choice Institutionalism for the Study of International Law*, 2008 U. ILL. L. REV. 5). “From a normative or prescriptive point of view the argument is more powerful. Decision making should be rational in so far as this is possible. The problems are analyzed with a view to overcoming them, not submitting to them. If groups do not develop procedures which lead to rational decisions, then it is desirable to design them so that they do,” Nicholson, *supra* at 57.

<sup>32</sup> When I speak of the welfare of states here, I am implicitly assuming that the decision-makers within the state are pursuing their own vision of the public interest. If this is not the case, then unanimity’s effect should be viewed as improving the welfare of all decision makers.

<sup>33</sup> Such is the strength of the sovereignty norm in international affairs, according to Stephen Krasner, that the attributes of international legal sovereignty, Westphalian (political) sovereignty and domestic sovereignty are often confounded with consequences for the effectiveness of states to resolve the biggest international problems, see Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1075, 1077-1078 (2004).

Everybody is in favor of more efficient outcomes as long as they get some of the benefits. So, for example, all states are in favor of coordinating postal services in a way that allows shippers in one country to send packages to recipients in other countries. In 1874, the Treaty of Bern established the Universal Postal Union (UPU), the third oldest international organization in the world, to manage international shipment rules.<sup>34</sup> The basic rules of the UPU are simple: each country retains the money collected for international postage, foreign and domestic mail are to receive equal treatment, and postal rates are to be more or less uniform for the mailing of a letter anywhere in the world.<sup>35</sup> The UPU greatly simplified international mail by eliminating the need to affix stamps for every country through which a letter or package would travel – only stamps from the originating country are required. Although the original UPU rules required the recipient country's postal service to carry mail without being compensated, the benefits of allowing its citizens to communicate across borders far outweighed this cost (not to mention that fact that its own citizens also want the ability to ship internationally). In 1969 a system of payments was established to account for cases in which much more mail flowed in one direction than in the other. The UPU is a simple example of increasing the size of the pie in a way that creates net benefits for all states. Not surprisingly, virtually every country is a member – the UPU currently has 191 members.

The second consequence of an agreement can be called the distributional effect. Whatever gains a potential agreement might yield, the distribution of those gains is important. Each state, after all, is primarily interested in what it receives from a potential agreement. It will not consent to an agreement that generates net global gains but yields a net loss for itself. It is the distributional effect that triggers the consent problem.

Consider a simple environmental example. Imagine that one state (the “polluter”) has a great deal of industrial activity and creates pollution that has harmful effects on a neighboring state (the “victim”). Assume, further, that under some relevant evaluation of social gains and losses more stringent pollution controls are appropriate. That is, assume that the countries, taken together, will be better off if the polluter adopts tougher environmental laws (and assume that both states recognize this fact). Despite the potential for net gains, the polluter may prefer the status quo. The polluter bears the full costs of the proposed higher environmental standards, but much of the benefit is enjoyed by the other state. It is quite possible that the cost to the polluter will outweigh the benefits. Indeed, the fact that the polluter has not unilaterally opted for stronger pollution controls shows that it is better off without them. Because consent of the polluter is needed, the proposed agreement is likely to fail, even though it would be efficient.

To illustrate with a real-life example, consider the negotiation of international intellectual property rights prior to the Uruguay Round of trade talks in the mid-1990s. Repeated

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<sup>34</sup> The UPU was known as the General Postal Union until 1878.

<sup>35</sup> The UPU also establishes international standards to facilitate the coordination among postal services.



attempts to reach agreement on stronger intellectual property protections failed because it proved impossible to get the consent of all relevant states. This stalemate was eventually broken when the issue was included within the trade negotiations that led to the establishment of the World Trade Organization (WTO). The resulting agreement in IP is known as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).

The basic question in setting intellectual property policy is the tradeoff between the innovation incentive provided by strong protections of intellectual property and the access benefits provided by weaker protections. Identifying the IP policy that will generate the greatest total benefits (including both pecuniary and non-pecuniary benefits) is a difficult task, to be sure, but if you get it just right you maximize the size of pie.

The negotiation of a potential intellectual property agreement, however, was not about maximizing the size of the pie. Though the debate was at least partially framed by rhetoric about which policy was the “best” in a global sense, it was clear to everybody that the real issues in dispute centered on how alternative policies change the distribution of benefits. Developed states, led by the United States, sought strong protections because they produce a disproportionate amount of the intellectual property that would benefit from more stringent law. Developing countries, on the other hand, argued against increased IP protection because they benefited from relatively easy access to intellectual property provided by the then-existing rules.

It would not have been enough to show that a proposed policy was efficient. To get the agreement of both developed and developing states required a proposal that would make each individual state better off. Even if stronger protections would yield a more efficient outcome, for example, developing countries might well refuse to consent.

This distinction, between the policy that is most efficient in a global sense and one that makes every single state better off (or at least no worse off) is the distinction between what are known as Kaldor-Hicks efficiency and Pareto efficiency. A Pareto Improvement requires that somebody be made better off and nobody be made worse off. Thus, in the pollution example given above, increasing environmental standards will make the polluter worse off and in the intellectual property example, increasing international IP protections might make developing countries worse off. Neither of these represents a Pareto Improvement.

A Kaldor-Hicks improvement is much easier to achieve. It only requires that the gains to the “winners” exceed the losses to the “losers.” In other words, it requires only that the total pie get larger, not that every states receive a larger piece. Any efficient proposal is a Kaldor-Hicks improvement.

Using this terminology, the consent problem can be states as follows: to the extent international law requires that changes to the status quo yield Pareto improvements, it prevents many Kaldor-Hicks improvements. In less technical language, requiring consent for all decision-making frustrates many potential arrangements that would improve the lot of states as a whole. Restricting international cooperation to Pareto improvements (i.e.,

requiring consent) greatly restricts the ability of states to generate collective gains. This is the cost of conditioning a state's legal obligation on consent.

Finding Pareto improving arrangements can be difficult. So difficult, in fact, that one might wonder how states ever manage to reach agreement in some areas. The answer is that the parties that stand to gain from an agreement can try to find ways to compensate those who stand to lose. This is exactly why nesting IP issues within a set of trade negotiations broke the impasse between developed and developing countries and generated the TRIPs Agreement. Once the IP issues were being discussed alongside trade issues, it was possible for developed countries to offer developing countries trade concessions in exchange for stronger IP rights. By linking the two, a Pareto Improving package could be constructed. Developing countries were willing to accept strong IP rights in exchange for the benefits of greater trade access and developed countries were willing to make concessions on trade issues in order to get higher protections for IP. Both groups of countries benefited and agreement was reached.<sup>36</sup>

In the pollution example given above, it was assumed that tougher pollution controls represent a Kaldor-Hicks improvement. This means that the gains to the victim exceed the losses to the polluter. This, in turn, makes it at least theoretically possible for the victim to compensate the polluter and still retain enough to be better off. This reflects the general rule that any Kaldor-Hicks improvement can be made into a Pareto improvement with suitable transfers.

The relationship between Pareto and Kaldor-Hicks Improvements is one of the consequences of the Coase Theorem, which teaches that even a consensus rule will not prevent an efficient outcome if the parties can negotiate. It is simply a matter of constructing appropriate transfers from those that stand to gain to those that stand to lose.

In practice, however, the creation of the necessary transfers can be extremely difficult and, at times, impossible. Put another way, the transaction costs are often simply too high for the parties to reach agreement. There are many features of a problem that can affect the transaction costs associated with bargaining, but one that is worth mentioning at this point is the number of participants. More participants means higher transaction costs. "The transaction costs of bargaining increase geometrically with the number of bargainers."<sup>37</sup> Problems that can be solved among a few players in a region are much more difficult to

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<sup>36</sup> The description in the text is one of two possible interpretations of events leading up to the TRIPs Agreement. The other, less optimistic interpretation is that by bringing the IP issues into the trade negotiations, developed countries were able to combine their preferred IP rules (reflected in the TRIPs Agreement) and membership in the new WTO. This prevented developing countries from joining the WTO while refusing to accept TRIPs. More pointedly, developing countries were forced to choose between capitulation on the IP issues and exclusion from the international trading system. Because the new WTO would replace the old trading system, developing countries were denied the option of retaining the status quo. For this reason there is no reason to think that they were made better off by the arrangement. Whichever version of events is more accurate, both involve developed countries finding a way to get the consent of developing states by linking trade and IP.

<sup>37</sup> Robert Cooter, *THE STRATEGIC CONSTITUTION* 112 (2000).

resolve when the number of affected states is larger. The trading system provides a good example. The original General Agreement on Tariffs and Trade (GATT) was negotiated after the Second World War by 23 states. Its successor, the WTO, was born in 1995 with 123 members. Today the WTO has 153 members. It is hardly surprising that multilateral trade negotiations have become more cumbersome and difficult over time.<sup>38</sup> The most recent round of trade negotiations, the Doha Round, was launched in 2001 and continues today, mostly because there is no sign of agreement. With so many members it is much more difficult to reach consensus on new trading rules. One or more members perceive virtually any proposed change as harmful, and constructing compensatory transfers with so many members is almost impossible. Add to this the inevitable strategic posturing by all parties and reaching agreement becomes an enormous challenge.

Here we see one reason why the consent problem is more serious today than it was in the past. The steady increase in interdependence among states has created a much larger set of challenges. The economic policies of major countries have implications for almost every person on the planet. Drug interdiction efforts in central Asia affect law enforcement in Europe and the United States. Greenhouse gas emissions in China contribute to rising temperatures everywhere in the world. A military rivalry between India and Pakistan concerns the entire planet because both belligerents have nuclear weapons. More problems implicating more people make the consent problem more complex and more difficult to resolve. Strategies that may have worked fifty or a hundred years ago will no longer suffice to address pressing problems.

The European Union has encountered and responded to this same phenomenon. As the EU has grown in size, transaction costs have increased and consensus has become more difficult to achieve. The EU has adopted the obvious solution of deemphasizing consensus in favor of non-consensual approaches. In 2009, for example, the Treaty of Lisbon both expanded the ability of the European Council of Ministers to make decisions by “qualified majority voting” (i.e., super-majority voting) and redefined the meaning of qualified majority voting so as to make it easier to achieve.<sup>39</sup> Proponents of this change argued,

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<sup>38</sup> I have argued elsewhere that better global cooperation will require limits on the consensus rule in global trade negotiations, see Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT’L L.J. 303 (2004) (expressing the need for institutional reforms to enhance international cooperation and reduce bias in favor of trade) and Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT’L L. 1 (2010) (arguing that without institutional reforms the WTO’s recent expansion may well have met its limits). For various issue areas, see Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT’L L. 403 (2001) (arguing the global trade agenda will not progress with a focus on trade issues alone); John H. Jackson, *The Perils Of Globalization and the World Trading System*, 24 FORDHAM INT’L L.J. 371 (2000) (on the need for greater institutional coordination of various competing objectives); Daniel C. Esty, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994) (on the challenges of harmonizing environmental and trade objectives); Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV 885 (2003) (on integrating labor standards); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT’L L.J. 173 (2005) (on inconsistencies within the global trading structure of overlapping national policies); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT’L L. 733 (1999) (the consequences for intellectual and cultural property).

<sup>39</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

successfully, that EU expansion adding an additional ten states made the prior unanimity standard too demanding.<sup>40</sup>

## B. INTERNATIONAL AGREEMENTS: GETTING TO YES

### 1. How Agreements are Reached

For much of the history of international law, the consent problem was manageable because interactions across states lines were limited in number and modest in effect. International problems have always existed, of course, but as long as they represented only a small part of a nation's concerns, life could go on even when no satisfactory solutions were available. When international problems grew too large, accommodations could be made in an ad hoc fashion, usually consistent with the requirement of consent.<sup>41</sup>

In areas where interactions among states were either frequent or of particular importance and where consent was difficult to achieve, other strategies were deployed. In some cases, of course, states used force in pursuit of their goals.<sup>42</sup> Where there was enough cultural connection, appeals were made to natural or religious law, each of which is a form of non-consensual international law. When a community of nations convinces itself that some course of action is required (or prohibited) by God, cooperation is easier. If these divine commands happen to yield behaviors that maximize the size of the global pie, Kaldor-Hicks efficiency is achieved. This approach has its limits, of course. To mention just two weaknesses, norms derived from religious belief cannot be counted on to increase overall welfare and they are as likely to provoke conflict as cooperation as different states arrive at different interpretations of God's commands.

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<sup>40</sup> Stephen C. Sieberson, *Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon*, 50 VA. J. INT'L L. 919, 922 (2010).

<sup>41</sup> The principle of *pacta sunt servanda* emerged in the early modern European state system of the fifteenth, sixteenth and seventeenth centuries through writing of such early publicists Vitoria, Suárez, Gentili, Grotius and Pufendorf based on an analogy with contracts in private law. "[I]n this period it was still widely held that treaties were binding only upon princes that entered into them, and not their successors; that treaties, like private contracts, were not binding if concluded under duress; and that they remained binding irrespective of any *clausula rebus sic stantibus*, or proviso that conditions remained the same. The far-sighted Gentili sought to dispute these views, and drawing upon him Grotius later developed a general theory of treaties as a distinct species of contract, but even these thinkers remained under the sway of private-contract analogy to some degree." Hedley Bull, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 27-29 (3rd. ed., 2002). For a description of the anarchic international system by an international legal scholar, see A.A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *INTERNATIONAL Regimes* (Stephen D. Krasner, ed.)(1990). It was out of this system of treaty-making that the modern system of international diplomacy emerged in the mid fifteenth century, see M.S. Anderson, *THE RISE OF MODERN DIPLOMACY, 1450-1919*, 150-154 (2002).

<sup>42</sup> A classic account of war and diplomacy in the early modern era of Papal decline is found in Barbara W. Tuchman, "The Renaissance Popes Provoke the Protestant Secession: 1470-1530," *THE MARCH OF FOLLY: FROM TROY TO VIETNAM*, ch. 3 (1984). It was against this backdrop Niccolò Machiavelli authored *The Prince*, the classic realist treatise on political philosophy studied by international and domestic political scientists alike.

Even when international conflicts were rare, however, they sometimes required more explicit cooperation among states. For centuries the international agreement has offered one way to frame that cooperation. By way of illustration, consider the establishment of territorial boundaries. Even when neighboring states have no other form of interaction they need to establish borders. This problem has existed for as long as there have been political units with defined territories. Indeed, if we go further back in history and prehistory, even where boundaries were not clear, humans (and pre-humans for that matter) have used force and the threat of force to protect territory they viewed as their own. For international lawyers, the obvious solution is the creation of an international agreement. By reaching agreement on boundaries (or other problems) it is hoped that states can co-exist peacefully.

The 1648 Peace of Westphalia consisted of a series of treaties that brought an end to both the Thirty Years' War in the Holy Roman Empire, during which Protestants and Catholics fought a religious conflict and European powers battled for dominance, and the Eighty Years' War between Spain and the Dutch Republic. Like any complex peace agreement, the Peace of Westphalia was the result of negotiations and involved a good deal of give and take. For example, many territories were recognized as independent from the Holy Roman Empire, including the Netherlands and Switzerland. France gained control of some, but not all disputed land on its Eastern frontier, Sweden also gained some territory as well as a payment of cash, and the city of Bremen was declared to be independent. In short, the arrangement was detailed and highly complex. Reviewing the terms of the Peace, it is easy to see the painstaking effort required to reach a consensus. Like any negotiation, this one featured strategic posturing, bluffs, threats, and haggling. The one thing that we can say with confidence, however, is that in the end each of the parties had to be convinced that they were better off under the Peace than with continued war. The complexity of the arrangement reflects in part the need to achieve just such a Pareto Improvement. The various terms represent what up to now I have referred to as "transfers" among the parties and they were designed to reach consensus.

The Peace of Westphalia can be seen as a good example of a negotiated agreement (actually a series of agreements) and a set of transfers among bitter enemies that succeeded in making all parties better off. It also illustrates, however, how difficult it is to overcome transaction costs in the international arena. Though peace was ultimately achieved, it came only after decades of terrible bloodshed.<sup>43</sup>

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<sup>43</sup> Before his death at the Battle of Lützen in 1632, Swedish Emperor Gustavus Adolphus "noted 'all the wars of Europe are now blended into one.' More than 200 states of varying sizes had fought in the war. The devastation brought by thirty years of war is simply incalculable. Catholic Mainz, occupied by the Swedes, lost 25 percent of its buildings and 40 percent of its population. In four years, the predominantly Protestant duchy of Württemberg lost three-quarters of its population while occupied by imperial troops. Almost 90 percent of the farms in Mecklenberg were abandoned during the course of the war. Many villages in Central Europe were now uninhabited. Although devastation varied from region to region during the Thirty Years' War, German cities lost a third of their population, and the rural population declined by 40 percent. Central Europe, like the rest of the continent, may have already been suffering from economic and social crisis that had begun in the 1590s. But the wars contributed to the huge decline of the population of the states of the Holy Roman Empire from about 20 million to 16 million people. A year before the Treaty of Westphalia, a Swabian wrote in the family Bible: "They say the terrible war is now over. But there is still no sign of peace."

Despite the enormous cost of war, fighting continued year after year, decade after decade. Peace would have been better for the parties as a group, but it was only after many years that the parties arrived at an arrangement able to garner the consent of everyone involved. The years of violence were not at all about increasing the size of the pie. They were entirely devoted to the efforts of each party to capture more for itself, at the expense of others. The need for consent from all parties combined with the difficulty in overcoming transaction costs prevented Europe from finding peace for almost a hundred years.

This use of transfers to get the consent of relevant parties is hardly unique to international law. Domestic contract law systems exist in significant part to address the same concerns. Like the use of contracts in domestic law, the use of agreements in international law provides a critical tool for managing cooperation. In the domestic context, however, nobody would suggest that every important problem can be solved through contract. It is universally understood that some forms of require a government with the authority to make decisions on behalf of citizens. There is no dispute, for example, that government should be charged with arranging for national defense, public order (e.g., police and fire services), public services (e.g., roads), and more.

Notice how this contrasts with the reality of the international system where there is nothing that can credibly be described as a government.<sup>44</sup> There is, in particular, no legislative body and no authority capable of coercing states to take actions that serve some notion of the common good.<sup>45</sup> Collective decision-making among states remains a consent-based process.

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Everywhere there is envy, hatred and greed; that's what this war has taught us . . . We live like animals, eating bark and grass. No one could have imagined that anything like this would happen to us. Many people say there is no God . . . but we still believe God has abandoned us." John Merriman, *THE MODERN HISTORY OF EUROPE: FROM RENAISSANCE TO THE PRESENT* 160 (3rd ed., 2010).

<sup>44</sup> For such legal positivists as Hans Kelsen the use of force under international law was part of the natural order of states existing as part of a system of primitive law "in which sanctions are authorized by the general acceptance of the principle of 'blood revenge,' the essential element of coercion is present by virtue of the willingness and ability of individual members of the society to enforce their rights by resort to self-help." Bull, *supra* note 42 at 125-126. The inherent right of self-defence under the UN Charter is one of the few recognizable remnants of substantive law from the anarchic state system of early modern Europe which survives.

<sup>45</sup> I hasten to add that there are plenty of differences between the need of the citizens of a state and the needs of states in the international system. To begin with, there are not nearly as many states in the world as there are individuals in even a small town. Small numbers make cooperation easier so one would expect that having only a couple hundred states would make it easier to solve common problems. The challenges that concern us are also different. Individual states need a military force to protect themselves from external threats but the international community as a whole does not. Infrastructure projects such as roads and public services such as police can be ably carried out at the national level and there is no compelling need for international versions of those same services. Some may respond that there are important international analogs such as the need for an international criminal law. I do not wish to resist such ideas, but it seems clear that the standard work of police forces, fire departments, and public works departments would gain little if anything by being created at an international level.

Some international problems can be solved relatively easily, even when consent is required. The simplest of these are those in which states have common interests – meaning that each state, acting individually, would act as needed to solve the problem. These situations are so simple to solve that they might not be termed “problems” at all. For example, Switzerland and Bolivia have no interest in using force against one another. They share an interest in continued peace.

Another class of problems, usually referred to as coordination problems, is also easy to address without any compromise of the consent principle. These are situations in which states wish to work together and simply need to agree on how to do so. For example, the Warsaw Convention harmonizes standards ranging from safety standards to the tagging of luggage.<sup>46</sup>

Things become more difficult when the interests of the parties are not so closely aligned. The paradigmatic version of conflicting interests, of course, is the prisoner’s dilemma. In these situations a solution requires that states behave differently than they would in the absence of cooperation. Attempts to solve such problems can fail for any number of reasons, including the failure to obtain the consent of one or more states. This was the case with the 1997 Mine Ban Treaty, which bans all anti-personnel landmines.<sup>47</sup> Though many states joined the treaty, some, including the United States refused because they did not feel the terms served their interests.<sup>48</sup>

A failure to reach agreement in such situations can be described as an inability to overcome transaction costs. If, for example, transfers were available to address situations like the Mine Ban Treaty, those that stood to benefit most from the agreement (or those that are most enthusiastic about the agreement) could transfer value in some form to those that

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<sup>46</sup> The “Warsaw System” for international air carrier liability consists of the following instruments: Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 40 (the Warsaw Convention), Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, opened for signature Sept. 28, 1955, art. XI, 478 U.N.T.S. 371, 381 (the Hague Protocol), Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31 (1961) (the Guadalajara Convention) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, amended by Protocol Done at the Hague on 28 September 1955, Sept. 25, 1975, ICAO Doc. 9148, reprinted in Lawrence B. Goldhirsch, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 401 (2000) (the Montreal Protocol No. 4), cited in Paul Stephen Dempsey, *International Air Cargo Liability and the Tower of Babel*, 36 GEO. WASH. INT’L L. REV. 239, 240-241 at notes 2-8 (2004).

<sup>47</sup> U.N. Convention on the Prohibition of the Use, Stockpiling, Production and transfer of Anti-Personnel Mines and on their Destruction, *open for signature* Sept. 18, 1997 (entry into force Mar. 1, 1999) (<http://www.unhcr.org/refworld/docid/3ae6b3ad0.html>).

<sup>48</sup> See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 655-663 (1998).

stood to lose. The Mine Ban Treaty was not a complete failure (in fact, it is better described as a remarkable success) in that it was signed by many countries – there are currently 156 parties to the treaty. Nevertheless, the failure to get others to join can be described as a failure to identify and offer sufficient transfers to persuade the non-participants that it is in their interest.

Whenever a value-increasing agreement fails to achieve consensus, or a potential agreement is never even negotiated, we have another example of transaction costs interfering with the effort to increase the size of the global pie. Examples of this sort include, among many others, the stalled and almost certainly failed Doha Round of trade negotiations and the failed attempts to get Iran (and North Korea) to abandon their nuclear aspirations. Countless other opportunities for cooperation have no doubt been missed without even getting as far the negotiating table.

This problem is ubiquitous in the international arena. Most instances of the use of force, for example, could be avoided if the barriers to finding a compromise were sufficiently low. Military conflict almost always generates net costs, even in those cases where it ultimately benefits the winner. Whatever the outcome of a war (or, more accurately, the expected outcome), the parties could both be made better off by avoiding the conflict and arranging transfers to make both sides better off.<sup>49</sup>

If this seems abstract and far-fetched when applied to warfare, it is only because I am using unfamiliar language to describe what we observe with regularity. Even in the high-stakes realm of war and peace and even between bitter enemies, efforts are made to find arrangements that generate mutual gains. During the Cuban Missile Crisis, for example, the United States and the Soviet Union engaged in a dangerous game of brinkmanship, but ultimately avoided war by agreeing that the USSR would remove the missiles and medium-range bombers from Cuba in exchange for an end to the American blockade of Cuba and assurances that The U.S. would not invade that country. To make the bargain work, the Soviet Union went so far as to put the missiles on the decks of transport ships so U.S. reconnaissance planes could count them.<sup>50</sup> Every war that ends in a conditional surrender

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<sup>49</sup> It is possible to imagine exceptions where even zero transaction costs would not be enough. If, for example, the minimum that one side demands is more than the other side can give, there is no room for compromise and it is conceivable that both will prefer violent conflict to either compromise or a backing down. This might, for example, have been true in the case of Nazi Germany on the eve of the Second World War. That regime was so intent on conquest within Europe that nothing short of capitulation would likely have satisfied Hitler. Situations of this type, however, come up only when a regime prefers a high-risk, negative sum strategy over a low-risk zero-sum alternative. Alternatively, it may be that some regimes are sufficiently irrational and aggressive that no rational strategy of transfers can be effective. Whether such states can be dealt with effectively within the framework of international law is an open question. See John Yoo, *Using Force*, 71 U. CHI. LAW R. 729 (2004).

<sup>50</sup> Robert F. Kennedy, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1971), 86-88. “President Kennedy understood that the Soviet Union did not want war, and they understood that we wished to avoid armed conflicts. Thus, if hostilities were to come, it would be either because our national interests collided – which, because of their limited interests and our purposely limited objectives, seemed unlikely – or because of our failure or their failure to understand the other’s objectives,” *id.* at 103-104.



before the losing side's military capabilities are completely destroyed offers another example of parties seeking a way to avoid further bloodshed. The Iraqi acceptance of Security Council requirements to end the 1991 Gulf War is just one of many available examples.<sup>51</sup>

The point about transfers and transaction costs is really twofold. First, there are many circumstances in which parties with fundamentally opposing interests can reach agreement through the construction of transfers from the party that "wins" from and agreement to the party that "loses." This happens when transaction costs are small enough to be overcome by the gains from cooperation. Second, it is often the case that states are simply not able to overcome these transaction costs and so no agreement is reached. As any observer of the international system knows, there are endless ways for negotiations to fail in the complex world of state-to-state interaction.<sup>52</sup> This all means that it makes sense for states to invest in the effort to construct appropriate transfers and to try to reach consensus. It also means that we should harbor no illusion that this effort, by itself, is enough to consistently overcome the consent problem's status quo bias.

## **2. International Law & the Global Commons: Fisheries**

The prior section focuses situations in which states have divergent interests and seek to resolve the problem by constructing appropriate transfers. Even if it is possible to identify an outcome that increases the size of the pie, it may prove impossible to reach agreement on terms that will persuade everyone to participate.

In this section, I consider a different kind of problem that often proves insoluble under a consent-based approach: public goods problems. The familiar definition of a public good is a good which is both non-rivalrous and non-excludable.<sup>53</sup> The air we breathe, for example, can be used by one person without preventing another from doing the same and it is (within reason) not possible to exclude others from using it.

The nature of public goods makes them vulnerable to underinvestment or overuse because effort to create or protect them benefits all users while the costs are borne only by those

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<sup>51</sup> Iraq accepted the U.S. ceasefire offer on February 28, 1991, which was formalized on March 3, 1991 with an agreement by Iraq to renounce its annexation and accept liability for the damage. The UN Security Council adopted Resolution 687 on April 3, 1991 which reaffirmed Iraq's financial responsibilities and mandated the destruction of Iraq's nuclear biological and chemical weapons, Erik Goldstein, "Second Gulf War (Kuwait Crisis) 1990-1," WARS AND PEACE TREATIES 135, 138 (1992).

<sup>52</sup> Andrew T. Guzman & Beth Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO*, 31 J. LEG. STUD. 205 (2002).

<sup>53</sup> See James C. Murdoch and Todd Sandler, *The voluntary provision of a pure public good: The case of reduced CFC emissions and the Montreal Protocol* 63(3) J. OF PUB. ECON. 331, 332 (1997) (describing the efforts of individual nations to thin atmospheric CFC emissions leading to global warming as being in the nature of a pure public good. Thinning the ozone layer has consequences worldwide and is therefore non-excludable. Harm suffered by one nation does not reduce harm to other nations and is therefore non-rival).

that participate in the effort. This creates an incentive for each state to free ride on the efforts of other states. Problems of this sort come up with some regularity in dealings among states.

Examples make this presentation much more concrete. The clearest examples are environmental problems and I will use management of international fisheries as an illustration. It is worth noting that there is no shortage of other examples. Management, monitoring, and reaction to contagious disease could just as easily be considered. Countries bear the full cost of their efforts to prevent, treat, and contain disease, but the benefit of such efforts (prevention of global outbreaks of disease) are enjoyed by the entire world.<sup>54</sup> The regulation of banking and finance is similar in the sense that domestic regulation must be paid for domestically but to the extent domestic regulation helps to prevent international financial crises, the benefits are felt abroad. One can describe some aspect of collective security in this way as well. Even human rights might be considered a public goods problem if suffering in one country is judged to impose costs on others.

### 3. Free Riding and Fisheries

Modern fishing technology is such that it would be both inefficient and catastrophic to let every state take as many fish as it wanted. Not only does each state get the full benefit from its own fishing while imposing much of the associated costs (of diminished fish stocks) on others, a laissez-faire regime pits states against one another in a race to maximize their own benefits before the fish are gone. The familiar result is that states have little incentive to unilaterally pursue sustainability on the high seas.<sup>55</sup>

An international agreement could conceivably lead to sustainable policies, but the associated transaction costs would be substantial. To cite just a few of the costs, any sensible policy would have to allocate fishing quotas to states. Those with large fishing industries would seek a large quota while those with smaller fishing industries might argue for a quota that gives each state the same rights. Any mechanism for adjusting fishing quotas over time would pit established fishing nations against emerging ones. The total permissible take would similarly have to be agreed upon.

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<sup>54</sup> This offers an explanation for why some global containment efforts are taken through the United Nations and the World Health Organization (WHO). These entities are able, at least in principle to consider the full global benefits of their efforts.

<sup>55</sup> See Evelyne Meltzer, *Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. & INT'L L. 255 The case of the North Pacific Salmon fishery is illustrative. Because the salmon is an anadromous stock, meaning that it returns inland to spawn, open ocean fishing of immature salmon considerable reduces the yield and sustainability of the fishery as well as interfering with domestic efforts to manage the fishery. After protracted deadlock, the 1992 North Pacific Salmon Treaty, *open for signature* February 11, 1992, T.I.A.S. No. 11465 ([www.npafc.org](http://www.npafc.org)), established a complete ban on high seas fishing extending across the North Pacific Ocean and adjacent high seas north of 33 degrees latitude. Despite a firm agreement being achieved with great difficulty, enforcement issues remain regarding the use of re-flagging and driftnets (see Kelley R. Bryan, *Swimming Upstream: Trying to Enforce the 1992 North Pacific Salmon Treaty*, 28 CORNELL INT'L L.J. 241, 242 (1995)).

Even if all of these problems are overcome, the best outcome for an individual state is to remain unconstrained while everyone else limits their fishing and pursues a sustainable total catch. In other words, there is an incentive to free ride – to withhold consent from the agreement while others commit themselves.<sup>56</sup> Any state that refuses to join the agreement stands to benefit as every other state reduces its catch. When many states pursue this strategy it becomes difficult to reach an agreement at all. The entire enterprise can collapse.

How can this problem be overcome? One solution is to give a single authority the power to manage a fish population as well as all the costs and the benefits associated with the resource. When this happens – for example, when an entire fish population is contained within a single country's jurisdiction the problem is not present.<sup>57</sup>

When fish refuse to stay within a single country's jurisdiction, other strategies are needed. If the above challenges make an international agreement impossible, states may consider delegating the authority to establish and distribute fishing quotas to an international organization. If all relevant states are subject to the power of this organization, the free rider problem is eliminated.<sup>58</sup>

This strategy addresses some of the concerns associated with an agreement, but the free rider problem remains. Why would a state agree to live by the decisions of this organization when it can instead remain outside the system and fish all it wants? It is better off letting other states join the organization without doing so itself. The free rider problem is simply pushed back a stage, from creation of an agreement on substantive rules to creation of an organization charged with making rules.

The solution that has been pursued most successfully has been to permanently assign the fishing rights over specific fish-stocks to individual states. Giving states what amounts to ownership over the fish causes them to weigh both the costs and benefits of their fishing policies. Like the other options (an agreement or an international organization) this strategy assigns rights to a single entity (a state) in such a way as to cause the internalization of relevant costs and benefits. Unlike the other approaches, this solution overcomes the consent problem because it leverages unilateral actions by self-interested states.

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<sup>56</sup> It also provides states that are subject to a conservation system with an incentive to violate their commitments. See Andrew T. Guzman (2008), *supra* note 6 at 64-68 (describing the compliance problem associated with public goods in the context of climate change and the imposition of sanctions on violators).

<sup>57</sup> The challenge of resource management includes many other problems that might lead to over-fishing, including political failures, corruption, low discount rates, and more. My only point here is that the public goods problem is not always present.

<sup>58</sup> Though it would be replaced a principal-agent problem to the extent the international organization did not pursue to goals of the states.

In 1958, participants in the first United Nations Conference on the Law of the Sea signed the Convention on the High Seas, which provided that all states are free to fish on the high seas subject only to the requirement that this right “be exercised . . . with reasonable regard to the interests of other States.”<sup>59</sup> As a practical matter, this language provided no meaningful protection for international fish stocks.

States at the Conference were well aware of the public good problem they faced, but they were unable to reach agreement. In the Convention on Fishing and Conservation of Living Resources of the High Seas, also adopted at the Conference, states recognized that coastal states had a “special interest” in living resources adjacent to its territorial sea, but it failed to specify any special rights to protect those interests.<sup>60</sup> All that could be agreed upon was a requirement that states whose nationals engaged in fishing adjacent to the territorial seas of a State negotiate with the coastal state with an eye toward conservation.<sup>61</sup> In other words, the Conference called on individual states to enter into international agreements with one another. Predictably, this did little to promote sustainability.

Keep in mind that there was significant agreement among the parties to the Convention that fish and other living resources were in jeopardy. The preamble to the Convention states that modern exploitation “has exposed some of these resources to the danger of being over-exploited.”<sup>62</sup> Everybody agreed that conservation efforts were needed and would increase to total size of the pie. There was no fundamental disagreement about the challenge, but the consent problem prevented a solution. States that benefited from free access to fishing on the high seas preferred to free ride.

As it happened, a more unilateral and decentralized solution emerged. Shortly after the UN Conference, Iceland decided to unilaterally claim a 12-mile limit, within which it asserted exclusive rights. It was motivated by concerns that the British fishing fleet was exhausting “Iceland’s” fish stocks.<sup>63</sup> A confrontation ensued in which Britain tried to ignore Iceland’s claims, and Iceland responded by cutting British fishing lines, boarding ships, and taking

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<sup>59</sup> Article 2, U.N. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 6465 U.N.T.S. 450 (entered into force Sept. 20, 1962) (<http://treaties.un.org/doc/Publication/UNTS/Volume%20450/volume-450-I-6465-English.pdf>)(both the Convention on the High Seas and the Convention on Fishing and Conservation of Living Resources on the High Seas were superseded by UNCLOS III (1982), *infra* at note 65).

<sup>60</sup> Art. 6(1), U.N. Convention on Fishing and Conservation of Living Resources of the High Seas. 8164 U.N.T.S. 285, *opened for signature* Apr. 29, 1958 (entered into force Mar. 20, 1966)(<http://treaties.un.org/doc/Publication/UNTS/Volume%20559/volume-559-I-8164-English.pdf>).

<sup>61</sup> Art. 6(3), U.N. Convention on Fishing and Conservation of Living Resources of the High Seas.

<sup>62</sup> Preamble, U.N. Convention on Fishing and Conservation of Living Resources of the High Seas.

<sup>63</sup> Ownership or rights to fish stocks is created by law, so in the absence of illegality by Britain one cannot say that Iceland was entitled to the fish. From Iceland’s perspective, however, the stocks of fish within its waters were being affected by Britain’s fishing, even though that fishing was taking place outside Iceland’s waters. See Mark Kurlansky, *COD: THE BIOGRAPHY OF A FISH THAT CHANGED THE WORLD* (1997), 161-169. The dispute was resolved in February 1976 when the European Community established a European 200 mile-zone, in the midst of British and Icelandic negotiations, *id.* at 169.

fishermen into custody. In 1961, the two countries entered an agreement under which Britain recognized the 12-mile limit. In 1972 Iceland once again unilaterally extended its jurisdiction over fisheries – this time to 50 miles – triggering another round of conflict between Iceland and Britain and a 1974 ICJ ruling in Britain’s favor. Iceland was not deterred, however, and in 1975 it extended its fisheries jurisdiction to 200 miles. A fresh round of protests and conflicts took place, but eventually an agreement was reached in which Iceland’s 200-mile limit was accepted.<sup>64</sup>

This extension of jurisdiction was happening around the same time in other countries as well. By 1982 fifty-five states claimed exclusive economic zones of 200 miles and an additional 22 claimed a 200-mile fishing zone. Because these extensions of jurisdiction were unilateral, States opposed to an extension of coastal jurisdiction, including some of the world’s most powerful states (Japan, the United States, the Soviet Union) could not prevent them.

By the time of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the *de facto* fisheries jurisdiction or exclusive economic zone (EEZ) was 200 miles for many countries. Countries that objected to this extension of territorial rights could no longer get their way simply by withholding their consent. This was a critical change in the negotiating dynamic. The result was a compromise in which coastal states enjoyed exclusive control over economic activity within 200 miles (the “exclusive economic zone” or EEZ) of the coast while the non-economic rights in the EEZ remained with the international community (e.g., right of navigation).<sup>65</sup>

The EEZ gives states a form of ownership over resources within 200 miles of its coast. This had the practical effect of bringing many fish stocks within the exclusive control of a single country. The resource is effectively privatized, giving the “owner” an incentive to concern itself with conservation.

The solution is not a perfect one, however. There remain fish stocks that straddle national borders or that extend beyond the EEZ into the high seas. One example is off the East Coast of Canada. In 1994, an organization called the North Atlantic Fisheries Ocean (NAFO) sought to regulate the fishing of turbot. Spain and Portugal refused to accept the NAFO quota and Canada’s ability to exclude Spanish and Portuguese fishing vessels from the Canadian EEZ was of little use because the fish stock crossed into international waters. Canada responded with a policy of boarding and seizing Spanish and Portuguese ships in

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<sup>64</sup> Volume V, NEW DIRECTIONS IN THE LAW OF THE SEA at 29 (R. Churchill et al, eds,)(1977).

<sup>65</sup> Part V, United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994). The eventual inclusion 200 mile nautical limit was the result of efforts by the Group of 77 developing nations, particularly African and Latin American states, to push for recognition of this principle as part of the development agenda in the Convention on the Law of the Sea negotiations, see Robert B. Krueger & Myron H. Nordquist, *The Evolution of the 200-Mile Exclusive Economic Zone; State Practice in the Pacific Basin*, 19 VA. J. INT’L L. 321, 325-328 (1979).

international waters.<sup>66</sup> In March of 1995, Canadian vessels seized the Spanish flag ship the *Estai* fishing 245 nautical miles from the coast of Newfoundland. It was only after a tense standoff that an agreement for cooperative regulation of these fish stocks was achieved.<sup>67</sup>

Despite its flaws, the solution that emerged in the fisheries context is an improvement over the prior non-cooperative regime. Unilateral actions helped address the problem because states were able to exclude others from access to what had previously been a public good. They turned a public good into a private one. A moment's reflection on the world's most challenging problems suggests that generalizing this strategy would not be easy. Most public goods, including a hospitable climate, global health, collective security, and so on, cannot easily be converted into private goods.

There is a lesson that can be taken from the fisheries example, however. Iceland and other states unilaterally denied access to fish within 200 miles of their coasts. This was a unilateral change to the status quo that ultimately drove dissenting states to the negotiating table. The 1982 UNCLOS was the product of consent, but that consent was only possible because the *status quo ante* was no longer an option. In other words, denying states the option of retaining the status quo will sometimes encourage agreement.

Just this happened with the TRIPs Agreement. In Part III, above, I describe the agreement as an example of a transfer from supporters of a proposal to objectors. This is certainly true, but it leaves out another important aspect of the negotiation. The TRIPs Agreement was part of a larger set of WTO Agreements entered into at the end of the Uruguay Round trade talks in the mid-1990s. The proposed agreement was considered a "single undertaking," meaning that states had to accept the entire package (including TRIPs) or nothing at all. The old GATT system would be abandoned, so a country that refused to join the WTO would be outside the trading system altogether.<sup>68</sup> The practical effect was to prevent states that refused to join the new WTO from retaining the benefits they enjoyed under the former GATT regime. Developing countries hostile to the new intellectual property rules had to choose between the WTO system with TRIPs and exclusion from the trading system. They could not go back to the old GATT system – the status quo was no longer available.

As in the fisheries context, consent was achieved by denying access to the status quo. This strategy can, for good reason, feel like coercion. Much like a thief offering a choice of "your

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<sup>66</sup> M. Kiever, *The Turbot War: Gunboat Diplomacy or Refinement of Law of the Sea?*, 37 C. DE D. 543, 555-556 (1996) (<http://www.fd.ulaval.ca/cahiers/docprotege/37-2-p.pdf>).

<sup>67</sup> Jamison E. Colburn, *Turbot Wars: Straddling Stocks, Regime Theory, and A New U.N. Agreement*, 6 J. OF TRANSNATIONAL L. & POL'Y 323 (1998).

<sup>68</sup> The GATT rules themselves were incorporated into the WTO, but after the birth of the WTO there was no way to be party to the GATT but not the WTO.

money or your life,” this strategy of generating consent works because it manipulates the available options, arguably forcing a state to consent.<sup>69</sup>

Even if we put aside normative objections, a strategy of cutting off access to the status quo has at most limited usefulness in generating international agreement. It can only work when states (or other groups) seeking to change the rules have the power to manipulate the available options. The particular features of fisheries allowed manipulation through a series of unilateral actions. In the case of the TRIPs Agreement, it happened that the most powerful players in the trading system supported change.

Consider, by way of contrast, the problem of nuclear proliferation. The Nuclear Non-Proliferation Treaty (NPT) came into force in 1970 and sought to prevent the spread of nuclear weapons. The existence of the treaty is itself an impressive accomplishment. Generating near universal consent required persuading non-nuclear states that promising not to receive, manufacture, or acquire nuclear weapons (among other commitments) served their interests. Nuclear weapons states, for their part, had to conclude that promising not to transfer or assist in the development of nuclear weapons was in their interest. This is a public goods problem because states may view the acquisition of nuclear weapons as a security benefit but will ignore the threat this poses to international security. That is, they internalize the benefits but not the costs.<sup>70</sup>

The consent of the nuclear weapons states is relatively easy to understand. The NPT identifies five such states. With such a small number, the participation of each is important to the overall treaty, meaning that it is difficult for any of them to free ride and it is easier to imagine negotiating transfers of some kind to persuade reluctant states to join. Even so France and China did not sign the treaty until 1992, so there was some holding out.<sup>71</sup>

Perhaps more surprising was the success achieved in getting the “non-nuclear states” to join the agreement. The treaty boasts 189 members, so it has achieved near universal

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<sup>69</sup> Any discussion of consent in international law must accept that there is no simple way to determine when consent is given. When a thief with a gun says “your money or your life,” the recipient of the threat may hand over her money. This would not mean any reasonable definition of consent. On the other hand, when a store offers goods at a fixed price, a customer’s decision to buy is normally thought to be consensual, even if the goods being sold are necessary to sustain life. Where one draws the line between a consensual transaction and a coercive act is hard to know. The same is true at the international level. Article 52 of the Vienna Convention on the Law of Treaties states that a treaty is void if it is the product of coercion, but it defines coercion as the threat of use of force in violation of international law. Many forms of pressure and persuasion that might be considered coercive remain permissible. As one would expect, states in negotiation are constantly engaged in hard bargaining and the exchange of threats. These are vexing problems for any discussion of consent. For the purposes of this Article, however, it is not necessary to provide a single, clear definition of consent. For the more part I am interested in instances where states are unwilling to give consent rather than instances where their consent was arguably coerced.

<sup>70</sup> The relevant technology is also both non-rivalrous and non-excludable, at least if the relevant technological information is not kept secret.

<sup>71</sup> UNITED NATIONS TREATY SERIES, “Status of the Treaties,” Treaty on the Non-Proliferation of Nuclear Weapons (NPT), *opened for signature* June 12, 1968 (entered into force Mar. 5, 1970)( <http://treaties.un.org/>).

consent.<sup>72</sup> It turns out, however, that “near universal” consensus and “universal consensus” are two very different things in this area. Here is the list of the non-members: India, Pakistan, Israel, and North Korea.<sup>73</sup> Each of these states has acquired nuclear weapons (though there is some lingering doubt with respect to North Korea).<sup>74</sup> South Africa initially refused to join the treaty and acquired nuclear weapons. It was only in the early 1990s, after the fall of apartheid, that it signed the treaty and dismantled its nuclear weapons program. Other states that held out for many years include Cuba, Brazil, Chile, and Argentina. The set of states withholding their consent has obviously not been random. Many have a clear interest in nuclear weapons and others are (or were) governed by regimes with reasons to preserve the option of seeking nuclear weapons. I do not wish to focus on questions of compliance in this paper,<sup>75</sup> but it is also worth mentioning that Iran, though a member of the NPT, is known to be in violation and that Libya was in violation for a time but returned to compliance in the 2003.<sup>76</sup>

The NPTs failure to get the consent of states with a strong interest in acquiring nuclear weapons demonstrates how difficult it is to reach agreement. If these non-participants had been persuaded to join the treaty (and comply with it) when it initially came into force in 1970, the world would be a safer place. For the holdout countries, however, the security gains from possession of nuclear weapons outweighed the benefits of joining the treaty.

It is important to add that the NPTs failure to attract every state does not change the fact that the treaty has been very successful and may have greatly reduced the number of states with nuclear weapons. I discuss it here to point out that sometimes it is not possible to generate agreement through any of the techniques we have discussed, including the elimination of the status quo as an option. Though there are efforts to deny non-signatories certain benefits, these mechanisms have been too weak to generate consent from the above-mentioned non-participants.

Finally, I want to mention one more potential solution to the problem of reaching agreement when addressing public goods problems or, indeed, any prisoner’s dilemma. It is often the case that all relevant parties would prefer universal agreement (and compliance) to the status quo. Thus, if free riding is not an option, it will sometimes be

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<sup>72</sup> *Id.*

<sup>73</sup> North Korea was a member of the treaty until its withdrawal in 2003, *id.* See Johnathan Pollack, *The United States, North Korea and the of the Agreed Framework*, LVI NAVY WAR COLLEGE REVIEW 11 (2003).

<sup>74</sup> Richard Lloyd Perry, “North Korea is fully fledged nuclear power, experts agree,” THE TIMES (London), April 24, 2009, (<http://www.timesonline.co.uk/tol/news/world/asia/article6155956.ece>) (citing multiple anonymous sources that North Korea possesses nuclear weapons).

<sup>75</sup> I have written extensively on the issue of compliance, *see, e.g.*, Guzman, (2008) at note 6.

<sup>76</sup> *Libya : Change is in the air but happens slowly on the ground*, THE ECONOMIST (London, UK), March 11, 2006, available at NewsBank: en\_en\_main\_20060311t000000\_0058\_xml\_xml., (discussing the decision of Libya to pursue economic reforms, abandon of nuclear and biological weapons and compensate the Lockerbie victims as a result of sustained international sanctions and scrutiny, led by the United States and Great Britain).



possible to reach agreement. This raises what can be termed the “doomsday” approach – a proposed agreement can provide that if any state free rides by refusing to consent to the agreement, then nobody is bound. Unless everyone joins, the agreement is null and void. Every state is then forced to choose between participation and failure of the agreement.

The problem this sort of aggressive reciprocity requirement is that it makes the entire enterprise extremely fragile. In the NPT case, for example, it is entirely possible that one or more of the non-participants was not simply free-riding but rather preferred no agreement to participation. Providing that entry into force requires full participation (or participation of all relevant countries, however defined) is a risky proposition for the drafters. Rather than getting an agreement with some free-riding, they may end up with no agreement at all.

#### IV. NON-CONSENSUAL INTERNATIONAL LAW

Up to this point, the Article has discussed the basic challenge of the consent problem and how it can frustrate valuable cooperation. Viewing the international legal system through this lens invites us to think of non-consensual forms of rule-making. This Part of the Article is devoted to an examination of these practices. It reveals a suite of doctrines and practices that can constrain the actions of states while circumventing the norm of consent. These include approaches that rely on formal and binding international law (customary international law, *jus cogens*, UN Security Council Resolutions under Chapter VII of the Charter) and soft law approaches (international organizations and international tribunals).

Taken as a group, these strategies are best viewed as exceptions to the general requirement of consent. Even when taken as a group, however, they represent no more than a small dent in the consent requirement. Each of the non-consensual approaches is heavily constrained in its ability to influence state behavior, and fall far short of a direct assault on the consensus requirement. Though these non-consensual approaches are important, the consent problem remains an enormous challenge for global cooperation.

##### A. CUSTOMARY INTERNATIONAL LAW

The oldest form of non-consensual international law is customary international law (CIL). It is non-consensual in the sense that a state can be bound by CIL even if it has not agreed to or accepted the rule. The familiar requirements for CIL are that there be a sufficiently general practice of states and *opinio juris* (sense of legal obligation). Neither of these requirements explicitly requires consent, and though attempts have been made to argue that CIL satisfies conventional notions of consent, those arguments cannot sustain even mild scrutiny.<sup>77</sup>

If *opinio juris* required that the acting state itself felt a sense of legal obligation, this would begin to approach a notion of consent, but even this would not be enough. Perceiving a legal requirement is not at all the same as consenting to that requirement. A public

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<sup>77</sup> For a more detailed discussion, see Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 141-45 (2005).

corporation in the United States can recognize an obligation to disclose certain information under the Securities Act, but this does not imply that the firm consented to that obligation. For a state, a sense of legal obligation might reflect (among other things) an understanding of the norms of the international community, even if the state does not and would not consent to such norms.

Despite the tenuous connection between CIL and consent, the commitment to consent within international law is so strong that some commentators have felt compelled to seek a reconciliation of the two. The most common argument is based on “inferred consent,”<sup>78</sup> and relies on the “persistent objector” doctrine. To avoid a rule of CIL, a state must become a persistent objector – it must make its objection widely known, must do so on a consistent basis, and must do so before the practice solidifies into CIL.<sup>79</sup>

In any event, the dominant view on the meaning of *opinio juris* is that the sense of legal obligation must be felt by states generally, and not by the acting state in particular. The ICJ reflects this view in the *North Sea Continental Shelf* cases. In describing CIL, the Court states that “[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>80</sup>

The inferred consent argument relies on the persistent objector doctrine to conclude that if a state fails to object to a rule of CIL, then this failure to object can be taken as support for the rule.<sup>81</sup> Whatever one might think of the persistent objector doctrine (there is some support for the view that it is almost impossible for a state to qualify as a persistent objector), it provides far too narrow an exception to support the inferred consent argument. First, the failure to object to a norm is not at all the same thing as consent.<sup>82</sup> A state might fail to object for any number of reasons having nothing to do with consent. It may prefer to avoid objecting for political reasons; it may not feel that the norm is changing into custom – making objection unnecessary; or it may simply not be sufficiently affected by the rule to bother objecting. The inferred consent theory also fails to explain why objections brought after a CIL rule is established are insufficient to satisfy the persistent objector doctrine and why new states, which could not possibly have objector at the time CIL rules were being formed, are not able to take advantage of the persistent objector doctrine.

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<sup>78</sup> See Michael Byers, *CUSTOM, POWER AND THE POWER OF RULES* 142-46 (1999) and Mark Villager, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 18-22 (1985).

<sup>79</sup> See T.L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *HARV. J. INT'L L.* 457, 458 (1985).

<sup>80</sup> *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 *I.C.J.* 3, 44 (Feb. 20).

<sup>81</sup> *Id.*

<sup>82</sup> Byers, *supra* note 78, at 143.

Some writers have attempted to rescue the notion of consent in CIL by arguing that states have consented to “secondary” rules of CIL.<sup>83</sup> The idea here is that states have consented (at some unspecified moment in the past) to the way in which CIL rules change over time, including a rule under which CIL can arise without a state’s affirmative consent.<sup>84</sup> At best, this approach amounts to a sort of consent-once-removed. On its own terms the argument is flawed because it is simply a fiction to claim that states consented to the rules governing the creation of CIL. The argument does not (and could not) claim that states ever gave explicit consent to a set of secondary rules governing custom formation. Even if one does not demand explicit consent (though without such a demand the argument seems empty) the rules governing the formation of CIL were overwhelmingly developed by a few European states. The vast majority of states did not play any significant role in the development of the rules governing CIL.

Furthermore, there is no scope for any state to withdraw its consent to the secondary rules of CIL or even to withhold its consent to such rules when it becomes a state. The supposed “consent” to these rules turns out to be a necessary and unavoidable part of becoming a state. This is consent in the same sense that humans consent at birth to breathe in oxygen and breathe out carbon dioxide.

Upon examination, then, it is clear that CIL can bind states without their consent.<sup>85</sup>

One can trace CIL, or at least legal norms that resemble what we now call CIL, back to ancient times. Prior to the Roman Empire, a law of nations existed, though it was founded on religious commitments and beliefs rather than the modern-day parallel, a sense of legal obligation.<sup>86</sup> The Roman Empire followed a law of nations, or *jus gentium*, in its relations with foreigners, and the term eventually came to refer to a “natural law” among nations.<sup>87</sup> During the Middle Ages, international law in Europe once again found its foundations in religion and was considered to be universally binding.<sup>88</sup> It was Hugo Grotius, in the seventeenth century, who first conceived of *jus gentium* as the result of voluntary acts rather than as emanating from natural law.<sup>89</sup> Following the Peace of Westphalia in 1648,

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<sup>83</sup> See Vaughan Lowe, *Do General Rules of International Law Exist?*, 9 REV. OF INT’L STUDIES, 207, 208-210 (1983).

<sup>84</sup> See Anthony A. D’Amato, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 42-44 (1971).

<sup>85</sup> See Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 23 (1977) (“A State can be bound by a rule of customary international law even if it has never consented to that rule”).

<sup>86</sup> See David J. Bederman, *RELIGION AND THE SOURCES OF INTERNATIONAL LAW IN ANTIQUITY*, IN *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 3 (Mark W. Janis ed., 1991).

<sup>87</sup> Mark W. Janis, *AN INTRODUCTION TO INTERNATIONAL LAW* 1, 1 at note 2 (1988).

<sup>88</sup> Arthur Nussbaum, *A CONCISE HISTORY OF THE LAW OF NATIONS* 24 (1947).

<sup>89</sup>*Id.*, at 104; see generally Hugo Grotius, *DE JURE BELLI AC PACIS* (1625).

custom and practice came to be seen as primary sources of international law.<sup>90</sup> The concept of legal obligation emerged at this point to distinguish legally mandatory practices from voluntary ones.

The emphasis on state sovereignty, however, did not fit well with the concept of a mandatory law of nations. For the two to coexist required acceptance of the fiction that nations “by virtue of their sovereign statehood, had de facto consented to compliance with customary practices out of a sense of legal obligation.”<sup>91</sup> If one were very charitable, it may be possible to conclude that the participant states in the Peace of Westphalia (the Holy Roman Empire, the Habsburg Austria, Spain, France, Sweden, the Dutch Republic, and the German principalities), through their participation in the establishment of the new European system, consented to the prevailing conception of the law of nations.<sup>92</sup> Even if one were persuaded by this argument, it cannot be said that other states provided their consent.

This history of CIL provides support for the notion that non-consensual rules can lead to better outcomes for states and individuals.<sup>93</sup> Some of the oldest rules of CIL represent attempts to increase the size of the international pie. Prohibiting attacks on other nations, honoring agreements, protecting wrecked ships and their personnel, providing reasonable care for prisoners of war, and protecting diplomats, are all rules with long traditions and broad compliance, each of which is likely to increase the overall well-being of states.<sup>94</sup>

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<sup>90</sup> See Koh, at note 27, 2607-2608 (1997).

<sup>91</sup> *Id.* at 2608.

<sup>92</sup> Over two hundred states participated in the peace agreement, the preliminaries of which had begun in 1643 and which was finally concluded when the Elector of the Holy Roman Empire, Emperor Ferdinand III of Bohemia, signed the peace treaty on October 24, 1648. The peace was only concluded after Ferdinand suffered further military setbacks during the summer of 1648, including the partial occupation of Prague and the defeat of the Spanish Army in Flanders. By this time, the Wars of Religion had been eclipsed by a struggle for dynastic succession, pitting France and Sweden against Habsburg Austria and Spain. The peace was really a series of treaties concluded to reflect the new strategic and political balance within Europe, and the growing concern of rulers with the domestic instability wrought by perpetual warfare and a shifting social order. The actual Treaty of Westphalia was concluded in the towns Osnabrück and Münster, with the Treaty of Münster concluded separately with Spain accepting Dutch independence. While the treaty did not end the wars between Spain and France, the result of the peace was to fundamentally re-order the strategic balance in Europe until at least the French Revolutionary Wars, see Merriman, *supra* note 44, at 157-160.

<sup>93</sup> To be sure, non-consensual rules can do harm as well as good. They also tend to be disproportionately influenced by powerful states. The permissive attitude among European states toward the subjugation of non-European peoples comes to mind, for example. Some historical examples of non-consensual practices were far less consensual than anything I am suggesting here. Colonialism, for example, ignored the concerns of the vast majority of the world and left only European powers with a voice. This Article’s call for a weakening of the consent requirement bears little relationship to these events.

<sup>94</sup> Bederman, *supra* at note 86.

CIL, then, has served as a solution to some persistent frictions among states. The Vienna Convention on the Law of Treaties (VCLT) provides a good modern example of CIL serving this function.<sup>95</sup> Though the VCLT is itself a treaty, it is universally accepted as reflecting rules of CIL. The United States, for example, is not party to the treaty and yet accepts that it is bound through CIL.<sup>96</sup> There are obvious reasons to have every states playing by the same rules when it comes to the negotiation and application of treaties. If the United States refused to comply with the VCLT (as reflective of CIL), there would be persistent doubts about the status of agreements between it and its treaty partners. When disputes arose, for example, the appropriate method for interpreting a treaty would be uncertain. CIL avoids this problem – there is no doubt that VCLT arts. 31-32 provide the correct approach to interpretation.<sup>97</sup>

Once CIL is recognized as a source of non-consensual international law, we must ask how important an exception it is. To what extent does it address the consent problem and can it help with our current challenges? While CIL provides some useful background norms, it has neither the clarity nor the flexibility to address current problems among states.

The hallmarks of CIL – general practice and *opinio juris* – are simply inadequate to identify the existence of a rule of CIL with precision. Furthermore, even when it is agreed that a rule exists, its boundaries are almost never clear. The problem “lies in the intangibility of custom, in the numerous factors which come into play, in the great number of various views, spread over centuries, and in the resulting ambiguity of the terms involved.”<sup>98</sup> A discussion of the vagueness of CIL leads almost inevitably to a whole series of critiques that make this source of international law less effective. These critiques have been laid out in many places, so I will not present them in any detail here, but they include circularity in the definition of CIL (a norm is a rule of international law if states believe that they are legally required to comply with the norm), uncertainty about the amount and consistency of state practice, difficulty in assessing the subjective views of states (or, for that matter, even accepting that states have a single subjective view of their obligations), the relative importance of practice and *opinio juris*, and more.<sup>99</sup> All of these conceptual problems undermine the effectiveness of CIL.

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<sup>95</sup> Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, May 23, 1969, entered into force January 27, 1980 [hereinafter, VCLT].

<sup>96</sup> See, eg., Transmittal of the Vienna Convention on the Law of Treaties, S. Exec. Doc. No. L, 65-118, at 1 (1971) (statement of Secretary of State William P. Rodgers) (emphasizing how the VCLT “is already generally recognized as the authoritative guide to current treaty law and practice”); see generally, Robert E. Dalton, NATIONAL TREATY LAW & PRACTICE: UNITED STATES, IN NATIONAL TREATY LAW & PRACTICE 765, 766 (Duncan Hollis et al. eds., 2005).

<sup>97</sup> VCLT, arts. 31-32.

<sup>98</sup> Karol Wolfke, CUSTOM IN PRESENT INTERNATIONAL LAW, xiii (2d ed. 1993).

<sup>99</sup> See Guzman (2005), supra note 77 at 124-128 (2005); D’Amato, supra note 84); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA LAW. REV. 665, 679, 710 (1986); John Leslie Brierly, *THE LAW OF NATIONS* 61 (1936); Akehurst, supra note 85.

Beyond the matter of vagueness, the usefulness of CIL is undercut by the fact that it changes slowly and cannot be used as a policy tool.<sup>100</sup> There are debates about what is required to change a rule of CIL, but nobody believes that doing so is easy. At a minimum, the practice or *opinio juris* that caused the rule to emerge in the first place must have ended. This sometimes means that a state can change a rule of CIL only by violating that rule. If violations are frequent enough and widespread enough, the rule may collapse.

If one wants to not simply terminate an existing rule but replace it with another rule of CIL, even more must be done. It is necessary not only to end the existing combination of practice and *opinio juris* but to replace it with some other combination of practice and *opinio juris*, centered on a new norm, and sufficient to satisfy the (vague) definition of CIL. So, for example, early in the twentieth century there existed a rule governing the expropriation of foreign investment by sovereign states. When such expropriations took place the government of the host state was required to pay “prompt, adequate, and effective” compensation, a standard of compensation known as the “Hull Rule.”<sup>101</sup> By the 1930s some states – more notably in Latin America – protested that this was no longer (and perhaps had never been) a rule of CIL. After the Second World War, many other states, including many newly independent former colonies, joined the growing chorus of voices rejecting this interpretation of CIL. There followed United Nations Resolutions rejecting the Hull Rule and passionate statements from many states against it.<sup>102</sup> These protests and declarations provide good evidence of the legal beliefs of states. The Hull Rule was also weakened by the general practice of states. During the wave of expropriations that ended by the early 1980s, expropriating states often refused to pay “full” compensation.

The inherent ambiguity in CIL has meant that to this day there is no agreement on the state of CIL. Though some states and commentators claim that the Hull Rule continues to apply, many others argue that the old rule of CIL no longer applies.<sup>103</sup>

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<sup>100</sup> There is some debate about just how quickly CIL can change. It is not necessary to resolve that issue here. See Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 513, 532 (Ronald St. J. MacDonald & Douglas M. Johnston, eds., 1983); Danilenko, *supra* note 2 at 97 note 74 (1993); Andrew T. Guzman (2005), *supra* note 77, 157-59.

<sup>101</sup> See *Concerning the Factory at Chorzow (Ger. V. Pol.)*, 1926-29 P.C.I.J. (ser. A), Nos. 7, 9, 17, 19; *Norwegian Shipowners Claims Arbitration (U.S. v. Nor.)* 1 Rep. Int'l Arb. Awards 307 (1922); *Spanish-Moroccan Claims Arbitration (U.K. v. Spain)*, 2 Rep. Int'l Arb. Awards 615 (1925); Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 644-646 (1998).

<sup>102</sup> Notice that this represents a use of another form of non-consensual international law. See *infra* Part IV.D.

<sup>103</sup> See *Ebrahimi v. Islamic Republic of Iran*, Iran Award 560-44/46/47-3, at ¶51-52 (Iran-U.S. Cl. Trib. Oct. 12, 1994) (WESTLAW, INT-IRAN Database) (“[W]hile international law undoubtedly sets forth an obligation to provide compensation for property taken, international law theory and practice do not support the conclusion that the ‘prompt, adequate and effective’ standard represents the prevailing standard of

Whatever view one takes, CIL was unable to adapt to the post-war world and there is no evidence that a new rule on expropriation is emerging. Rather than rely on CIL, states have turned to consent-based international law methods. Since the late 1940s, thousands of bilateral investment treaties have been signed and these now represent the dominant form of inter-state cooperation with respect to foreign investment. CIL was simply not up to the task.

The turn away from CIL in investment reflects both its glacial rate of change and the fact that it is not a policy tool. It is beyond the control of any single state, and even groups of states cannot easily affect it. It cannot be deployed as a solution to emerging problems. When binding international law must be created or changed in a timely way, CIL cannot help. States must rely on treaties and must confront the consent problem.<sup>104</sup>

## B. JUS COGENS

In some areas where CIL fails to deliver the desired rules, or where it is felt that a less derogable form of law is required, commentators appeal to a more aggressive and explicitly non-consensual form of international law, *jus cogens*.<sup>105</sup> A *jus cogens* norm, also referred to as a peremptory norm, is defined as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>106</sup> Once a norm is accepted as a *jus cogens* norm it is binding on states

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compensation.... Rather, customary international law favors an ‘appropriate’ compensation standard.”); Sornarajah, *The International Law of Foreign Investment*, supra note 14, at 365-65 (“It is safe to conclude that there is no customary practice supporting the norm of full compensation for nationalisation.”); Dolzer, supra note 14, at 561 (“[Although] compensation must be paid for expropriated alien property as a matter of international law ... the evidence for the Hull rule’s continuing validity falls short of the mark ....”); Schachter, supra note 8, at 123 (“[T]he ‘prompt, adequate and effective’ formula has not won general acceptance in cases or state practice.”); but see Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab republic, 17 I.L.M. 1 (1978); Interlocutory Award in Case Concerning SEDCO, Inc. v. National Iranian Oil Company and the Islamic Republic of Iran, Iran-United States Claims Tribunal, 10 Iran-U.S. Cl. Rep. 180 (1986).

<sup>104</sup> Finally, in addition to the vagueness and inflexibility of CIL, it is worth mentioning that its ability to influence the behavior of states is limited. In other writing I have described it as a weak source of law that “can only generate cooperation when the gains from violation are small.” Andrew T. Guzman (2008) supra note 6 at 209. Other commentators have at times been even more skeptical, “we deny the claim that customary international law is an exogenous influence on States’ behavior,” see Goldsmith & Posner, supra at note 31. Even the most optimistic observer would have to conclude that the power of CIL is limited. This, too, undermines its usefulness as a solution to the consent problem.

<sup>105</sup> Antonio Cassese notes that the concept finds its roots in the positivist legal theorists Rachel, Wolff, Martens and Vattel. These theorists had divided the legal order into three spheres: (i) internal law (*jus civile*) pertaining to the internal life of the State; (ii) the law applicable to relations among civilized States (*jus gentium*); (iii) natural law (*jus naturae*), regulating the law of mankind or a necessary body of law, which perforce prevailed over *jus voluntarium* of treaties. *Jus Cogens* norms fall into this last category of laws, Cassese, *INTERNATIONAL LAW*, 139 (1st ed., 2001).

<sup>106</sup>VCLT, Art. 53.

with or without their consent. Given the non-consensual and overriding nature of just cogens norms, it is not surprising that these norms are rare. Norms commonly recognized as jus cogens norms (though there is some debate about some of them) are: the use of force, slavery, genocide and crimes against humanity, torture and prolonged and arbitrary detention, self-determination, and racial discrimination.”

If it were possible to create such norms through some manageable process, they might represent an important counter to the problem of consent. In fact, there is no accepted method for determining the existence of such rules, and whatever the process might be, it is clearly not something individual states can control.

Appeals to *jus cogens* have some of the appeal that religion or natural law once had. They assert that a particular conduct is required without regard to either consent or cost. If such norms were aligned with the interests of the international community as a whole (however defined) they could represent a solution to the problem of consent. The few *jus cogens* norms that exist do fit this description. Certainly prohibiting slavery, genocide and torture contributes to international well-being. Mandating that prohibition even for states that refuse to consent to those norms can also be described as serving the interests of global welfare.<sup>107</sup> The prohibition against the use of force, which is generally understood to align with the UN Charter’s prohibition on the use of force is more controversial inasmuch as some observers advance normative arguments in favor of expanding the exceptions to this rule including, for example, humanitarian intervention.<sup>108</sup>

Ultimately, *jus cogens* represents an interesting exception to international law’s focus on consent, but it lacks the scope or flexibility to be a useful tool for states seeking to address global problems.

### C. THE UNITED NATIONS SECURITY COUNCIL

The closest thing the world has to a global legislature empowered to impose binding legal rules is surely the United Nations Security Council. At the 1945 San Francisco Conference, the Second World War’s victorious powers signed the UN Charter, establishing the United Nations. As part of the effort to ensure a lasting peace, the Security Council was created. This body is nothing like an international legislator, but it comes far closer than any other international institution (outside the organs of the EU) to being one.

The United Nations Charter gives the Security Council “primary responsibility for the maintenance of international peace and security.”<sup>109</sup> It has the authority to impose legally

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<sup>107</sup> I recognize that some might resist this characterization. It is not critical to my argument that you believe existing *jus cogens* norms are Kaldor-Hicks improvements over an absence of such norms.

<sup>108</sup> See Martti Koskenniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law 65 Mod. L. Rev. 159 (2002).

<sup>109</sup> UN Charter, art. 24.



binding measures on all UN members. This authority is found in Chapter VII of the UN Charter, and only resolutions adopted under that Chapter are binding on states. More specifically, article 48 (in Chapter VII) provides that:

“The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”<sup>110</sup>

This strong language suggests that the Security Council has tremendous authority to bind nations without their consent. Upon closer inspection, however the Council’s authority turns out to be heavily constrained.

As all students of international law know, the Security Council is made up of fifteen members. Five of these are permanent members (“P5”) while the other ten serve two-year terms. The non-permanent membership is informally distributed to provide some regional representation. Within the Security Council each member has one vote. A resolution on substantive matters is adopted if it receives the affirmative vote of nine or members and no permanent member casts a negative vote.<sup>111</sup>

The ability to enact non-consensual yet binding rules is a dramatic departure from business and usual for international law. The Security Council can, and at times does, impose legal obligations on states against the will of those states. Like all deviations from the consent-based model of international law, however, this one is limited. Several legal, political, and practical constraints prevent the Security Council from making a habit out of its Chapter VII authority.

### 1. “Peace and Security”

The Council’s authority is limited to actions taken to maintain international peace and security. Before it can act, the Council is to determine the existence of “any threat to the peace, breach of the peace, or act of aggression.”<sup>112</sup> Though the limits of this authority are difficult to pin down with any precision and there is no consensus on the discretion that the Security Council has to make such a determination, there is no doubt that such limits exist. It would strain credibility, for example, if the Council adopted a resolution purporting to govern international banking services.<sup>113</sup>

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<sup>110</sup> UN Charter, art. 48.1.

<sup>111</sup> The text of Article 27.3 of the Charter seems to require that all permanent members cast a positive vote, the practice of the Council, supported by a decision of the ICJ in the *Namibia* case, ICJ Reports (1971), 6, at ¶¶ 20-2; 49 ILR 2, has been that it is enough that a permanent member not object.

<sup>112</sup> UN Charter, art. 39.

<sup>113</sup> In several cases, the Security Council has adopted resolutions which explicitly state that they are acting under Chapter VII, but that do not explicitly determine the existence of a threat to the peace. For example, the Council adopted Resolutions 1422 and 1487 addressing the immunity of UN peacekeepers from prosecution by the International Criminal Court. SC. Res. 1422, 12 July 2002, SC Res. 1487, 12 June 2003. This arguably weakens the need for a finding of a threat to the peace.

This limit on its non-consensual law-making authority prevents the Security Council from addressing many of the world's problems. It would be a dramatic departure from past practice for it to impose some legally binding obligation on states with respect to climate change, global poverty, disease control, economic issues, or anything from a long list of other issues that do not implicate global peace and security.

## **2. Super-Majorities and Vetoes**

The voting procedures of the Council do not demand consensus but are nevertheless burdensome. A resolution requires a super-majority of members (9 of 15) and, more importantly, all permanent members have a veto. During the Cold War, of course, this made action almost impossible. Since the disintegration of the Soviet Union it is somewhat easier for the Council to act, but securing the support of the P5 remains a major challenge. Any issue that is of truly global importance will affect each of the P5 members in a different way and a resolution can only be adopted if each of them believes it to serve their interests. The consent problem constrains the actions of the Security Council.

There are plenty of instances when the Security Council's efforts to impose non-consensual solutions have failed. The U.S. invasion of Iraq in 2003 is an obvious example. Perhaps a more telling example is the NATO bombing of Kosovo in 1999. In the late 1990s conflict within Kosovo and Serbia attracted the attention of western states. NATO and others advocated in favor of intervention justified on humanitarian grounds and out of concern that the conflict could spread.

The United States, several European states (including P5 members France and the United Kingdom), and Russia pushed both sides of the conflict to the negotiating table in February of 1999. This effort ultimately failed as Serbia refused to accept the proposed agreement.<sup>114</sup> When talks broke down, Belgrade launched an offensive targeting both the Kosovo Liberation Army (KLA) and ethnic Albanians more generally. NATO responded with a bombing campaign against various targets in Kosovo and Serbia, prompting an escalation in Serbia's offensive, including the deportation of hundreds of thousands of Kosovar Albanians, thousands of deaths, and all manner of other abuses. It was only several months later that a peace agreement was reached.

When the February 1999 negotiations failed, the situation called out for a non-consensual solution. Several major powers were concerned about the conflict and there was hope that they could agree on some common approach because none had essential security interests at stake. This is very much the kind of situation the Security Council was designed to address. Yet no resolution came from the Council. NATO did not even seek an authorization to use force because it knew that Russia would refuse. In the end, it proved impossible to reach consensus among the P5 and the Security Council was unable to act. It is impossible to know whether a Security Council Resolution could have led to a better

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<sup>114</sup> Koskenniemi, *supra* at note 11.

outcome. We do know, however, that it was not up to the task of imposing a solution on this volatile situation.

### **3. Bark Without Bite**

The Kosovo experience also illustrates a different form of failure in the Security Council's non-consensual power. In 1998 the Security Council adopted resolutions aimed at restoring peace in the region. Resolution 1160, adopted in March of 1998, demanded that Serbia withdraw its "special police units and cease[] action by the security forces affecting the civilian population." Resolution 1199, adopted in September of 1998 demanded that Belgrade cease hostilities and negotiate a political settlement. Both of these resolutions were Chapter VII resolutions, meaning that they were legally binding on all U.N. Members, including Yugoslavia. As such, they were a classic form of non-consensual rule-making.

They were also fruitless. These resolutions neither resolved the dispute nor prevented the atrocities of 1999. Though the resolutions were formally binding on all parties, there were no tools available to enforce them. It was understood that Russia would not consent to the use of the most powerful enforcement weapon in the Security Council's arsenal – authorization of the use of force. Beyond this particular example, the lack of enforcement of Security Council resolutions greatly curtails that body's ability to carry out its mission.

The lack of coercive enforcement need not mean that Security Council resolutions are meaningless. Most international legal obligations come without coercive enforcement and the international legal system works because these obligations sometimes succeed in changing the behavior of states.<sup>115</sup> The challenge is especially acute for the Security Council, however, because threats to international peace and security involve such high stakes. In the face of security threats, countries are likely to prioritize their own narrow interests above compliance with international law. Without a credible threat to authorize the use of force, many Security Council resolutions fall on deaf ears.

### **4. The Security Council vs. The Consent Problem**

Taken together, the above constraints on the Security Council's power explain why the Chapter VII authority has been used sparingly and carefully. According to Patrik Johansson, there have been 477 Chapter VII resolutions adopted since 1946, though only 21 of these were adopted during the Cold War.<sup>116</sup> The total number, however, is somewhat misleading. The Council has typically adopted multiple resolutions addressing a single issue so the number of "threats to the peace" that have been addressed is much smaller. Furthermore, the resolutions have almost all addressed specific geographic controversies

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<sup>115</sup> See Guzman (2008), *supra* note 6 at 33-48 (discussing reasons why states comply with international law).

<sup>116</sup> Patrik Johansson, *The Humdrum Use of Ultimate Authority: Defining and Analysing Chapter VII Resolutions*, 78 NORDIC J. INT'L L. 309, 327 (2009). There is no precise definition of when a resolution is a Chapter VII resolution, so others may have a slightly different count.

rather than broad global threats.<sup>117</sup> They have also, with few exceptions, targeted small, weak, or unpopular states embroiled in or threatening conflict.<sup>118</sup>

All of this reflects the practical limits of the Council's ability to engage in non-consensual rule-making. It is one thing to establish a peacekeeping force in Cote d'Ivoire.<sup>119</sup> It is altogether more difficult to get a resolution attempting to resolve global security threats that implicate important interests for the P5.

By and large, the Security Council has focused on where the P5 can agree. This limits the Council's *de facto* authority to a relatively small subset of the world's major problems. Examples include resolutions on the Falklands Islands, Iraq in advance of the 1990 Persian Gulf War, Somalia, Democratic Republic of the Congo, and Lebanon. In some instances the Council has adopted resolutions to address the aftermath of violence. This was the case with resolution 1101 about Albania, among others.

Some resolutions have addressed rogue states engaged in conduct judged to be a threat to peace despite the absence of contemporaneous violence. Resolution 1718, for example, was a response to North Korea's claim that it had carried out a successful nuclear test. Resolution 418, aimed at the apartheid regime in South Africa, sought to address an isolated regime engages in atrocious and persistent human rights violations.

None of this means the Security Council is ineffective. Within the limited range of issues on which the P5 can agree, and subject to the other constraints discussed above, the Security Council is sometimes able to make a difference. Consider one specific example that illustrates how the Security Council engages in a form of quasi-legislative rule-making, and how it can overcome the consent problem. Resolution 1373, adopted on September 28, 2001, just seventeen days after the September 1, 2001 terrorist attacks on the United States,<sup>120</sup> imposed a series of requirements on UN members to combat terrorism by non-states actors.<sup>121</sup> These included an obligation to criminalize the financing of terrorism, to

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<sup>117</sup> Andrea Bianchi, *Security Council's Anti-Terror Resolutions and their Implementation by Member States*, 4 J. INT'L CRIM. JUST. 1044, 1046-47 (2006).

<sup>118</sup> Johansson, *supra* note 117, at Appendix, identifies the following topics (in order of the date of the first resolution): Israel/Palestine, Koprea, Congo, Southern Rhodesia, South Africa, Falkland Islands, Iran/Iraq, Iraq, Yugoslavia, Somalia, Libya, Liberia, Haiti, Angola, Rwanda, Sudan, Zaire, Albania, Central African Republic, Sierra Leone, Democratic Republic of the Congo, East Timor, Afghanistan, Ethiopia/Eritrea, ICRT/ICTY, International Terrorism, International Criminal Court, Cote D'Ivoire, Non-proliferation, Burundi, Lebanon, Iran, DPR Korea, Chad/Central African Republic.

<sup>119</sup> Security Council Resolution 1528 (2004).

<sup>120</sup> Eric Rosand, *supra* note 7 at , 546-47 (2005).

<sup>121</sup> Bianci, *supra* note 118, at 1046-47.

freeze terrorist assets, to refrain from providing support to terrorists, and to deny safe haven to terrorists.<sup>122</sup>

What makes this resolution unusual – aside from the fact that it was adopted so quickly after the 9/11 attacks on the United States – is that states had been negotiating about these issues for years. Since the 1960s, when terrorist airplane hijackings began, states had negotiated a series of agreements intended to frustrate international terrorism. Whatever the merits of these treaties, they obviously failed to prevent the September 11 attacks. Furthermore, they were not universal. Some of the most affected states were not party to relevant anti-terrorism treaties, which of course undermined the impact of those agreements.<sup>123</sup> Not only did the agreements in existence suffer from limited membership, the substantive terms of the agreements were weak.<sup>124</sup>

Prior to the Security Council resolution, the anti-terrorism efforts of states suffered from the consent problem. To bind the states most able to take action against terrorist efforts required the consent of those states, but at least some of them were reluctant to accept legal obligations to act. For those states the perceived benefits of joining were outweighed by the costs. To get some of these states in required a weakening of the substantive terms of the agreements. The theoretical solution to this kind of bargaining problem would involve the creation of transfers from those who stand to gain from the agreement to those who stand to lose. In the terrorism area, however, such transfers did not succeed.<sup>125</sup>

Following the 9/11 attacks, the Security Council stepped in and imposed its own rules through Resolution 1373. The core provisions of the resolution were actually taken from the Terrorism Financing Convention, an existing treaty that had not entered into force. The non-consensual aspect of this action is clear. The Convention had been signed in December of 1999, but had been ratified by only four countries at the time of the Security Council resolution. The pace of ratifications demonstrated, at a minimum, a lack of enthusiasm for the treaty.<sup>126</sup> By stepping in and using its Chapter VII powers, the Security Council was able to avoid the consent problem.

This kind of broad-based, non-consensual action by the Security Council is not typical. The large majority of Chapter VII resolutions are aimed at specific behaviors or situations in specific countries. They rarely look as much like general legislation as the above example.

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<sup>122</sup> S.C. Res. 1373, ¶¶ 1-2, U.N. Doc. S/RES/1372 (Sept. 28, 2001).

<sup>123</sup> Rosand, *supra* note 7, at 577.

<sup>124</sup> Todd Sandler, *Collective Action and Transnational Terrorism*, 26 *WORLD ECON.* 779, 797 (2003).

<sup>125</sup> If the latter describes the situation it reflects the fact that the status quo was, in fact, the efficient outcome because the would-be winners from a stronger set of rules did not value those rules enough to pay for the losses of the would-be losers.

<sup>126</sup> Paul C. Szasz, Note, *The Security Council Starts Legislating*, 96 *AM. J. INT'L L.* 901, 903 (2002).

In conclusion, then, the Security Council is able to help overcome the consent problem in certain instances, but its ability to do so is highly constrained. The UN Charter imposes legal limits on what the Council can do, the voting rules further limit the scope for non-consensual action, a lack of enforcement weakens any actions it takes, and political constraints provide a practical limit on its ability to impose legal obligations on states. It represents no more than a modest counter-balance to the requirement of consent and certainly does not solve the problem that requirement creates.<sup>127</sup>

#### D. INTERNATIONAL ORGANIZATIONS

The obvious way to solve problems that affect many people is to create some sort of voting procedure or to delegate the decisions to a body that itself has some procedure for reaching decisions. This is what legislatures do for states, it is what student councils do for high schools, and it is what corporate boards do for corporations. To the extent this happens in the international context it has the potential of avoiding the normal consent requirements associated with the creation of international rules. As I have expressed elsewhere, however, the most striking thing about international delegations of this type is that they are so rare and so modest.<sup>128</sup>

Even international organizations noted for their influence tend not to have or not to use such authority. The WTO, for example, operates by consensus rather than through a voting system.<sup>129</sup> States could, of course, allocate a form of legislative authority to any international organization. To date, however, they have rarely chosen to do so.

If IOs do not serve a sort of legislative function, what is their role? In particular, what is their role in the creation of international legal rules and how does that role intersect with the consent problem? This Part examines the role of IOs and discusses how they contribute to both consensual and non-consensual rule-making. With respect to consensual rule-making their primary role is to make it easier to construct the transfers necessary to

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<sup>127</sup> Finally, I should mention that there are other, less important, international organizations authorized to make formal legal rules. These include the Codex Alimentarius Commission, which promulgates guidelines and recommendations relating to certain human health and safety issues, the International Office of Epizootics, which does something similar for animal health, and Secretariat of the International Plant Protection Convention, which deals with plant health. Even here, however, one can dispute the extent to which these organizations are creating real international law. The recommendations of each of the above three bodies are soft law rules that are made binding through the WTO's SPS Agreement. The WTO permits states with the authority to exclude products that fail to meet the standards provided in those guidelines. So there is a sense in which these bodies can affect state behavior, but the most the standards can do is provide a justification for refusing to import a product. The organizations do not and cannot limit a state's ability to refuse entry of products based on health and safety concerns.<sup>127</sup> So while there is a delegation of authority here, and while it does impact the formal legal rules states face, the authority of the relevant international organizations is extremely limited.

<sup>128</sup> Guzman & Landslide, *supra* at note 27.

<sup>129</sup> The WTO rules themselves authorize a voting procedure that would allow for non-consensual decision-making and non-consensual amendments to certain rules. In practice, however, decisions are made by consensus. See WTO Agreement, arts. IX, X.

achieve consensus. On the non-consensual side, IOs normally lack the power to create binding legal rules, but they are able to create or at least influence soft law rules, which sometimes allows them to affect state behavior.

Even a brief examination of IOs makes it clear that they engage in numerous and varied activities. They serve as a forum for discussion and negotiation, they work to increase transparency and accountability, they issue statements about international law (among other things), they provide dispute resolution facilities, and much more. Each organization exists for a different purpose and pursues different objectives, so naturally each takes different actions. If one steps back a little, however, the vast array of IO activities can be placed into five broad categories: the reduction of transactions costs to negotiation and agreement; the promulgation of soft law – meaning norms that do not constitute international law; the setting of standards (closely related to soft law norms); the execution of operational activities (e.g., UNICEF), and dispute resolution. I discuss transaction costs, soft law, and standard setting in the next three sub-sections. The operational activities of IOs are normally the result of some consent-based process (or conceivably some other non-consent-based process) but are not themselves relevant to our discussion, so I do not address them. Dispute resolution is addressed in the discussion of international tribunals in Part IV.E.

### **1. Transaction Costs: The WTO**

One of the important functions of IOs is to facilitate consensual cooperation among states. Another way to describe this role is to say that they reduce the transactions costs of reaching consensus. As discussed in Part III, transaction costs are a key barrier to agreements that increase global well-being but impose costs of some countries. This is a large category of agreements and the associated reductions in transaction costs have the potential to pave the way for many beneficial arrangements.

There is no shortage of examples of institutions that serve (or at least strive) to reduce transaction costs among states. The United Nations is the most conspicuous such organization. By providing a forum for all states to meet and discuss common issues, it seeks to facilitate dialogue, understanding, and cooperation. A more specialized example is the World Intellectual Property Organization (WIPO), which provides a forum for governments and other entities interested in intellectual property issues to meet.<sup>130</sup>

Another example, and the one I want to discuss in a greater depth, is the World Trade Organization (WTO) and its predecessor, the General Agreement on Tariffs and Trade (GATT).<sup>131</sup> The WTO remains committed to consensus in decision-making, and in this

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<sup>130</sup> WIPO is, in fact, a specialized agency of the United Nations. This fact emphasizes that the UN works to encourage dialogue in many substantive areas.

<sup>131</sup> Strictly speaking, the GATT was not an international organization. It served many of the same functions as an IO, however, and I will not dwell on this formalistic distinction.

sense operates does not seek to avoid the consent problem.<sup>132</sup> Despite its commitment to consent, the trading system has enjoyed tremendous success. Since its inception as the General Agreement on Tariffs and Trade (GATT) in 1947, the GATT and its modern successor the WTO have overseen the reduction of average tariff rates in industrialized countries from about 40% to less than 4%. During the same time period, trade has increased rapidly – far faster than the growth in GDP. This is an impressive record, and one that can be credited with promoting growth and prosperity in most of the world. Given the political pressures domestic governments face to protect local industries and markets, it is hard to believe that similar progress would have been made in trade relations without the GATT/WTO system.

The most important of the GATT/WTO achievements have been the eight successful rounds of trade negotiations rounds. The most recent of these, the Uruguay Round, was completed in 1994 and established the WTO. Conclusion of each round of negotiation required the consent of all participants, which was achieved with two main tools – the time-honored practice of jawboning and the exchange of concessions (which I have also called “transfers”). Negotiating rounds were often time-consuming and laborious – the Uruguay Round, for example, was launched in 1986 and did not wrap up until 1994. Time gives states and their representatives the opportunity to explore countless possible arrangements in an attempt to structure an agreement that will garner consent. It also gives states time to discover the opportunities and constraints each of them faces, and so makes it easier to find mutually advantageous agreements. This process reduces the barriers to agreement – the transaction costs.

Despite the GATT/WTO’s success in reducing transactions costs and achieving consensus in trade negotiations, there is a limit to this approach. In fact, we may be witnessing this limit in the current Doha Round of negotiations, launched in 2001. Labeled the “Development Round,” it was to be the latest in the line of negotiations to liberalize trade. Though the effort has not officially been abandoned, every indication is that it has failed. The nature of trade negotiations among close to 150 states is sufficiently complex that the failure cannot be blamed on any single event. That said, it is clear that at least in the area of agriculture states were unable to find transfers sufficient to achieve consensus.

The Doha Round illustrates a more general point. No IO is able to overcome all transaction costs. The effort to do so is critically important, but the consent problem continues to present a major hurdle for even the most successful IOs. In particular, in areas where

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<sup>132</sup> Though its formal rules indicate that some decisions can be made by majority or super-majority vote, the practice has been to make decisions by consensus. The formal rules governing voting and the effect of votes are somewhat complex within the WTO. For example, proposed amendments to the WTO Agreement itself (which lays out the structure of the WTO but not the substantive rules) or the associated multilateral trade agreements (which include the substantive rules) can, in general, lead to voting if consensus is not achieved. Proposed amendments to some of the relevant rules, however, require unanimity. WTO Agreement, art. X.2. Other amendments apply only to the WTO members who have accepted them. WTO Agreement, arts. X.3, 5. Finally, some amendments can be binding on all members if approved by a two-thirds majority. WTO Agreement art. X.5.



transaction costs are especially high or especially difficult to overcome, consent remains elusive. These include some of the world's greatest problems, including climate change, nuclear weapons, use of force, cross-border economic inequality, and so on.

## 2. IOs and the Creation of Soft Law Rules – The UN Human Rights Committee

When IOs reduce the transaction costs associated with agreement, they are acting within the consent principle. Resulting agreements are the product of consent and the IOs role is essentially to make it easier to find common ground. When it works, it achieves a Pareto Improvement that makes all participating states better off.

Some of what IOs do, however, can be understood as an effort to work around the consent problem. Any time an IO creates rules, norms or guidelines without the consent of all members, it is attempting to influence state conduct in the absence of state consent. This includes, for example, the making of proposals, drafting of white papers, promulgation of codes of conduct, and on and on. Such actions lack the formal status of international law and so are not formally binding on states, but that are intended to nudge states in one direction or the other.

Classical international law has trouble categorizing or understanding this sort of conduct. It is not law, strictly speaking, yet it is more than “mere” politics. It does not even have a respectable name and falls under the category of “soft law.” There is no single definition of soft law, but it most commonly understood to mean quasi-legal rules that are not legally binding on states. It is, then, a residual category, sweeping in everything that falls short of classical international law while still having some legal character.<sup>133</sup>

Because it is not legally binding, international lawyers have struggled to know how to treat it. One the one hand, there is a temptation to dismiss the entire category so that we can focus on binding obligations. This positivist approach can be found sprinkled throughout legal debates on international law.<sup>134</sup> “[S]ublegal obligations are neither soft law nor hard law: they are simply not law at all.”<sup>135</sup> On the other hand, there is no denying that soft law affects state behavior.<sup>136</sup>

The most conspicuous examples of soft law are agreements among state that do not constitute treaties under international law. These include, for example, the Universal

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<sup>133</sup> I have discussed this definition in more detail in other writing. See Guzman & Meyer (2010), , at 172-73 and Guzman & Meyer (2009), at 518

<sup>134</sup> See Danilenko, *supra* at note 2.

<sup>135</sup> Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM J INTL L 413, 414-15 n 7 (1983); Danilenko, *supra* at note 2, at 200; Jan Klabbers, *The Redundancy of Soft Law*, 1996, 65 NORDIC J. INT'L L. 167.

<sup>136</sup> See Jose Alvarez (2005) *supra* note 26. ( 2005) (listing a variety of examples of influential soft law actions by international organizations); *see also*, Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 3 (2006).

Declaration on Human Rights (though this has arguably since become CIL), the Helsinki Final Act, and the Basle Accord on Capital Adequacy. These instruments operate much like treaties in the sense that they apply only to states that have agreed to their terms – they satisfy the consent principle. Because the states involved do not choose to make them treaties, however, they do not rise to the level of formal international law.<sup>137</sup>

Of greater interest in this Article are actions by IOs that do not rely on state consent. Here I have in mind the authority IOs have to “speak” without the unanimous consent of their members. When states create an IO they can specify any rules they wish for its operation. They could, for example, give the organization the power to create binding rules of international law as they did with the Security Council. At the other end of the spectrum, states could restrict the IOs role to a narrow set of very specific functions and deny it the ability to make any statements without the consent of all members.

As it turns out, however, states most often give IOs power that lies between these two extremes. They allow IOs to “speak” in a variety of ways. This speech has the potential of influencing the interests and positions of states and, therefore, can affect behavior. Furthermore, once the organization is established, this speech normally does not require the consent of all member states.

The tradeoff facing states creating an IO is clear. Soft law created by IOs has the potential to affect the understandings and expectations of states about international legal obligations (both soft and hard law obligations). Giving this power to an IO may help the community of nations solve problems, but it also makes it harder to individual states to resist actions from which they do not benefit.

To be sure, states retain some influence over the IOs they create. Collectively, states have the power to change the rules of the organization or even shutter its doors. This collective power, however, is entirely different from the normal consent-based system in which every state has a veto. It is also true that an individual state retains the power to ignore the IO or terminate its membership.<sup>138</sup> This puts some limit on the costs that can be imposed on the state against its will, but does not eliminate those costs.

The surrender of control is magnified by the fact that any IO with a permanent staff has some measure of freedom to deviate from its sponsors’ preferred positions. The organization may develop its own objectives, distinct from those of its member states. There is a limit to this freedom for the institution because, as already mentioned, states retain collective control. As long as the organization does not stray so far from what states want as to provoke a correction, however, it can pursue its own goals.

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<sup>137</sup> There are debates about the meaning of such soft law instruments. My views are recorded elsewhere. See Guzman & Meyer (2010) at note 134.

<sup>138</sup> Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

In creating an IO, then, a state hopes that the benefits of overcoming the consent problem will outweigh the costs of occasionally being affected by soft law that does not serve its interests. With this tradeoff in mind, we can see at least some of the reasons why states might empower an IO to speak without the consent of all its members. Imagine, for example, a problem that negatively affects many states. These states share an interest in solving the problem, but they may not all want the same solution. Suppose that all states prefer a solution to the status quo, but some prefer one proposed solution while others prefer an alternative. It may prove difficult to reach consensus on either of the solutions, but if nothing is agreed upon, every state is worse off. Delegating this decision to an IO charged with evaluating the issue and recommending a solution, states can achieve a solution that, once presented, is implemented by every country. This problem is known in game theory as the “battle-of-the-sexes” problem.<sup>139</sup> It is well established that creation of a focal point is enough to solve the game. The selection of the venue for the Olympic Games provides a nice example. There are normally several cities that wish to host the Olympic Games and some process is required to pick a host. Rather than having states attempt to negotiate with one another the decision is left to the International Olympic Committee (IOC), a non-governmental organization. When the IOC makes a choice, no state – not even those of the losing cities – has an incentive to reject the result.<sup>140</sup>

A more general example of the power of IOs is provided by the United Nations General Assembly and its ability to request an advisory opinion from the ICJ. This allows the General Assembly to investigate legal questions and nudge international law forward in a way that serves the interests of the international community. This is what the Assembly did in the *Western Sahara Case*.<sup>141</sup> The non-consensual aspects of this power are evident in the Israeli-Wall case.<sup>142</sup>

To illustrate the tradeoff between the desire to avoid the consent requirement and the concern about losing control in greater detail, consider the United Nations Human Rights Committee (“the Committee”). The Committee was established by Article 28 of the International Covenant on Civil and Political Rights (“ICCPR” or “the Convention”) to monitor compliance with the terms of the ICCPR.<sup>143</sup> The Committee consists of eighteen

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<sup>139</sup> James D. Morrow, *GAME THEORY FOR POLITICAL SCIENTISTS* at 91-92 (1994).

<sup>140</sup> I put aside other factors that may undermine the Olympic Games such as boycotts motivated by independent political disagreements, as occurred in 1980 and 1984.

<sup>141</sup> 1975 I.C.J. 6, 7-8 (May 22).

<sup>142</sup> 2004 I.C.J. 136.

<sup>143</sup> International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (1967) (entered into force Mar. 23, 1976) [hereinafter the ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976 [hereinafter Optional Protocol].

members who, although nominated by their home states, are elected and serve in their personal capacities.<sup>144</sup> Committee members are formally independent of states.<sup>145</sup>

The Committee carries out its task of monitoring compliance in three ways. First, the ICCPR requires that parties report to the Committee on the steps they have taken to implement the obligations created by the ICCPR.<sup>146</sup> The ICCPR specifically authorizes the Committee to “comment” on the reports and submit those comments to the states for their consideration.<sup>147</sup> Second, the ICCPR permits states to declare their willingness to have their compliance with the Convention challenged by other member states.<sup>148</sup> If an amicable solution is not reached between the parties, the Convention authorizes the Committee to request information from the parties and requires it to issue a report on the dispute.<sup>149</sup> Third, under the Optional Protocol to the ICCPR states can permit individuals to lodge complaints about their human rights practices with the Committee.<sup>150</sup> When a complaint is properly made, the Committee is authorized to receive information about the dispute from both the individual and the state concerned, and to formulate and express its “views” on the matter.<sup>151</sup>

The “views” and “comments” expressed by the Committee fit our definition of soft law and illustrate how IOs and soft law work together. These views and comments have no independent legal effect – they do not bind states.<sup>152</sup> Nevertheless, the views expressed by the committee have indirect legal significance. They elaborate on what is required by the ICCPRs legally binding obligations, adding a nonbinding gloss to them. The nonbinding nature of these statements necessarily reduces their compliance pull, but nevertheless influences our understanding of international law.

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<sup>144</sup> ICCPR, Art. 28(3) .

<sup>145</sup> That being said, it should hardly come as a surprise that states have established selection procedures that allow them to exert substantial influence over the makeup of the Committee. In addition to nominating individuals to serve on the Committee, states elect the Committee members. Significantly, the ICCPR provides that a person may be renominated and reelected thus creating an incentive for Committee members to be mindful of the interests states have in their decisions, ICCPR Art. 29(3) and Art. 32(1).

<sup>146</sup> ICCPR, Art. 40.

<sup>147</sup> ICCPR, Art. 40(4)

<sup>148</sup> ICCPR, Art. 41

<sup>149</sup> ICCPR, Art. 41(1)(h)

<sup>150</sup> Optional Protocol. Art. 1..

<sup>151</sup> *Id.*, Art. 5.

<sup>152</sup> Helfer & Slaughter *supra* at note 27.).

Of particular interest is the system of review established by the Optional Protocol. Although the Committee is established by the ICCPR, and at least all of the initial members of the ICCPR concurred in its creation, it is the individual petition system established by the Optional Protocol that has been most effective in developing a human rights jurisprudence.<sup>153</sup> Notably, while the ICCPR has 162 parties, the Optional Protocol has only 111.<sup>154</sup> Thus, the Optional Protocol represents a delegation, by a subset of states, of the power to announce soft legal standards applicable to a broader group of states.<sup>155</sup>

Consider, for example, one of the Committee's most famous decisions, *Toonen v. Australia*.<sup>156</sup> There, the Human Rights Committee expressed the "view" that Tasmania's anti-sodomy laws violated the privacy and anti-discrimination provisions of the ICCPR. This view, of course, was not binding on Australia, but nevertheless has been seen as a contributing factor in the Australian government's decision to effectively preempt the Tasmanian law.<sup>157</sup> But the Toonen decision's consequences did not stop with Australia. In 1995, a year after the Toonen decision, the Committee expressed concern in its consideration of the United States' report made under Art. 40 of the ICCPR "at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination."<sup>158</sup> This statement was a direct effort by the Committee to extend the reach of its Toonen decision to other contexts – in this case, contexts in which it lacked jurisdiction to hear individual disputes. The United States, after all, has not signed the Optional Protocol to the ICCPR, and thus cannot have its practices challenged by individuals.<sup>159</sup> Nevertheless, as evidenced by its comments on American practices, the Committee, and likely other states as well, understood the Toonen decision to provide

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<sup>153</sup> *Id.*

<sup>154</sup> See Office of the United Nations High Commissioner for Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights, New York, 16 Dec. 1966, (<http://www2.ohchr.org/english/bodies/ratification/5.htm>).

<sup>155</sup> In other words, in the Committee's case it is the Committee's jurisdiction that effects the delegation, rather than its creation.

<sup>156</sup> Commun. No 488/1992, UN Doc CCPR/C/50/D/488/1992 P 7.8 (1994), available in ICCPR, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol 5, UN Doc CCPR/C/OP/5/133 (2005).

<sup>157</sup> See Emma Mittelstaedt, Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations, 9 CHI. J. INT'L L. 353, 386 at note 13 (2008).

<sup>158</sup> Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. GAOR Hum. Rts. Comm., 53d Sess., U.N. Doc. CCPR/C/79/Add 50 (1995).

<sup>159</sup> See Office for the United Nations High Commissioner for Human Rights: Status of Ratification of the Principal International Human Rights Treaties, at 11, available at <http://www.unhcr.ch/pdf/report.pdf>.

clarification of the ICCPR's binding obligations. The Toonen decision, in other words, is a soft law obligation piggybacking on the hard law obligations of the ICCPR.

The UN Human Rights Committee illustrates how an IO can use soft law to influence states. The most direct targets of its efforts are states that have consented to the ICCPR.<sup>160</sup> In contrast to this example, some IOs are created with the goal of influencing states that have not consented to the creation of the organization. A good example is the Financial Assistance Task Force (FATF), an intergovernmental body created to combat money laundering and terrorist financing.<sup>161</sup> Its main role is to recommend domestic law approaches to deal with money laundering and terrorist financing. Prior to the establishment of the FATF, the need for consent was a major challenge for efforts to discourage international money laundering and the financing of terrorism. The states most likely to facilitate such activities had little incentive to join the effort and without them success was virtually impossible. Worse still, these states would benefit from their weaker standards if other countries adopted tough rules. Without the ability to impose international law on non-consenting states, it initially seems that the effort cannot possibly succeed.

FATF solved this problem by overcome the need for consent. It did so by exploiting the market realities of the banking industry. Members of the FATF include all the key financial centers in the world. As long as this club remained committed to the goal of reducing money laundering and terrorist financing (that is, as long as none of the major financial centers defected), it had the power to shut any non-compliant country out of world financial markets. In other words, the FATF members were strong enough to force compliance by other states.

To ensure compliance, the FATF member states set up a system of monitoring and inspection and mechanism to blacklist countries that judged to be non-compliant or non-cooperative. The FATF then recommends that financial institutions give special attention to transactions with institutions from a blacklisted country. The practical effect is to greatly increase the costs for blacklisted countries to do business and operate their financial systems. In 2000 and 2001, 23 jurisdictions were blacklisted. By 2006, all of them had satisfied the FATF and had been removed from the blacklist. Since that time, none have been added.<sup>162</sup> As of 2010, the FATF annual report states that 180 countries have adopted their standards (though in some of these countries there are doubts about the level of implementation).<sup>163</sup>

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<sup>160</sup> Though it is worth mentioning that the work of the Committee is sometimes claimed to represent customary international law and, therefore, to apply to all states.

<sup>161</sup> AN INTRODUCTION TO THE FATF AND ITS WORK (2010), [www.fatf-gafi.org](http://www.fatf-gafi.org).

<sup>162</sup> Anne van Aaken, *Effectuating Public International Law through Market Mechanisms?*, 165 J. INT'L & THEORETICAL ECON. 33, 47-48 (2009).

<sup>163</sup> Blake Puckett, *Clans and the Foreign Corrupt practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 GEO. J. INT'L L. 815, 833 (2010);

The FATF was able to create an effective system of soft law because it was able to harness powerful incentives for compliance. By penalizing the financial services sector in non-compliant countries, the FATF created a form of enforcement that made the costs of non-compliance higher than the benefits. The process through which cooperation was achieved resembles the TRIPs agreement in the sense that some countries were induced to comply (or, in the case of TRIPs, to consent) because they were denied the option of retaining the status quo.<sup>164</sup>

The FATF is not the only instance of soft law rules attempting to eliminate the status quo as an option for non-compliant states. The Kimberley Process Certification Scheme, for example, certifies the origin of rough diamonds with the aim of preventing “blood diamonds” from entering the mainstream diamond market. Participating countries include all major diamond exporters and importers, all of which have adopted domestic regulation prohibiting trade in conflict diamonds. This process was established through a non-binding General Assembly Resolution.<sup>165</sup> Though no country is required to join the system, the world’s major diamond importers are participating and have agreed that they will only import diamonds that have been certified and will only trade with countries that are members of the system. This has put diamond exporters (and in particular exporters of conflict diamonds) in the position of either joining the system and exposing themselves to a certain amount of monitoring of their diamond production or refusing to join and being shut out of major markets. The option of simply trading freely without any certification ceased to be available. The result has been that all major diamond exporters have joined the system.

#### E. TRIBUNALS

International tribunals represent the final category of non-consensual law-making that I want to consider. When a dispute is submitted to the jurisdiction of an international tribunal, two distinct kinds of non-consensual rules emerge. First, there is a resolution of the specific dispute. For most international tribunals the resolution of the dispute is the only sense in which their actions are, formally speaking, international law. Under NAFTA’s investment chapter, for example, an investor can seek arbitration of a dispute with one of the state parties. Any resulting award has “no binding force except between the disputing parties and in respect of the particular case.”<sup>166</sup>

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<sup>164</sup> Cross ref to TRIPs.

<sup>165</sup> UN General Assembly Resolution A/RES/55/56 (2000). The Security Council issued a resolution in support of the Kimberley Process, but did not do in a way that produced a binding obligation for states. U.N. Security Council, 4694th Meeting. "Resolution 1459 (2003) [Expressing Support for the Kimberley Process] (S/RES/1459). January 28, 2003.

<sup>166</sup> NAFTA, art. 1136.1.

Despite this clear limit on a tribunal's ability to create binding international law, there is no doubt that the decisions of international tribunals have a profound effect on our understanding of the law and on future cases. When a tribunal speaks to a legal question, it affects the expectations of states. Future conduct inconsistent with a rule pronounced by a tribunal is, for this reason, more likely to be considered illegal. The importance of tribunals in shaping our understanding of the law becomes self-evident when we turn to examine specific international law topics. It would be impossible, for example, to discuss the international law rules governing the use of force without considering the ICJ's *Nicaragua* case.<sup>167</sup> One cannot understand the international trade rules governing health and safety without understanding the *EC – Hormones* case from the WTO's Appellate Body.<sup>168</sup> Humanitarian law cannot be explained without the *Tadic* case.<sup>169</sup>

This form of quasi-judicial law-making sits awkwardly within our existing notions of international law. In prior writing, Timothy Meyer and I dubbed it "International Common Law,"<sup>170</sup> to reflect the fact that the rules are created by tribunals as is done in common law systems. The analogy is imperfect, of course, because in common law systems caselaw creates binding precedent.

A tribunal's ruling, of course, is made without the consent of affected states. The parties to the dispute (and perhaps interested third parties) have an opportunity to present arguments to the tribunal, but their consent is neither required nor sought. Non-parties operating under the same legal regime are not even heard. The resulting decision then forms a part of the jurisprudence that shapes the legal obligations of states.

The above-mentioned *Nicaragua* case at the ICJ is a good example. The United States had engaged in a use of force against Nicaragua, and the ICJ had to determine if this use of force was permitted under the UN Charter's self-defense exception. The United States argued that Nicaraguan actions against El Salvador were sufficient to trigger a right to collective self-defense in the latter that opened the door for the disputed American actions. There is no doubt that an armed attack by Nicaragua against El Salvador would be sufficient to trigger this right of collective self-defense, but Nicaragua's actions arguably fell short of this level. Nicaragua had provided various forms of assistance to Salvadorian rebels, including arms and safe haven, but had not carried out a direct military attack on that country. The dispute, then, centered on the question of whether these actions were sufficient to trigger a right of self-defense.<sup>171</sup>

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<sup>167</sup> Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar v. US), 1986 ICJ 14 (June 27, 1986).

<sup>168</sup> EC – Measures Concerning Meat and Meat Products, WT/DS26, 1998.

<sup>169</sup> International Court Tribunal for the former Yugoslavia, Prosecutor v. Dusko Tadic, Jurisdiction Appeal, Case No. IT-94-1-AR72 (October 2, 1995).

<sup>170</sup> Guzman & Meyer (2009), *supra* at note 134

<sup>171</sup> Nicaragua, *supra* note 167, at 103-104.



The UN Charter states that the Charter shall not “impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”<sup>172</sup> At issue, then, was the meaning of the terms “armed attack” and “use of force.” The ICJ ruled that El Salvador’s actions constituted “intervention” by Nicaragua, which was deemed insufficient to trigger a right to use of force by the United States. It then went further, in an attempt to clarify what the law permits in the face of an intervention. It concluded that a state may respond to such intervention with “proportionate countermeasures,” but that the right to such countermeasures was limited to the target of the intervention – El Salvador in this case:

While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force. [Nicaragua’s actions] could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador.<sup>173</sup>

This decision was hardly a self-evident interpretation of the Charter. The tribunal was engaged in what can only be described as rule-making. In performing its duties as an international court, the ICJ shaped one of the most fundamental legal rules in the international system – that governing the use of force. It did so over the objections of the United States, one of the two super-powers of the day, and without any input from the large majority of countries in the world.

As is true for the other forms of non-consensual rule-making, tribunal decisions have the advantage of allowing international law to develop and of (potentially) identifying and implementing superior rules over the objection of dissenting states. On the other hand, granting this power to a tribunal requires that states surrender some control over the rules that govern their behavior. The risk for an individual state is that it will not be able to prevent the emergence of a rule it dislikes. For states as a whole there is the additional risk that the tribunal may make decisions inconsistent with the collective interests of states – the tribunal may pursue its own agenda. Whenever states consider the creation of a tribunal, then, they have to weight the benefits of non-consensual rule-making against the associated loss of control.

A broad-based grant of jurisdiction to an international tribunal, coupled with a high degree of respect for its decisions, would create a significant source of non-consensual law-making. In practice, however, states have resisted such a large-scale empowerment of international tribunals. Though several international tribunals have been created, and there is some discussion of the “proliferation” of international courts and tribunals,<sup>174</sup> their

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<sup>172</sup> UN Charter, art. 51.

<sup>173</sup> *Nicaragua*, supra note 167, at ¶ 249.

<sup>174</sup> See Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 Conn. L. Rev. 929, 950 (“The proliferation of international tribunals also, of course, creates the opportunity for plural norm

influence is constrained by a combination of limited jurisdiction, cabined discretion, and lingering state influence.<sup>175</sup> As one commentator observed, “most of the[] rulings are exactly what states hoped for when they delegated authority to [international tribunals.]”<sup>176</sup>

Consider, for example, the architect of the already-discussed *Nicaragua* case, the ICJ. It is the “the principal judicial organ of the United Nations,”<sup>177</sup> and could have been structured to have general jurisdiction over virtually any international law claim. As it actually exists, however, the Court’s *de facto* ability to engage in non-consensual rule-making is quite limited.

The most important limit on the Court’s influence is the limit on its jurisdictional reach. The ICJ is only competent to entertain disputes between States that have accepted its jurisdiction, which can be done in any of three ways. First, after a dispute arises, the disputing States may, by special agreement, submit the dispute to the Court.<sup>178</sup> This delivers much greater control to states, allowing them to consider whether or not to submit a specific case to the Court and greatly diminishes the extent to which it can be termed a non-consensual process. Under this head of jurisdiction the ICJ is arguably serving as “a glorified arbitration panel.”<sup>179</sup>

Second, States may accept the jurisdiction of the Court with respect to the interpretation of a treaty by including an appropriate clause in the treaty.<sup>180</sup> Agreeing to jurisdiction in this way empowers the Court to engage in non-consensual rule-making, but only with respect to the specific treaty. As it turns out, states have been reluctant to submit to the ICJ’s

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creation.”); Benedict Kingsbury, Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?, 31 N.Y.U. J. Int’l L. & Pol. 679, 679 (1999) (“The rapid proliferation of international courts and tribunals, and the increased activity of many of them, pose numerous practical problems . . .”); Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 N.Y.U. J. Int’l L. & Pol. 709, 709 (1999) (stating that one of the most important developments in international law in the post-Cold War age has been “the enormous expansion and transformation of the international judiciary”). But see Jose E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex. Int’l L.J. 405, 411 (2003) (describing the claim that “[t]he recent proliferation of international tribunals constitutes the ‘judicialization’ of international law” as a “half truth” and possibly closer to myth).

<sup>175</sup> Guzman & Landside, *supra* note 27, at 1712-23.

<sup>176</sup> Alter, *supra* note 27 at 75.

<sup>177</sup> International Court of Justice, <http://www.icj-cij.org/court>.

<sup>178</sup> Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 33.

<sup>179</sup> Eric A. Posner, The Decline of the International Court of Justice, in *International Conflict Resolution* (Stefan Voigt, Max Albert, & Dieter Schmidtchen, eds 2006).

<sup>180</sup> ICJ Statute, *supra* note 178, art. 36(1).

jurisdiction in this way, especially in recent years.<sup>181</sup> The United States, for example, has not used this type of clause since the early 1970s.<sup>182</sup>

Finally, a State may make a declaration accepting the compulsory jurisdiction of the Court over international law disputes with other States that have made a similar declaration.<sup>183</sup> If used universally, this form of jurisdiction would represent a major delegation by states to the Court. In practice, however, only a minority of UN members accepts such jurisdiction and among the permanent members of the Security Council, only the UK does so.<sup>184</sup> Further narrowing the importance of this form of jurisdiction, States that accept this “general” jurisdiction typically make aggressive use of reservations to limit its practical effect.<sup>185</sup> Such reservations can even be used on the eve of a violation of international law. Two days before Canada adopted domestic legislation allowing it to board Spanish and Portuguese fishing vessels in international waters as part of its effort to preserve Turbot stocks in the North Atlantic, it submitted a new declaration of acceptance of ICJ jurisdiction that excluded from the Court’s jurisdiction disputes concerning “conservation and management measures taken in respect of fishing vessels” in the North Atlantic.<sup>186</sup> In other words, it created an exception to the ICJ’s jurisdiction in anticipation of a specific violation of international law.

In addition to limiting the formal jurisdiction of the ICJ, states have found ways to “punish” the Court for rulings that a state dislikes. When France found itself the defendant in the *Nuclear Weapons Case*, for example it refused to participate.<sup>187</sup> The ICJ retained jurisdiction over the dispute, but France’s lack of cooperation undermined the institution. States can also punish the ICJ by withdrawing consent to jurisdiction. The United States withdrew its consent from the Court’s general compulsory jurisdiction during the *Nicaragua* case, and withdrew its consent to jurisdiction under the Vienna Convention on Consular Relations in the wake of the *Avena* Case.<sup>188</sup> Such withdrawals reduce the influence of the ICJ over future disputes, but their more important function is to signal to the ICJ that states will not tolerate unfavorable rulings. This creates a chill on ICJ rulings, reducing the willingness of

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<sup>181</sup> Posner, *supra* note 181, at 9.

<sup>182</sup> *Id.*

<sup>183</sup> ICJ Statute, *supra* note 178, art. 36(2).

<sup>184</sup> See United Nations Member States, <http://www.un.org/Overview/growth.htm>; Declarations Recognizing the Jurisdiction of the Court as Compulsory, at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&PHPSESSID=9d070681160227f37c427c2068ebf1ed>.

<sup>185</sup> Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AMER. J. INT’L L. 57, 65 n.49 (1987).

<sup>186</sup> Ana Paula Linhares, *The ICJ Canada-Spain Fishing Dispute*, 8 RECIEL 215, 215 (1999).

<sup>187</sup> Scott & Carr, *supra* note 185, 65 at note 49.

<sup>188</sup> *Id.*

the Court to adopt decisions that diverge too much from what the preferred positions of the participating states.

All of these restrictions on the reach of the Court have greatly limited its impact on international law. This is best seen through its limited docket. Since its founding, the Court has delivered only 104 judgments in contentious cases. Though some of these cases have affected international law in important ways, it is clear that the institution itself represents no more than a modest pushback against the consent problem.

The lesson from the ICJ can be generalized to other tribunals – one way or another, states cabin the influence of tribunals and preserve the central role of consent. With the ICJ there is very little limiting the international law subject matter on which the court can opine, but other features of the institution severely limit its influence and the number of cases it hears.

Other tribunals are much busier and, in fact, play a major role in the shaping of legal rules, but do so over a carefully delimited set of legal issues and subject to strict limits on their discretion. The best example here is the dispute resolution system at the World Trade Organization (WTO) which has played a critical role in the development of the trading system.

Even within the realm of trade the WTO tribunals' ability to shape the law is limited. First, they can only respond to the facts of the case before them – they do not have the authority to issue advisory opinions or any other form of legal ruling. Second, they are constrained by the text of the WTO Agreements. The Appellate Body (the most important judicial organ of the WTO) “cannot add to or diminish the rights and obligations provided in covered agreements.”<sup>189</sup> This language represents an attempt to discourage activist interpretations. It appears to have worked inasmuch as the Appellate Body has shown itself to be reluctant to stray from the meaning of the WTO Agreements.<sup>190</sup> Perhaps the most important reason for the Appellate Body's conservative approach is that it is a political entity. Its discretion is cabined by a variety of mechanisms, including the selection of AB members; the threat to rewrite the DSU; criticism of decisions by Member States; defiance and non-compliance; and unilateral exit.<sup>191</sup> Thus, even though the AB has been granted significant authority and discretion, the political realities at the WTO have kept it in check and prevented the WTO from fundamentally altering the rights and obligations of its members.

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<sup>189</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17.1, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 3.2 [hereinafter DSU].

<sup>190</sup> Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L LAW 247, 260 (2004).

<sup>191</sup> *Id.*

All that said, it must be concluded that the dispute resolution process is an important part of how the WTO legal regime has developed. There is no denying that tribunals are engaged in non-consensual rule-making. In some instances this non-consensual process seems to have worked in the sense that it has resolved disputes when negotiation has failed – for example, disputes between the United States and Europe over hormone-treated beef and genetically-modified organisms.

The WTO dispute resolution system, as successful, as it is, illustrates why tribunals are not an adequate solution to the consent problem. Tribunals are reactive rather than proactive. They respond to specific disputes and their primary task is to resolve those disputes. They are not able to create new obligations, and they are not able to repeal or reverse an existing rule. At the WTO, the dispute resolution organs can do very little about the key challenges to the trading system such as agricultural protectionism by powerful members, the tension between the multilateralism of the WTO and regional trade liberalization efforts, and the persistent struggle to balance the goal of liberalized trade against important non-trade priorities such as environment, health, national security, and human rights cannot be resolved by the dispute resolution system.

The problem does not lie with the dispute resolution system, but rather with the process of negotiation. Like the larger world, the WTO operates by consensus. This makes it almost impossible to address serious problems. Tribunals are simply not designed to engage important problems and seek sensible policy responses.

## V. CONCLUSION: THE PROBLEM OF OUR BIGGEST PROBLEMS

There is shortage of serious problems facing the world today. From climate change to nuclear proliferation to terrorism to economic crises, we live in an interdependent world with shared challenges. Responding effectively requires a collaborative effort by many states. By itself, however, this is not enough.

Effective and appropriate solutions to complex problems will not always serve the interests of every single country on the planet. Sometimes the best solutions will require some countries to accept burdens so that others can benefit. In the language used in this Article, it is foolish to reject all Kaldor-Hicks Improvements that are not also Pareto Improvements.

This Article has not only demonstrated the inefficiency of a commitment to consent. It has also surveyed the international legal system's non-consensual forms of rule-making and shown them to be inadequate to address the consent problem. There is simply too little flexibility or authority in these non-consensual approaches to address the world's problems.

If the global community hopes to make progress, we will have to increase our ability to overcome the consent problem. Analogizing to domestic systems or even to the EU, one can imagine systems based on some form of global international democracy. This could take any number of forms including voting by states (as is done in many IOs) or by individuals to elect some form of international legislative body (as is done in the EU).

Generating a body capable of adopting rules over the objection of some states would greatly improve the prospects of achieving policy outcomes that benefit the international community generally, even if they do not benefit every state.<sup>192</sup>

There is something to be said for a system that includes some form of governance at a global level. The case for it include its ability to overcome the consent problem by giving some international body the authority to make collective decisions and impose obligations on states, even over the objections of some states.

Whatever their merits, however, such proposals smack of the utopian. There is no reason to think that the nation state is prepared to surrender its position as the dominant form of political organization or even to take much smaller steps toward meaningful international governance. The hesitant and halting moves toward international cooperation have all stopped well short of a broad delegation of rule-making authority to international institutions. The international structures we have, whether international organizations or international tribunals, do no more than nibble around the edges of the notion of state supremacy and sovereignty. They cannot be said to represent a substantial delegation from the state to international bodies.<sup>193</sup>

So while I can understand and have some degree of sympathy for the idea of a move toward greater international democracy, I am not persuaded that it is a viable solution. Certainly it is not a solution at present, and seems unlikely to be in the near future. Ironically, enough, the consent problem itself is a key reason why such efforts have never gone far in the past and are unlikely to succeed in the future. Even if some form of global democracy would be normatively desirable (a point on which I prefer to take no position) it is not a realistic solution to our current struggles with the consent problem.

Indeed, I do not believe that there is any magic bullet capable of helping us overcome the consent problem. The best we can strive for is incremental progress – a better balancing of the valuable protections provided by consent and the desperate need for non-consensual solutions to our problems. I do not believe we can aspire to an entirely new category of non-consensual solutions or approaches, and so we must to the best we can with what we have. This leaves with a limited number of options. CIL and *Jus Cogens* norms cannot be changed to suit the needs of the moment, and so is clearly not a form of rule-making that can be pressed into service for the purpose of responding to the consent problem. The Security Council could conceivably seek to extend its reach and press more aggressively to address global problems, but it would soon encounter political resistance from all but the P5 states. It would also be hampered, as it has always been, by the veto power of the P5.

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<sup>192</sup> See David Held, *The transformation of Political Community; Rethinking Democracy in the Context of Globalization*, in *DEMOCRACY'S EDGES* (Ian Shapiro & Casiano Hacker-Cordon, eds 1999); Jeffery Atik, *Democratizing the WTO*, 33 *GEO. WASH. INT'L L. REV.* 451 (2001).

<sup>193</sup> Guzman & Landslide, *supra* note 27.

This leaves both IOs and international tribunals. These represent the two most promising tools with which to combat the consent problem. Tribunals are obviously constrained because they are reactive rather than proactive – they can only resolve disputes that come before them. Where legal rules are in place, they can be effective in diffusing disputes and making the rules more effective. They can also adjust the meaning of international commitments at the edges without requiring a full-scale, consent-based renegotiation of the underlying agreement. This has been done at the ICJ, the WTO, the international criminal law tribunals, investment tribunals, and elsewhere. Though tribunals can have significant legitimacy problems and must not stray too far from the specific rules they are asked to interpret, they provide some needed flexibility. Criticism of international tribunals should be mindful of the need to have them making judgments about international law and engaging in limited forms of non-consensual rule-making.

The most promising way to address the consent problem, however, is through IOs. International organizations are a well established part of the international system, and are already engaged in a wide range of soft-law activities. The best response to the consent problem in the short term would be for IOs to, at the margin, become more aggressive and to speak with a stronger voice. States and commentators, in turn, should bolster these efforts. We should acknowledge the critical role that IOs have to play, and we should put more pressure on reluctant states to follow the IO recommendations, guidelines, proposals, and so on.

My proposal, then, is a call for an increased embrace of the activities of IOs and a recognition that they are our best chance to make inroads against the consent problem. I recognize that this suggestion is an easy target. It is both too weak and too strong, for example. It is too weak because it lacks drama. I am not suggesting any wholesale changes to the international system or a complete restructuring of doctrinal categories. I could do so, of course, but I see no reason to think that suggestions of that sort will lead to change. It is too strong because I am suggesting a change in norms and expectations that will shift power from states to international institutions. These institutions are not directly elected, they are normally not responsive to individual states, and when they make mistakes (as they surely do from time to time) it will normally take unanimous consent to override those mistakes.

This is all true. Because it is true I would not support a limitless delegation of authority to IOs or to any other international entity. The state is and should remain the key political unit. My claim is simply that from where we are today, it is imperative that we move toward a system in which there is more rather than less non-consensual rule-making. The best change to move in that direction can be found in existing (or perhaps future) IOs. Such an approach will be far from perfect. It will have to contend with IOs pursuing agendas that states do not support and IOs advancing rules that are value-reducing rather than value-increasing from a global perspective.

I support such a shift in attitudes because it will expand the set of attainable solutions for the world's problems. A few states will find it more difficult to resist value-increasing policies that happen to impose small costs on their own population. It will be more difficult

for states to demand a payoff in exchange for going along with beneficial policies. States will be more flexible in negotiations because their ability to block any and all changes to the status quo will be weakened.

It is possible to have too much of a good thing, and international law has too much room for consent in its system. The commitment to state control over events creates a suffocating status quo bias that does more harm than good. Stronger and more influential IOs would provide a modest yet valuable counterweight. They hold the promise of helping the international legal system move forward more effectively and delivering solutions that are currently beyond our reach.