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# Against Consent

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*This Article challenges the conventional view of consent in international law. It argues that our existing commitment to consent is excessive and that better outcomes would result from greater use of nonconsensual 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 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.*

*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. 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*

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*compliance placed on states. This move toward greater support for nonconsensual soft law would help to overcome the consent problem, and represent a step in the right direction for the international system.*

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## INTRODUCTION

“[International Law] is based on the consent (express or implied) of states.”<sup>1</sup> The importance of consent is built into the DNA of international law scholars.<sup>2</sup> Many of the most important international law scholars of

1. ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 4 (2005).

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 1, intro. note at 18 (1987) (“Modern international law is rooted in acceptance by states which constitute the system.”); JAMES LESLIE BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE MODERN LAW OF PEACE 51–54 (1963) (noting that states obey international law because they have consented to it); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 1995) (“[T]he general consent of states creates general rules of application.”); 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 (2002) (the principle of reciprocity remains the governing norm in the creation of international legal obligations); Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. 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 L. 137 (2005) (“Notwithstanding criticism of Article 38 and state consent, most international lawyers rely on them as international law’s operating framework.”). But see Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL LAW DECISIONS 9–10 (Stephen M.

the last sixty years have gone so far as to assert that a state cannot be bound without its consent.<sup>3</sup>

In an era of pressing global challenges, however, this commitment to consent must be moderated. Though consent does indeed protect the interests of states and support notions of sovereign equality, it also functions as a barrier to effective cooperation in a world of vastly divergent priorities and concerns. In both practice and scholarship, the first (positive) effect of consent is given too much weight, while the second (negative) effect is all but ignored.

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 political 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.

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 demonstrate that our commitment to consent is a major problem for today's international legal system. An excessive commitment to consent can cripple efforts to use international law as a tool to help solve the world's largest problems. We live in a world with nuclear weapons, a warming climate, vanishing fisheries, grinding poverty, and countless other problems whose solutions require a high level

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Schwebel ed., 1971) (citing eleven other possible sources of international obligation).

3. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27) ("[I]n international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise."); *Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 3, 47 (Feb. 5) ("[H]ere as elsewhere, a body of rules could only have developed with the consent of those concerned."); 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."); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 169 (1987) ("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."); GENNADII MIKHAILOVICH DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 7 (1993); 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.").

of cooperation among states. Unless we change how we view the role of consent, it will be almost impossible to address these problems.<sup>4</sup>

The Article proceeds as follows. The first 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 they are not as important as is commonly thought. Part II evaluates the consequences of the consent requirement for efforts to achieve international cooperation. It explains how the powerful status quo bias of the consent requirement frustrates many desirable forms of cooperation and defeats many efforts to achieve better outcomes. Part III surveys the forms of nonconsensual 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 are much too weak to overcome the consent problem in most circumstances.<sup>5</sup> To resolve the most pressing issues facing the world today, we must find additional ways to overcome the conservatism of consent. Finally, I consider how, in light of the consent problem and the limited ways states have to avoid that problem, we should

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4. 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. *See, e.g.*, 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. *See, e.g.*, Fitzmaurice, *supra* note 2; 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.

5. 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" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7). 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, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448 [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.

move forward, concluding that the best solution is for the international system to embrace and promote the nonconsensual soft law norms promulgated by international tribunal and international organizations.<sup>6</sup>

### I. 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>7</sup> It creates endless bottlenecks, provides many veto points, and invites strategic holdout 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>8</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>9</sup>

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 (in the form of more states, more non-state actors, deeper integration, and more common problems) means that achieving agreement is increasingly difficult. Simply put, effective solutions to 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>10</sup> This is good advice that applies to any critique of consent in international law. There are powerful

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6. The EU represents perhaps the single greatest example of international cooperation on political, social, and economic issues the world has ever seen. It is also an exception to the normal requirement of consent for state-to-state collaboration. The modern EU was made possible only because political processes were created that allow for non-consensual decisions. 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.

7. Geoffrey Palmer, *New Ways to Make Environmental Law*, 86 AM. J. INT’L L. 259, 259 (1992).

8. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 172–73 (2008).

9. 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 *unanimity*, for in the latter case there exists full agreement on a given text and in addition the general consent is underscored by a vote.” ROBBIE SABEL, *PROCEDURE AT INTERNATIONAL CONFERENCES* 312–16 (2006) (citing CASSESE, *supra* note 3, at 196).

10. ASHTON APPLEWHITE, WILLIAM R. EVANS III & ANDREW FROTHING, *AND I QUOTE* 79 (2003).

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.

### *A. Compliance and Consent*

The signature feature of international law is its lack of coercive enforcement.<sup>11</sup> This reality makes compliance with international law a matter of constant concern.<sup>12</sup> Imposing rules on states without their consent creates the risk that the rules will be ignored. The consent requirement, then, promises to reduce the frequency of noncompliance 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.

But 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 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 “compliance-pull” and change the behavior of states. For this reason, 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, the consent of a state to a rule hardly ensures 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 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), for example, they did so because it

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11. 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* Part III.C, U.N. 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.

12. *See* GUZMAN, *supra* note 8.

was a necessary condition for membership in the WTO.<sup>13</sup> 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>14</sup>

Overall, consent is a highly imperfect proxy for state willingness to comply with legal rules. Examples of noncompliance despite state consent abound, including with respect to the prohibition on the use of force, many multilateral environmental agreements, human rights commitments, and investment agreements.<sup>15</sup>

### B. *Legitimacy and Consent*

A rule made without the consent of affected states faces legitimacy problems that speak to both the desirability and practicability of nonconsensual rules.<sup>16</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>17</sup>

I wish to focus on the possibility that legitimacy 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 indicators increase the likelihood that a rule will serve the interests of the governed. Determinacy allows

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13. Anu Bradford, *When the WTO Works, and How it Fails*, 51 VA. J. INT'L L. 1, 21 (2010).

14. See *infra* Part II.A.

15. 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, *supra* note 8, at 42–45.

16. 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 undermines the legitimacy of nonconsensual rule-making.

17. To the extent that 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 generally 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 regardless of whether 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.

18. 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, *supra* note 17, at 30–46.

19. Symbolic validation refers to the rule's ability to communicate or signal authority. *Id.*

20. Coherence refers to the degree to which the rule is applied coherently and consistently. *Id.*

21. Adherence is the relationship between a primary rule of obligation and the secondary rules governing its creation, interpretation, and application. *Id.*



those affected to know the meaning of a rule and so gives them greater opportunity to voice any concerns or objections.<sup>22</sup> Symbolic validation includes evidence that authority is being exercised “in accordance with right process.”<sup>23</sup> This procedural feature gives potential opponents of a proposed rule an opportunity to object, making adoption of a welfare-reducing rule less likely.

Any move toward nonconsensual rule-making must at least pause to consider these issues. But one should not take this point too far. There is no reason to think that unanimity is a necessary condition to achieve legitimacy. 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 nonconsensual governance systems, but it is also hard to think of many such systems (other than international law) that rely on consent and are considered legitimate. Legitimacy and consensus may in fact be inconsistent.

### C. *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 well as anything can, that all states believe a proposed rule to be in their interest.<sup>24</sup> This is the best

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22. *Id.* at 30–46.

23. *Id.* at 25–46; see also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 27–40 (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 705–11 (1988).

24. 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.

evidence we can hope for that a rule will increase global well-being.<sup>25</sup> Consent, then, protects states and the international system from changes that will reduce the joint welfare of states.<sup>26</sup>

The relationship between consent and state welfare is the central topic of Part II.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 defeats many welfare-enhancing forms of international law. 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>27</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.

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25. 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 key assumption to conventional rational analysis of international affairs is that states are rational actors interested in maximizing the welfare of their 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 & 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 (2008). "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.

26. 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.

27. 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 MICH. J. INT'L L. 1075, 1077-78 (2004).

## II. STATES DO IT BY CONSENSUS

### A. *The Consent Problem*

When states evaluate a potential solution to a shared 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.”

Everybody is in favor of more efficient outcomes as long as they get some of the benefits. For instance, 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>28</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>29</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. 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 192 members.<sup>30</sup>

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

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28. See Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577. The UPU was known as the General Postal Union until 1878. See *About History*, THE UPU, UNIVERSAL POSTAL UNION, <http://tinyurl.com/cp636m4> (last visited Apr. 16, 2012).

29. See Treaty Concerning the Formation of a General Postal Union, *supra* note 28, arts. 3–7. The UPU also establishes international standards to facilitate the coordination among postal services.

30. See *The UPU*, THE UPU, UNIVERSAL POSTAL UNION, <http://www.upu.int/en/the-upu.html> (last visited Apr. 16, 2012).

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 attempts to reach agreement on stronger intellectual property (IP) protections failed because it proved impossible to get the consent of all relevant states.<sup>31</sup> 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 is known as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs).<sup>32</sup>

The basic question in setting IP policy is the tradeoff between the innovation incentive provided by strong intellectual property protection and the access benefits provided by weaker protection. Identifying the IP policy that generates the greatest total benefits (including both pecuniary and nonpecuniary benefits) is a difficult task, to be sure, but getting it right maximizes the size of the pie.

The negotiation of a potential IP 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 changed the distribution of benefits. Developed states, led by the United States, sought strong protections because they produce a

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31. Andrew T. Guzman, *International Antitrust and the WTO: The Lesson From Intellectual Property*, 43 VA. J. INT'L L. 933, 946–51 (2003).

32. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 1869 U.N.T.S. 299 [hereinafter TRIPs].

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.<sup>33</sup> 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 makes the polluter worse off, and in the IP example, increasing international IP protections makes 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 state receive a larger piece. Any efficient proposal is a Kaldor-Hicks improvement.

Using this terminology, the consent problem can be stated 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 from all decision-making states 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.

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 explanation 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.

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33. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 42 (6th ed. 2012).

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 intellectual property. Both groups of countries benefited, and agreement was reached.<sup>34</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 transaction costs are low enough.<sup>35</sup> 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 mean higher transaction costs.<sup>36</sup> Problems that can be solved among a few players in a region are much more difficult to address 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 twenty-three states.<sup>37</sup> Its successor, the

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34. 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. *See also* discussion *infra* Part II.B.

35. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

36. "The transaction costs of bargaining increase geometrically with the number of bargainers." ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 112 (2000).

37. *Members and Observers*, WORLD TRADE ORGANIZATION, available at <http://tinyurl.com/2vons> (last visited Apr. 16, 2012). *See also* Sungjoon Cho, *Beyond Rationality: A Sociological Construction of the World Trade Organization*, 52 VA. J. INT'L L. 321, 322 n.2 (2012).

WTO, was born in 1995 with 128 members.<sup>38</sup> Today, the WTO has 153 members.<sup>39</sup> It is hardly surprising that multilateral trade negotiations have become more cumbersome and difficult over time.<sup>40</sup> The most recent round of trade negotiations, the Doha Round, was launched in 2001 and continues today without any sign of agreement.

The steady increase in interdependence among states creates an additional 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 in the contemporary world.

The European Union (EU) 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 de-emphasizing consensus in favor of nonconsensual 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>41</sup> Proponents of this change argued successfully that the

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38. *Members and Observers*, *supra* note 37; Cho, *supra* note 37, at 322 n.2.

39. *Members and Observers*, *supra* note 37; Cho, *supra* note 37, at 322 n.2.

40. 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); see also Bradford, *supra* note 13 (arguing that without institutional reforms the WTO's recent expansion may well have met its limits). For various issue areas, see generally DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE* (1994) (discussing the challenges of harmonizing environmental and trade objectives); 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); Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733 (1999) (noting the consequences for intellectual and cultural property); Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885 (2003) (exploring the integration of labor standards); John H. Jackson, *The Perils Of Globalization and the World Trading System*, 24 FORDHAM INT'L L.J. 371 (2000) (discussing the need for greater institutional coordination of various competing objectives); Paul B. Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L.J. 173 (2005) (noting the inconsistencies within the global trading structure of overlapping national policies).

41. 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.

addition of ten new members made the prior unanimity standard too demanding.<sup>42</sup>

## B. *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>43</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>44</sup> Where there was enough cultural connection, appeals were made to natural or religious law, each of which is a form of nonconsensual international law.<sup>45</sup> When a community of nations

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42. 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).

43. 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 as 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 (3d 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*, at 150–54 (2002).

44. 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*, in *THE MARCH OF FOLLY: FROM TROY TO VIETNAM* 51, 51–126 (1985). It was against this backdrop that Niccolò Machiavelli authored *The Prince*, the classic realist treatise on political philosophy studied by international and domestic political scientists alike.

45. Religious law remains relevant in the world today, perhaps most obviously among Islamic states. Natural law is largely out of fashion but is not completely without adherents. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 16–19 (2d ed. 2004) (suggesting that natural law is one of the foundations of human rights law).



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.

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 prehumans, 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.

The 1648 Peace of Westphalia consisted of a series of treaties that brought an end to both the Thirty Years' War, 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.<sup>46</sup> 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 it was 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.

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46. See generally WILLIAM JONES & WILLIAM RUSSELL, *THE HISTORY OF MODERN EUROPE: PART I. FROM THE RISE OF THE MODERN KINGDOMS TO THE PEACE OF WESTPHALIA, IN 1648* (2010); WILLIAM JONES & WILLIAM RUSSELL, *THE HISTORY OF MODERN EUROPE: PART II. FROM THE PEACE OF WESTPHALIA IN 1648, TO THE PEACE OF PARIS, IN 1763* (2011).

The Peace of Westphalia is 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>47</sup> 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.

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 addressing some issues requires 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>48</sup>

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47. 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% of its buildings and 40% 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% 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%. 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. 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 M. MERRIMAN, *THE MODERN HISTORY OF EUROPE: FROM RENAISSANCE TO THE PRESENT* 160 (3d ed., 2010).

48. 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

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>49</sup> Collective decision-making among states remains a consent-based process.

Some international problems can be solved relatively easily, even when consent is required. The simplest 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 in air travel ranging from safety to the tagging of luggage.<sup>50</sup>

Things become more difficult when the interests of the parties are not so closely aligned. The paradigmatic version of conflicting interests, of

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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 43, at 125–26. The inherent right of self-defense under the UN Charter is one of the few recognizable remnants of substantive law from the anarchic state system of early modern Europe that survives.

49. 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.

50. 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 (commonly known as the Warsaw Convention), Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. XI, Sept. 28, 1955, 478 U.N.T.S. 371, 381 (commonly known as the Hague Protocol), The Convention 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) (commonly known as the Guadalajara Convention); Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, ICAO Doc. 9148, *reprinted in* LAWRENCE B. GOLDBIRSH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 401 (2000). A summary can be found in Paul Stephen Dempsey, *International Air Cargo Liability and the Tower of Babel*, 36 GEO. WASH. INT’L L. REV. 239, 240–41 nn.2–8 (2004).

course, is the prisoner's dilemma. Attempts to solve a problem of this sort 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 antipersonnel landmines.<sup>51</sup> Though many states joined the treaty, some, including the United States, refused because they did not feel the terms served their interests.<sup>52</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 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.<sup>53</sup> Nevertheless, the failure to get others to join can be described as a failure to identify and offer sufficient transfers to persuade the nonparticipants.

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.<sup>54</sup> Countless other opportunities for cooperation have no doubt been missed without even getting as far as 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>55</sup>

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51. U.N. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *opened for signature* Sept. 18, 1997, 2056 U.N.T.S. 211 (entered into force Mar. 1, 1999), *available at* <http://tinyurl.com/77gwp8f> (last visited Apr. 16, 2012).

52. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 655–63 (1998).

53. John F. Cloverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 221, 270 (2004).

54. *North Korea's Nuclear Program*, N.Y. TIMES, Feb. 29, 2012, *available at* <http://tinyurl.com/lt5l27> (last visited Apr. 16, 2012); *The Doha round . . . and round . . . and round*, ECONOMIST, July 31, 2008, *available at* <http://www.economist.com/node/11848592> (last visited Apr. 16, 2012).

55. 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

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 and assurances that the United States would not invade. 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>56</sup> Every war that ends in a conditional surrender 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>57</sup>

The point about transfers and transaction costs is 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" 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

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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. L. REV. 729 (2004).

56. ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 86–88 (1971).

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 103–04.

57. 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, *Middle Eastern Wars: Second Gulf War (Kuwait Crisis) 1990-1*, in *WARS AND PEACE TREATIES: 1816 TO 1991*, at 135, 138 (1992).

negotiations to fail in the complex world of state-to-state interaction.<sup>58</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 on situations in which states have divergent interests and seek to resolve the problem by constructing appropriate transfers. 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 one that is both nonrivalrous and nonexcludable.<sup>59</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 efforts to create or protect them benefit all users while the costs are borne only by those 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 benefits of such efforts (prevention of global outbreaks of disease) are enjoyed by the entire world.<sup>60</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 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

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58. See, e.g., 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).

59. See James C. Murdoch & Todd Sandler, *The voluntary provision of a pure public good: The case of reduced CFC emissions and the Montreal Protocol*, 63 J. 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 nonexcludable. Harm suffered by one nation does not reduce harm to other nations and is therefore nonrival).

60. 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.

considered a public goods problem if suffering in one country is judged to impose costs on others.

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>61</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.

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>62</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.

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

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61. 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 (1994). 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 considerably 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, Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, U.S.-Can.-Jap.-Rus., Feb. 11, 1992, T.I.A.S. No. 11465, established a complete ban on high seas fishing extending across the North Pacific Ocean and adjacent high seas north of thirty-three degrees latitude. Despite a firm agreement being achieved with great difficulty, enforcement issues remain regarding the use of re-flagging and driftnets. See, e.g., Kelly R. Bryan, Note, *Swimming Upstream: Trying to Enforce the 1992 North Pacific Salmon Treaty*, 28 CORNELL INT'L L.J. 241, 242 (1995); Seth Korman, Note, *International Management of a High Seas Fishery: Political and Property-Rights Solutions and the Atlantic Bluefin*, 51 VA. J. INT'L L. 697 (2011).

62. It also provides that states that are subject to a conservation system with an incentive to violate their commitments. See Guzman, *supra* note 8, at 64–68 (describing the compliance problem associated with public goods in the context of climate change and the imposition of sanctions on violators).

eliminated.<sup>63</sup> But 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.

How can this problem be overcome? 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.<sup>64</sup>

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>65</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 goods problem they faced, but 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 their territorial seas, but it failed to specify any special rights to protect those interests.<sup>66</sup> All that could be agreed upon was a requirement that states whose nationals engaged in fishing adjacent to the territorial seas of another state negotiate

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63. Though it would be replaced with a principal-agent problem to the extent the international organization did not pursue to goals of the states.

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

65. United Nations Convention on the High Seas, art. 2, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 11 (entered into force Sept. 20, 1962), *available at* <http://tinyurl.com/28rrolb> (last visited Apr. 16, 2012). Both the Convention on the High Seas and the Convention on Fishing and Conservation of Living Resources on the High Seas were superseded by United Nations Convention on the Law of the Sea. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994), *available at* <http://tinyurl.com/7vbg4g7> (last visited Apr. 16, 2012).

66. United Nations Convention on Fishing and Conservation of Living Resources of the High Seas, art. 6(1), *opened for signature* Apr. 29, 1958, 559 U.N.T.S. 285 (entered into force Mar. 20, 1966), *available at* <http://tinyurl.com/cmhuvgg> (last visited Apr. 16, 2012).



with the coastal state with an eye toward conservation.<sup>67</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>68</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 twelve-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>69</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 fishermen into custody. In 1961, the two countries entered an agreement under which Britain recognized the twelve-mile limit.<sup>70</sup> In 1972, Iceland once again unilaterally extended its jurisdiction over fisheries — this time to fifty miles — triggering another round of conflict between Iceland and Britain and a 1974 International Court of Justice (ICJ) ruling in Britain’s favor.<sup>71</sup> 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>72</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 twenty-two claimed a 200-mile fishing zone.<sup>73</sup> Because these extensions of jurisdiction were

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67. *Id.* art. 6(3).

68. *Id.* pmbl.

69. 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 161–69 (1997). 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.

70. 5 NEW DIRECTIONS IN THE LAW OF THE SEA 29 (R. Churchill et al. eds., 1977).

71. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

72. See NEW DIRECTIONS IN THE LAW OF THE SEA, *supra* note 70, at 29.

73. See generally William T. Burke, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS

unilateral, states opposed to an extension of coastal jurisdiction, including some of the world's most powerful states (Japan, the United States, and 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 consent. This was a critical change in the negotiating dynamic. The result was a compromise under which coastal states enjoy exclusive control over economic activity within 200 miles (the EEZ) of the coast, while the noneconomic rights in the EEZ remained with the international community (e.g., right of navigation).<sup>74</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 Northwest 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.<sup>75</sup> Canada responded with a policy of boarding and seizing Spanish and Portuguese ships in international waters.<sup>76</sup> In March 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>77</sup>

Despite its flaws, the solution that emerged in the fisheries context is an improvement over the prior noncooperative regime. Unilateral actions helped address the problem because states were able to exclude others

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1982 AND BEYOND (1994).

74. See United Nations Convention on the Law of the Sea, *supra* note 65, at Part V. The eventual inclusion of the 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, 325–28 (1979).

75. For a discussion on the incident, see generally Michael Keiver, *The Turbot War: Gunboat Diplomacy or Refinement of Law of the Sea?*, 37 LES CAHIERS DE DROIT 543 (1996).

76. *Id.* at 555–56.

77. Jamison E. Colburn, *Turbot Wars: Straddling Stocks, Regime Theory, and A New U.N. Agreement*, 6 J. TRANSNAT'L L. & POL'Y 323 (1998).

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, and collective security, 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.

This also occurred with the TRIPs Agreement. In Part II.A, I described the agreement as an example of a transfer from supporters of the 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 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.<sup>78</sup> The old GATT system would be abandoned, so a country that refused to join the WTO would be outside the trading system altogether.<sup>79</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 money or your life," this strategy of generating consent works because it manipulates the available options.<sup>80</sup>

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78. See *supra* note 13.

79. 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.

80. 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. Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331 (1969) ("A treaty is void if its conclusion has been procured by the threat or

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.<sup>81</sup> 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.

The consent of the nuclear weapons states is relatively easy to understand. The NPT identifies five such states.<sup>82</sup> 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>83</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 consent.<sup>84</sup> It turns out, however, that “near universal” consent and “universal” consent are two very different things. Here is the list of nonmembers: India, Pakistan, Israel, and North Korea.<sup>85</sup> Each of these states has acquired nuclear weapons (though there is some

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use of force in violation of the principles of international law embodied in the Charter of the United Nations.”). 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.

81. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

82. See NPT, *supra* note 81, art. IX, para. 3.

83. *Treaty on the Non-Proliferation of Nuclear Weapons: Status of the Treaty*, UNITED NATIONS OFFICE OF DISARMAMENT AFFAIRS, available at <http://tinyurl.com/dymazqk> (last visited Apr. 16, 2012).

84. *Id.*

85. North Korea was a member of the treaty until its withdrawal in 2003. *Id.*; see also Jonathan D. Pollack, *The United States, North Korea and the of the Agreed Framework*, 56 NAVY WAR COLLEGE REV. 11 (2003).

lingering doubt with respect to North Korea).<sup>86</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.<sup>87</sup> Other states that held out for many years include Cuba, Brazil, Chile, and Argentina.<sup>88</sup> 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.

The NPT's 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 nonparticipants 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 NPT's 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 nonsignatories certain benefits, these mechanisms have been too weak to generate consent from the above-mentioned nonparticipants.

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 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 with 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 nonparticipants was not simply free riding but rather preferred no agreement to participation.

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86. Gregory C. Shaffer, *Hard Versus Soft Law in International Security*, 52 B.C. L. REV. 1147, 1181 (2011); Donald Kirk, *Yes, North Korea is a nuclear power*, ASIAN TIMES ONLINE, May 26, 2009, available at <http://tinyurl.com/dyxr5q6> (last visited Apr. 16, 2012).

87. See *supra* note 83 (noting that South Africa did not become a party to the NPT until 1991).

88. *Id.* (showing the following dates of accession for Cuba (2002), Brazil (1998), Chile (1995), and Argentina (1995)).

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.

### III. NONCONSENSUAL 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 nonconsensual 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*, and UN Security Council Resolutions under Chapter VII of the Charter) and soft law approaches (international organizations and international tribunals).

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 nonconsensual approaches is heavily constrained in its ability to influence state behavior, and falls far short of a direct assault on the consent requirement.

#### A. *Customary International Law*

The oldest form of nonconsensual international law is customary international law (CIL). It is nonconsensual 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* (a sense of legal obligation).<sup>89</sup> 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>90</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 as obligatory is not at all the same as consenting to that requirement. A public 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

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89. For a more detailed discussion, see Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 141–45 (2005).

90. *Id.*

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.

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 ICJ states that “[t]he States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”<sup>91</sup>

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>92</sup> and 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>93</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 can be taken as support for the rule.<sup>94</sup> Whatever one might think of the persistent objector doctrine, 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>95</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, thus 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 objected at the time CIL rules were being formed, are not able to take advantage of the persistent objector doctrine.

Some writers have attempted to rescue the notion of consent in CIL by arguing that states have consented to “secondary” rules of CIL.<sup>96</sup> The idea

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91. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20).

92. See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 142–46 (1999); MARK EUGEN VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 18–22 (1985).

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

94. *Id.*

95. BYERS, *supra* note 92, at 143.

96. See Vaughan Lowe, *Do General Rules of International Law Exist?*, 9 REV. INT'L STUD. 207, 208–

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>97</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 these rules.

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.

### 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 nonconsensual form of international law, *jus cogens*.<sup>98</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>99</sup> Once a norm is accepted as a *jus cogens* norm, it is binding on states with or without their consent. Given the nonconsensual and overriding nature of *jus cogens* norms, it is not surprising that they are rare. Norms commonly recognized as *jus cogens* norms (though there is some debate about some of them) include those relating to the use of force, slavery, genocide, crimes against humanity, torture and prolonged and arbitrary detention, the right to self-determination, and freedom from racial discrimination.

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10 (1983).

97. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 42-44 (1971).

98. 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*); and (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. ANTONIO CASSESE, *INTERNATIONAL LAW* 139 (1st ed. 2001).

99. See Vienna Convention on the Law of Treaties, *supra* note 80, art. 53.



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 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>100</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>101</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.<sup>102</sup> 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>103</sup> It has the authority to impose legally binding measures on all UN

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

101. See Martti Koskeniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

102. See *San Francisco Conference*, UNITED NATIONS, available at <http://tinyurl.com/7m3eyvc> (last visited Apr. 16, 2012).

103. U.N. Charter art. 24.

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>104</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. Within the Security Council, each member has one vote. A resolution on substantive matters is adopted if it receives the affirmative vote of nine members and no permanent member casts a negative vote.<sup>105</sup> This power to enact nonconsensual yet binding rules is real, but it is also subject to severe constraints.

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>106</sup> Though the limits of this authority are difficult to pin down with 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>107</sup>

The voting procedures of the Council do not demand consensus but are nevertheless burdensome. A resolution requires a super-majority of members (nine of fifteen) 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

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104. U.N. Charter art. 48.1.

105. 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, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21), has been that it is enough that a permanent member not object.

106. U.N. Charter art. 39.

107. In several cases, the Security Council has adopted resolutions that 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. S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003). This arguably weakens the need for a finding of a threat to the peace.

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 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 twenty-one of these were adopted during the Cold War.<sup>108</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.<sup>109</sup> Furthermore, the resolutions have almost all addressed specific geographic controversies rather than broad global threats.<sup>110</sup> They have also, with few exceptions, targeted small, weak, or unpopular states embroiled in or threatening conflict.<sup>111</sup>

All of this reflects the practical limits of the Council's ability to engage in nonconsensual rule-making. It is one thing to establish a peacekeeping force in Cote d'Ivoire.<sup>112</sup> It is altogether more difficult to get a resolution attempting to resolve global security threats that implicate important interests for the P5. The need to focus on areas where the P5 can agree limits the Council to a relatively small subset of the world's major problems.<sup>113</sup>

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108. 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.

109. The resolutions regarding Iraq's activities under President Saddam Hussein offer one example. Over the course of fourteen years, from 1990–2004, the Security Council passed twenty-one resolutions against the dictatorship under topics including weapons inspections, economic sanctions, and requests to terminate the UN Oil-for-Food program." See *United Nations Security Council Resolutions on Iraq*, PROCON.ORG (Sept. 10, 2009), 7:25 AM PST, <http://tinyurl.com/6qt3zxs>.

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

111. Johansson, *supra* note 108, at Appendix (identifying 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).

112. S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004).

113. 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

#### 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 to avoid 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>114</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>115</sup> States could, of course, allocate a form of legislative authority to any international organization (IO). 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? Even a brief examination of IOs makes it clear that they engage in numerous and varied activities. Each organization exists for a different purpose and pursues different objectives, so naturally, each takes different actions. If one steps back a little, however, one sees that IOs perform at least three important functions that address the consent problem: They provide a forum for negotiation and discussion, they promulgate soft law rules, and they provide dispute resolution services. I discuss the first two of these in the next two subsections. Dispute resolution is addressed in the discussion of international tribunals in Part III.E.

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 provide a forum for discussion and exchange of information that reduces the transactions costs of reaching consensus. There is no shortage of examples of institutions that serve (or at least strive) to reduce

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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. 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.

114. See generally Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693 (2008).

115. The WTO rules themselves authorize a voting procedure that would allow for nonconsensual decision-making and nonconsensual amendments to certain rules. In practice, however, decisions are made by consensus. See Marrakesh Agreement Establishing the World Trade Organization, arts. IX, X, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994) [hereinafter WTO Agreement].

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>116</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>117</sup> The WTO remains committed to consensus in decision-making, and in this sense, it does not seek to avoid the consent problem.<sup>118</sup> Despite the WTO's commitment to consent, the trading system has enjoyed tremendous success. Since its inception as the General Agreement on Tariffs and Trade in 1947, the GATT and its modern successor have overseen the reduction of average tariff rates in industrialized countries from about 40% to less than 4%.<sup>119</sup> This has been achieved through eight successful rounds of trade negotiations. Conclusion of each round 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.<sup>120</sup> 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

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116. Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3. WIPO is, in fact, a specialized agency of the United Nations. See *What is WIPO?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <http://www.wipo.int/about-wipo/en> (last visited Apr. 16, 2012). This fact emphasizes that the UN works to encourage dialogue in many substantive areas.

117. See generally *The WTO in Brief*, WORLD TRADE ORGANIZATION, available at <http://tinyurl.com/2lqmc9> (last visited Apr. 16, 2012). 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.

118. 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, *supra* note 115, art. X.2. Other amendments apply only to the WTO members who have accepted them. *Id.* arts. X.3, 5. Finally, some amendments can be binding on all members if approved by a two-thirds majority. *Id.* art. X.5.

119. Kyle Bagwell & Robert W. Staiger, *Economic Theory and the Interpretation of GATT/WTO*, 46 AM. ECONOMIST 3, 3 (2002).

120. *Understanding the WTO: The Uruguay Round*, WORLD TRADE ORGANIZATION, available at <http://tinyurl.com/7z4auwl> (last visited Apr. 16, 2012).

to discover the opportunities and constraints each of them faces, and makes it easier to find mutually advantageous agreements.

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.<sup>121</sup> The nature of trade negotiations among more than 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.

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 IO's role is 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, and promulgation of codes of conduct. Such actions lack the formal status of international law and so are not formally binding on states, but they are intended to nudge states in one direction.

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 is most commonly understood to mean quasi-legal rules that are not legally binding on states.<sup>122</sup> It is, then, a residual category, sweeping in everything that falls short of classical international law while still having some legal character.<sup>123</sup>

Of greatest 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

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121. See *ECONOMIST*, *supra* note 54.

122. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEG. ANALYSIS 171 (2010).

123. See *id.* at 172; Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515, 518 (2009).

international law, as they did with the Security Council. At the other end of the spectrum, states could restrict the IO's role to a narrow set of very specific functions and deny it the ability to make any statements without the consent of all members.<sup>124</sup>

States most often give IOs power that lies between these two extremes. They allow IOs to "speak" through resolutions, declarations, and similar pronouncements. This speech can influence 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 for individual member 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 close 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>125</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.<sup>126</sup> 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.

### *E. Tribunals*

International tribunals represent the final category of nonconsensual law-making that I wish to consider. When a dispute is submitted to the jurisdiction of an international tribunal, two distinct kinds of nonconsensual rules emerge. First, there is a resolution of the specific

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124. For a detailed discussion of IOs, see Andrew T. Guzman, *Doctor Frankenstein's International Organizations* (Mar. 14, 2012) (unpublished manuscript) (on file with the Virginia Journal of International Law Association).

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

126. See generally Guzman, *supra* note 124.

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>127</sup>

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>128</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>129</sup> Humanitarian law cannot be explained without the *Tadic* case.<sup>130</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>131</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 case law creates binding precedent.

A tribunal's ruling 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. Nonparties 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.

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 nonconsensual law-making. In practice, however, states have

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127. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1136.1, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993).

128. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

129. Appellate Body Report, European Communities – Measures Concerning Meat and Meat Products, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

130. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

131. See generally Guzman & Meyer, *supra* note 123.



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>132</sup> their influence is constrained by a combination of limited jurisdiction, cabined discretion, and lingering state influence.<sup>133</sup> As one commentator observed, “most of the[] rulings are exactly what states hoped for when they delegated authority to [international tribunals].”<sup>134</sup>

The most important limit on the ICJ’s influence, for example, 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 ICJ.<sup>135</sup> This delivers much greater control to states, allowing them to consider whether to submit a specific case to the ICJ, and greatly diminishes the extent to which it can be termed a nonconsensual process. Under this limit on jurisdiction, the ICJ is arguably serving as “a glorified arbitration panel.”<sup>136</sup>

Second, states may accept the jurisdiction of the ICJ with respect to the interpretation of a treaty by including an appropriate clause in the treaty.<sup>137</sup> Agreeing to jurisdiction in this way empowers the ICJ to engage in nonconsensual rule-making, but only with respect to the specific treaty. As it turns out, states have been reluctant to submit to the ICJ’s jurisdiction in this way, especially in recent years.<sup>138</sup> The United States, for example, has not used this type of clause since the early 1970s.<sup>139</sup>

Finally, a state may make a declaration accepting the compulsory jurisdiction of the ICJ over international law disputes with other states that

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132. See Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929, 950 (2006) (“The proliferation of international tribunals also, of course, creates the opportunity for plural norm 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 José 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).

133. Guzman & Landside, *supra* note 114, at 1712–23.

134. Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 75 (2008).

135. Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

136. Eric A. Posner, *The Decline of the International Court of Justice*, in INTERNATIONAL CONFLICT RESOLUTION 111, 118 (Stefan Voigt et al. eds., 2006).

137. ICJ Statute, *supra* note 135, art. 36(1).

138. Posner, *supra* note 136, at 117.

139. *Id.*

have made a similar declaration.<sup>140</sup> If used universally, this form of jurisdiction would represent a major delegation by states to the ICJ. In practice, however, only a minority of UN members accepts such jurisdiction, and among the permanent members of the Security Council, only the United Kingdom does so.<sup>141</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>142</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>143</sup> In other words, it created an exception to the ICJ’s jurisdiction in anticipation of a specific violation of international law.

The restrictions on the reach of the ICJ have greatly limited its impact on international law. This is best seen through its limited docket. Since its founding, the ICJ has delivered only 104 judgments in contentious cases.<sup>144</sup> 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. In one way or another, states cabin the influence of tribunals and preserve the central role of consent.

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

There is no 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.

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140. ICJ Statute, *supra* note 135, art. 36(2).

141. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, available at <http://tinyurl.com/bsaf2yb>.

142. Gary L. Scott & Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AM. J. INT’L L. 57, 65 n.49 (1987).

143. Ana Paula Linhares, *The ICJ Canada-Spain Fishing Dispute*, 8 REV. EURO. COMM. & INT’L ENVTL. L. 215, 215 (1999).

144. For a listing of all contentious cases, see *List of Contentious Cases by Date of Introduction*, INTERNATIONAL COURT OF JUSTICE, available at <http://tinyurl.com/5stauut> (last visited Apr. 16, 2012).

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 that some countries 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 nonconsensual 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 nonconsensual 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 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>145</sup>

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>146</sup>

So while I can understand and have some 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 it seems unlikely to be one 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

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145. See David Held, *The Transformation of Political Community; Rethinking Democracy in the Context of Globalization*, in DEMOCRACY'S EDGES 84 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999); Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001).

146. Guzman & Landsidle, *supra* note 114.

democracy would be normatively desirable, 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 nonconsensual solutions to our problems. I do not believe we can aspire to an entirely new category of nonconsensual solutions or approaches, and so we must do the best we can with what we have. This leaves a limited number of options. CIL and *jus cogens* norms cannot be changed to suit the needs of the moment, and thus, are clearly not forms 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.

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 resolving 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, 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.

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 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 IOs' 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. 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, and for that reason 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 nonconsensual rule-making. The best chance to move in that direction can be found in existing (or perhaps future) IOs. Such an approach will be far from perfect. It will at times 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 consent. The overcommitment 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.