# THE DECAY OF CONSENT: INTERNATIONAL LAW IN AN AGE OF GLOBAL PUBLIC GOODS

*By Nico Krisch**

The consensual structure of the international legal order, with its strong emphasis on the sovereign equality of states, has always been somewhat precarious. In different waves over the centuries, it has been attacked for its incongruence with the realities of inequality in international politics, for its tension with ideals of democracy and human rights, and for standing in the way of more effective problem solving in the international community. While surprisingly resilient in the face of such challenges, the consensual structure has seen renewed attacks in recent years. In the 1990s, those attacks were mainly "moral" in character. They were related to the liberal turn in international law, and some of them, under the banner of human rights, aimed at weakening principles of nonintervention and immunity.[1] Others, starting from the idea of an emerging "international community," questioned the prevailing contractual models of international law and emphasized the rise of norms and processes reflecting community values rather than individual state interests.[2] Since the beginning of the new millennium, the focus has shifted, and attacks are more often framed in terms of effectiveness or global public goods. Classical international law is regarded as increasingly incapable of providing much-needed solutions for the challenges of a globalized world; as countries become ever more interdependent and vulnerable to global challenges, an order that safeguards states' freedoms at the cost of common policies is often seen as anachronistic. According to this view, what is needed—and what we are likely to see—is a turn to nonconsensual lawmaking mechanisms, especially through powerful international institutions with majoritarian voting rules.[3]

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[1] *See, e.g.*, FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998); CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (2d ed. 1999).

[2] *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AJIL 529 (1993); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195 (1993 IV); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217 (1994). See also the overview in ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG (2001).

[3] See the analysis in part I and in the legal literature, especially Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71; Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012); JOEL P. TRACHTMAN, THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT (2013).



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In this article, I do not focus on the normative part of this argument.[4] What I am interested in is the analytical part, which has received far less attention: the question of whether and how international law is changing. To what extent do we see a turn toward nonconsensual structures? How strong is the resilience of the consent-based system today? What forms does change take, and how does it accommodate continuing concerns about sovereign equality? While we would not expect a wholesale shift to an "efficient," problem-solving global order—too strong is the attachment of central actors (both weak and strong) to sovereignty and its benefits—pressure for change is likely in areas where common problems are most acute. The forms and channels of change, however, are difficult to anticipate, as they will be driven not only by functional needs and problem structures, but also by other factors, such as power constellations and institutional contexts.

This article seeks to understand these processes of transformation by looking into three issue areas in which we are likely to see significant pressure for change—global antitrust, climate change, and terrorism financing. Its findings do suggest a turn toward nonconsensual lawmaking but in a quite different way than is usually assumed. They show a continuing resilience of the consent element in international law; change is circumscribed and focused mainly on institutions that are not only relatively malleable but also of particular use to a set of powerful actors—including exclusive institutions such as the UN Security Council. Apart from this dynamic, change takes place largely outside the channels of traditional international lawmaking—in particular, through unilateral action and informal structures that appear more useful for problem solving and the effective exercise of power than formal institutions and the increasingly firm and demanding processes of multilateral treaty making. The resulting picture is one in which international law is often sidelined and in which hierarchy plays a significant role, both within and outside the formal international legal order. This shift is partly mitigated by forms of representation and consultation, but it remains a significant move away from a consent-based order, suggesting a reconfiguration not only of international law itself but also of its place among other normative orders in global politics.

This article has four parts. Part I outlines the challenge being waged against consent-based international law, especially in relation to global public goods, and it develops the analytical framework of the inquiry. Part II examines the degree and forms of change through the three case studies mentioned above. Part III draws the findings together to paint a broader picture of international legal change in these areas. Part IV develops the implications for the broader trajectory of international law—which extend beyond the scope of the public goods problems that have been the focus of this article.

## I. Consent Under Challenge

International law has never been based on consent in a pure form. It has long been influenced by natural law ideas; it has incorporated moral reasoning, most prominently in international humanitarian law and possibly in the *jus cogens* doctrine; and some of its traditional pillars, customary international law and general principles of law, cannot be fully explained on the basis

[4] I have some sympathies for the normative argument but regard it as one-sided, leaving out countervailing arguments about the right domain of decision making. *See* Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Postnational Law 69–108 (2010). See also the analysis and critique of this position in Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 Eur. J. Int'l L. 669, 683–93 (2012).

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of state consent.[5] Moreover, institutions with lawmaking and adjudicatory powers act at one remove from states' consent. Their powers have always been subject to reinterpretation in ways that were not entirely controlled by the initial act of delegation.[6] Nevertheless, most of international law's deep structure is related to the consent of states. Deliberate lawmaking, in particular, depends on it since treaties are based on the assent and ratification of the parties, and given that strong institutional lawmaking powers are largely absent from the international scene, treaties are the main way by which new rules can be created in a controlled way.[7]

It is this centrality of consent that has come under increasing attack in recent years—and not only, and perhaps not even primarily, from international lawyers. The main thrust of the critique is that international law is ineffective in solving global problems as those problems become more salient. To an unprecedented extent, national polities have become—or have begun to understand that they are—dependent on, and vulnerable to, forces and dynamics outside their own boundaries. Although the problems cannot typically be solved through national action alone, the requisite transboundary measures often face severe collective-action problems, which international law is generally unable to overcome.

### *The Challenge of Global Public Goods*

These collective-action problems are neatly illustrated by the discourse on global public goods. Although public goods—goods that are *non-excludable* and *non-rivalrous* in their consumption[8]—have traditionally been discussed within the framework of the nation-state, the recent extension of the concept to the global sphere signals the degree to which various public goods have come to be seen as influenced by global activities and actions.[9] More than anything, using the label *public goods* in this context points to the difficulties of maintaining adequate availability or production. Unlike private and certain collective goods, public goods are prone to underproduction; not only are the production costs high, but, because of such goods' non-excludable character, the incentives for free-riding are substantial.[10] In the domestic context,

[5] *See*, *e.g.*, Tomuschat, *supra* note 2, at 278–90; Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269 (2001); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 433–34 (1983) (especially on custom); Charney, *supra* note 2, at 536–42; Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 508–16 (2000).

[6] *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 53–73 (2d ed. 2009).

[7] Traditional customary law is typically viewed as too slow and unpredictable in its processes to serve regulatory purposes well, whereas "modern" custom—more focused on *opinio juris* than actual state practice—is typically viewed as requiring broader consensus to gain legal force. *See generally* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[8] *Non-excludable* because nobody can be excluded from their usage, and *non-rivalrous* because they do not deteriorate if more people use them. *See*, *e.g.*, ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 359–60 (1995); Shaffer, *supra* note 4, at 673–5. Non-excludable goods are the primary focus here because of the particular governance challenges that they present. See also the definition in MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 14–15 (1965), which includes merely non-excludable goods (often termed *common-pool resources*). Other definitions focus on the non-rivalrous element and include *club goods*, which are non-rivalrous but excludable. *See*, *e.g.*, Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

[9] GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY (Inge Kaul, Isabelle Grunberg & Marc A. Stern eds., 1999); PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (Inge Kaul, Pedro Conceicao, Katell Le Goulven & Ronald U. Mendoza eds., 2003).

[10] For overviews, see Inge Kaul, *Global Public Goods: Explaining Their Underprovision*, 15 J. INT'L ECON. L. 729 (2012) and Gonzalo Escribano Francés, *Provisión de Bienes Públicos Globales y Economía Política International*, *in* LA PROTECCIÓN DE BIENES JURIDICOS GLOBALES 39 (Carlos Espósito & Francisco J. Garcimartín Alférez eds.,

these problems are typically addressed through coercive government, especially the power of taxation.[11] In the decentralized setting of global politics, however, the collective-action problems associated with public goods are exacerbated ever further.

*Public goods and international law.* International law in its classical form appears as particularly ill suited to tackling this challenge. As a threshold matter, its consent-based structure presents a structural bias against effective action on global public goods, especially given the large number of sovereign states today. Increasingly, commentators have thus urged an overhaul of the international legal order in favor of a more effective problem-solving mechanism that is able to counter free-rider problems in ways comparable to those in use at the domestic level. As William Nordhaus, an influential economist, has noted,

> the Westphalian system leads to severe problems for global public goods. The requirement for unanimity is in reality a recipe for inaction. . . .
>
> To the extent that global public goods may become more important in the decades ahead, one of our major challenges is to devise mechanisms that overcome the bias toward the status quo and the voluntary nature of current international law in life-threatening issues.[12]

This picture may be overly grim since certain types of global public goods do not involve collective-action problems of this kind and therefore do not suffer as much from the hurdles of "Westphalian" decision-making processes.[13] *Single-best-effort goods*, which can be provided by a single actor or group of actors, do not necessarily require joint rulemaking. Yet most global public goods do create the problems that Nordhaus describes. *Aggregate-effort goods*—typical in environmental protection—depend on the cooperation of (at least) the most influential players. *Weakest-link goods*—often encountered in relation to safety and security issues—require action by all, including those least willing or able to do so.[14] And the provision of even single-best-effort goods often depends on funding contributions from others, thereby also requiring forms of cooperation beset by free-rider problems.[15]

International law is not without solutions to such problems. Public goods can be bundled with (excludable) *club goods* that fit the contractual structure of the international legal order much better.[16] Free riding can also be made more costly, as through mild forms of coercion

2012). But see also the critique by Friedrich Kratochwil, *Problems of Policy-Design Based on Insufficient Conceptualization: The Case of "Public Goods," in* MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS: THEORIES, RULES AND INSTITUTIONS FOR THE CENTRAL POLICY CHALLENGE IN THE 21ST CENTURY 61 (Ernst-Ulrich Petersmann ed., 2012) (Eur. Univ. Inst., Working Paper RSCAS 2012/23)), *at* http://cadmus.eui.eu/handle/1814/22275/.

[11] Olson, *supra* note 8, at 13–16.

[12] William N. Nordhaus, *Paul Samuelson and Global Public Goods* 8 (2005), *at* http://www.econ.yale.edu/~nordhaus/homepage/PASandGPG.pdf.

[13] *See* SCOTT BARRETT, WHY COOPERATE? THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS, chs. 1–3 (2007); Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651, 658–65 (2012); Shaffer, *supra* note 4, at 675–81.

[14] On the different types of goods, see the overview in Bodansky, *supra* note 13, at 658–65.

[15] See BARRETT, *supra* note 13, ch. 4.

[16] *See* Montreal Protocol on Substances That Deplete the Ozone Layer, Art. 4, Sept. 16, 1987, 1522 UNTS 3, *available at* http://ozone.unep.org/.

by powerful actors, thus driving states to join common regimes.[17] Moreover, solutions do not always have to be found at the international level. They can be facilitated through polycentric regimes, operating in a multitude of forms at different levels.[18] Even so, many cases remain in which the need for consent will obviate problem solving—where treaties appear as "inappropriate instrument[s],"[19] and other, nonconsensual solutions are called for.

This line of critique—probably strongest among economists—has also become more widespread among international lawyers in recent years.[20] Unsurprisingly, it is especially pronounced among international lawyers with an economic bent or a rational-choice orientation,[21] but it is shared by scholars from many other backgrounds.[22] Dissatisfaction with a consent-based order is perhaps strongest among those that focus on problems demanding large-scale collective action, as in the case of climate change, where the inability to proceed by majority rule is increasingly seen as "untenable" in light of the challenge.[23]

Such skepticism of consent is, of course, not new to international law. In fact, many international lawyers with an internationalist mind-set have harbored variants of it since the early twentieth century, and it has strong affinities with the idea of an international community, which was especially prominent in the 1990s.[24] But the skepticism is also not universally shared. Anti-consensual arguments have themselves been under heavy critique from the perspective of national autonomy, democracy, and sovereign equality; for the critics, "anything

[17] *See* Helfer, *supra* note 3, at 100–02. Consent requirements in international law are, after all, merely formal protections of sovereign equality. *See* Nico Krisch, *More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (Michael Byers & Georg Nolte eds., 2003).

[18] *See generally* Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 1 (2010).

[19] BARRETT, *supra* note 13, at 72.

[20] The interest of international lawyers in global public goods can be seen in a number of recent symposia. *See* Symposium, *Global Public Goods and the Plurality of Legal Orders*, 23 EUR. J. INT'L L. 643 (2012); *Mini-symposium on Multilevel Governance of Interdependent Public Goods*, 15 J. INT'L ECON. L. 709–91 (2012); MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS, *supra* note 10; LA PROTECCIÓN DE BIENES JURIDICOS GLOBALES, *supra* note 10.

[21] Guzman, *supra* note 3, at 749 (the "commitment to consent is a major problem for today's international legal system"); TRACHTMAN, *supra* note 3, at 2 ("[T]here will be circumstances in which more highly articulated constitutional or organizational structures—including executive, legislative, and judicial functions—will be useful."); Helfer, *supra* note 3, at 124–25 ("it has become apparent that voluntary treaty making and treaty adherence procedures often produce a problematic result").

[22] Shaffer, *supra* note 4, at 679 ("For aggregate efforts public goods . . . , there is a greater need for centralized institutions to produce them, leading to a relinquishment of some national sovereignty."); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable*, *in* INFORMAL INTERNATIONAL LAWMAKING 500, 525 ( Joost Pauwelyn, Ramses Wessel & Jan Wouters eds., 2012) (state consent is seen as "too strict" as it "makes collective action in an increasingly networked but diversified world extremely difficult"); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 259, 298 ( Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (international intervention beyond traditional constraints becomes legitimate if "there are good reasons for deciding an issue on the international level, because the concerns that need to be addressed are best addressed by a larger community in order to solve collective action problems and secure the provision of global public goods").

[23] JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 215 (2010); *see also* Daniel C. Esty & Anthony L. I. Moffa, *Why Climate Change Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime*, 15 J. INT'L ECON. L. 777, 779 (2012) ("a new environmental regime needs to be constructed with institutional capacities designed to respond to global-scale collective action problems").

[24] *See supra* note 2 and accompanying text.

else [than a consent-like criterion] would be dictatorial."[25] However that may be, the attack on consent seems to have gained strength and salience through the increased urgency of global cooperation problems—most centrally, those involving global public goods.

*The rise of output legitimacy.* The attack on consent has affinities with a significant shift in the discourse about the legitimacy of global governance—that is, a shift from input to output legitimacy. This shift has been given its most prominent expression in Fritz Scharpf's account of the legitimacy of European Union (EU) integration policies, which he saw as justified primarily on the basis of effectiveness (output) while being deficient on the democratic (input) side.[26] In Scharpf's view, this structure of legitimation should have limited EU decision making to pareto optimal solutions,[27] but identifying output legitimacy as the sole, or main, foundation— even for this limited range of policies—went significantly beyond frameworks for the legitimacy of domestic political institutions.[28] Despite much criticism,[29] this position has reshaped the debate on the legitimacy of governance beyond the state, and similar contentions have recently gained ground. One of the most influential contributions to this debate, by Allen Buchanan and Robert Keohane, treats the "comparative benefits" of an institution as one of the principal criteria for assessing its legitimacy.[30] And while their initial account also included the consent of (democratic) states as a precondition for legitimate governance, the later formulation by Keohane silently dropped this criterion and permitted "comparative benefit" to take center stage.[31]

This focus parallels greater flexibility in democratic theory itself; in light of the structures and challenges of global governance, it has relaxed strong requirements known from the domestic context in favor of an emphasis on democratic forums, contestation, deliberation, or merely a "democratic minimum."[32] It has sometimes even limited itself to defining a process of democratization—a "democratic-striving approach"—rather than standards of democracy as such.[33] This trend remains controversial,[34] but it signals that the classical, central place of consent in

[25] Jan Klabbers, *Law-Making and Constitutionalism*, *in* THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 81, 114 ( Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); *see also* Weil, *supra* note 5.

[26] *See* FRITZ W SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999).

[27] For Scharpf, arguments from output could ground only pareto-optimal solutions but not measures with greater distributive effects. In later works, he has softened this limitation, especially with respect to judge-made law in the EU. *See* Fritz W Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173, 189–90 (2009).

[28] *See* Fritz W Scharpf, *Legitimationskonzepte jenseits des Nationalstaats* (Max Planck Inst. for the Study of Societies, Working Paper No. 04/6, 2004).

[29] *See*, *e.g.*, Andrew Moravcsik & Andrea Sangiovanni, *On Democracy and "Public Interest" in the European Union*, *in* DIE REFORMIERBARKEIT DER DEMOKRATIE. INNOVATIONEN UND BLOCKADEN 122 (Wolfgang Streeck & Renate Mainz eds., 2002).

[30] Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 422 (2006).

[31] *See* Robert O. Keohane, *Global Governance and Legitimacy*, 18 REV. INT'L POL. ECON. 99 (2011).

[32] *See* David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, 39 GOV'T & OPPOSITION 364, 383–86 (2004); Philip Pettit, *Democracy, National and International*, 89 MONIST 301(2006); JOHN DRYZEK, DELIBERATIVE GLOBAL POLITICS (2006); JAMES BOHMAN, DEMOCRACY ACROSS BORDERS: FROM DÊMOS TO DÊMOI (2007).

[33] See the overview in Graínne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 101 (2008).

[34] See, for example, the more demanding position defended in JÜRGEN HABERMAS, DER GETEILTE WESTEN, ch. 6 (2004); Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 CONSTELLATIONS 444 (2008).

international law and institutions has been increasingly eroded by considerations of effectiveness. The urgency of solving global problems, expressed in the notion of global public goods and reflected in the shift to output legitimacy, has placed consent and sovereign equality under ever greater strain.

*Potential Forms of Change and Action*

Ideational change does not necessarily translate into institutional structures, and the growing attack on consent may not lead to, or reflect, actual processes of institutional or legal change. In fact, much of that attack stems precisely from the perception of a *lack* of movement toward nonconsensual forms of lawmaking.[35] Commentators have also noted, however, an erosion of consensual elements of different kinds—for example, with regard to the persistent-objector rule in the creation of custom, third-party effects of treaties, majority voting in treaty bodies and international organizations, and certain practices of treaty making.[36] Such an erosion is likely to be furthered by the greater salience of global public goods and other global cooperation challenges. These challenges affect the preferences of states (which now increasingly depend on cooperation to pursue goals that they value), and such a shift in preferences should normally produce pressure for change.[37]

The forms such change can take are manifold and vary in degree in the distance between consent and eventual decision.[38] Commentators tend to focus their expectations, however, on stronger lawmaking mechanisms, especially through independent legislation in international organizations and through majority-based, rather than consensus-based, decision making in multilateral forums.[39] This approach largely follows an analogy with domestic responses to public goods problems—that is, through a central government with powers of coercion and taxation. Though typically stopping short of calls for a world government, such ideas build on the institutionalist agenda that has been so influential—especially among international lawyers—throughout the twentieth century.[40] Yet agreement on such changes is hard to come by in a decentralized political order, especially when agreements are supposed to solve collaboration problems that have severe distributional consequences. The more that states' policy preferences diverge, the less likely the (consensual) delegation of powers to a collective decision maker becomes.[41] As it is precisely the need for consent from each state concerned that creates

[35] *See*, *e.g.*, Guzman, *supra* note 3, at 788–90.

[36] See Tomuschat, *supra* note 2, at 241–352; Simma, *supra* note 2, at 322–75; Helfer, *supra* note 3, at 74–75; Guzman, *supra* note 3, at 775–87; Malgosia Fitzmaurice, *Consent to Be Bound—Anything New Under the Sun?*, 74 NORDIC J. INT'L L. 483 (2005); Patrick Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 INT'L & COMP. L.Q. 779, 785–94 (2010).

[37] For a recent functionalist account along such lines, see TRACHTMAN, *supra* note 3.

[38] For example, consent may be lacking entirely; it may be thought of as tacit; or it may come at one remove, as in the creation of majoritarian or independent institutions with rulemaking or adjudicatory powers.

[39] *See* Guzman, *supra* note 3; TRACHTMAN, *supra* note 3; *see also* Tomuschat, *supra* note 2, at 240.

[40] *See* David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

[41] Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, *in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 21 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006); RANDALL STONE, CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY 27 (2011). But see also the contrary finding in Barbara Koremenos, *When, What and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151, 170–2 (2008), which may be due to a stronger focus on delegation involving dispute settlement rather than policymaking. *See also id.* at 179. On delegation and its forms

TABLE 1
FORMS OF NONCONSENSUALISM

| | |
|---|---|
| International law-making | Collective: centralized rule- and decision making through common institutions without unanimity requirements |
| | Multilateral: joint rulemaking in multilateral forums without (or with softened) unanimity requirements |
| Alternatives | Unilateral: single- or multistate rule- and decision making on global issues affecting other jurisdictions without their consent |
| | Informal: soft-law and government networks without a claim to binding rulemaking |

the problem-solving difficulties of international law, it is unlikely that consensual steps will provide solutions in many instances. At times, then, it is through nonconsensual processes that nonconsensualism will come about: through potentially bold moves by some states or institutions to change the rules of the game and to reinterpret old rules or posit new decision-making rules and an expansion of institutional powers.

If momentum in such a direction is not forthcoming, states may also turn to other means. They may decide to go it alone and turn to unilateral measures, in the process potentially softening the jurisdictional boundaries that limit extraterritorial action. Under certain market conditions, unilateralism will be a suitable tool, and both the United States and the EU have traditionally been active in this respect.[42] Extending jurisdiction in order to deal unilaterally with global public goods has also found increasing support among legal commentators in the United States.[43] Another alternative tool calls upon soft law and informal institutions. They allow for greater speed and flexibility in the establishment, design, and operation of rule-making processes, sometimes provide for enforcement, and have thus gained greater prominence in global governance in recent years. For states willing to act on global challenges yet facing obstacles in the formal paths of international lawmaking, these alternatives present opportunities for effective action, at least in certain circumstances.[44]

What form of action is chosen will typically depend on various factors. One of them is the expected degree of effectiveness. Unilateral action and informal norms are often seen to be most consequential in coordination games, which are self-enforcing and thus require neither strong

in general, see Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1 (2008).

[42] *See* Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459, 460, 483 (2009); Note, *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226 (2011); Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

[43] *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251 (2006); Ralf Michaels, *Global Problems in Domestic Courts*, *in* THE LAW OF THE FUTURE AND THE FUTURE OF LAW 165 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura Kistemaker eds., 2011), *at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_11_Web.pdf.

[44] *See*, *e.g.*, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010). Conceptually, I understand soft law as categorically different from hard law (and not just as another point on a continuum); *see* Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005).

cooperation nor formal enforcement once a focal point is set.[45] They are seen to be less effective in the collaboration games that are typical of global public goods problems—unless compliance is ensured by other means, as through supportive action by powerful states. Failing that, unilateral action may still contribute to the solution of public goods problems by advancing certain norms and paving the way for formal institutions, though often in a less significant way than other approaches. The effectiveness of different tools will also depend on the type of public goods problems at issue and the scope of action required to address them. Where weakest-link goods are concerned, a universal approach will usually be necessary for effective action.[46] Aggregate-effort goods may be dealt with by involving a more limited number of (key) states; *minilateralism* has been suggested as a potentially fruitful avenue here.[47] Single-best-effort goods, by contrast, will typically lend themselves to unilateral action (although provision by any one state may depend on a broader spread of the ensuing burden). In any case, the required scope of a solution does not necessarily equal the scope of necessary participants deciding on it. Broad participation may foster implementation: if states have contributed to a solution, they will typically be more likely to implement it than if they have not. But solutions can also be effectively initiated by a more limited range of actors if compliance by third states is brought about by other means.

The above analysis suggests that movement toward nonconsensualism should be more pronounced in situations involving weakest-link or, to an extent, aggregate-effort goods—if the salience of the problems is sufficiently high for states to forgo the protections afforded by the classical, consent-based model. But other factors may modify this picture. One is the institutional context. Historical institutionalists, in particular, have theorized about the role of existing institutions in dealing with pressures for change; they expect that the more malleable these institutions (and their powers and procedures) are, and the less dominated they are by veto players, the more likely it is that change will take place in and through them, rather than through alternative channels.[48] International law is traditionally fraught with veto players, and it imposes high hurdles for change. We may thus expect a tendency for states to choose alternative forums if those provide roughly similar benefits. Yet in some contexts, international law is more malleable, as where powers of international institutions can be reinterpreted to deal with new problems.

Another important factor behind institutional developments is the relevant power constellation. Realists would expect institutions to be driven primarily by powerful states and to be shaped in their image. The more powerful a country is, the more the delegation of decision-making powers to a collective institution will appear to be costly, at least if it does not come with special privileges and control over the institution; otherwise, the costs involved will often lead to a search for alternatives.[49] Unilateralism may be an option, and club solutions, bringing

[45] Abbott & Snidal, *supra* note 44, at 429.

[46] *See supra* notes 13–15 and accompanying text.

[47] *See* Moisés Naím, *Minilateralism: The Magic Number to Get Real International Action*, 173 FOREIGN POL'Y 135 (2009). On the relationship between minilateralism and multilateralism in different regimes, see Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681 (1992).

[48] *See* James Mahoney and Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1 (James Mahoney & Kathleen Thelen eds., 2010).

[49] *See* Hawkins et al., *supra* note 41, at 22; Lora Viola, Duncan Snidal & Michael Zürn, *Sovereign (In)equality in the Evolution of the International System*, *in* OXFORD HANDBOOK OF TRANSFORMATIONS OF THE STATE (Stephan Leibfried, Evelyn Huber & John Stephens eds., forthcoming 2014).

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together only a group of key states in a common forum, may be another—especially in the case of aggregate-effort goods. Indeed, realist theorists expect much of global governance to take such forms.[50] In contrast to the egalitarianism and universalism typically envisaged in legal scholarship, nonconsensualism in a more realist vein may well take a relatively hierarchical bent. Although difficult to accommodate in formal international law because of its orientation toward sovereign equality, such hierarchies will often find a home in other, more informal settings.

The multiplicity of potential factors renders parsimonious accounts difficult. Problem structure, power distribution, and institutional landscape vary from issue area to issue area, and no one causal mechanism is likely to dominate outcomes. For pressure toward nonconsensualism in international law to gain traction, we will typically need a situation that presents a strong challenge to cooperation (such as problems involving weakest-link or aggregate-effort goods) and that is perceived as such by influential actors. Beyond that, expectations are relatively clear-cut only when different factors coincide. For example, strong collective action through common, nonconsensual institutions is likely when such institutions exist, can be used for a given problem, and reflect existing power structures reasonably well. The UN Security Council may thus be a likely focus in those problem areas in which it arguably possesses powers. Likewise, when such institutions are absent (or are too rigid or egalitarian) and when problem and market structures allow non-universal approaches to be relatively effective, we may expect a turn to unilateral or club tools.

The turn to nonconsensual lawmaking may thus well present quite a complex picture, with different intensities and different forms in different areas. This picture differs significantly from the common assumption that the dominant direction of change is toward strong central institutions and majoritarian rule-making powers. Nonconsensualism, in the shape expected here, does not necessarily present a formal challenge to the consent element in international law proper, for it may, in part, actually take place outside the international legal order, especially in the informal realm.

In the next section we trace these developments, along with the challenges they present, in three key issue areas, all of which are characterized by significant problems of global public goods: global antitrust, climate change, and terrorism financing. As discussed in more detail below, regulatory effort regarding antitrust and climate change are best characterized as dealing with aggregate-effort goods, whereas terrorism financing triggers weakest-link problems. Influential countries perceive all three problems as important and as requiring transboundary solutions, even if they differ on what those solutions should be. In climate change, despite broad agreement about the need for action, the urgency of the problem, the type of action required, and the distribution of the burden are all matters of ongoing dispute. In terrorism financing, while action is widely seen as important and urgent, the primary push for action stems from Western countries. Likewise, though effective antitrust measures are widely seen as important among market economies, the United States and EU are the primary protagonists for international (or transnational) action.

[50] *See* DANIEL W. DREZNER, ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES (2007).

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This article thus focuses on cases in which, because of these factors, change is relatively likely or in which the pressure on the consensual structure of international law, because of its supposed bias toward inaction, should be significant. As any research based on "most likely" case studies, this has limitations.[51] If a "most-likely test" is passed—that is, if the expected outcome is indeed observed—inferences on the strength of a causal mechanism may be impossible. In our case, that would mean that we would not be able to establish whether the phenomenon is actually driven by global public goods problems or may be due to other factors (and therefore potentially find broader expression in other contexts). But if a most-likely test is failed, such a result should help us to better understand the foundation and limitations of the initial hypothesis. In particular, if we do not find change—or if we find limited change—in most-likely cases, we would have reason to question whether the demand for institutional change actually leads to the supply of such change, and we would be better able to focus on the particular factors that undercut the move toward institutional change.

The expected variation in both the intensity and forms of change should also provide further insight into the mechanisms that shape international law. In this respect, the three cases display significant variation regarding the factors that are likely to drive institutional change. As already mentioned, the cases bring together different types of global public goods problems, with different consequences for, among other things, the scope of actors necessary for effective action. They also exemplify different kinds of institutional backgrounds. Whereas antitrust historically found little international institutionalization, climate change (at least since the Kyoto Protocol)[52] has been addressed through a web of institutions, and action against terrorism financing has been able to rely, at least in part, upon the strong, relatively flexible capacities of the United Nations' security architecture. Finally, power constellations differ considerably from one case to the next. Antitrust is characterized by strong asymmetries of market power that may be translated into regulatory action. In the environmental field, power differentials are less pronounced but may be aggravated through linkages with, for example, development aid. And the situation in terrorism financing is somewhat mixed as it involves strong asymmetries in both financial markets and the security domain but less of an actual capacity of powerful states to effect change since they depend on the action of others "on the ground."

The variation among these factors should ultimately help us to understand better what drives institutional change toward nonconsensualism, but the concurrent variation of factors from one case to the next also precludes the possibility, with our small number of cases, of sufficiently isolating the factors and drawing reliable conclusions as to causality. A more extensive range of cases (for example, in a quantitative study with a large *n*) would allow for broader conclusions, but such an effort would be at odds with the contextual, exploratory approach taken here. This study is primarily interested in charting, rather than explaining, a potentially major shift in international law. The relatively wide net needed for the purpose should generate more refined hypotheses that can serve as a basis for further research.

[51] *See*, *e.g.*, INGO ROHLFING, CASE STUDIES AND CAUSAL INFERENCE: AN INTEGRATIVE FRAMEWORK 84–96 (2012); *see also* John S. Odell, *Case Study Methods in International Political Economy*, 2 INT'L STUD. PERSP. 161, 166 (2001); Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 QUALITATIVE INQUIRY 219, 231–32 (2006).

[52] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 UNTS 162, *available at* http://unfccc.int/kyoto_protocol/items/2830.php.

## II. TRACES OF CHANGE

### *Securing Markets: Antitrust Regulation and Enforcement*

In an increasingly liberalized and globalized economy, market regulation and enforcement are key goods. Nevertheless, the decentralization of authority and control makes them difficult to produce, and free riding is common. My focus here is on antitrust—the prevention of cartels and anticompetitive behavior. A standard governmental function in free-market economies, it requires extension beyond state boundaries when companies' actions have effects on markets worldwide. Individual states will typically have neither the means to detect, nor the power to counteract, anticompetitive behavior abroad, while they may be reluctant to act against anticompetitive behavior by their own firms when it affects firms elsewhere.[53] The result is likely to be underregulation, leading to significantly distorted markets.

International cooperation on this issue was seen as crucial even decades ago. Initiatives for a global competition law appeared in the 1920s, yet even then they were largely thwarted by disagreement over the substance of the rules.[54] More progress was achieved in the 1940s with the Havana Charter, but it failed to pass the ratification hurdle in the U.S. Senate. When elements of the charter were brought to life separately—through the General Agreement on Tariffs and Trade—the antitrust provisions were not included.[55] A draft agreement developed in the UN Economic and Social Council a few years later was also rejected by the United States.[56] Subsequent efforts, especially by developing countries, to formulate antitrust rules within the framework of the UN Conference on Trade and Development were successful in the UN General Assembly but have failed to attract sufficient support from developed economies.[57]

As multilateral efforts faltered, the United States turned to unilateral options and extended the application of its own antitrust laws to international markets.[58] As powerfully formulated in the 1945 *Alcoa* decision, the United States moved away from the classical territorialist position, in which jurisdiction was largely determined by whether the act in question took place on U.S. territory, and toward "effects-based" jurisdiction.[59] Internationally, this position remained a minority one for decades, and it was criticized by most observers and by other countries as transgressing jurisdictional limits.[60] By the late 1960s, however, the European Commission came to adopt a similar position;[61] by the 1990s, both U.S. and EU approaches were

[53] *See* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510–24 (1998); Andrew T. Guzman, *Competition Law and Cooperation: Possible Strategies*, *in* COOPERATION, COMITY, AND COMPETITION POLICY 345, 354 (Andrew T. Guzman ed., 2011). But see also the different emphasis in Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383 (2007).

[54] DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 24–31 (2010).

[55] *See id.* at 38–52; Diane P. Wood, *The Impossible Dream: Real International Antitrust*, U. CHI. LEGAL F. 277, 281–84 (1992).

[56] Wood, *supra* note 55, at 284–85.

[57] *Id.* at 285–87; D. Daniel Sokol, *International Antitrust Institutions*, *in* COOPERATION, COMITY, AND COMPETITION POLICY, *supra* note 53, at 187, 199–200.

[58] *See* Wood, *supra* note 55, at 297–300.

[59] United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).

[60] *See* MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 432–49 (2010).

[61] *See* Damien Geradin, Marc Reysen, & David Henry, *Extraterritoriality, Comity, and Cooperation in EU Competition Law*, *in* COOPERATION, COMITY, AND COMPETITION POLICY, *supra* note 53, at 21, 26–30. The effects doctrine has remained somewhat circumscribed in the jurisprudence of the European Court of Justice. *See*, *e.g.*, Case 89/85, *In re* Wood Pulp Cartel, 1988 E.C.R. 5193.

characterized as involving a "liberal extraterritorial application of competition law";[62] and various other countries have also moved in the same direction.[63] Some courts and commentators have argued that effects-based jurisdiction has become accepted in international law,[64] yet numerous countries continue to resist the doctrine, leaving its status under international law uncertain.[65]

Such legal doubts have not posed obstacles to the practical success of extraterritorial jurisdiction in the antitrust area. Companies cannot typically afford to ignore the regulations of major markets that they seek to enter, and cannot efficiently divide their operations and tailor them to the regulatory requirements of particular jurisdictions; the potential result is a race to the top in which the strictest standards prevail over time.[66] This dynamic has allowed the United States and EU to act relatively effectively against cartels and anticompetitive behavior in a global market and to regulate large-scale mergers that had worldwide implications.[67] In these efforts, the United States and EU have been aided by the relative convergence of their standards and by the increased cooperation between their authorities,[68] despite serious disagreements in a limited number of cases.[69] The extraterritorial actions of these two economic powers can thus be regarded as providing the global public good in question in a "hegemonic" mode, very much in line with classical hegemonic stability theory.[70] The actions thereby overcome key problems in the production of public goods—especially those of substantive disagreement, free riding, and distribution of costs, which are typically seen as key obstacles to reaching cooperative schemes. Yet this mode of provision also has obvious weaknesses: practical challenges such as information gathering abroad; the lack of a holistic approach, resulting in gaps and overlaps in different policies; difficulties in tackling outward-facing anticompetitive behavior such as export cartels; and potential normative clashes such as those involving the industrial policies of developing countries.[71]

[62] DABBAH, *supra* note 60, at 469; *see also* Wood, *supra* note 55, at 301. On European attempts to promote its approach to competition law abroad, see Umut Aydin, *Promoting Competition: European Union and the Global Competition Order*, 34 J. EUR. INTEGRATION 663 (2012).

[63] See the contributions in COOPERATION, COMITY, AND COMPETITION POLICY, *supra* note 53, especially those on Brazil and China, and also EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 1187–88 (2d ed. 2011).

[64] *See* CÉDRIC RYNGAERT, JURISDICTION OVER ANTITRUST VIOLATIONS IN INTERNATIONAL LAW 195–97 (2008).

[65] DABBAH, *supra* note 60, at 423, 469–76.

[66] *See* Bradford, *supra* note 42, at 10–20.

[67] But see the limitations reflected in F. Hoffmann–La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). See also Note, *supra* note 42, at 1269–79, which observes an expansion of extraterritorial criminal prosecution in antitrust cases as jurisdiction for civil suits has been restricted in the wake of *Empagran*.

[68] *See* Maher M. Dabbah, *Future Directions in Bilateral Cooperation: A Policy Perspective*, *in* COOPERATION, COMITY, AND COMPETITION POLICY, *supra* note 53, at 287, 290–93.

[69] See Bradford, *supra* note 42, at 19–22, who also argues that stricter EU rules typically take precedence over more permissive U.S. rules in the area.

[70] *See* Charles P. Kindleberger, *Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides*, 25 INT'L STUD. Q. 242 (1981); *see also* Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985).

[71] For concise discussions of limits to the decentralized approach to antitrust regulation and enforcement, see Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189 (2009); Eleanor M. Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, *in* COOPERATION, COMITY, AND COMPETITION POLICY, *supra* note 53, at 265, 273–79.

An attempt to overcome some of these limitations and reach a worldwide, multilateral agreement on competition policies in the WTO context was undertaken in the mid-1990s, primarily by the EU.[72] Yet this attempt was soon frustrated, and even a more modest proposal, focusing on procedural elements, failed to gain sufficient traction.[73] This failure is generally attributed to the opposition of both the United States and developing countries.[74] The United States did not see much promise in the effectiveness of such a scheme, and it feared that a multilateral agreement would potentially lead to compromises on substance (at best to a lowest common denominator) and to potential encroachments on its own sovereignty.[75] Developing countries, though traditionally interested in global antitrust regulation,[76] saw the initiative as yet another means of enabling dominant foreign companies to gain access to their markets and as an intrusion that would potentially hinder cooperation among their own firms.[77] For both the United States and developing countries, the expected benefits were too low, and the costs too high, compared to what had already been achieved through the hegemonic solution.[78]

Although the WTO initiative has failed, other avenues for cooperation have remained open or have opened up since. Bilateral and regional agreements have been used to enhance information flows, provide for technical assistance, and establish obligations of positive comity.[79] Stronger informal cooperation has been fostered through the Organisation for Economic Cooperation and Development (OECD) and also, since 2001, the International Competition Network (ICN).[80] Both institutions have developed recommendations and best practices, and the ICN, with members from more than ninety jurisdictions, has provided an important focal point for efforts at exchanging knowledge, strengthening cooperation, and moving toward greater convergence in substantive rules through the development of "best practices."[81]

Overall, though, the global picture of antitrust policies remains heavily decentralized; both its rules and enforcement are mostly national in character. Attempts at multilateral or collective institutional action have been unsuccessful, partly because central actors such as the United

[72] *See* Fox, *supra* note 71, at 272; GERBER, *supra* note 54, at 101–07.

[73] Fox, *supra* note 71, at 272.

[74] *See* GERBER, *supra* note 54, at 103–07; *see also* ELHAUGE & GERADIN, *supra* note 63, at 1239–47.

[75] *See* GERBER, *supra* note 54, at 105–06; Fox, *supra* note 71, at 272; Bradford, *supra* note 53, at 401–10.

[76] *See* Guzman, *Is International Antitrust Possible?*, *supra* note 53, at 1537.

[77] GERBER, *supra* note 54, at 106–07; Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective*, 9 J. INT'L ECON. L. 293, 295–99 (2006). Bradford, *supra* note 53, at 410–13, emphasizes the problem of transaction costs for developing countries.

[78] See the analysis of country incentives in Guzman, *Is International Antitrust Possible?*, *supra* note 53, at 1526–29. See also Bradford, *supra* note 53, at 401–37, who also argues that negotiations failed largely because of the lack of expected benefits, but does not discuss the impact of extraterritorial regulation on that calculation.

[79] GERBER, *supra* note 54, at 108–09; ELHAUGE & GERADIN, *supra* note 63, at 1225–39; DABBAH, *supra* note 60, at 494–540; Michal S. Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 U. TORONTO L.J. 239 (2010).

[80] *See generally* GERBER, *supra* note 54, at 111–16; DABBAH, *supra* note 60, at 130–53 (also discussing on the continuing role of the UN Conference on Trade and Development).

[81] *See* Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151 (2009); GERBER, *supra* note 54, at 115–16; Sokol, *supra* note 57, 200–02; Marie-Laure Djelic, *International Competition Network*, *in* HANDBOOK OF TRANSNATIONAL GOVERNANCE 80 (Thomas Hale & David Held eds., 2011); THE INTERNATIONAL COMPETITION NETWORK AT TEN: ORIGINS, ACCOMPLISHMENTS AND ASPIRATIONS (Paul Lugard ed., 2011); Yane Svetiev, *The Limits of Informal International Law: Enforcement, Norm-Generation, and Learning in the ICN*, *in* INFORMAL INTERNATIONAL LAWMAKING, *supra* note 22, at 271. See also the discussion of problems in Michal S. Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT'L L.J. 1, 45–54 (2009).

States and EU have reduced the need for cooperation by extending their unilateral capacities.[82] They have stretched the jurisdictional boundaries for extraterritorial action in a way that allows them in many cases to affect the behavior of global markets. That does not mean that the public good of antitrust enforcement will be provided in all circumstances, but only that the strongest actors can take enforcement into their own hands whenever anticompetitive behavior hurts them.[83] As distinct from other situations involving public goods, the United States and EU can have this impact because their markets are so important to the subjects of regulation, internationally active companies. We can also infer that when unilateral avenues for change are open and relatively effective, the most powerful actors are likely to follow that route since it is less costly (in terms of controlling both the substance and procedure) than multilateral or collective institutional alternatives.

The turn to unilateral provision has been accompanied, and somewhat softened, by certain procedural devices. A widely influential OECD recommendation provides for notification and, upon request, consultation between competition authorities whenever an antitrust enforcement action may affect important interests of another country or its nationals.[84] Many bilateral agreements have decided to follow this recommendation and have specified procedures for notification and information exchange.[85] In some cases, they have gone further by including obligations of positive comity, requiring authorities to consider additional actions if requested to do so by their counterparts from another country.[86] The ICN has adopted recommended practices for cooperation in merger review procedures,[87] and a 2007 ICN report noted the broadening of enforcement cooperation, making it now a "a global phenomenon."[88] Yet even if such cooperation mitigates the limitations of a decentralized approach, it hardly compensates for the shift in regulatory control that comes with the broader jurisdiction exercised by the United States and the EU today.

*Preserving the Environment: The Global Fight Against Climate Change*

Environmental protection is the quintessential public good in that it is non-exclusive and non-rivalrous in consumption. It is also, most likely, the quintessential *global public good*, as is abundantly clear in relation to climate change and the difficulties in the fight against it.[89] The challenge of reducing emissions to a sufficient extent to curb global warming is enormous—not

[82] *See* Guzman, *Is International Antitrust Possible?*, *supra* note 53, at 1526–27.

[83] See also the accounts in Gal, *supra* note 81, at 40–45, and GERBER, *supra* note 54, at 74–78.

[84] *See*, *e.g.*, Revised Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL (Sept. 21, 1995).

[85] For U.S. antitrust agreements, see U.S. Department of Justice, *Antitrust Cooperation Agreements*, *at* http://www.justice.gov/atr/public/international/int-arrangements.html; for EU antitrust agreements, see European Commission, *Bilateral Relations on Competition Issues*, *at* http://ec.europa.eu/competition/international/bilateral/index.html. See also the U.S. enforcement guidelines for antitrust authorities, with direct reference to the OECD recommendation, in ELHAUGE & GERADIN, *supra* note 63, at 1226 (paragraph 2.92).

[86] See especially the 1991 and 1998 agreements between the United States and EU, in ELHAUGE & GERADIN, *supra* note 63, at 1226–34.

[87] International Competition Network, *Recommended Practices for Merger Notification Procedures* (n.d.), *at* http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

[88] International Competition Network Steering Group, *International Enforcement Cooperation Project* 1 (2012), *at* http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf.

[89] *See* BARRETT, *supra* note 13, at 74.

only financially and technologically, but in terms of social adaptation, both individual and collective.[90] These steep costs represent high hurdles for effective action, invite free riding, and risk placing those who bear the costs at a competitive disadvantage vis-à-vis those who refuse to take on their share of the burden. Unilateral, extraterritorial action cannot be as effective as it is in addressing antitrust problems, as emissions emanate from a much wider range of actors who are typically not directly vulnerable to the intervention of foreign governments.[91] Even though action in multiple sites and at different levels may contribute to a solution,[92] the lack of central institutional control—for example, an institution that could help to provide the good and distribute the burden through taxation—is felt here more immediately than in other areas. Nevertheless, since the prevention of global warming is an aggregate-effort good, institutional structures may not need to include all countries; including the heaviest polluters may suffice to make significant progress, with the implication that "club" strategies are more promising than in other situations.[93]

Climate change regulation was long focused on the classical multilateral process, which had worked exceptionally well in a related field—protecting the ozone layer. The 1992 UN Framework Convention on Climate Change (UNFCCC)[94] and the 1997 Kyoto Protocol followed in that track, though the latter has been heavily criticized from many directions ever since its adoption, and negotiations on a post-Kyoto framework have been overshadowed by disagreement.[95] In the eyes of many observers, multilateral treaty negotiations themselves have become too cumbersome to surmount such disagreement, and the slow and uncertain progress toward a legally binding, universal successor to the Kyoto Protocol seems to confirm their doubts.[96]

Given that consensual multilateralism failed to produce effective solutions to the climate change challenge, one might have expected a rise of nonconsensual elements within the UNFCCC framework. With respect to formal lawmaking, however, the reverse may be true.[97]

[90] On the extent of the challenge, see DAVID G. VICTOR, GLOBAL WARMING GRIDLOCK: CREATING MORE EFFECTIVE STRATEGIES FOR PROTECTING THE PLANET, chs. 2, 5, 6 (2011).

[91] I do not discuss here potential (but highly problematic) strategies of geo-engineering, which could be employed by single states or even private actors. *See* BARRETT, *supra* note 13, at 37–40; VICTOR, *supra* note 90, at 185–96; Michael Specter, *The Climate Fixers: Is There a Technological Solution to Global Warming?*, NEW YORKER, May 14, 2012, at 96.

[92] *See* Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550 (2010).

[93] *See* BARRETT, *supra* note 13, ch. 3; VICTOR, *supra* note 90, at 210–15.

[94] May 9, 1992, 1771 UNTS 107, S. TREATY DOC. NO. 102-38 (1992).

[95] For overviews, see BRUNNÉE & TOOPE, *supra* note 23, at 131–41; PHILIPPE SANDS, JACQUELINE PEEL, ADRIANA FABRA AGUILAR & RUTH MACKENZIE, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 274–98 (3d ed. 2012). For a critical account, see VICTOR, *supra* note 90, ch. 7. For the ratification status, see United Nations Framework Convention on Climate Change, *Status of Ratification of the Kyoto Protocol*, *at* http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php. For a concise account of dominant concerns driving institutional design, see Alexander Thompson, *Rational Design in Motion: Uncertainty and Flexibility in the Global Climate Regime*, 16 EUR. J. INT'L REL. 269 (2010).

[96] *See* VICTOR, *supra* note 90, at 210–15, 224–29; Charlotte Streck, *Innovativeness and Paralysis in International Climate Policy*, 1 TRANSNAT'L ENVTL. L. 137, 139 (2012). In 2012, and over objections from Russia, parties agreed to a second commitment period under the Protocol, effectively extending it until 2020, though with binding emissions reduction obligations for only a small set of countries. *See* Roger Harrabin, *UN Climate Talks Extend Kyoto Protocol, Promise Compensation*, BBC NEWS (Dec. 8, 2012), *at* http://www.bbc.co.uk/news/science-environment-20653018.

[97] See also Robyn Eckersley, *Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?*, 12 GLOBAL ENVTL. POL. 24, 30–31 (2012), who diagnoses a particularly strong, "affirmative" form of multilateralism in the climate change context.

As lawmaking is institutionalized in the UNFCCC Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), states as well as civil society groups have focused their participation claims on this setting, which has led to meetings of enormous, often unwieldy size.[98] Inroads into this robust, consent-oriented multilateralism have been limited. The practice of consensus—the default mode of decision making in the COP—is somewhat softer than consent since it counts acquiescence as agreement, but it is typically regarded as unavailable in the face of open objections.[99] This understanding of consensus, however, has been challenged in the climate change context at least twice in the last few years, and with respect to momentous decisions—the adoption of elements of the Copenhagen Accord[100] over protests by Bolivia and the adoption of a second commitment period despite the opposition of Russia.[101] Although these decisions have not created binding obligations for the parties, they have served to define the course of the climate change regime. The urgency of moving forward led the respective chairs, as well as the other parties, to ignore the objections, initiating a process in which consensus may be redefined in a less consensual fashion, potentially as "quasi-consensus" or "general agreement."[102]

The COP/CMP process has challenged consensual structures in another way.[103] Under Article 18 of the Kyoto Protocol, the CMP is tasked with establishing a compliance procedure, with the proviso that "[a]ny procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."[104] For many, this proviso implied that new compliance procedures required an amendment, which would have involved a lengthy process and would have limited the resulting solution to only those countries that ratified the amendment.[105] Given these difficulties, when it came to creating such a procedure, "[p]ragmatism prevailed"[106] over formal legal considerations; the new compliance mechanism was enacted through a COP decision alone.[107] The decision leaves it to the parties (collectively) to "decide on the legal form"[108] of the procedures and mechanisms, and is thus

[98] See, for example, the account of the Copenhagen negotiations, with more than forty thousand participants, in Daniel Bodansky, *The Copenhagen Climate Change Conference: A Postmortem*, 104 AJIL 230 (2010).

[99] Consensus is not defined in the UNFCCC, but the formula in Article IX of the WTO Agreement is often taken to capture the practice: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision." Marrakesh Agreement Establishing the World Trade Organization, Art. IX n.1, Apr. 15, 1994, 1867 UNTS 154; *see also* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 157–58 (2007).

[100] Decision 1/CP.15 (Dec. 18, 2009), *in* Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

[101] *See* Duncan French & Lavanya Rajamani, *Climate Change and International Environmental Law: Musings on a Journey to Somewhere*, 25 J. ENVT'L L. 437, 448–51 (2013).

[102] *Id.* at 449–50. I wish to thank Veerle Heyvaert for drawing my attention to this development.

[103] See also the discussion in Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 23–33 (2002).

[104] *Supra* note 52.

[105] On the debate, see Streck, *supra* note 96, at 147.

[106] *Id.*; *see also* BRUNNÉE & TOOPE, *supra* note 23, at 185, 201.

[107] Conference of the Parties to the Framework Convention on Climate Change, 7th Sess., Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, Report of the Conference of the Parties at 64, Decision 24/CP.7, UN Doc. FCCC/CP/2001/13/Add.3 (Jan. 21, 2002).

[108] *Id.*

regarded as nonbinding or at least as ambiguous as to its legal character.[109] This move may fit into a broader picture in which the boundaries between binding and nonbinding norms appear blurred in global environmental regulation, and especially in the climate change context.[110] Yet the decision also reflects an attempt to overcome the limitations of formal, consensual international law by moving toward greater informality.

Informality has itself helped to pave the way for stronger "minilateralism" within the UNFCCC process.[111] The 2009 Copenhagen Accord, concluded among only five countries—Brazil, China, India, South Africa, and the United States—helped to break a deadlock in broader negotiations and, though nonbinding in character, became a focal point for the regulatory process in the following years.[112] Many countries associated themselves immediately with the Accord, yet a significant number of excluded governments also heavily criticized the move to a smaller forum.[113] Dissatisfaction prevented the formal endorsement of the Accord by the COP;[114] it was only a year later that many of its elements were integrated into the UNFCCC framework.[115]

Despite these attempts at softening the consensualism of the universal, multilateral process, many actors have found the UNFCCC's consensual approach too burdensome and have sought to achieve progress in other forums, some of which—such as the Major Economies Forum (MEF), which brings together seventeen countries and trading blocs to reach understandings on climate change—are, again, club structures.[116] The result is a dazzlingly multifaceted regime complex, with little binding law and few hierarchies but manifold interactions between its parts.[117] In one forum, though, we may observe a move toward stronger collective, nonconsensual decision making that has resulted in pressures for change in formal rules. In particular, since 2007, some Western governments have tried to place climate change on the UN Security Council's agenda by framing it as a threat to the peace[118]—an effort that has drawn much praise from commentators interested in effective tools to address climate change.[119] Though bringing climate change within the Council's purview could be seen as yet another

[109] *See* BRUNNÉE & TOOPE, *supra* note 23, at 201–04.

[110] *See* French & Rajamani, *supra* note 101, at 443–48.

[111] *See* Eckersley, *supra* note 97.

[112] *See* Bodansky, *supra* note 98, at 234; IAN CLARK, HEGEMONY IN INTERNATIONAL SOCIETY 231–32 (2011).

[113] Bodansky, *supra* note 98, at 238; Ian M. McGregor, *Disenfranchisement of Countries and Civil Society at COP-15 in Copenhagen*, 11 GLOBAL ENVTL. POL.1, 5 (2011). On previous, related critiques in climate change negotiations, see Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 15 (2011). On the broader picture, Dana R. Fisher & Jessica F. Green, *Understanding Disenfranchisement: Civil Society and Developing Countries' Influence and Participation in Global Governance for Sustainable Development*, 4 GLOBAL ENVTL. POL. 65 (2004).

[114] The COP only "took note" of the document. *See* Conference of the Parties, United Nations Framework Convention on Climate Change, Copenhagen, Dec. 7–19, 2009, Report of the Conference of the Parties on Its Fifteenth Session, Addendum at 4, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

[115] *See* Lavanya Rajamani, *The Cancun Climate Agreements: Reading the Text, Subtext, and Tea Leaves*, 60 INT'L & COMP. L.Q. 499, 515 (2011).

[116] *See* Keohane & Victor, *supra* note 113.

[117] See *id.* and Kenneth W. Abbott, *The Transnational Regime Complex for Climate Change* (2011), *at* http://ssrn.com/abstract=1813198, for different, though largely complementary, accounts.

[118] *See* UN SCOR, 62d Sess., 5663d mtg., UN Doc. S/PV/5663 (Apr. 17, 2007).

[119] *See*, *e.g.*, Shirley V. Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is It Time for the Security Council to Legislate?*, 9 MELB. J. INT'L L. 495 (2008).

step in the rapid expansion of its powers since the end of the Cold War, the topic seems far removed from the original Charter conception of the Council's powers.[120] Many states have thus contested the Council's consideration of the issue and have sought to shift the debate back to the General Assembly and other UN bodies.[121] This opposition has not prevented discussion in the Council, but it has led the Council to adopt a cautious stance[122] and to seek legitimacy for this move into new territory by greater procedural inclusion of countries otherwise unrepresented in the Council. Each of the Council's formal debates on climate change featured participation by more than fifty states.[123]

Another result of the clogged channels of multilateralism has been the exploration of unilateral options by proponents of action to combat climate change.[124] Unilateral action is difficult in this area: not only can strict emissions standards in one jurisdiction give other jurisdictions a competitive advantage in global markets, they may also fail to produce positive effects, because of "carbon leakage."[125] In order to address these problems, the EU and the United States have considered the inclusion of importers in their emissions-trading schemes and the introduction of border-adjustment measures.[126] The potential implementation of such policies has provoked strong objections, most notably from China and India, but also, in the case of certain EU measures, from the United States.[127] These policies seem to involve, in part, a redefinition of the jurisdictional limits on extraterritorial action, or at least a "territorial extension" in response to transboundary challenges.[128] An example is the inclusion of international flights in the EU's emissions-trading scheme. For some, jurisdiction in this instance

[120] On Security Council powers and their extension in general, see Nico Krisch, *Chapter VII Powers: The General Framework* and *Article 39*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1237 & 1272 (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus eds., 3rd ed. 2012).

[121] *See* UN SCOR, 62d Sess., 5663d mtg., UN Doc. S/PV/5663 (Apr. 17, 2007). On the different positions in the debate, see Stephanie Cousins, *UN Security Council: Playing a Role in the International Climate Change Regime?*, 25 GLOBAL CHANGE, PEACE & SECURITY 191, 201–07 (2013).

[122] See Statement by the President of the Security Council, UN Doc. S/PRST/2011/15 ( July 20, 2011), and the Security Council's controversial discussion in UN SCOR, 66th Sess., 6587th mtg., UN Doc. S/PV.6587 ( July 20, 2011). In 2013, because of objections, discussions were held at an informal meeting. *See* Flavia Krause-Jackson, *Climate Change's Links to Conflict Draws UN Attention*, BLOOMBERG.COM (Feb. 16, 2013), *at* http://www.bloomberg.com/news/2013-02-15/climate-change-s-links-to-conflict-draws-un-attention.html.

[123] *See* UN SCOR, 62d Sess., 5663d mtg., UN Doc. S/PV/5663 (Apr. 17, 2007); UN SCOR, 66th Sess., 6587th mtg., UN Doc. S/PV.6587 ( July 20, 2011).

[124] On unilateralism in environmental affairs generally, see Gregory Shaffer & Daniel Bodansky, *Transnationalism, Unilateralism and International Law*, 1 TRANSNAT'L ENVTL L. 31 (2012), and also Daniel Bodansky, *What's So Bad About Unilateral Action to Protect the Environment?*, 11 EUR. J. INT'L L. 339 (2000).

[125] *See*, *e.g.*, James Bushnell, Carla Peterman & Catherine Wolfram, *Local Solutions to Global Problems: Climate Change Policies and Regulatory Jurisdiction*, 2 REV. ENVTL. ECON. POL'Y 175–93 (2008). But see also Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531 (2009), who are more hopeful about the effects of unilateral action (by the United States).

[126] *See* Stéphanie Monjon & Philippe Quirion, *Addressing Leakage in the EU ETS: Border Adjustment or Output-Based Allocation?*, 70 ECOLOGICAL ECON. 1957 (2011); Joanne Scott & Lavanya Rajamani, *EU Climate Change Unilateralism*, 23 EUR. J. INT'L L. 469 (2012).

[127] *See* James Kanter, *At Climate Talks, Trade Pressures Mount*, N.Y. TIMES (Dec. 17, 2009), *at* http://www.nytimes.com/2009/12/18/science/earth/18trade.html; Tancrède Voituriez & Xin Wang, *Getting the Carbon Price Right Through Climate Border Measures: A Chinese Perspective*, 11 CLIMATE POL'Y 1257 (2011); Fiona Harvey, *Sanctions Threat to European Airlines over Emissions Trading*, GUARDIAN (Feb. 23, 2012), *at* http://www.guardian.co.uk/environment/2012/feb/23/european-airlines-emissions-trading-sanctions-threat. For a normative discussion see Robyn Eckersley, *The Politics of Carbon Leakage and the Fairness of Border Measures*, 24 ETHICS & INT'L AFF. 367 (2010).

[128] On territorial extension see Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. (forthcoming 2014).

is based on the fact that "air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union."[129] This effects-based rationale for jurisdiction, similar to that long used in antitrust, enables each state affected by an issue—that is, for matters of global public goods, *all* states—to exercise regulatory powers.[130]

In the overall picture of climate change policies, unilateral action is too ineffective to play a central role. Instead, it forms part of the broader climate change regime, which remains centered on the multilateral UNFCCC process but has increasingly branched out to include multiple, partly competing sites, controlled by different governmental and private actors. Although direct challenges to consensual international lawmaking remain limited, some movement has occurred regarding institutional procedures and powers, and also jurisdictional limits. As in the field of antitrust, the limited progress on climate change in classical multilateral, treaty-oriented settings has resulted in a flight into informality and especially into club negotiations. This informality, though leaving the form of the treaty intact, places significant pressure on international law as a mode of global regulation.

*Managing Security: Countering the Financing of Terrorism*

International security is not generally categorized as a public good. Too much of it depends upon the relations between particular states or entities, and it is fragmented in both production and consumption. Unsurprisingly, discussions of international security typically come to be conceptualized in terms of national security. But national security itself depends, in part, on public goods such as the international regulation of armaments, and no state can be excluded from the benefits of a world in which nuclear proliferation is controlled.[131] The example considered here is that of international terrorism—in particular, the prevention of the financing of terrorism. While international terrorism affects countries in unequal ways, most are under some degree of threat and thus benefit from effective global regulation and enforcement.[132] Although countering the financing of terrorism can thus be considered a global public good, it is also importantly different from the global public goods discussed in previous sections. While those other challenges were best characterized as involving aggregate-effort goods (with antitrust possibly considered a single-best-effort good under certain market conditions), terrorist financing involves a weakest-link good. Efforts to counter such financing can be rendered futile if only a small group of states do not cooperate, especially since terrorism's operational costs are often quite limited.[133] Cooperation therefore needs to be more or less comprehensive; unilateral action alone has no reasonable hope of succeeding.

[129] Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change, Opinion of Advocate General Kokott, para. 154 (Oct. 6, 2011), *at* http://curia.europa.eu/juris/celex.jsf?celex=62010CC0366&lang1=en&type=NOT&ancre=. The European Court of Justice used a more conventional approach to ground jurisdiction. *See* Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change, Judgment, paras. 121–30 (Dec. 21, 2011).

[130] See also the "cosmopolitan pluralist" conception of jurisdiction in Berman, *supra* note 43, at 481–501.

[131] *See* BARRETT, *supra* note 13, at 59–61, 133–48.

[132] *See* Anne L. Clunan, *The Fight Against Terrorist Financing*, 121 POL. SCI. Q. 569, 572 (2006); BARRETT, *supra* note 13, at 60.

[133] *See* Clunan, *supra* note 132, at 570–74; Richard Barrett, *Time to Reexamine Regulation Designed to Counter the Financing of Terrorism*, 41 CASE W. RES. J. INT'L L. 7, 11 (2009).

Efforts at international cooperation on terrorism began in the first half of the twentieth century and intensified in the 1970s. Disagreement on the definition of terrorism, however, limited progress in rulemaking to a set of narrowly circumscribed types of terrorist acts.[134] In the 1990s, greater convergence facilitated a broader approach that came to include efforts to counter the financing of terrorism. The issue gained momentum in 1998 when France presented a draft of what in the following year would become the International Convention for the Suppression of the Financing of Terrorism (Financing Convention).[135] Also in 1999, the UN Security Council ordered the freezing of funds of the Taliban as a reaction to their continued support to Osama bin Laden and Al Qaeda; a year later, the Council extended the freeze to the funds of bin Laden and his associates.[136]

The attacks of September 11, 2001, triggered a wave of new efforts.[137] The Financing Convention had at that point been ratified by only four states. In an unprecedented legislative move, the Security Council, in Resolution 1373, rendered most of the convention's provisions mandatory for all UN member states and established an oversight mechanism under Security Council aegis.[138] Today, the Financing Convention has 182 parties,[139] and the Security Council's implementation scheme has grown considerably.[140] The Council's own Counter-terrorism Committee, aided by a standing Counter-terrorism Executive Directorate, promulgates best practices, codes, and standards on terrorist financing, provides technical assistance to member states, and assesses progress in implementing Council resolutions. Despite its broad powers, the Counter-terrorism Committee has taken a cautious approach, seeking not to antagonize governments and emphasizing norm creation, persuasion, and capacity building.[141] In a complementary, operational role, the committee that administers the sanctions against Al Qaeda centrally designates suspected Al Qaeda members and supporters, and supervises the financial restrictions (and travel ban) imposed on them.[142]

[134] *See* BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW, ch. 3 (2008); Christian Walter, *Terrorism*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2011); *see also* TERRORISM AND INTERNATIONAL LAW (Rosalyn Higgins & Maurice Flory eds., 1997).

[135] International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 UNTS 197; *see also* Roberto Lavalle, *The International Convention for the Suppression of the Financing of Terrorism*, 60 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 491 (2000).

[136] SC Res. 1267 (Oct. 15, 1999); SC Res. 1333 (Dec. 19, 2000).

[137] *See generally*, Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AJIL 315 (2003); Clunan, *supra* note 132; JAE-MYONG KOH, SUPPRESSING TERRORIST FINANCING AND MONEY LAUNDERING (2006); Thomas J. Biersteker, Sue E. Eckert & Peter Romaniuk, *International Initiatives to Combat the Financing of Terrorism*, *in* COUNTERING THE FINANCING OF TERRORISM 235 (Thomas J. Biersteker & Sue E. Eckert eds., 2008); Michael Levi, *Combating the Financing of Terrorism*, 50 BRIT. J. CRIMINOLOGY 650 (2010).

[138] SC Res. 1373 (Sept. 28, 2001).

[139] *See* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en.

[140] *See* Eric Rosand & Alistair Miller, *Strengthening International Law and Global Implementation*, *in* UNITING AGAINST TERROR: COOPERATIVE NONMILITARY RESPONSES TO THE GLOBAL TERRORIST THREAT 51 (David Cortright & George A. Lopez eds., 2007); William B. Messmer & Carlos L. Yordán, *A Partnership to Counter International Terrorism: The UN Security Council and the UN Member States*, 34 STUD. IN CONFLICT & TERRORISM 843, 846–51 (2011).

[141] Monika Heupel, *Combining Hierarchical and Soft Modes of Governance: The UN Security Council's Approach to Terrorism and Weapons of Mass Destruction Proliferation After 9/11*, 43 COOPERATION & CONFLICT 7 (2008).

[142] *See*, *e.g.*, Eric Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions*, 98 AJIL 745 (2004).

International cooperation to prevent terrorist financing has also occurred through more informal channels such as the Egmont Group, a transnational network of financial intelligence units of initially twenty, now more than one hundred, countries, and the Wolfsberg Group, which brings together eleven globally active banks to set industry standards.[143] The most prominent informal actor is the Financial Action Task Force (FATF), originally created to tackle money laundering but, after 2001, also tasked with developing policies on terrorism financing.[144] Its eight (later nine) Special Recommendations on Terrorist Financing support and elaborate the UN standards.[145] Compliance with these FATF standards is promoted through various channels. The Security Council has urged UN members to implement the standards;[146] the World Bank and International Monetary Fund (IMF) have used the standards as part of their regular assessments of countries' performance;[147] and bilateral assistance schemes often incorporate the standards.[148] In 2000, the FATF also established its own compliance mechanism of blacklisting jurisdictions deemed to be "noncooperative." This confrontational approach provoked widespread criticism, and the FATF replaced it with a more cooperative approach a few years later.[149] But, apparently at the request of the G-20, the FATF subsequently returned to naming and shaming countries with compliance problems, supplemented by recommendations for FATF members and other jurisdictions to take countermeasures against those with serious problems.[150]

International efforts at countering the financing of terrorism and at convincing countries to engage in their own effective action against it may have had considerable success—debate continues as to the degree of success and how to measure it—but these efforts necessarily leave gaps and do not, in themselves, overcome the resistance or inertia of countries that do not see the benefits for themselves as justifying the high compliance costs.[151] Countries for whom the issue

[143] *See*, *e.g.*, KOH, *supra* note 137, at 143–54.

[144] *See* Biersteker et al., *supra* note 137, at 239–41; Kathryn L. Gardner, *Terrorism Defanged: The Financial Action Task Force and International Efforts to Capture Terrorist Finances*, *in* UNITING AGAINST TERROR: COOPERATIVE NONMILITARY RESPONSES TO THE GLOBAL TERRORIST THREAT, *supra* note 140, at 157; Yee-Kuang Heng & Ken McDonagh, *The Other War on Terror Revealed: Global Governmentality and the Financial Action Task Force's Campaign Against Terrorist Financing*, 34 REV. INT'L STUD. 553 (2008); Ian Roberge, *Financial Action Task Force*, *in* HANDBOOK OF TRANSNATIONAL GOVERNANCE, *supra* note 81, at 45.

[145] Financial Action Task Force, *FATF Recommendations: IX Special Recommendations* (2014), *at* http://www.fatf-gafi.org/topics/fatfrecommendations/documents/ixspecialrecommendations.html.

[146] SC Res. 1617 (July 29, 2005).

[147] *See* KOH, *supra* note 137, at 170–77; Biersteker et al., *supra* note 137, at 241–42.

[148] *See* James Thuo Gathii, *The Financial Action Task Force and Global Administrative Law*, J. PROF. LAW. 197, 208 (2010).

[149] *See* Gardner, *supra* note 144, at 170–71. On the initial controversy and potential reasons for the later shift, see Rainer Hülsse, *Even Clubs Can't Do Without Legitimacy: Why the Anti–Money Laundering Blacklist Was Suspended*, 2 REG. & GOVERNANCE 459, 462–66 (2008).

[150] *See* Hülsse, *supra* note 149, at 473; Roberge, *supra* note 144, at 47; Financial Action Task Force, *High-Risk and Non-cooperative Jurisdictions: FATF Public Statement—19 October 2012* (Oct. 19, 2012), *at* http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/fatfpublicstatement-19october2012.html. In 2012, the FATF has also threatened Turkey with the suspension of membership because of continuing compliance problems. *See* Financial Action Task Force, *FATF General: Outcomes of the Plenary Meeting of the FATF, Paris, 17–19 October 2012: Statement on Turkey* (Oct. 19, 2012), *at* http://www.fatf-gafi.org/topics/fatfgeneral/documents/outcomesoftheplenarymeetingofthefatfparis17-19october2012.html.

[151] On the impact of the global regime and its limits, see Clunan, *supra* note 132, at 578–83, Biersteker et al., *supra* note 137, at 243–49, Heng & McDonagh, *supra* note 144, at 564–72, Messmer & Yordán, *supra* note 140, at 851–58, Jeanne K. Giraldo & Harold A. Trinkunas, *Terrorist Financing: Explaining Government Responses*, *in*

is of higher priority would therefore be expected not only to seek the strengthening of the cooperative regime but also to add their own unilateral efforts to it. And though unilateralism faces practical obstacles in this area (as noted earlier), it is also a standard part of the regime today. The Financing Convention, like other terrorism-related conventions, generally predicates jurisdiction on territoriality or nationality, but it also contains a prosecute-or-extradite rule for all countries.[152] Both the Convention and Security Council Resolution 1373 demand government action on funds implicated in such offenses, regardless of a particular jurisdictional link, and the Council resolution, in particular, requires countries to freeze all the funds of persons involved in terrorist offenses, wherever the funds are located or the offenses occurred.[153] Under international law, countries are thus entitled to seize the funds of all those persons and entities that they deem to fall into that category, and some countries, especially the United States, have made ample use of this broad license.[154] The United States has also in other respects extended the reach of its financial regulations beyond traditional jurisdictional boundaries. It has, for example, required foreign banks with correspondence accounts in the United States to disclose foreign bank records, including by subpoena, in a way that banks had long resisted on jurisdictional grounds. It has also instituted a system of designating foreign jurisdictions and financial institutions as violating standards on money laundering and on terrorism financing abroad, and it has, in this context, barred certain foreign banks from accessing the U.S. financial system.[155] These actions are linked to U.S. territory through the direct regulatory target—operation on U.S. financial markets—but because they target banking practices abroad, they could raise concerns on jurisdictional grounds in the same way as, for example, extraterritorial securities regulation.[156] Yet the permissive jurisdictional rules of the Financing Convention and relevant Security Council resolutions, coupled with favorable political circumstances, seem to have led to widespread acquiescence.[157]

In a reconfigured way, concerns over jurisdictional limits have provoked further criticism of the FATF and its practice of blacklisting countries. The FATF is a classical club organization; created by the OECD and G-7, until the late 1990s it had no other members. Since then, it has added numerous "strategically important" countries, such as Brazil, China, India, Russia,

TERRORISM FINANCING AND STATE RESPONSES 282, 291–94 (Jeanne K. Giraldo & Harold A. Trinkunas eds., 2007), and Richard Barrett, *Preventing the Financing of Terrorism*, 44 CASE W. RES. J. INT'L L. 719 (2012).

[152] International Convention for the Suppression of the Financing of Terrorism, *supra* note 135, Arts. 7, 10. On the quasi-universal character of such jurisdiction, see CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 104–06 (2008). The Convention seeks to avoid jurisdictional conflict by an obligation of countries to "strive to coordinate" their actions. See Article 7(5).

[153] International Convention for the Suppression of the Financing of Terrorism, *supra* note 135, Art. 8; SC Res. 1373, *supra* note 138, para. 1(c).

[154] On the United States see JIMMY GURULÉ, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM, ch. 8 (2008). For a relatively permissive view on jurisdictional limits to U.S. action, see Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law,* 48 HARV. J. INT'L L. 121 (2007).

[155] *See* Anne L. Clunan, *U.S. and International Responses to Terrorist Financing*, *in* TERRORISM FINANCING AND STATE RESPONSES, *supra* note 151, at 260, 265, 277–79; Sue E. Eckert, *The US Regulatory Approach to Terrorist Financing, in* COUNTERING THE FINANCING OF TERRORISM, *supra* note 137, at 209–17; GURULÉ, *supra* note 154, at 156–72.

[156] On jurisdictional issues in securities regulation, see RYNGAERT, *supra* note 152, at 77–78; Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 AJIL 289 (2003).

[157] But see also Moyara de Moraes Ruehsen, *Arab Government Responses to the Threat of Terrorist Financing*, *in* TERRORISM FINANCING AND STATE RESPONSES, *supra* note 151, at 152, 164, 167, on skepticism and charges of bias against the U.S. listing process.

and South Africa, but it still stands at only thirty-six members.[158] Its original, confrontational compliance procedures, dating from 2000, were directed at nonmembers—most aggressively at Myanmar, Nauru, and the Seychelles, but also at Egypt, Russia, and various offshore jurisdictions, especially in the Caribbean.[159] For the targets, the blacklisting process was taken to be an illegitimate intrusion. As the chairman of the Caribbean Financial Action Task Force stated, it was unacceptable "that a handful of states, however powerful, should usurp the right to dictate standards to the rest of the world under the threat or imposition of sanctions."[160] Some countries complained that the process's coercive character violated their sovereign right to develop their own economic policies.[161] There was, of course, no coercion as such, but blacklisted jurisdictions faced the threat of sanctions ranging from advisories for financial institutions, to prohibitions of financial transactions with FATF members, with their vast financial markets. Unsurprisingly, most targets felt the need to comply with FATF "recommendations," and the blacklisting process was widely seen as extraordinarily effective in inducing change.[162] Even though the process was later replaced by less intrusive procedures, FATF decision making remains largely exclusive in character. The FATF has encouraged nonmembers to organize into FATF-style regional bodies (FSRBs), most of which are now "associate members" of the FATF, which gives them a stronger role than that of mere observers or nonmembers.[163] The FATF has also opened up its decision-making process through public consultations, which have generated a significant number of detailed responses, especially from the financial sector.[164] Most nonmembers of the club, however—including countries within the FSRBs—fall far short of having an effective voice in FATF decision making.

The choice of an informal forum—the FATF—for addressing terrorist financing can be read as a flight from a broader multilateralism that, as in our previous examples, may have seemed unworkable or at least unlikely to produce the results desired by the most powerful players.[165] Yet here again, the approach chosen does not formally challenge the consensual structure of international law. A more direct challenge to consensual lawmaking lies in the expansion of UN Security Council powers. As mentioned in the previous section, the Council's powers were reinterpreted and broadened throughout the 1990s, bringing new areas within the Council's purview and adding new tools to its armamentarium.[166] The fight against terrorism paved the way for a further, significant leap. Though the Council's powers had been previously construed as limited to circumscribed action regarding particular conflicts and countries, the Council now turned to legislative action that set rules for all UN member states—and without being

[158] On the "club" character see DREZNER, *supra* note 50, at 142, and Hülsse, *supra* note 149, at 461.

[159] *See* DREZNER, *supra* note 50, at 142–44; Hülsse, *supra* note 149, at 461–62.

[160] *Quoted in* Hülsse, *supra* note 149, at 464.

[161] *Id.* at 464–65.

[162] *See* DREZNER, *supra* note 50, at 142–45; Hülsse, *supra* note 149, at 462; Heng & McDonagh, *supra* note 144, at 565–68; J. C. Sharman, *The Bark Is the Bite: International Organizations and Backlisting*, 16 REV INT'L. POL. ECON. 573 (2009); *see also* Giraldo & Trinkunas, *supra* note 151, at 287–88.

[163] *See* KOH, *supra* note 137, at 177–88; Gardner, *supra* note 144, at 168–70; Hülsse, *supra* note 149, at 470; Heng & McDonagh, *supra* note 144, at 571–72.

[164] Financial Action Task Force, *FATF Recommendations: Review of the FATF Standards* (2014), *at* http://www.fatf-gafi.org/topics/fatfrecommendations/documents/reviewofthefatfstandards.html.

[165] See the account in DREZNER, *supra* note 50, at 142, and see Gathii, *supra* note 148, at 203–04.

[166] *See supra* note 120 and accompanying text.

limited to a particular time period, conflict, or situation. It thereby replaced the treaty-making process, which is relatively cumbersome, slow, and ineffective, and became, in effect, a central, worldwide rulemaking body—the absence of which is so often decried.[167] The particular situation that allowed for this institutional leap—the days and weeks after 9/11—helped to avoid principled concerns about process and powers.[168] Later attempts at similarly broad legislation have met with stronger criticism, however, potentially undercutting the consolidation of the Council's broader powers as a matter of law.[169]

The Security Council has sought to ease the way for its expanded lawmaking through substantive and procedural means. For example, as mentioned above, Resolution 1373 largely drew upon a body of rules developed by the General Assembly and enshrined in the Financing Convention.[170] And although the process leading up to the resolution's adoption in September 2001 was short and also dominated by the permanent members (as is usual in the Council), a wider set of voices was included at the implementation stage, especially at the point about two years after adoption, when implementation began to lag.[171] For its next attempt at legislation—Resolution 1540 of April 2004, whose goal was to curb the proliferation of weapons of mass destruction—the Council invited significantly broader participation, sought to include a wider range of actors at the preparation stage, and, before adopting the resolution, held an open debate in which more than fifty states participated.[172] Although the process still had its critics, the resulting regime has found broad support and has been unanimously reaffirmed by the Security Council.[173]

Overall, efforts at countering the financing of terrorism have not led to a wholesale remaking of the international legal order, but they have exerted various pressures. Those pressures have remained relatively limited regarding jurisdictional rules, partly because of a permissive treaty framework, partly because unilateral action in this area faces greater obstacles than in, for example, the field of antitrust. Rules on treaty making have remained untouched, but as in our previous case studies, they have been marginalized by a turn to both informal and institutional lawmaking. The latter has given rise to an extension of UN Security Council powers well beyond what would have been contemplated just a few years earlier. The channels of lawmaking and decision making on terrorism financing have thus become increasingly club-like, as both the Security Council and FATF are bodies with limited memberships, dominated by a few central players. As we have seen, this shift has itself been somewhat moderated by broader representation and participation, but it remains a serious challenge to the idea of an order based on sovereign equality, so central to classical international law.

[167] *See* Paul C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AJIL 175 (2005).

[168] *See* Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AJIL 275, 284 (2008). The reaction in the UN General Assembly, however, has been described as "tepid" by Szasz, *supra* note 167, at 903. See also the mixed picture in CATHÉRINE DENIS, LE POUVOIR NORMATIF DU CONSEIL DE SÉCURITÉ DES NATIONS UNIES: PORTÉE ET LIMITES 317–40 (2005).

[169] *See* Krisch, *supra* note 120, at 1253–54. *But see* SC Res. 1540 (Apr. 28, 2004).

[170] See Szasz, *supra* note 167, at 903, but also the nuances in DENIS, *supra* note 168, at 151–54.

[171] *See* Johnstone, *supra* note 168, at 284–89.

[172] *See id.* at 290–94; *see also* Talmon, *supra* note 167, at 177–78, 186–88.

[173] *See* SC Res. 1977 (Apr. 20, 2011).

## III. BEYOND AND AROUND CONSENT: A PICTURE OF CHANGE

For all their diversity, the three case studies in part II reveal the contours of a broader picture. They suggest a significant resilience of consent, despite certain challenges to traditional legal structures, especially in relation to jurisdictional boundaries and institutional powers. They also signal that treaty law, itself not formally challenged, is increasingly sidelined through recourse to institutional lawmaking, informal forums, and unilateral action. Taken together, as I will argue below, they point to an increasing nonconsensualism, though one that often takes place outside formal international law and shows many traces of hierarchy, even if it is somewhat cushioned by new forms of representation and consultation.

The picture I paint here is tentative and incomplete, and it is important to keep its limitations in mind when describing and trying to understand the processes of change being examined in this article. Three case studies provide only a glimpse into much broader practices of global governance, and my findings may prove to be unrepresentative—especially as I have chosen three "most likely" cases, which tell us little about areas in which pressures for cooperation are less acute or where existing institutional structures are more accommodating.[174] Even so, the findings in this article may indicate a trend that foreshadows developments in other areas in which problems concerning global public goods become more severe.

### *The Resilience of Consent in International Law*

Perhaps surprisingly, the consent element in international law has proved to be highly resilient in our case studies; direct challenges to it have remained circumscribed. Treaty law does not seem to have come under significant pressure at all; the key role of consent in creating new rules via treaties, though obviously impeding efforts at lawmaking, continues to be firmly anchored. If anything, processes of treaty making may have moved toward broader and firmer inclusiveness, making multilateralism more robust.[175] Mirroring developments in international environmental negotiations more generally,[176] multilateralism in climate change negotiations now typically involves a broad set of actors beyond the 195 state parties to the UNFCCC—especially nongovernmental organizations of various kinds.[177] Negotiations on the WTO's international antitrust regime were structured by the organization's broad membership and its established negotiation practices, including settled negotiation groups.[178] Such preexisting structures and practices do not eliminate logrolling or soft coercion, but they limit the impact of such strategies (when compared to negotiations in less established or smaller forums). In the climate change context, however, we have observed a qualification of the consensual structure in one respect: consensual decision making in the Conference of the Parties

[174] *See supra* note 51 and accompanying text.

[175] See the qualitatively demanding account of multilateralism in John G. Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561 (1992).

[176] *See, e.g.*, Kal Raustiala, *The "Participatory Revolution" in International Environmental Law*, 21 HARV. ENVTL L. REV. 537 (1997). See also BOYLE & CHINKIN, *supra* note 99, ch. 2, on the increasing participation of nonstate actors in international lawmaking more broadly.

[177] *See* Bodansky, *supra* note 112, at 230.

[178] For a discussion of the hurdles for dealing with antitrust in the WTO, see Andrew Guzman, *International Antitrust and the WTO: The Lesson from Intellectual Property*, 43 VA. J. INT'L L. 933, 953–56 (2003).

has occasionally been regarded as possible despite the open objections of single states.[179] This trend is not settled, but it may signal a greater readiness for states to move to a form of majority voting on crucial issues on which consensus is lacking, even though the rules of procedure do not provide for such majoritarian actions.[180] That said, the respective decisions did not purport to create binding obligations for states, and no one has claimed that they have gained the force of custom.[181] Given the high stakes in climate change, the decisions represent a very limited concession to effectiveness. In other issue areas, moves to soften consensus have had even less success,[182] and even when nonconsensual decision making is formally available, it is not necessarily used.[183]

The growth of institutional lawmaking powers has presented a greater challenge to consensual decision making. Especially noteworthy in this context are the Security Council's actions on anti-terrorism "legislation" and, to a lesser extent, climate change regulation. In both cases, Council action (which, in the case of climate change, was merely discussion) was justified as necessary to deal with a global threat[184]—thereby relying on the "global public goods" perspective that has framed our inquiry here. Yet apart from the Council, there has been little movement. On antitrust, no central institution was available to take on new powers, and the WTO—the locus of some hopes—was eventually not used; it was generally accepted that such WTO action would have required a delegation of powers through a new and specific—but politically infeasible—treaty norm, rather than through a mere interpretative move. On climate change, a set of institutions existed under the UNFCCC regime, but no effort was made to harness them for broader purposes of lawmaking, except perhaps to establish the compliance mechanism for the Kyoto Protocol. Here, the Conference of the Parties turned to an informal solution to overcome the strictures of the amendment route that would have been necessary to create binding rules.[185] This approach may still have transgressed Kyoto provisions, but it hardly represents a broader challenge to the boundaries of lawmaking powers for international institutions. We can observe some such challenges in other areas (for example, in relation to infectious diseases),[186] and, more generally, one should recognize that international organizations have increasingly been taking on lawmaking functions within contemporary global

[179] *See supra* notes 100–02 and accompanying text.

[180] In the UNFCCC context, agreement on voting rules—especially majority voting—has been elusive, and decisions continue to be taken by consensus. *See* Rajamani, *supra* note 115, at 515 & n.138. Deviations from consensual decision making are not infrequent in international institutions. *See* KLABBERS, *supra* note 6, at 206–11; PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 261–75 (5th ed. 2001). They are less frequent in the context of multilateral treaty conferences. *See* BOYLE & CHINKIN, *supra* note 99, at 157–60. COPs are hybrids between both institutional types. *See* Brunnée, *supra* note 103, at 16; *see also* Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AJIL 623 (2000).

[181] On the relation of treaties, consensus, and custom, see BOYLE & CHINKIN, *supra* note 99, at 234–38.

[182] With a view to negotiations on the Arms Trade Treaty, see Dapo Akande, *What Is the Meaning of "Consensus" in International Decision Making?*, EJIL: TALK! (Apr. 8, 2013), *at* http://www.ejiltalk.org/negotiations-on-arms-trade-treaty-fail-to-adopt-treaty-by-consensus-what-is-the-meaning-of-consensus-in-international-decision-making/.

[183] On the example of the Montreal Protocol, see Daniel Bodansky, *Legitimacy*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 704 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2008).

[184] See, for example, UN SCOR, 57th Sess., 4453d mtg., UN Doc. S/PV.4453 (Jan. 18, 2002), on anti-terrorism legislation, and UN SCOR, 62d Sess., 5663d mtg., UN Doc. S/PV/5663 (Apr. 17, 2007) on climate change.

[185] *See supra* notes 104–09 and accompanying text.

[186] *See* D. FIDLER, SARS: GOVERNANCE AND THE GLOBALIZATION OF DISEASE 132–45 (2004).

governance.[187] But apart from judicial institutions,[188] much of this lawmaking remains informal (or ambiguous as to its status),[189] and when institutions exercise broader formal powers, they seem for the most part to remain within the bounds of delegation, especially if one accepts that these bounds are subject to relatively flexible interpretation. The Security Council may thus well be a special case.

Somewhat greater movement away from consensualism is apparent when it comes to jurisdictional rules. In all three case studies, we have found examples of challenges to classical, territorially based boundaries of jurisdiction. These challenges were largely sanctioned by international instruments in the case of terrorism financing, but in the other two areas, traditional limits were stretched. In antitrust, the turn to effects-based regulation is no longer new, though it is still not entirely settled as a matter of international law. Its justification extends the territorial rationale in a world of integrated markets, where the location of an act is often irrelevant to its (global) impact. This approach does not embrace a "global public goods" justification directly, however, and U.S. courts have recently emphasized the (at least theoretical) limitation of such an approach, which excludes U.S. action when direct effects are solely produced elsewhere.[190] Similar developments in other areas suggest that U.S. courts do not see their role as solving problems of a global nature as such.[191] Likewise, in the area of climate change, the EU stance on international aviation contains an extraterritorial element that, as we have seen, is justified by some with reference to a public "bad"—$CO_2$ emissions—the production of which has effects on all countries.[192] The strength of reaction against the EU measures highlights both the significance of the shift and its highly unsettled character.

### *Toward Informality and Hierarchy*

Given the current gap between the need to provide certain global public goods and the capacity of traditional international law to do so,[193] the above efforts to provide those goods through nonconsensual methods may seem to present only a weak challenge to consensualism. But a complete picture needs to take into account not only the direct, "frontal" attacks on traditional international legal structures and consensual decision making, but also the ways in which these structures and processes are circumvented, sidelined, or replaced.

As we have seen, such indirect attacks have been prominent in all the cases we have considered here, and they have typically taken the form of a turn to *informality*. Informal structures

[187] *See* JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005).

[188] *Id.*, ch. 9; BOYLE & CHINKIN, *supra* note 99, ch. 6; INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE (Armin von Bogdandy & Ingo Venzke eds., 2012).

[189] *See* Brunnée, *supra* note 103, at 23–31; Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231 (2009).

[190] *See supra* note 67; Buxbaum, *supra* note 43, at 273–75.

[191] On such a turn in the interpretation of the Alien Tort Statute, see Note, *supra* note 42, at 1233–45, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013), and Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, ASIL INSIGHTS (Apr. 18, 2013), *at* http://www.asil.org/insights/volume/17/issue/12/supreme-court-holds-alien-tort-statute-does-not-apply-conduct-foreign. On securities regulation see Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173, 1243–63 (2012).

[192] *See supra* note 129 and accompanying text.

[193] *See* section above entitled "The Challenge of Global Public Goods."

TABLE 2
FORMS OF NONCONSENSUALISM IN THREE ISSUE AREAS

| | |
|---|---|
| International lawmaking Alternatives | Collective: Security Council (FT) |
| | Multilateral: Kyoto Protocol COP (CC) |
| | Unilateral: European Union (AT, CC) (extraterritorial); United States (AT, FT) (extraterritorial) |
| | Informal: Copenhagen Accord (CC); Financial Action Task Force (FT); Major Economies Forum (CC) |

AT, antitrust; CC, climate change; COP, Conference of the Parties; FT, financing of terrorism.

have probably been least central to antitrust regulation. The OECD and the International Competition Network do have a role in coordinating international efforts and in mutual learning—which is important in view of the dearth of formal multilateral rules and the failure to establish effective institutions within the WTO context. Nevertheless, they play a secondary role in a structure dominated by unilateral, extraterritorial forms of regulation. Informal cooperation is arguably more important in the field of climate change, where the Copenhagen Accord and interaction in settings such as the Major Economies Forum have been regarded as necessary alternatives, or complements, to the protracted and cumbersome negotiations in the multilateral UNFCCC context. And in the area of terrorism financing, we have found especially the Financial Action Task Force (FATF) to be a central actor alongside, and partly in tandem with, national regulators and formal international bodies, such as the UN Security Council and international financial institutions. The resulting institutional landscape is summarized in Table 2.

The presence and prominence of informal institutions and norms in global governance has long been documented and analyzed.[194] Much of the work in this area has emphasized the functional benefits of informality, especially its greater speed and flexibility, the lower sovereignty costs that it entails, and its availability to a greater range of actors than the formal multilateral process.[195] Typically, these analyses assume that the range of cooperating parties remains the same across institutional forms.[196] In our cases, though, the turn to informality often implied a turn to a smaller set of actors—to a club structure in which decisions of global reach are taken by a group of powerful countries. This highlights one benefit (at least to some actors) of informal structures—namely, their susceptibility to greater exclusivity, to "minilateral" forms of cooperation.[197] For the Copenhagen Accord, the Major Economies Forum, and the FATF, this exclusivity was of major appeal to powerful actors and promised them more favorable outcomes than classical multilateralism.[198]

[194] *See, e.g.*, Abbott & Snidal, *supra* note 44; SLAUGHTER, *supra* note 44; INFORMAL INTERNATIONAL LAWMAKING, *supra* note 22; Shaffer & Pollack, *supra* note 44; Felicity Vabulas & Duncan Snidal, *Organization Without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements*, 8 REV. INT'L ORGS. 193 (2013).

[195] See Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991), and the overview in Shaffer & Pollack, *supra* note 44, at 719.

[196] *See, e.g.*, the analysis in Abbott & Snidal, *supra* note 44. But see also the greater sensitivity to varying constellations of membership between formal and informal institutions in Vabulas & Snidal, *supra* note 194.

[197] *See* SLAUGHTER, *supra* note 44, at 227–30; JONATHAN G.S. KOPPELL, WORLD RULE: ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE 161–62, 171–73 (2010); Viola et al., *supra* note 49.

[198] But see also Vabulas & Snidal, *supra* note 194, at 213–14, on the benefits that both powerful and weak countries may derive from informal institutions.

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TABLE 3
EQUALITY AND NONCONSENSUALISM IN THREE ISSUE AREAS

| | |
|---|---|
| Egalitarian | Kyoto Protocol COP (CC) |
| Hierarchical | Copenhagen Accord (CC); European Union (AT, CC) (extraterritorial); Financial Action Task Force (FT); Major Economies Forum (CC); Security Council (FT); United States (AT, FT) (extraterritorial) |

AT, antitrust; CC, climate change; COP, Conference of the Parties; FT, financing of terrorism.

If we see this club informality in conjunction with the shift toward unilateralism in antitrust and toward broader Security Council powers in the area of terrorist financing, significant commonalities emerge. Despite their different forms, the challenges to classical structures in all these areas point in the direction of more *hierarchical* forms of governance. In antitrust, the market structure allows this hierarchy to be effective through unilateral (and partly coordinated) action of the United States and EU, without a need to create broader institutions. In climate change, the need for cooperation is greater, and informal hierarchies interact with formal multilateralism in an as-yet unsettled institutional framework. In the fight against terrorism financing, an exclusive formal institution—the Security Council—is complemented by an informal club institution, the FATF, and both are tightly linked to national, partly unilateral efforts. The resulting picture, shown in Table 3, is uneven, and it combines consolidated and formal, with unsettled and informal, authority. To some extent, these findings support the view that in regime complexes, as present here (at least as regards climate change and terrorism financing), powerful countries benefit from forum shopping for institutions that suit their preferences—and that they can shape.[199] The situation is very different from cooperation in the classical forms of international law, with their formal promise of sovereign equality.

The semiformal structure of the new order is characterized by largely concentric circles of decision makers: while the United States is always part of the "club," the EU or key European governments are also usually members (as in the Security Council, MEF, FATF, and unilateral antitrust). China and Russia are central as permanent members of the Security Council and, more recently, as members of the MEF and the FATF (which they joined only in the 2000s). Brazil, India, and South Africa are also now part of the MEF and FATF, and together with China and the United States, they formed the group negotiating the Copenhagen Accord; their increasing inclusion is a reflection of the general rise of the BRICS (or, in the climate change context, BASIC) countries.[200] Australia, Canada, Japan, Mexico, and South Korea are also members of the MEF and FATF. The core decision makers are similar in most of these institutions (and others)[201]—typically the G-7 plus the BRICS countries. Their de facto influence

[199] See Daniel W. Drezner, *The Power and Peril of International Regime Complexity*, 7 PERSP. ON POL. 65 (2009), but see also the more ambivalent picture in Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1 (2004), and Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13 (2009).

[200] BRICS is a shorthand for Brazil, Russia, India, China, and South Africa. On their emergence in world politics, see, for example, Andrew Hurrell, *Hegemony, Liberalism and Global Order: What Space for Would-Be Great Powers?*, 82 INT'L AFF. 1 (2006). Russia is not a member of BASIC.

[201] On the WTO see Amrita Narlikar, *New Powers in the Club: The Challenges of Global Trade Governance*, 86 INT'L AFF. 717 (2010). On recent quota "rebalancing" at the IMF, see International Monetary Fund, *G-20 Ministerial Meeting: G-20 Ministers Agree 'Historic' Reforms in IMF Governance* (Oct. 23, 2010), *at* http://www.imf.org/external/pubs/ft/survey/so/2010/NEW102310A.htm.

is translated into formal or informal institutional structures that effectively establish hierarchies, though usually without creating "legalized" hegemonies in a formal sense.[202]

The picture of nonconsensualism commonly drawn by international lawyers is an egalitarian one: a shift toward majoritarian decision making that retains for all states a right to equal participation.[203] The picture arising from our analysis is different: nonconsensualism, whether in formal or informal guise, creates more exclusive decision-making structures that reduce the number of decision makers—and typically not in an egalitarian fashion but in a way that entails a loss of control for all but the most powerful players. As a result, most forms of nonconsensualism that we have observed eliminate consent (and often even participation) only for the many, not for the few.

*Procedural Mitigation: Representation and Consultation*

Most countries are excluded from direct participation in decision making in this more hierarchical world, but they are not left without a role. The different settings have developed mechanisms of what we might call "procedural mitigation," mainly through forms of representation and consultation of outsiders.[204]

*Representation.* Representation is the prime vehicle for broader participation in the UN Security Council, where the different regions periodically elect "their" Council members. The link between members and constituencies can at times be tenuous, and the status of elected members is inferior to that of the permanent members because of the absence of veto power, the lack of continuity in their work on the Council, and their comparatively peripheral role in decision making processes, which are dominated by the permanent members or a subset of them. Nevertheless, the elected members wield influence through their votes, play an important informational role, and channel the views of nonmember states into Council deliberations.[205]

In the FATF, representation works differently and takes two main forms. One is the broadening of the membership beyond the OECD world, which has taken place in different steps since the early 2000s. This expansion was partly driven by the desire to include "strategically important" jurisdictions, but it was also portrayed as a means "to ensure a higher degree of participation and geographical balance" and to "engender a greater sense of ownership."[206] As in climate change negotiations, in the shift from the G-8 to the G-20, or in recent IMF reforms, the inclusion of countries such as Brazil, China, India, and South Africa helps to integrate the most influential players but is also intended to ensure a greater "virtual" representation of

[202] On instantiations of legalized hegemony, see GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004). On hierarchies and club structures in international politics, see DREZNER, *supra* note 50, CLARK, *supra* note 112, and DAVID A. LAKE, HIERARCHY IN INTERNATIONAL RELATIONS (2009).

[203] *See*, *e.g.*, Tomuschat, *supra* note 2, at 240, 328–29; TRACHTMAN, *supra* note 3, at 253–87.

[204] For a related discussion see Robert O. Keohane & Joseph S. Nye, *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, *in* POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD 219 (Robert O. Keohane ed., 2002).

[205] *See* Kishore Mahbubani, *The Permanent and Elected Council Members*, *in* THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 253 (David Malone ed., 2004).

[206] *See* Hülsse, *supra* note 149, at 469.

countries, especially those from the developing world, which may feel closer—culturally, economically, or strategically—to these newcomers than to the Western-dominated old core.[207] In a similar vein, the MEF has established a practice of inviting around ten countries (not always the same) from different regions to participate in its meetings.[208] A second device to ensure broader representation in the FATF is, as mentioned earlier, the creation and inclusion of FATF-style regional bodies. These bodies were initially conceived mainly as "transmission belts" for FATF policies in different regions,[209] yet over time, some of them have developed a limited degree of autonomy, at times resulting in criticism of FATF policies.[210] Initially merely "observers," most FSRBs now hold the status of "associate members" in the FATF, which suggests a more meaningful participation in decision making, including the possibility of attending plenary meetings.[211]

*Consultation.* As associate members, FSRBs play a consultative role at the FATF, which has also, since the early 2000s, undertaken broader efforts at increasing its transparency and procedural openness by consulting with, and soliciting input from, outsiders.[212] The focus here has typically been the private sector, but the FATF also conducts multistage consultations with countries that are being considered for inclusion in the FATF's "public statement" of high-risk and noncooperative jurisdictions.[213] These consultations are in line with a growing trend toward public consultations as a standard tool in global regulatory governance[214]—one that helps institutions to gather information and reactions from both the private and public sectors.[215] By contrast, in settings such as the UN Security Council, consultations are geared exclusively at governments. As we saw in part II, the Council sought to cushion its move into new issue areas and toward broader legislative powers by inviting nonmember governments to speak in open debates, and in both cases, more than fifty governments participated in Council discussions, including representatives of broader groupings, such as the Non-aligned Movement.[216] The Council seemed intent on replicating General Assembly debates—without giving nonmembers a right to vote.

[207] *See* Jared Wessel, *Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 183 (2006). On the G-20, see Andrew F. Cooper, *The G20 As an Improvised Crisis Committee and/or a Contested 'Steering Committee' for the World*, 86 INT'L AFF. 741 (2010), and Andrew F. Cooper, *The G20 and Its Regional Critics: The Search for Inclusion*, 2 GLOBAL POL'Y 203 (2011).

[208] See the accounts of MEF meetings at Major Economies Forum on Energy and Climate, *Past Meetings*, *at* http://www.majoreconomiesforum.org/past-meetings/.

[209] *See also* Financial Action Task Force, *Financial Action Task Force Mandate (2012–2020)*, para. 12 (Apr. 20, 2012), *at* http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf (describing the functions of FATF-style regional bodies).

[210] *See supra* note 160 and accompanying text.

[211] *See* Financial Action Task Force, *supra* note 209.

[212] *See* Hülsse, *supra* note 149, at 471.

[213] *See* Financial Action Task Force, *High-Risk and Non-cooperative Jurisdictions* (2014), *at* http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html. On the procedure in its more confrontational variant of the early 2000s, see Wessel, *supra* note 207, at 176.

[214] *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15, 37–9 (2005).

[215] See Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15, 24–8 (2006), on the Basel Committee.

[216] *See supra* notes 123, 172, and accompanying text.

Consultations also play a role in redefining jurisdictional limits, especially in the area of antitrust. As noted above, the OECD has recommended that government agencies notify their counterparts in other countries whenever investigations or proceedings "may affect important interests" of those other countries.[217] Alternatively, an affected country can request consultations on its own initiative, and its views should be given "full and sympathetic consideration" and be used to "find a mutually acceptable solution in the light of the respective interests involved."[218] If this approach sounds far-reaching and cooperative, the OECD document also emphasizes that the country that initiated the investigation retains the "full freedom of ultimate decision."[219] Consultation plays the same sort of limited role in relation to climate change unilateralism. For example, the EU emissions trading regime foresees that if a non-EU state adopts measures to tackle $CO_2$ emissions from aviation, the EU should consult with that state to determine the extent to which EU measures should be amended.[220] While this unilateralism is "contingent,"[221] it is still unilateralism. As in antitrust, these consultations with third states concern only the implementation of the policy, not its definition.[222]

Although representation and consultation have coalesced into legal principles in certain contexts,[223] they have yet to mature into formal requirements that apply generally to global governance institutions. Practices of representation and consultation to date have been too varied and inconsistent to ground the emergence of a broader principle. Even so, it is significant that we can observe them in most of the areas in which we have found a turn to greater exclusivity and hierarchy, whether formal or informal. In many instances, they are deployed precisely as legitimating strategies to allay concerns about illegitimate decision making in the club structures that are increasingly visible in cooperative global regimes.[224] This is small solace, however. For most states, participation in this mode is far less effective than in classical multilateralism. Outside treaty making and formal international law, the notion of sovereign equality remains relatively weak. As global governance progressively shifts away from multilateral processes, consent is slowly giving way to representation and consultation.

## IV. THE TRAJECTORY OF INTERNATIONAL LAW

In this article, I have examined three issue areas to understand how the increasing pressures toward global problem solving generate new institutional forms, especially nonconsensual

[217] *See* Organisation for Economic Co-operation and Development, Recommendations and Best Practices: Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/FINAL, para. I(A)(1) (July 27–28, 1995).

[218] *Id.*, para. I(B)(4)(b), (6).

[219] *See*, *e.g.*, *id.*, paras. I(A)(1), (B)(4)(b). For an instance of friction despite such consultation, see Eleanor Morgan & Steven McGuire, *Transatlantic Divergence: GE-Honeywell and the EU's Merger Policy*, 11 J. EUR. PUB. POL'Y 39 (2004).

[220] Council Directive 2003/87/EC, Art. 25(a), 2003 O.J. (L 275) 35.

[221] Scott & Rajamani, *supra* note 126, at 469.

[222] During the policymaking stage, when the EU held public consultations on extending emissions trading to aviation, non-EU governments could have taken part but apparently did not do so. *See* European Commission, *Reducing the Climate Change Impact of Aviation: Report on the Public Consultation March–May 2005*, at 4–6, 37–39 (n.d.), *at* http://ec.europa.eu/clima/policies/transport/aviation/docs/report_publ_cons_en.pdf.

[223] *See*, *e.g.*, Kingsbury et al., *supra* note 214, at 37–42; Krisch, *supra* note 120, at 1258–59.

[224] See also Eckersley, *supra* note 97, for a normative argument in favor of an "inclusive" minilateralism with greater elements of representation.

ones. The analysis has revealed a limited degree of change within traditional forms of international law but also a turn toward unilateral, informal, and club tools that are increasingly outside the international legal system as such. The pressure for change has mostly been absorbed not through new binding international rules and formal institutions, but through alternative means of regulation—ones in which consensual elements are weak and hierarchies are often pronounced.

*Legalization, the Place of International Law, and the Place of Consent*

This analysis is in stark contrast to the dominant narrative of the continuing rise and growth of international law in times of global interdependence. That narrative is common among international lawyers—whether sympathetic or hostile to the development—and is also widely shared among international relations scholars. The group of scholars that initiated the influential work on "legalization in world politics" formulated their starting point quite succinctly: "In many issue-areas, the world is witnessing a move to law."[225] This claim reflects the spread of universal multilateral treaties but also, even more strongly, the proliferation of international courts and tribunals and the expansion of their dispute settlement activities.[226] Its plausibility is also enhanced by the growth of international interdependence and the recognition that problems reaching beyond national boundaries can be addressed only through broad cooperative regimes.

The trajectory of international law found in the present study is markedly different, and it reflects the fact that the need for greater cooperation—obvious in all three issue areas under analysis—is not always, or not even typically, satisfied by international law. It highlights Miles Kahler's observation that legalization "is a complex and varied mosaic rather than a universal and irreversible trend."[227] But the analysis presented also suggests that international law faces serious limitations in addressing intractable public goods problems. It seems to confirm the views—of many economists but also an increasing number of legal scholars—that the classical international legal order, with its emphasis on consent, is ill equipped to deal with such problems. But instead of being transformed in a nonconsensual way, as expected by many, international law has been surrounded and sidelined by alternative regulatory structures of a unilateral, minilateral, informal kind, and often with hierarchical elements.

This picture challenges common narratives about the direction of change in international law, but in certain ways it also brings to the fore what is, in fact, a continuing feature of international law. The binding obligations of international law have never been the sole form of international regulation and cooperation. International law has always been surrounded by politics, informality, and unilateralism. Minilateralism and multilateralism have long coexisted.[228] Powerful actors have often perceived formal international law and institutions as problematic and ineffective, and have therefore sought informal solutions—within the institutions

[225] Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 385 (2000).

[226] *See, e.g.*, Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

[227] Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 661 (2000); *see also* Christian Brütsch & Dirk Lehmkuhl, *Complex Legalization and the Many Moves to Law*, *in* LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 9 (Christian Brütsch & Dirk Lehmkuhl, eds., 2007).

[228] Kahler, *supra* note 47.

or without.[229] Weaker states, too, have turned away from formal lawmaking when confronted with powerful opposition, and have used majoritarian forums with informal powers instead. Such a strategy was apparent in the 1960s and 1970s when the UN General Assembly played a key role in the effort to establish a New International Economic Order.[230]

Yet despite such continuities, there are also indications that significant change is under way, especially as regards the respective weights of formal and informal rulemaking. Late in the twentieth century, it was still widely perceived that "contractual international law and multilateralism [were] the dominant institutional practices governing modern international society"[231] and that states had "come to accept and internalize treaty-making as the appropriate foundation for both."[232] The number of new multilateral treaties signed each year had grown exponentially over the course of the century, and using treaties to confront new problems seemed to have become "best practice." Yet this trend actually stalled around 1960, with exceptions in some areas such as the environment, and the number of new treaties began to decline.[233] After another small peak in the 1990s,[234] the decline seems to have accelerated since the turn of the millennium.[235] Whatever the precise reasons behind this development, it signals that already within international law, the institution in which consent is most firmly anchored—the (multilateral) treaty—is in decline.

At the same time, we are witnessing a radical expansion of global regulation in general.[236] This expansion often comes in forms other than formal law—especially through informal norms and institutions, which by all accounts have grown rapidly over the last few decades.[237] But much of today's informality looks different from that of former times. Elaborate institutional structures for rulemaking and implementation have been developed, and as concerns about institutional legitimacy have grown, formalized procedures and participation rights have been established.[238] Through these procedures, the informal realm slowly becomes more lawlike, and some commentators have suggested that informal norms should, under certain

[229] On informal solutions within formal institutions, see STONE, *supra* note 41; Jacob Katz Cogan, *Representation and Power in International Organizations: The Operational Constitution and Its Critics*, 103 AJIL 209 (2009). On an early example of an outside option, the Concert of Europe, see SIMPSON, *supra* note 202, ch. 4.

[230] *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE, ch. 4 (2003).

[231] Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT'L ORG. 555, 558 (1997).

[232] Robert Denemark & Matthew J. Hoffmann, *Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making*, 43 COOPERATION & CONFLICT 185, 186 (2008).

[233] *Id.*

[234] *Id.*

[235] Whereas an average of thirty-five new treaties was deposited with the UN secretary-general each year in previous decades, this figure reportedly dropped to around twenty for the period of 2000 to 2009; *see* Joost Pauwelyn, Ramses Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking,* 25 EUR. J. INT'L L. (forthcoming 2014).

[236] *See*, *e.g.*, JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 3 (2000); Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, *in* THE POLITICS OF GLOBAL REGULATION 1 (Walter Mattli & Ngaire Woods eds., 2009).

[237] *See*, *e.g.*, SLAUGHTER, *supra* note 44; Pauwelyn et al., *supra* note 22; HANDBOOK OF TRANSNATIONAL GOVERNANCE, *supra* note 81. But see also Stefan Voigt, *The Economics of Informal International Law: An Empirical Assessment*, *in* INFORMAL INTERNATIONAL LAWMAKING, *supra* note 22, at 82, who finds a sharp increase in informal agreements concluded by the United States in the 1990s and 2000s, but a decrease since 2007.

[238] *See also* Kingsbury et al., *supra* note 214, at 37–41.

circumstances, be recognized as "law."[239] This view faces significant obstacles, not least because the actors themselves typically do not understand informal norms as "binding" in the same way as traditional legal norms.[240] From a sociolegal or political science perspective, however, it is easier to understand law as a matter of degree and kind rather than exclusively in binary terms.[241] And for purposes of understanding "legalization" in global politics, it is useful to broaden the focus so that a variety of "moves to law" can be better captured and explained.[242] Regardless, however, of whether we are considering a shift *within* law or *from* law, the combined effect of a decrease in new multilateral treaties and a significant increase in informal regulation is certainly a shift away from classical, formal international law.

This broader picture fits some of the findings of the present study, and it allows us to characterize more precisely in what way international law is undergoing change. The starting point of this article was the hypothesis that nonconsensualism *within* international law has been increasing, but we have found only limited evidence for such an internal shift. As I mentioned in the beginning, international law has long embodied nonconsensual elements; custom, in particular, has often developed with far less than universal support. Moreover, the formal international legal order—considered as such—has changed less than one might have expected; consent has remained relatively resilient, especially as regards treaty making.

Instead, we may speak of a shift in the relative position of international law within the global order. Considered as an element of the broader universe of transboundary rulemaking, formal international law, with its strong attachment to consent, is only one among other institutional normative orders (which, as just mentioned, we may or may not call "law"), and from the evidence I have discussed above, its importance may be decreasing. Likewise, we may diagnose a *decaying role of consent* in global rulemaking. As we have seen, it is not that the place of consent in formal international law has been shifting much. Instead, what we are witnessing is a reconfiguration. The highly consensual structures of formal international law (such as treaty making) are being increasingly sidelined by less consensual ones—for example, delegated majority rulemaking, unilateral action, and informal processes—with only thin procedural compensations.

### *The Decay of Consent: Beyond Public Goods Problems?*

How broad is the scope of this shift? Since the present article focused specifically on global public goods problems—for which pressures on classical structures were thought to be strongest—its findings cannot simply be generalized beyond that realm. In other areas, consensual international law may play a different role. For example, it does not pose structural problems for trade, a largely contractual regime that deals with club goods and that can exclude free riders from its benefits. Nonconsensual elements in this area—present primarily in the judicial function—are important to enforce and fill the gaps in interstate contracts, but they are not necessary to overcome the free riding of third states. The pressures on classical, largely consensual

[239] *See, e.g.*, ALVAREZ, *supra* note 187, at 588–601; Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009); Pauwelyn et al., *supra* note 22, at 526–33.

[240] *See* Raustiala, *supra* note 44, at 586–91.

[241] See, for example, the conceptualization of hard and soft law on a continuum in Abbott & Snidal, *supra* note 44, and also Roger Cotterrell, *What Is Transnational Law?*, 37 LAW & SOC. INQUIRY 500 (2012).

[242] *See also* Brütsch & Lehmkuhl, *supra* note 227.

international law may thus not be as pronounced in this area, and formal legalization may remain strong.[243]

The trends identified in this article may nevertheless reflect developments well beyond global public goods situations, and they may lead us to probe harder into when and where the processes of formal legalization continue intact or not. The dynamics of multilateral treaty making—including its decline in recent decades—are similar across issue areas, whether the area in question is dominated by club goods, like trade, or public goods, like the environment.[244] Informal regulation has increased across a broad range of issue areas, many of them related to trade—and certainly not limited to public goods situations.[245] In coordination games, in particular, formal international law is often thought to be less important because cooperation is self-enforcing, and the terms of cooperation may be set by informal (and often hierarchical) institutions, without the need for binding form.[246] The emergence of hierarchical (club) structures has also been identified in various global governance contexts not involving public goods.[247]

In the present study, the public goods character of the problems discussed does not actually seem to have been decisive in driving institutional design. Contrary to initial expectations, it certainly has not generated rule- and decision-making processes that are strongly nonconsensual. Many of the actual structures remain informal and uni- or plurilateral, and they are, indeed, often relatively ineffective—especially in relation to climate change. Moreover, they do not appear as fundamentally different from, or more robust than, structures in areas with less pressing cooperation problems.[248] The exception here may be the financing of terrorism, where strong formal (universal) and informal (club) institutions jointly respond to a weakest-link problem. But this institutional strength may also be explained by the availability of a suitable formal forum—the Security Council—or by the particular salience of the issue in the most powerful country, the United States. Overall, then, the analysis presented here does not support the suggestion that the informal institutional structures examined above are specifically the product of efforts to address problems involving global public goods.[249]

Explanations of the trends identified here must therefore begin elsewhere—most likely with the particular costs (especially in terms of speed and flexibility) that states incur when operating through formal, consensual international law.[250] These costs are high in any multilateral setting in which numerous diverse states come together. The costs are especially high when—as

[243] Most case studies in the initial legalization project were then also concerned with international trade and trading blocs as instances of legalization. Another relatively strong case concerned human rights, whereas the remaining ones (monetary affairs and Asia) displayed limited degrees of legalization. *See* LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001).

[244] *See* Denemark & Hoffmann, *supra* note 232, at 202–6. The issue areas are categorized only broadly, however, so they will often mix different problem types.

[245] See the range of issues and institutions in INFORMAL INTERNATIONAL LAWMAKING: CASE STUDIES (Ayelet Berman, Sanderijn Duquet, Joost Pauwelyn, Ramses A. Wessel & Jan Wouters eds., 2012), *at* http://www.fichl.org/fileadmin/fichl/documents/LOTFS/LOTFS_3_Web.pdf.

[246] *See* Abbott & Snidal, *supra* note 44, at 429; *see also* Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991); TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011).

[247] DREZNER, *supra* note 50.

[248] For an overview of institutional structures, see KOPPELL, *supra* note 197.

[249] The present inquiry does not allow for firm conclusions on this matter, however, since the design provides no comparison between cases involving public goods and ones involving other types of goods.

[250] *See* Abbott & Snidal, *supra* note 44.

in the environmental field and, to an extent, the WTO context—the multilateral process has become increasingly standardized, formalized, and opened up to public scrutiny. Faced with the often clogged channels of multilateralism, governments may well choose to move toward bilateralism, unilateralism, or informal settings in which results can be produced more easily (and less consensually), even if they thereby forgo some of the benefits of formal, binding law and institutions.

Given the prominence of club structures and hierarchies in our picture, another major explanatory factor is power.[251] As we have seen, powerful actors have consistently opposed structures that could force them into costly compromises, and they have supported strong formal institutions only when granted special privileges. But creating such (unequal) formal institutions afresh is exceedingly difficult.[252] Otherwise, powerful states have preferred unilateral or informal club structures when they were available, even if those structures promised to be less effective at problem solving. Given these outside options, the costs of formal international lawmaking may have often seemed too high for powerful actors to bear. This dynamic, again, may well be independent of the public goods character of the problems at issue. To be sure, the problem structure will influence the costs and substantive advantages and disadvantages of the available options, but powerful countries will also, more generally, be wary of international law's egalitarian ways.[253]

Since this article was not designed with an explanatory purpose, these observations must remain somewhat speculative. Nevertheless, they indicate that the phenomena analyzed in the previous sections are not limited to public goods problems and that the shifts within and away from formal international law traced above may well apply more broadly. It may even be that strong legalization remains limited to only a few "islands." Consent remains central to (formal) international law, but it provides a hurdle to effective collective action for all kinds of problems in today's complex international society. Actors, especially powerful ones, will often find it useful to circumvent formal processes and, in so doing, may reconfigure (and leave behind) international law as we know it. The analysis presented here cannot answer just how widespread the resulting (direct and indirect) erosion of consent will be, but the question will obviously be the subject of much future research, both theoretical and empirical.

## V. CONCLUSION

International law has difficulties in responding effectively to serious collective-action problems, and its consensual structure has often been seen as the main obstacle to tackling key issues of global public goods. Many observers, finding consent as a guiding principle to be inadequate, have called for new, nonconsensual forms of lawmaking and have noted movement toward nonconsensualism in practice. In this article, I have analyzed three issue areas to determine, at least in part, whether, to what extent, and in what forms we can actually find elements of such movement in the international legal order.

[251] *See also* DREZNER, *supra* note 50.

[252] The delegation of powers by multilateral treaties to international institutions rarely involves formal voting privileges for powerful countries. *See* Koremenos, *supra* note 41, at 165–68. Privileges are typically of an informal nature. *See* Cogan, *supra* note 229; STONE, *supra* note 41.

[253] *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power in the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

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The changes identified have turned out to be uneven. Somewhat surprisingly in light of the magnitude of the problem, consent has remained relatively resilient in formal international law. Treaty making has developed more, rather than less, inclusive processes, and among international institutions, only a few have undergone a major transformation in their powers beyond their initial delegatory frames. A greater challenge to traditional international law comes in the form of unilateral, extraterritorial regulation by certain countries and groups of countries. Much of the regulatory action in the three issue areas, however, has occurred in informal settings and through informal processes, and has generated what are taken to be "soft" norms. The resulting institutional structure is often characterized by exclusivity, and the overall picture is one in which hierarchy is a defining feature. Formal international law as a whole often moves to the sidelines, and alternative institutional forms, in which consent and sovereign equality are less firmly embedded, take center stage.

These findings hold significant insights for the broader trajectory of international law. They may frustrate the hopes of those who had expected international law to flourish as interdependence among nations grows. And they may also disappoint those who had thought that formal international lawmaking would return to greater importance with the shift from uni- to multipolarity. The account offered here sees functional needs as a driving factor behind institutional change, but as one that is conditioned by power structures and existing institutional channels. When these channels—as in the increasingly inclusive processes of treaty making and formal international institutional action—become too burdensome, powerful actors shift to other forums that they can shape more easily. As we have seen, club structures—allowing (formally or informally) for cooperation among a limited set of powerful states—are a widespread result, and one that is often defended in the name of greater effectiveness. The normative force of sovereign equality—the main principle underlying traditional international law's consensual structure—is de facto weakened by this turn. Outside formal international law, sovereign equality is less established and, while not meaningless, has a weaker institutional pull. Consent increasingly gives way to forms of representation and consultation.

Whether these developments are good or bad has not been the question animating this article. There may be some reasons for stressing effectiveness, and others for maintaining procedural inclusiveness. In constructing a global order, the proper balance between the two remains uncertain, as is reflected in the intractable debate over input versus output legitimacy.[254] Yet the institutional and legal space that is opened up by such a challenge to existing structures cannot actually be filled by normative theorizing. As this article reminds us, it is instead filled by moves of social and political actors (in particular, powerful ones), who seek to build not only the "right" order but also, and perhaps primarily, an order that suits them well. Those who—like economist William Nordhaus, whom I quoted earlier in this piece[255]—call for a turn away from consent in the name of effectiveness and global public goods will need to be careful about what they wish for. Nonconsensualism, as we have observed it here, typically does away only with the consent of the less powerful, and it can easily become a tool of hierarchy and control.

International law may thus find itself in a quandary. If it keeps faith with its consensual ways, it risks being increasingly marginalized. If it adapts and softens its insistence on consent, its potentially increased relevance is likely to come at the cost of losing its appeal for the many

[254] *See supra* notes 26–34 and accompanying text.
[255] *See supra* note 12 and accompanying text.

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countries for whom consent and sovereign equality were precisely what distinguished international law from other forms of international politics. The analysis presented here has identified instances of both strategies, and change has turned out to be far from uniform across issue areas and institutional forms. As consent is in decay, international law's architecture—and its place in the broader universe of global institutions—is shifting, but we have only begun to understand the shape, direction, and momentum of that shift.

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