From Consent to Consultation:
The Shifting Architecture of International Law

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Draft, 10/04/2013

Not for citation or circulation

Abstract

Because of its emphasis on state consent, classical international law is often seen as inadequate for solving problems of a global scale, especially when they involve global public goods. As these problems grow in importance, many commentators call for, and expect pressure towards, the inclusion of non-consensual elements in the international legal order. This article analyzes to what extent, and in what forms, we can empirically observe such a turn to non-consensualism. It develops expectations about the salience of different forms (collective, multilateral, unilateral; formal/informal; egalitarian/hierarchical) in responses to significant challenges of global public goods, and it uses three issue areas – antitrust, climate change regulation, and the control of terrorism financing – to investigate actual processes of change and their shape. It finds a certain, but limited, pressure on traditional international legal categories, such as multilateral treaty-making, the boundaries of institutional powers, and jurisdictional limits for unilateral action. More prominent is a turn to informal institutions and rules, often coupled with more exclusive, minilateral decision-making processes that allow for greater speed, flexibility and hierarchy in problem-solving. The limited role of consent in this order is compensated, in part, by the emergence of structures of representation and processes of consultation. In the resulting picture, international law retains much of its consensual character, but it is increasingly sidelined in favour of other sites of governance in which consent plays a much more limited role. These findings allow us to gain a better understanding of processes of change of international law and of its place in the broader normative order in global politics.

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Introduction

The consensual structure of the international legal order, with its strong emphasis on the sovereign equality of states, has always lived precarious lives. In different waves since its inception, 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. Often enough, these three strands – in short: challenges from power, morality, and effectiveness – have reinforced each other in the attacks of powerful states.

The consensual structure has proved surprisingly resilient in the face of such challenges, but recent years have seen renewed attacks on it. In the 1990s these were mainly 'moral' in character. They were related to the liberal turn in international law, and some of them aimed at weakening principles of non-intervention and immunity in the name of human rights.[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 of 'global public goods'. Classical international law is regarded as increasingly incapable of providing much-needed solutions for the challenges of a globalised 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 non-consensual law-making mechanisms, especially through powerful international institutions with majoritarian voting rules.[3]

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

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[1] See, eg, Fernando R Tesón, *A Philosophy of International Law* (1998); Charles R Beitz, *Political Theory and International Relations* (2nd ed, 1999).

[2] See, eg, Jonathan I Charney, 'Universal International Law' (1993) 87 *AJIL* 529; Christian Tomuschat, 'Obligations Arising for States without or against their Will' (1993) 241 *Recueil des Cours* 195; Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217; 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) *University of Illinois Law Review* 71; Andrew T Guzman, 'Against Consent' (2012) 52 *Va J Int'l L* 747; Joel P Trachtman, *The Future of International Law: Global Government* (2013).

[4] I have some sympathies for the normative argument but regard it as one-sided, leaving out counter-vailing arguments about the right domain of decision-making. See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010) ch 3; and the analysis and critique of this position in Gregory Shaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *Eur J Int'l L* 669 at 683-93.

whether and how international law is changing. To what extent do we see a turn towards non-consensual 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? 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. But while pressure for change is likely in areas where common problems are most acute, it is difficult to anticipate the forms it may take – they will be driven not only by functional needs and problem structures, but also by power constellations and institutional contexts. We may thus expect to find change in elements of international law that are more malleable, but may expect to see shifts towards other institutions where international law proves to be too resilient.

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 – antitrust, climate change and terrorism financing. Its findings do indeed suggest a turn towards non-consensual law-making, but in quite a different way than is usually assumed. They show change in elements of international law that are not only relatively malleable but also of particular use to a set of powerful actors – the limits of extraterritorial regulation and the powers of exclusive institutions, especially the UN Security Council. Apart from this, change takes place largely outside international law itself – in informal structures that appear more prone to problem-solving and to the imprints 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 one in which hierarchy plays a significant role, both within and outside the formal international legal order. This shift is partly mitigated by the limitations of informal governance, by forms of representation and by procedural tools, especially the rise of consultation processes. Nevertheless, it is a significant shift away from a consent-based order and it suggests a reconfiguration not only of international law itself but also of its place among other normative orders in global politics.

The article proceeds through three main parts. In Part I, it outlines the challenge waged against consent-based international law, especially from the angle of global public goods and output (rather than input) legitimacy. It also develops hypotheses on what kind of change we can expect in international law as a result of cooperation pressures. Part II examines the degree and forms of change through the three above-mentioned case studies. Part III draws the findings together to paint a broader picture of international legal change and seeks to understand this change better by inquiring into some of the factors behind it. Neither the broader picture nor the account offered here to understand it should be seen as definitive – too limited is the empirical base on which they rest and too varied and shifting the processes they reflect. But they give us an insight into changes in the shape and place of international law which are likely to find reflection in other areas in which the need for global regulation exerts pressure on traditional structures.

I. Consent under Challenge

International law has never been based on consent in a pure form. It has been influenced by natural law ideas for long; has incorporated moral reasoning, most prominently in international humanitarian law and possibly in the ius cogens doctrine; and one of its main pillars, customary international law, cannot be fully explained on the basis of state consent.[5] Moreover, institutions with law-making and adjudicatory powers act at one remove from states' consent; and 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 law-making, in particular, depends on it: treaties are based on the assent and ratification of the parties, and given that strong institutional law-making 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 – perhaps not even primarily – from international lawyers. The main angle of the critique is international law's lack of effectiveness in solving common global problems; the trigger the greater salience of such problems. National polities have become – or have begun to understand that they are – dependent on and vulnerable from outside their own boundaries to an unprecedented extent. This is partly due to the global liberalisation of markets, which leads to greater economic interdependence; partly to the increasingly transboundary nature of security threats, especially terrorism; and partly to the global character of contemporary environmental problems, most notably climate change. Responses to problems of this kind typically need to go beyond national action and require equally transboundary measures, but they often face severe collective-action problems, which international law does not do much to resolve.

1. The Challenge of Global Public Goods

The extent of the resulting challenge is neatly captured in the discourse on global public goods, which represent a particularly strong case of collective-action problems. If public

[5] See, eg, Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *EJIL* 269; and especially on custom, Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413 at 433-4; Charney (1993), 536-542; Patrick Kelly, 'The Twilight of Customary International Law' (2000) 40 *Va J Int'l L* 449 at 508-16.

[6] See Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed, 2009) ch 4.

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

goods – goods that are non-exclusive in their consumption[8] – traditionally remained in the reference frame of the nation-state, the recent extension of the concept to the global sphere signals the increase on that level in goods from which all benefit and on which (often) all depend. The most influential policy work on the subject, which uses a relatively broad definition, groups issues ranging from market efficiency to the environment, health, peace and security, and more broadly the provision of justice under this heading.[9] More than anything, using the label 'public goods' here points to the difficulties of provision – unlike private and certain collective goods, public goods are prone to underproduction as the costs of provision are high and (because of their non-exclusive character) incentives for free-riding are notoriously great.[10] In the domestic context, the problem is typically solved through a government equipped with coercive means and – especially – the power of taxation.[11] In the decentralized setting of global politics, public goods exacerbate ubiquitous collective-action problems ever further.

International law in its classical form appears as particularly ill-suited to tackling this challenge. Its consent-based structure does not prevent effective action on global public goods, but it imposes high hurdles and thus creates a structural bias against such action. Increasingly, commentators have thus urged an overhaul of the international legal order in favour of a more effective problem-solving mechanism, able to counter problems of free-riding in similar ways as domestic government does. As influential economist, William Nordhaus, has noted,

> 'the Westphalian system leads to severe problems for global public goods. The requirement for unanimity is in reality a recipe for inaction. Particularly where there are strong asymmetries in the costs and benefits (as is the case for nuclear non-proliferation or global warming), the requirement of reaching unanimity means that it is extremely difficult to reach universal and binding international agreements. ...
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> 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-

[8] See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965) 14-5. Unlike other definitions, Olson's does not require 'non-rivalrous consumption'; see his account *ibid*, 14, fn 21.

[9] Inge Kaul, Isabelle Grunberg & Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999); Inge Kaul, Pedro Conceicao, Katell Le Goulven & Ronald U Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (2003).

[10] For overviews, see Inge Kaul, 'Global Public Goods: Explaining their Underprovision' (2012) 15 *J Int'l Econ L* 729; Gonzalo Escribano Francés, 'Provisión de Bienes Públicos Globales y Economía Política International', in Carlos Espósito & Francisco J Garcimartín Alférez (eds), *La protección de bienes juridicos globales* (2012) 39. But see also the critique of Friedrich Kratochwil, 'Problems of Policy-Design based on Insufficient Conceptualization: The Case of "Public Goods"' in Ernst-Ulrich Petersmann (ed), *Multilevel Governance of Interdependent Public Goods*, EUI Working Papers RSCAS 2012/23, 61.

[11] Olson 1965, 13-16.

> threatening issues. To someone who is an outsider to international law, the Westphalian system seems an increasingly dangerous vestige of a different world. Just as economists recognize that consumer sovereignty does not apply to children, criminals, and lunatics, international law must come to grips with the fact that national sovereignty cannot deal with critical global public goods.'[12]

This picture may be overly grim – 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] Especially 'single best efforts' goods, which can be provided by a single actor or group of actors, do not necessarily require joint rule-making. Yet the greater part of global public goods does indeed create the problems Nordhaus describes. 'Aggregate efforts' 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. And even for single best efforts goods, their provision will often depend on funding contributions from others, thus also requiring forms of cooperation beset by free-riding problems.[14]

International law is not without solutions to such problems. Public goods can be bundled with (excludable) club goods; the Montreal Protocol on the Ozone Layer, for example, links membership with trade benefits, thus providing an incentive against free-riding.[15] Free-riding can also be made more costly, as through mild forms of coercion by powerful actors, thus driving states to join common regimes.[16] Consent requirements in international law are, after all, merely formal protections of sovereign equality.[17] Moreover, solutions do not always have to be found on the international level, but can be facilitated through polycentric regimes, operating in a multitude of forms at different levels.[18] However, many cases remain in which the need for consent will obviate problem-solving –

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[12] William N Nordhaus, 'Paul Samuelson and Global Public Goods', 2005, 8, at http://nordhaus.econ.yale.edu/PASandGPG.pdf.

[13] See Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (2007) chs 1-3; Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23 *EJIL* 651 at 658-665; Gregory Schaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23 *EJIL* 669 at 675-81.

[14] See Barrett 2007, ch 4.

[15] See Art 4 Montreal Protocol on Substances that Deplete the Ozone Layer, http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5.

[16] See Helfer 2008, 100-2.

[17] 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* (Michael Byers and Georg Nolte, eds., 2003) 135.

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

where treaties appear as 'inappropriate instrument[s]'[19] and other, non-consensual solutions are called for.

This line of critique – probably strongest among economists – has also become more widespread among international lawyers in recent years.[20] It is, unsurprisingly, particularly pronounced among international lawyers with an economistic bent. Andrew Guzman finds that the 'commitment to consent is a major problem for today's international legal system' and that '[a]n excessive commitment to consent can cripple efforts to use international law as a tool to help solve the world's largest problems'.[21] To him, 'if the global community hopes to make progress, we will have to increase our ability to overcome the consent problem.'[22] Joel Trachtman, writing from a perspective of new institutional economics, argues that 'as more international law is needed in more fields, and as stronger international law is required in some fields, there will be circumstances in which more highly articulated constitutional or organizational structures, including executive, legislative, and judicial functions, will be useful.'[23] Others in a rational-choice tradition take a similar view. For example, Laurence Helfer notes that 'as globalization has expanded the need for legal rules to resolve collective action problems transcending national borders, it has become apparent that voluntary treaty making and treaty adherence procedures often produce a problematic result', and he observes a turn to nonconsensual international law-making in response.[24]

Yet the critique of consent from a public-good perspective is shared by scholars from many other backgrounds. Greg Shaffer, for one, holds that '[f]or aggregate efforts public goods … there is a greater need for centralized institutions to produce them, leading to a relinquishment of some national sovereignty.'[25] In many ways this aligns with constitutionalist approaches, such as that of Mattias Kumm, for whom international intervention beyond traditional constraints becomes legitimate '[i]f 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'.[26] And dissatisfaction with a consent-based order is perhaps strongest among those with a focus on the production of

[19] Barrett 2007, ch 2 [in conclusion].

[20] Interest of international lawyers in global public goods is reflected in a number of recent symposia; see 'Symposium: Global Public Goods and the Plurality of Legal Orders' (2012) 23 *EJIL* 643-791; 'Mini-Symposium on Multilevel Governance of Interdependent Public Goods' (2012) 15 *J Int'l Econ L* 709-91; Petersmann 2012; Esposito & Garcimartín Alférez 2012.

[21] Guzman 2012: 749.

[22] Guzman 2012: 788.

[23] Trachtman 2013, [7].

[24] Helfer 2008, 124-5.

[25] Shaffer 2012: 679.

[26] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff & Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009) 259 at 298.

particular goods, such as combatting climate change. From this angle, Jutta Brunnée and Stephen Toope find that 'a consensus rule without a majority-vote fall-back has become untenable'[27], and Daniel Esty and Anthony Moffa claim that 'a new environmental regime needs to be constructed with institutional capacities designed to respond to global-scale collective action problems'.[28]

Such skepticism of consent is, of course, not new to international law – in fact, many international lawyers with an internationalist mindset have harboured variants of it since the early 20th century, and it has strong affinities with ideas of an international community, prominent in the 1990s.[29] It is also not at all 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 else [than a consent-like criterion] would be dictatorial'.[30] However that may be, the attack on consent seems to have gained strength and salience through the increased urgency of global cooperation problems – and most centrally, problems of global public goods.

2. The Rise of Output Legitimacy

This attack on consent has affinities with a significant shift in the discourse about the legitimacy of global governance – a shift from input to output legitimacy. This shift has been given its most prominent expression in Fritz Scharpf's account of the legitimacy basis of EU integration policies, which he saw largely justified on the basis of considerations of effectiveness (output) while lacking on the (democratic) input side.[31] Scharpf intended to highlight the resulting limitations of EU decision-making – arguments from output could only ground pareto-optimal solutions but were unable to base measures with greater distributive effects.[32] Still, identifying output legitimacy as the sole, or main, justification even for this limited range of policies went significantly beyond previous frameworks for the legitimacy of political institutions. As Scharpf himself emphasises, even those domestic institutions that formally remain outside of normal democratic channels – such as independent central banks or constitutional courts – are nevertheless politically embedded

[27] Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law* (2010) 215.

[28] Daniel C Esty & Anthony LI Moffa, 'Why Climate Change Collective Action Has Failed and What Needs to Be Done Within and Without the Trade Regime' (2012) 15 *J Int'l Econ L* 777 at 779-80.

[29] See n [xx] above [Tomuschat, Simma, etc].

[30] Jan Klabbers, 'Law-making and Constitutionalism' in Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (2009) 81 at 114. See also Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *AJIL* 413.

[31] See Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (1999).

[32] In later works, Scharpf has softened this limitation, especially with respect to judge-made law in the EU. See Fritz W Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *Eur Pol Sc Rev* 173 at 189-90.

in a system of indirect political control.[33] Accepting that coordination games, regardless of the uneven distribution of benefits, could in principle be subject to regulation on the basis of effectiveness considerations alone would pave the way for much further-reaching institutional action in the international sphere – unhinged from the strictures of state consent or other forms of broad political input.[34]

Scharpf's position has received much criticism, not the least for the difficulties in measuring output without corresponding political input processes.[35] Yet it has reshaped the debate on the legitimacy of governance beyond the state, in which similar approaches have gained ground in recent years. One of the most influential contributions to this debate, by Allen Buchanan and Robert Keohane, regards the 'comparative benefits' of an institution as one of the main criteria for assessing its legitimacy.[36] And while their initial account also included the consent of (only democratic) states as a precondition of legitimate governance, later formulations silently drop this criterion.[37] In fact, in a recent application of this general framework, Keohane bases his (eventually positive) assessment of the UN Security Council almost exclusively on considerations of 'comparative benefit' – effectiveness – at the expense of other, more input-related criteria.[38]

This focus parallels greater flexibility in democratic theory itself, which in light of the structures and challenges of global governance has relaxed strong requirements known from the domestic context in favour of an emphasis on democratic forums, contestation, deliberation, or merely a 'democratic minimum'.[39] Often enough, it has gone so far as to limit itself to defining a process of democratization, of 'democratic-striving', rather than standards of democracy themselves.[40] This trend certainly remains contested – Jürgen Habermas's vision of the global order, for example, insists on a strong form of democracy in line with democratic standards in the domestic realm, which leads him to eschew institutions with far-reaching policy-making functions and to restrict global supranational

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[33] See Fritz W Scharpf, 'Legitimationskonzepte jenseits des Nationalstaats' (2004) *MPIfG Working Paper* 04/6.

[34] However, Scharpf (2004) only focuses on treaty negotiations and their inbuilt limitation to pareto-optimality.

[35] See, eg, Andrew Moravcsik and Andrea Sangiovanni, 'On Democracy and "Public Interest" in the European Union', in Wolfgang Streeck and Renate Mainz (eds), *Die Reformierbarkeit der Demokratie. Innovationen und Blockaden* (2002) 122.

[36] Allen Buchanan & Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & Int'l Aff* 405 at 422.

[37] See Robert O Keohane, 'Global Governance and Legitimacy' (2011) 18 *Rev Int'l Pol Econ* 99.

[38] Keohane (2011) 104-6.

[39] See David Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) *Government & Opposition* 364 at 383-6; Philip Pettit, 'Democracy, National and International' (2006) 89 *The Monist* 301; John Dryzek, *Deliberative Global Politics* (2006); James Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (2007).

[40] See the overview in de Graínne de Burca, 'Developing Democracy Beyond the State' (2008) 46 *Col J Trasnat'l L* 101.

bodies to limited functions of safeguarding peace and human rights.[41] Agreement on the proper normative frame of global governance thus remains elusive. But the classical, central place of consent in this frame – a place already under challenge, from a different angle, after the liberal turn of the 1990s – has been further 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.

3. Processes of Change: Sites, Forms, Factors

Ideational change does not necessarily translate into institutional structures, and so 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 towards non-consensual forms of law-making.[42] On the other hand, commentators have also noted an erosion of consensual elements of different kinds – 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, or certain practices of treaty-making.[43] 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 they value – and such a shift in preferences should normally produce pressure for change.

The connection between shifting interests and institutional change is tightest in functionalist and neo-functionalist accounts[44], recently developed further with a view to international law by Joel Trachtman.[45] Trachtman starts from trends in globalization, development, demography and technology and theorizes the changes in the utility function of individuals and states that follow from them. This leads him to assume that stronger international legal structures will become increasingly useful over time and that this functional need will translate into institutions. For Trachtman,

> 'due to social change, international relations will be an increasing proportion of the concerns of citizens and the responsibilities of states. This will drive increasing

[41] Jürgen Habermas, *Der geteilte Westen* (2004) ch 6; Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 *Constellations* 444.

[42] See, eg, Guzman (2012) 788-90.

[43] See Tomuschat (1993) [xx]; Malgosia Fitzmaurice, 'Consent to Be Bound – Anything New under the Sun?' (2005) 74 *Nordic J Int'l L* 483; Helfer (2008) 74-5; Patrick Dumberry, 'Incoherent and Ineffective: the Concept of Persistent Objector Revisited' (2010) 59 *Int'l & Comp L Qu* 779 at 785-94; Guzman (2012) 775-87.

[44] See, e.g., David Mitrany, *The Progress of International Government* (1933); Wolfgang Friedmann, *The Changing Structure of International Law* (1964); Ernst Haas, 'International Integration: The European and the Universal Process' (1961) 15 *Int'l Org* 366.

[45] Trachtman (2013).

> production of international law, and increasing production of organizational structures. This increasingly dense body of law and organizations will increasingly be seen to perform governmental functions. It is in this sense that the future of international law is global government.'[46]

Such 'global government' would be reflected in stronger legislative mechanisms, especially in international organizations and in majority-voting, rather than consensus-based decision-making. But Trachtman is careful not to push his point too far. Aware of functionalism's tendency to regard institutional change as an almost natural consequence of changed utility, he builds in a political caveat and suggests that far-reaching movement towards non-consensual law-making is likely only in certain 'constitutional moments'.[47] Smaller changes in this direction may face lower hurdles, but functionalism itself cannot tell us too much about them.[48] What it is good at is at pointing to the probability of increasing demand for, and pressure towards, a move away from consent.

Forms

To what extent such pressure will in fact lead to institutional change, and what forms such change may take, is less clearly predictable. The non-consensual elements this article is interested in may come in different shapes, but they share the lack of an explicit and immediate consent of states to the concrete rules and decisions they are subject to. While non-consensualism in this sense may vary in intensity – in the distance between consent and decision[49] – it can appear in three main, interrelated forms:[50]

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[46] Trachtman 2013, [7].

[47] Trachtman 2013, [234].

[48] See also the limited consideration of processes of change in Barbara Koremenos, Charles Lipson & Duncan Snidal, 'Rational Design: Looking Back to Move Forward' (2001) 55 *Int'l Org* 1051 at 1075-9; also the critique in Alexander Wendt, 'Driving with the Rearview Mirror: On the Rational Science of Institutional Design' (2001) 55 *Int'l Org* 1019 at 1032-41.

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

[50] The boundaries between the different forms may on occasion be blurred, for example in the conferences of the parties in multilateral environmental agreements (between multilateral and collective) or plurilateral institutions that take decisions affecting outsiders (between unilateral and collective).

Table 1: Forms of Non-Consensualism	
Collective	(Centralized) rule- and decision-making through common institutions without unanimity requirements
Multilateral	(Joint) rule-making in multilateral fora without (or with softened) unanimity requirements[51]
Unilateral	(Single or plural) rule- and decision-making on global issues affecting other jurisdictions without their consent

Most commentators expect (or call for) the first option, stronger collective mechanisms, primarily established through delegation.[52] This follows an analogy with domestic responses to public goods problems through a central government with powers of coercion and taxation. Though typically stopping short of calls for a world government, such ideas take further the internationalist institutionalism that has been so influential – especially among international lawyers – throughout the 20th century.[53]

Yet common institutions are hard to come by in a decentralized political order, especially when they are supposed to solve collaboration problems with severe distributional consequences. The more states' policy preferences diverge, the less likely the delegation of powers to a collective decision-maker becomes.[54] As it is precisely the need for consent from each state concerned that creates the problem-solving difficulties of international law, it is unlikely that (consensual) delegation will provide solutions in many instances. The same will be true for the expansion of non-consensual elements in multilateral fora and for a softening of jurisdictional boundaries that would allow for broader unilateral action. Movement towards non-consensualist structures in all these areas is more likely to occur through non-consensual processes – either within international law (through custom or institutional practices) or outside it (through informal fora and procedures, or also through action that challenges legal constraints) – and we thus need to cast a wide net to capture the variety of potential pathways.

Just as non-consensualism can come in formal or informal guises, it can also vary significantly in the range of actors behind it. The ideal type of a collective mechanism may be that of a universal organization with delegated powers from all states, but such universalism is rare both in the creation and in the shape of institutions. Oftentimes, non-consensual forms will be sought only by individual states, or groups of states, and the

[51] Apart from majority decision-making, this may be achieved through consensus mechanisms.

[52] See Guzman (2012); Trachtman (2013). On delegation and its forms, see Curtis A Bradley & Judith G Kelley, 'The Concept of International Delegation' (2008) 71 *Law & Contemporary Problems* 1.

[53] See David Kennedy, 'The Move to Institutions' (1987) 8 *Cardozo Law Review* 841.

[54] Darren Hawkins, David A Lake, Daniel Nielson, and Michael J Tierney, 'Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory' in Darren Hawkins et al (eds), *Delegation and Agency in International Organizations* (2006) 3 at 20-1. But see also the contrary finding in Barbara Koremenos, 'When, What and Why Do States Choose to Delegate?' (2008) 71 *Law & Contemporary Problems* 51 at 170-2, which may be due to a stronger focus on dispute-settlement rather than policy-making delegation; see also the remark *ibid* at 179.

resulting institutional structures may be more or less exclusive. A times, they may be quite hierarchical – formally (as in the UN Security Council) or informally (as in club decision-making).

These considerations suggest that non-consensualism can be further specified along two dimensions that may be present in all three of the forms sketched above: formality/informality and equality/hierarchy. Attention to these dimensions may help us to better understand the character of decision-making structures as well as the degree of challenge for the – formal and largely egalitarian – classical model of international law-making. Actual processes and institutions may lie on a continuum between the poles, but ideal types can be depicted as in Table 2.

Table 2: Dimensions of Non-Consensualism		
	Formal	*Informal*
Egalitarian	Majority decision-making in universal institutions	Government networks with majority decision-making
Hierarchical	Voting privileges in international institutions	Club structures

Factors

Whether non-consensualism is pursued, and what form it may take, will depend on a number of factors. One is the prevailing *problem structure*. Solutions to public goods problems – a particular type of collaboration problems – often require a broad scope. Where weakest-link goods are concerned, a universal approach will usually be necessary for effective action.[55] 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.[56] In any case, though, the required scope of a solution does not necessarily equal the scope of necessary participants in 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 decided on by a more limited range of actors if compliance is brought about by other means. For collaboration problems, unlike coordination games, setting a focal point for others to fall in line with is typically not enough. Compliance can still be achieved through such tools as persuasion, economic incentives or different degrees of coercion by, for example, a hegemonic power.[57] And while

[55] See supra text at n [xx].

[56] See Moisés Naím, 'Minilateralism: The Magic Number to Get Real International Action' (2009) 173 *Foreign Policy* 135. On the relationship between minilateralism in multilateralism in different regimes see Miles Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 *Int'l Org* 681.

[57] On the provision of public goods through a hegemonic power, see Charles P Kindleberger, 'Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides' (1981) 25 *Int'l Stud Qu* 242. See also Duncan Snidal, 'The Limits of Hegemonic Stability Theory' (1985) 39 *Int'l Org* 579.

it may be useful to endow solutions with the authority of binding international law[58], alternative, informal pathways often have lower costs and may under certain circumstances provide similar benefits in terms of compliance.[59]

A second major factor influencing the shape of institutions is the distribution of *power*. For powerful countries, delegation of decision-making power is particularly costly if they are not assured special privileges and control over a collective institution, and these costs will often drive them to seek alternatives.[60] Club solutions (often of an informal nature) may provide options – especially in the case of aggregate-efforts goods – and realist theorists expect much of global governance to take such forms.[61] Unilateralism, in particular extraterritorial regulation, is another suitable tool under certain market conditions, and both the US and the EU have been active in this respect.[62] Extending jurisdiction in order to deal unilaterally with global public goods has also found increasing support among legal commentators in the US.[63]

What kind of mechanism is chosen will also depend to a significant extent on the availability of *existing institutions*. Creating new institutions is often difficult, and existing ones may have the benefit of being stabilised through positive feedback or normalisation.[64] Yet they will still at times be sidelined in favour of other channels – when they are not sufficiently amenable to control by the powerful, or when they are too rigid to accommodate new tasks or initiatives. Historical institutionalists would expect that the more malleable institutions (and their powers and procedures) are, and the less they are dominated by veto players, the more change will take place within them, rather than through alternative channels.[65] For example, where powers of international institutions can be reinterpreted to

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[58] This may be, for example, because of the mobilization of domestic actors around binding international law; see Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

[59] See, eg, Kenneth W Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *Int Org* 421.

[60] See Hawkins et al (2006) 21-3 [xx]; Lora Viola, Duncan Snidal & Michael Zürn, 'Sovereign (In)equality in the Evolution of the International System', *Oxford Handbook* [xx] (forthcoming, manuscript with the author).

[61] See Daniel W Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (2007).

[62] See Tonya L Putnam, 'Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere' (2009) 63 *Int'l Org* 459 at 460, 483; Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern Univ L R* 1.

[63] See Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151 *U Penn L R* 311; Hannah L Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 *Virginia J Int'l L* 251; Ralf Michaels, 'Global Problems in Domestic Courts' in Sam Muller et al (eds), *The Law of the Future and the Future of Law* (2011) 165.

[64] See Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (2004).

[65] See James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (2010) 1.

deal with new problems, these institutions may provide a suitable forum. Otherwise, we may expect a turn to other, perhaps informal means.

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.[66] But where different factors coincide, expectations may be relatively clear-cut. For example, strong collective action through common institutions is likely where these institutions exist, can be used for a given problem, and reflect power structures reasonably well. The UN Security Council may thus be a likely focus in those areas in which it arguably possesses powers. Likewise, where such institutions are absent (or are too rigid or egalitarian) and where problem and market structures allow non-universal approaches to be relatively effective, we may expect a turn to unilateral or club tools. Insofar as these are difficult or impossible to achieve within the formal structure of international law, actors may turn to informal solutions instead.

The turn to non-consensual law-making is thus bound to present a complex picture, with different intensities and different forms in different areas – a picture that differs quite significantly from the frequent assumption that the dominant direction of change is towards strong central institutions and majoritarian rule-making powers. Not all of this turn may formally challenge the consent element in international law proper – much of it may actually take place outside the international legal order, especially in the informal realm. In the next section, I trace the forms of this challenge in three key issue areas, all of which characterized by significant problems of global public goods.

II. Traces of Change

International lawyers' accounts of change often start from individual instances in which old forms are tested and aim at finding similar phenomena in other contexts, or they construe broader categories and use a number of examples to illustrate elements of change.[67] These strategies, however, hardly allow for insights into the actual strength of a phenomenon, nor are they able to capture variations in its forms in a systematic manner.

This article instead begins from the study of a limited number of cases in which we may expect change and, drawing on the hypotheses developed above, inquires into the salience and forms of transformation observed there. It focuses on cases in which change is most likely. As any research based on 'most likely' case studies, this has limitations: if a

[66] I am sympathetic to a position of analytical eclecticism which accepts a multiplicity of potential accounts for real-world phenomena; see Rudra Sil & Peter J Katzenstein, 'Analytic Eclecticism in the Study of World Politics: Reconfiguring Problems and Mechanisms across Research Traditions' (2010) 8 *Perspectives on Politics* 411.

[67] For the former, see, eg, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217-384; for the latter, see, eg, Guzman 2012.

most-likely test is passed, inferences on the strength of a causal mechanism may be impossible. On the other hand, if a most-likely test is failed, we are faced with a puzzle that should help us to better understand the foundation and limitations of the initial hypothesis.[68] In our context, this is especially helpful: if we do not find change – or find limited change – in most-likely cases, this does not only question the direct relationship of demand and supply of institutional change but should also enable us to look more thoroughly at the factors behind that limited supply. Moreover, as we can expect to find variation not only in the intensity but also in the forms of change, we should be able to gain broader insights into the mechanisms that shape international law. These insights may be provisional, but they can lead to more refined hypotheses as a basis for further research.

The selection of case studies in this framework is guided by the assumption that change is most likely in areas in which we find (1) strong cooperation challenges, (2) which are perceived as such by influential actors, but (3) are characterized by a significant degree of disagreement over the goal and/or the means to reach it. Without conditions (1) and (2), we are unlikely to see significant pressure for change; without condition (3), solutions to the challenge could take classical consensual means, for example through multilateral treaties or the joint creation of powerful institutions. The issue areas I have selected (global antitrust, climate change, and terrorism financing) reflect significant global public goods problems – as sketched above, the paradigmatic cases of global cooperation challenges.[69] As I will discuss in more detail below, antitrust and climate change regulation are best characterized as dealing with aggregate-efforts goods; terrorism financing triggers problems of a weakest-link (or perhaps 'weaker link') kind. All these areas reflect serious disagreement as to the character and importance of the problem and the means to tackle it – most clearly as regards climate change, where not only the existence of the problem itself is still doubted but fundamental dispute also reigns over the adequate contributions of different actors to its solution. The other areas are characterized by less severe contestation, though views on the urgency of the problems, suitable solutions and the distribution of costs also differ widely.

1. Securing Markets: Antitrust Regulation and Enforcement

In an increasingly liberalised and globalised economy, market regulation and enforcement are key goods, but distributional conflict in a decentralised setting makes them difficult to produce and easy to free-ride on. My focus here is on antitrust – the prevention of cartels and anti-competitive behaviour – a classical element of public functions in free-market

[68] See, eg, Ingo Rohlfing, *Case Studies and Causal Inference: An Integrative Framework* (2012) 84-96; also John S Odell, 'Case Study Methods in International Political Economy' (2001) 2 *International Studies Perspectives* 161 at 166; Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12 *Qualitative Inquiry* 219 at 231-2.

[69] Global public goods problems are thus merely treated as particularly severe cases of collective action problems, not as a separate category that would lead us to expect particular institutional responses. I thank Joel Trachtman for pushing me to clarify this point.

economies, yet one that requires extension beyond state boundaries once action of companies in one place has effects on markets worldwide. Individual states will typically neither have the means to detect nor the power to counteract anticompetitive behaviour abroad, while they may not wish to act against such behaviour by their own firms when it affects others.[70] The result is likely to be underregulation, leading to significantly distorted markets.

International cooperation on this issue was seen as crucial already at an early stage. This led to initiatives for a global competition law in the 1920s, yet they were largely thwarted by disagreement over the substance of the rules.[71] More progress was achieved in the 1940s with the Havana Charter, which included both substantive competition law and an implementation procedure.[72] Yet in part because of these provisions, it failed to pass the ratification hurdle in the US Senate, and the competition parts were not included when elements of the Charter, namely the GATT, were brought to life separately.[73] A draft agreement developed in the UN Economic and Social Council a few years later was also rejected by the US.[74] Later efforts, especially by developing countries, to formulate antitrust rules in the UNCTAD framework, though successful in the UN General Assembly, have largely lacked reception among developed economies.[75]

As multilateral efforts faltered, the US turned to unilateral options and extended the application of its own antitrust laws to international markets.[76] The 1945 *Alcoa* decision formulated the shift most cogently – a shift away from the classical territorialist position, which established jurisdiction largely based on whether the act in question took place on US territory, towards an acceptance of 'effects-based' jurisdiction. US law now applied if activities abroad 'were intended to affect imports and did affect them'.[77] Even though enormously influential as a practical matter and ratified by legislative action in the early 1980s, internationally this remained a minority position for decades, seen by most observers as transgressing jurisdictional limits and provoking critique from other countries.[78] Yet the position was shared soon by the European Commission, even if somewhat circumscribed by

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[70] See Andrew T Guzman, 'Is International Antitrust Possible?' (1998) 73 *NYU Law Rev* 1501 at 1510-24; Andrew T Guzman, 'Competition Law and Cooperation: Possible Strategies' in Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP, 2011) 345 at 354. But see also the different emphasis in Anu Bradford, 'International Antitrust Negotiations and the False Hope of the WTO' (2007) 48 *Harv Int'l L J* 383.

[71] David J Gerber, *Global Competition: Law, Markets, and Globalization* (OUP, 2010) 24-31.

[72] Gerber (2010) 38-52.

[73] Wood, 'The Impossible Dream: Real International Antitrust' (1992) *U Chi Legal Forum* 277, at 281-4.

[74] Wood (1992), 284-5.

[75] Wood (1992), 285-7; D Daniel Sokol, 'International Antitrust Institutions' in Guzman (2011) 187 at 199-200.

[76] See Wood (1992), 297-300.

[77] US v Aluminum Co of America, 148 F.2d 416 (2 Cir. 1945), at 444.

[78] See Maher M Dabbah, *International and Comparative Competition Law* (CUP, 2010) 432-49.

the European Court of Justice in its 1985 decision in *Wood Pulp*, which relied on 'implementation' rather than mere effects.[79] By the 1990s, however, both US and EU approaches were characterised by a 'liberal extraterritorial application of competition law'[80], and a range of other countries moved in the same direction.[81] Some courts and commentators have argued that effects-based jurisdiction has become accepted in international law[82], yet the persisting critique of a number of countries – the UK, Switzerland, Canada, Australia among them – casts doubts on this position.[83] In spite of growing support and arguments in its favour on economic grounds, effects-based jurisdiction continues to lead a twilight existence under international law.[84]

Such legal doubts have not posed obstacles to the practical success of extraterritorial jurisdiction in this area. Companies can typically not afford to ignore regulation in any major market they seek access to, and in antitrust they cannot divide their operations so as to tailor them to the regulatory requirements of a particular jurisdictions, thus potentially creating a race-to-the-top effect in which the strictest standards prevail over time.[85] This has allowed the US and the EU to act relatively effectively against cartels and anticompetitive behaviour in a global market, and to regulate large-scale mergers with world-wide implications. It has been aided by a relative convergence of their standards and by increased cooperation between their authorities[86], even if serious disagreements have arisen in a limited number of cases.[87] The extraterritorial action of the US and the EU 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.[88] It overcomes key problems in the production of public goods, especially those of substantive disagreement, free-riding and the distribution of costs, typically seen as key obstacles to reaching cooperative schemes. Yet this mode of provision also has many obvious weaknesses, related to practical issues such as information-gathering abroad, the lack of a holistic approach and resulting gaps and

[79] ECJ, In re Wood Pulp Cartel (1985), CMLR 3 (1985), 474.

[80] Dabbah (2010), 469; see also Wood (1992), 301. On European attempts to promote their approach to competition law abroad see Umut Aydin, 'Promoting Competition: European Union and the Global Competition Order' (2012) 34 *Journal of European Integration* 663.

[81] See the contributions in Guzman (2011), especially those on Brazil and China; also Einer Elhauge & Damien Geradin, *Global Antitrust Law and Economics* (2nd ed., Foundation Press, 2011) 1187-8.

[82] See Cedric Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (Intersentia, 2008) 195-7.

[83] Dabbah (2010) 469-76.

[84] See Dabbah (2010) 423.

[85] See Bradford (2012) 10-20.

[86] See Maher M Dabbah, 'Future Directions in Bilateral Cooperation: A Policy Perspective' in Guzman (2011) 287 at 290-3.

[87] See Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern Univ L R* 1 at 19-22, who also argues that stricter EU rules typically take precedence over more permissive US rules in the area.

[88] See supra note [xx].

overlaps in different policies, difficulties in tackling outward-facing anti-competitive behaviour such as export cartels, and potential normative clashes, as for example with industrial policies in developing countries.[89] Moreover, as the 2004 decision in *Empagran* has clarified, the reach of US action is limited to anti-competitive behaviour with direct effects on US markets; behaviour without such effects needs to be tackled by other means.[90]

An attempt to overcome some of these limitations and reach a worldwide, multilateral agreement on competition policies was undertaken in the mid-1990s, primarily by the EU. The envisaged regime, negotiated in the WTO context, would have come about in different steps, beginning with procedural requirements such as transparency, cooperation and due process, then including limited substantive rules, such as non-discrimination, and eventually culminating in a more exacting substantive framework of rules, for example on cartels and abuse of dominance. It would also have included dispute resolution and technical assistance for developing countries.[91] However, the hope to reach such a comprehensive agreement was soon frustrated, and even a more modest proposal, focusing on the procedural parts, failed to gain sufficient traction; the issue was struck from the WTO agenda in 2003.[92] The failure is generally attributed to rejection by both the US and developing countries.[93] The US did not see much promise for greater effectiveness in such a scheme, and it feared a multilateral agreement may lead to compromises on substance, at best to a lowest common denominator, and to potential encroachments on its own sovereignty.[94] Developing countries, though traditionally interested in global antitrust regulation[95], saw the initiative as yet another tool to force access to their markets for dominant foreign companies, and as a potential device to hinder cooperation among their own firms.[96] For both sides, the expected benefits were too low and the costs too high, compared with what was already achieved through the unilateral solution.[97]

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[89] For concise discussions of limits to the decentralised 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' (2009) 10 *Chi J Int'l L* 189; Eleanor M Fox, 'Antitrust Without Borders: From Roots to Codes to Networks' in Guzman (2011) 265 at 273-9.

[90] See *F. Hoffmann-La Roche Ltd v Empagran SA*, 542 U.S. 155 (2004).

[91] See Fox in Guzman (2011) 272; Gerber (2010) 101-7.

[92] Fox in Guzman (2011) 272.

[93] See Gerber (2010) 103-7; also the discussion in Elhauge & Geradin (2011) 1239-47.

[94] See Gerber (2010) 105-6; Fox in Guzman (2011) 272; Bradford (2007), 401-10.

[95] See Guzman (1998) 1537.

[96] Gerber (2010) 106-7; Aditya Bhattacharjea, 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) 9 *J Int'l Econ L* 293, at 295-9. Bradford (2007), 410-3, emphasizes the problem of transaction costs for developing countries.

[97] See the analysis of country incentives in Guzman (1998), 1526-9. See also Bradford (2007), 401-37, who also explains the failure of negotiations largely with the lack of expected benefits, but does not discuss the impact of extraterritorial regulation on this calculation.

While the WTO initiative has failed, other avenues for cooperation have remained open, or have opened up since. Bilateral agreements have been used to enhance information flows, provide for technical assistance, and partly to establish obligations of positive comity.[98] Some progress has been made with agreements on the regional level.[99] Stronger informal cooperation has been fostered within the OECD and since 2001 also in the International Competition Network (ICN).[100] 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 towards greater convergence in substantive rules, albeit in a non-binding way through the development of 'best practices'.[101] The ICN also benchmarks practices of member authorities on the basis of these best practices, thus nudging them towards harmonization.[102]

Overall, though, the global picture of antitrust policies remains heavily decentralised – both rules and enforcement remain mostly national in character. Attempts at multilateral or collective institutional action have been unsuccessful, partly because central actors such as the US (and also the EU) have reduced the need for cooperation by an extension of their unilateral capacities.[103] They have stretched the jurisdictional boundaries for extraterritorial action in a way that allows them to act in most situations in which global markets are affected in a significant way. As mentioned above, this does not mean that the public good of antitrust enforcement will be provided in all circumstances; it only means that the strongest actors can take enforcement into their own hands whenever anti-competitive behaviour hurts them.[104] Unlike in other public-good situations, this is practically possible because the subjects of regulation – internationally active companies – are vulnerable to the action of US and EU authorities because of their links with (and assets in) these markets. Yet it signals that when unilateral avenues are open, most attempts at change will follow that route – for the most powerful actors, it is less costly (in terms of control of the substance and

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[98] Gerber (2010) 108-9; Elhauge & Geradin (2011) 1225-39; Dabbah (2010) 494-540.

[99] On the promise, see Michal S Gal, 'Regional Competition Law Agreements: An Important Step for Antitrust Enforcement' (2010) 60 *U Toronto L J* 239.

[100] See generally Gerber (2010) 111-6; Dabbah (2010) 130-53, also on the continuing role of UNCTAD.

[101] See Eleanor M Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) 43 *International Lawyer* 151; Gerber, 115-6; Sokol in Guzman (2011), 200-2; Marie-Laure Djelic, 'International Competition Network' in Thomas Hale & David Held (eds), *Handbook of Transnational Governance* (Polity Press, 2011), 80-8; Paul Lugard (ed), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (Intersentia, 2011); Yane Svetiev, 'The Limits of Informal International Law: Enforcement, Norm-generation, and Learning in the ICN' in Pauwelyn, Wessel & Wouters (2012) 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' (2009) 33 *Fordham Int'l L J* 1 at 45-54.

[102] See Fox (2009) 160-5.

[103] See Guzman (1998) 1526-7.

[104] See also the accounts in Gal (2009) 40-5; Gerber (2010) 74-8.

procedure) than multilateral or collective institutional alternatives. And the rejection of WTO negotiations by developing countries also suggests that even for them – who are likely to benefit least from US and EU antitrust action – unilateral action has reduced the need to enter into the kinds of compromise that multilateral or collective action requires.

The turn to unilateral provision has been accompanied, and somewhat softened, by procedural devices contained in domestic regulation, bilateral agreements and informal 'best practices' documents. 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.[105] Many bilateral agreements have taken this up and specified procedures for notification and information exchange.[106] In some cases, they have gone further by including obligations of positive comity, requiring authorities to consider action if requested to do so by their counterparts from another country.[107] The ICN has adopted recommended practices for cooperation in merger review procedures[108], and a 2007 ICN report has pointed to the broadening of enforcement cooperation, making it now a 'a global phenomenon.'[109] Yet even if such cooperation somewhat mitigates the limitations of a decentralised approach, it hardly provides compensation for the shift in regulatory control that comes with the broader jurisdiction exercised by the US and the EU today. The institutional structure of public-good production in this area, relying as it does on unilateral action by two powerful economies, is likely to change in a more multipolar order, with the rise of markets in China, India and elsewhere. Increasing clashes on antitrust policies may prepare the ground for a more cooperative, perhaps multilateral scheme, but there is little evidence for this so far.

2. Preserving the Environment: The Global Fight against Climate Change

Environmental protection is the quintessential public good – non-exclusive and non-rivalrous in consumption – and as regards transboundary challenges, probably the quintessential 'global public good'. This is nowhere nearly as clear as when it comes to

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[105] 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 (21 September 1995).

[106] For US antitrust agreements, see http://www.justice.gov/atr/public/international/int-arrangements.html; for EU antitrust agreements, see http://ec.europa.eu/competition/international/bilateral/index.html. See also the US enforcement guidelines for antitrust authorities, with direct reference to the OECD recommendation, in Elhauge & Geradin (2011) 1226, at para. 2.92.

[107] See especially the 1991 and 1998 agreements between the US and the EU, in Elhauge & Geradin (2011) 1226-34.

[108] ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Coordination (2004).

[109] ICN Steering Group, International Enforcement Cooperation Project, http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf

climate change and the difficulties of the fight against it.[110] The challenge of reducing emissions to a sufficient extent to curb global warming is enormous, financially, technologically and in terms of societal adaptation.[111] These steep costs erect high hurdles for effective action, invite free-riding and risk placing the bearers of the costs at a competitive disadvantage vis-à-vis those who choose not to participate. Unilateral, extraterritorial action faces far greater problems than in antitrust, as emissions emanate from a much wider range of actors who are typically not themselves directly vulnerable to the intervention of foreign governments.[112] Even though action in multiple sites and at different levels may contribute to a solution[113], the lack of a central institution that could help to provide the good and distribute the burden through taxation is felt here more immediately than in other areas. At the same time, because the prevention of global warming is an aggregate-efforts good, institutional structures may not need to include all countries.[114] Bringing the heaviest polluters together may suffice to make significant progress, and 'club' strategies may therefore bear substantial promise.[115]

However, the focus in climate change regulation was for long the classical multilateral process, which had worked exceptionally well in a related field, that of ozone layer protection, with the 1987 Montreal Protocol. The UN Framework Convention on Climate Change (UNFCCC), adopted in 1992, followed in that track and quickly attracted a broad membership. Reaching detailed commitments proved more difficult, though, and the 1997 Kyoto Protocol took long to enter into force and even though it has been ratified by more than 190 parties, has come in for harsh criticism ever since its adoption, both from environmental activists and from climate change skeptics. Limited effectiveness, the lack of binding commitments of developing countries and the refusal of the United States to become a party have been at the centre of the critique, and they have also overshadowed negotiations on a post-Kyoto framework since the late 2000s.[116] In the eyes of many

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[110] See Barrett (2007) 74.

[111] On the extent of the challenge, see David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (CUP, 2011) ch 2, 5 and 6.

[112] 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 (2007) 37-40; Victor (2011) 185-96; Michael Specter, 'The Climate Fixers: Is there a Technological Solution to Global Warming?' *The New Yorker*, 14 May 2012.

[113] See Elinor Ostrom, 'Polycentric systems for coping with collective action and global environmental change' (2010) 20 *Global Environmental Change* 550.

[114] See above [xx] and Barrett (2007) ch 3.

[115] See Victor (2011) 210-5.

[116] For overviews see Brunnée & Toope (2010) 131-41; Philippe Sands, Jacqueline Peel, Adriana Fabra Aguilar & Ruth MacKenzie, *Principles of International Environmental Law* (3rd ed, CUP, 2012) 274-98. For a critical account see Victor (2011) ch 7. For the ratification status see 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' (2010) 16 *Eur J Int'l Rel* 269.

observers, multilateral treaty negotiations themselves have become too cumbersome to overcome disagreements, partly because of growing civil society participation. The slow and uncertain progress towards a legally binding, universal successor to the Kyoto Protocol seems to confirm their doubts.[117] 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. Yet a new, universal agreement remains largely an aspiration.[118]

At the Copenhagen summit in 2009, key parties decided to break out of the universal frame and work in a 'minilateral' setting.[119] The resulting agreement, the 'Copenhagen Accord', was concluded by only five countries – the US, China, Brazil, India and South Africa – after an earlier attempt to negotiate in a 28-country setting had not met with success.[120] 114 countries immediately signed up to the Accord, and commentators highlighted the fact that for the first time, developing countries had been drawn towards commitments for mitigation action.[121] Unsurprisingly, though, just as in previous instances, the move to a smaller forum was heavily criticized by many excluded governments, with some calling it a 'coup d'Etat' against the United Nations.[122] This dissatisfaction also prevented the formal endorsement of the Accord by the UNFCCC Conference of the Parties (CoP) at Copenhagen; the CoP instead only 'took note' of the document.[123] A year later, many of the elements of the Copenhagen Accord were integrated into the UNFCCC framework - by 'consensus' in the CoP, despite open opposition by Bolivia to the substance as well as to the intransparent negotiation process.[124]

Given the limitations of the multilateral, universal setting, many actors have sought to achieve progress in other fora. These are partly intergovernmental, as in the G-8, G-20, the

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[117] See Victor (2011) 210-5, 224-9; Charlotte Streck, 'Innovativeness and Paralysis in International Climate Policy' (2012) 1 *Transnational Environmental Law* 137 at 139.

[118] See Roger Harrabin, 'UN climate talks extend Kyoto Protocol, promise compensation', *BBC News*, 8 December 2012, http://www.bbc.co.uk/news/science-environment-20653018.

[119] See Robyn Eckersley, 'Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?' (2012) 12 *Global Environmental Politics* 24 at 31.

[120] See Daniel Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem' (2010) 104 *Am J Int'l L* 230 at 234; Clark (2011) 231-2.

[121] See Bodansky (2010) 239-40; Brunnée & Toope (2010) 207-8.

[122] Bodansky (2010) 238; Ian M McGregor, 'Disenfranchisement of Countries and Civil Society at COP-15 in Copenhagen' (2011) 11 *Global Environmental Politics* 1 at 5. On previous critiques in climate change negotiations see Robert O Keohane & David G Victor, 'The Regime Complex for Climate Change' (2011) 9 *Perspectives on Politics* 7 at 15. 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' (2004) 4 *Global Environmental Politics* 65.

[123] UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) 4.

[124] See Lavanya Rajamani, 'The Cancun Climate Agreements: Reading the Text, Subtext, and Tea Leaves' (2011) 60 *Int'l & Comp L Q* 499; on the problems of consensus see pp 514-8.

World Bank, the REDD process on deforestation and degradation, the framework of the Montreal Protocol on the Ozone Layer, or the Major Economies Forum (MEF) which brings together seventeen countries and trading blocs to reach understandings on climate change.[125] Many fora are transnational or private, engaged in standard-setting, information provision, or in financing or running climate-related projects.[126] Some of the more successful initiatives in the latter group relate to emissions accounting standards, targeting firms and their accounting practices directly.[127] These often link up to subnational, national or, in the case of the EU, regional climate change policies, including emissions trading schemes.[128] The result is a dazzlingly multifaceted regime complex, largely without hierarchies, but with manifold interactions between its parts.[129]

The centre of gravity in climate change regulation has thus shifted away from the multilateral treaty process towards other forms and settings, especially minilateral ones. Some commentators are critical of this shift[130], others hail it as a step in the right direction, given the complexity of the problem and the degree of political disagreement on its solution.[131] Yet little in this process suggests that the urgency of the problem and the difficulties in tackling it have so far led to direct challenges to central categories of international law. The treaty framework in particular remains formally intact – though universally-oriented norms are set by clubs, informal government networks or private actors, these norms typically remain below the threshold of binding force. Formal validity continues to derive only from treaty-making processes, even if these are *de facto* increasingly sidelined or merely used to ratify norms produced elsewhere.

The process of treaty-making on climate change is highly institutionalized because of the centrality of the CoP of the UNFCCC, which also acts as the Meeting of the Parties of the Kyoto Protocol (CMP). This institutionalization has focused participation claims of states as well as civil society groups and has led to meetings of an enormous and often unwieldy size.

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[125] See Keohane & Victor (2011).

[126] See Liliana B Andonova, Michele M Betsill & Harriet Bulkeley, 'Transnational Climate Governance' (2009) 9 *Global Environmental Governance* 52; Kenneth W Abbott, 'The Transnational Regime Complex for Climate Change' (2011), at http://ssrn.com/abstract=1813198; Streck (2012) 137.

[127] See, eg, Jessica F Green, 'Private Standards in the Climate Regime: The Greenhouse Gas Protocol' (2010) 12:3 *Business & Politics*, Art. 3.

[128] On initiatives at different levels, see Ostrom (2010); Hari M Osofsky, 'Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen' (2010) 25 *Maryland J Int'l L* 64.

[129] See Keohane & Victor (2011) and Abbott (2011) for different, though largely complementary accounts.

[130] See Brunnée & Toope (2010) 178-9 (but see also 215 for their critique of consensus decision-making in the UN process).

[131] See especially Victor (2011) and, with more stringent institutional demands, Eckersley (2012). See also Ostrom (2010) and Lutz Weischer, Jennifer Morgan & Milap Patel, 'Climate Clubs: Can Small Groups of Countries Make a Big Difference in Addressing Climate Change?' (2012) 21 *Review of European Community & International Environmental Law* 177.

For example, the 2009 Copenhagen conference had more than 40,000 registered participants.[132] If this indicates a high level of inclusiveness – and may be a factor behind the turn to informal subsettings for negotiations, as in the Copenhagen Accord[133] – it is partly counteracted by attempts to take decisions even if not all parties are on board. Decision-making in the CoP in most instances proceeds through consensus, and although consensus is softer than consent as it counts acquiescence as agreement, it has typically been regarded as unavailable in the face of open objections.[134] As mentioned above, this principle has been challenged in the climate change context at least twice in the last few years with respect to momentous decisions – the integration of the Copenhagen Accord and the adoption of a second commitment period – and in the second case even despite the opposition of a key actor, Russia. These decisions have not created binding obligations for the parties, but 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'.[135]

The CoP/CMP process has also challenged existing boundaries in another way.[136] Under Article 18 of the Kyoto Protocol, the CMP is tasked with the establishment of a compliance procedure, with the proviso that 'any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.' For many, this implied that new non-compliance procedures required an amendment, which would have involved a lengthy process and a result limited to only those countries who ratified the amendment.[137] Given these difficulties, when it came to creating such a procedure, 'pragmatism prevailed'[138] over formal-legal considerations and the new compliance mechanism was enacted through a CoP decision alone.[139] The decision leaves it to the parties to 'decide on the legal form' of its procedures and mechanism and is thus regarded as non-binding or at least as ambiguous as to its legal character – though not for

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[132] See Bodansky 2010, 230.

[133] See also Eckersley (2012) 30-1, who diagnoses a particularly strong, 'affirmative' form of multilateralism in the climate change context.

[134] 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." See also Alan Boyle & Christine Chinkin, *The Making of International Law* (OUP, 2007) 157-8.

[135] See Rajamani (2011) 514-8, for a discussion with a view to the 2010 Cancún events. I wish to thank Veerle Heyvaert for drawing my attention to this development.

[136] See also the discussion in Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1 at 23-33.

[137] On the debate see Streck (2012) 147.

[138] Streck (2012) 147; see also Brunnée & Toope (2012) 185, 201.

[139] Decision 24/CP.7, UN Doc. FCCC/CP/2001/13/Add.3, 21 January 2002, 64.

that matter necessarily less effective.[140] Here, just as in Copenhagen and in many other norm-making sites of the climate change regime complex, the limitations of formal, consensual international law are overcome by a flight into a certain informality.

Pressures for a change in more formal powers are visible in another context. Since 2007, a number of Western governments have tried to place climate change on the UN Security Council's agenda by framing it as a threat to the peace[141], and they have drawn much praise from commentators interested in effective tools to address climate change.[142] Though this can be read as in line with the rapid expansion of Security Council powers since the end of the Cold War, it seems quite far removed from the original Charter conception and challenges the distribution of tasks among UN organs.[143] A great number of 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.[144] This opposition has not prevented discussion in the SC, but it has led to a cautious stance. In 2011, the Council issued a presidential statement in which it emphasized potential connections between climate change and security but stopped short of mentioning climate change as a threat to the peace in itself.[145] In 2013, it held only an informal gathering on the issue, apparently due to objections by Russia and China to placing it on the Council's formal agenda.[146] Moreover, the Security Council has sought to bolster the legitimacy of its move into new territory by greater procedural inclusion of countries not normally represented in the SC; each of its debates on climate change featured interventions by more than fifty governments.[147]

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[140] See Brunnée & Toope (2010) 201-4.

[141] See UNSC Verbatim Record (17 April 2007) UN Doc S/PV/5663.

[142] See Christopher K Penny, 'Greening the Security Council: Climate Change as an Emerging "Threat to International Peace and Security"'(2007) 7 *Intl Env Agreements* 35; Shirley V Scott, 'Climate Change and Peak Oil as Threats to International Peace and Security: Is It Time for the Security Council to Legislate?' (2008) 9 *Melb J Intl L* 495; Darragh Conway, 'The United Nations Security Council and Climate Change: Challenges and opportunities' (2010) 1 *Climate Law* 375, 377–81; Trina Ng, 'Safeguarding Peace and Security in our Warming World: A Role for the Security Council' (2010) 15 *J Conflict & Security L* 275. See also Alexandra Knight, 'Global Environmental Threats: Can the Security Council Protect Our Earth?' (1995) 80 *NYU L Rev* 1549.

[143] On SC powers and their extension in general see Nico Krisch, 'Chapter VII Powers: The General Framework' and 'Article 39' in Bruno Simma et al (eds), *The United Nations Charter: A Commentary* (3rd ed, 2012) 1237, 1272.

[144] See UNSC Verbatim Record (17 April 2007) UN Doc S/PV/5663.

[145] See UNSC Presidential Statement (20 July 2011) UN Doc S/PRST/2011/15 and the controversial discussion in UNSC Verbatim Records (20 July 2011) UN Doc S/PV.6587.

[146] See Flavia Krause-Jackson, 'Climate Change's Links to Conflict Draws UN Attention', Bloomberg.com, 15 February 2013, http://www.bloomberg.com/news/2013-02-15/climate-change-s-links-to-conflict-draws-un-attention.html; Security Council Report, 'Arria Formula Meeting on Climate Change', 14 February 2013, http://www.whatsinblue.org/2013/02/arria-formula-meeting-on-climate-change.php.

[147] See UNSC Verbatim Record (17 April 2007) UN Doc S/PV.5663; Verbatim Record (20 July 2011) UN Doc S/PV.6587.

Another result of the clogged channels of multilateralism has been the exploration of unilateral options by proponents of action against climate change.[148] Unilateral action is difficult in this area: not only can high emissions standards in one jurisdiction give others a competitive advantage in global markets; they may also fail to produce positive effects because of 'carbon leakage' – the shift of carbon-intensive production to countries with little or no climate policies.[149] In order to avoid such effects, the EU and the US have considered the inclusion of importers into their emissions trading schemes and the introduction of border adjustment measures, effectively taxes on imports from countries with lower emissions standards.[150] Such plans have provoked strong objections, most notably from India and China.[151] They have faltered in the US as part of the failure of the domestic climate change bill in the Senate, but the EU continues to contemplate such proposals and has also begun – under heavy protest[152] – to include international flights into the European emissions trading scheme for aviation.[153] Greater momentum towards a multilateral agreement has led the EU to suspend this latter measure on a provisional basis, with the threat of a resumption if international negotiations do not make sufficient progress.[154]

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[148] On unilateralism in environmental affairs generally, see Gregory Shaffer & Daniel Bodansky, 'Transnationalism, Unilateralism and International Law' (2012) 1 *Transnat'l Envt'l L* 31; also Daniel Bodansky, 'What's so bad about unilateral action to protect the environment?' (2000) 11 *Eur J Int'l L* 339.

[149] See, e.g., James Bushnell, Carla Peterman & Catherine Wolfram, 'Local Solutions to Global Problems: Climate Change Policies and Regulatory Jurisdiction' (2008) 2 *Review of Environmental Economics and Policy* 175–193. But see also Jody Freeman & Andrew Guzman, 'Climate Change and U.S. Interests' (2009) 109 *Columbia Law Review* 1531, who are more hopeful about the effects of unilateral action (by the US).

[150] See Stéphanie Monjon & Philippe Quirion, 'Addressing leakage in the EU ETS: Border adjustment or output-based allocation?' (2011) 70 *Ecological Economics* 1957; Joanne Scott & Lavanya Rajamani, 'EU Climate Change Unilateralism' (2012) 23 *Eur J Int'l L* 469.

[151] See James Kanter, 'At Climate Talks, Trade Pressures Mount', *New York Times*, 17 December 2009; Tancrède Voituriez & Xin Wang, 'Getting the carbon price right through climate border measures: a Chinese perspective' (2011) 11 *Climate Policy* 1257. For a normative discussion see Robyn Eckersley, 'The Politics of Carbon Leakage and the Fairness of Border Measures' (2010) 24 *Ethics & International Affairs* 367.

[152] See Fiona Harvey, 'Sanctions threat to European airlines over emissions trading', guardian.co.uk, 23 February 2012, http://www.guardian.co.uk/environment/2012/feb/23/european-airlines-emissions-trading-sanctions-threat.

[153] See Scott & Rajamani (2012); and the UK House of Commons Select Committee 'Energy and Climate Change - Tenth Report: The EU Emissions Trading System' (December 2011), http://www.publications.parliament.uk/pa/cm201012/cmselect/cmenergy/1476/147602.htm, paras 70-148.

[154] See European Commission, MEMO/12/854 of 12 November 2012, 'Stopping the clock of ETS and aviation emissions following last week's International Civil Aviation Organisation (ICAO) Council', at http://europa.eu/rapid/press-release_MEMO-12-854_en.htm.

The legality of such unilateral measures has mainly been discussed from the angle of different treaty regimes – in the case of border adjustments, WTO law[155]; in the aviation case, WTO law as well as the Chicago Convention on Civil Aviation and the US-EU Open Skies Agreement.[156] More importantly in our context, the latter issue has also given rise to broader concerns about jurisdictional rules. These were rejected by the Court of Justice of the European Union, which found that the arrival in or departure from an EU airport was sufficient to base the jurisdiction of the EU and its member states on conventional territorial grounds.[157] Scholarly reactions to this finding have been largely positive, but doubts remain especially insofar as the EU forces foreign airlines to buy CO_2 allowances for the entire length of a flight, thus also for the parts taking place outside Europe.[158] The court's Advocate-General, in her preparatory opinion, tellingly stressed the similarity of the extraterritorial dimension in this case with effects-based jurisdictional claims in the area of antitrust.[159] She concluded that the territorial principle, duly reinterpreted, provided a sufficient basis for the EU measures:

> "Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known 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."[160]

Seen in this light, EU unilateralism on climate change may form part of a broader trend to redefine jurisdictional rules. These rules are widened in such a way as to allow each state

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[155] See Ludivine Tamiotti, 'The legal interface between carbon border measures and trade rules' (2011) 11 *Climate Policy* 1202; see also Moritz Hartmann, 'Global Public Goods and Asymmetric Markets: Carbon Emissions Trading and Border Carbon Adjustments' in Ernst-Ulrich Petersmann (ed), Multilevel Governance of Interdependent Public Goods, *EUI Working Paper* RSCAS 2012/23, 131.

[156] On the various aspects, see Kati Kulovesi, '"Make your own special song, even if nobody else sings along": International aviation emissions and the EU Emissions Trading Scheme' (2011) 2 *Climate Law* 535; Lorand Bartels, 'The WTO Legality of the Application of the EU's Emission Trading System to Aviation', (2012) 23 *Eur J Int'l L* 429; Joshua Meltzer, 'Climate Change and Trade—The EU Aviation Directive and the WTO' (2012) 15 *J Int'l Econ L* 111; Brian F Havel & Gabriel S Sanchez, 'Toward an International Aviation Emissions Agreement' (2012) 36 *Harv Envt'l L R* 351 at 361-72. See also Scott & Rajamani (2012) 476-93 for a discussion from the perspective of the principle of common but differentiated responsibilities.

[157] European Court of Justice (Grand Chamber), Judgment of 21 December 2011, *Air Transport Association of America et al v Secretary of State for Energy and Climate Change*, C-366/10, paras 121-30.

[158] On the controversy see generally Kulovesi (2012), who holds a positive view herself; see also Scott & Rajamani (2012); Sanja Bogojević, 'Legalising Environmental Leadership: A Comment on the CJEU'S Ruling in C-366/10 on the Inclusion of Aviation in the EU Emissions Trading Scheme' (2012) 24 *Journal of Environmental Law* 345.

[159] European Court of Justice, Opinion of Advocate General Kokott, 6 October 2011, *Air Transport Association of America et al v Secretary of State for Energy and Climate Change*, C-366/10, paras 141-60.

[160] Ibid, para 154.

affected by an issue – for matters of global public goods, this necessarily means *all* states – to exercise its regulatory powers.[161] Even if this aspect is not brought out as clearly in the eventual judgment of the European Court, we can discern here a significant amount of pressure on the classical, more limited framework of jurisdiction under international law.

In the overall picture of climate change policies, though, unilateral action is too ineffective to play as central a role as it does, for example, in antitrust. Instead, it forms part of the broader climate change regime complex, which is still centred on the multilateral UNFCCC process but has increasingly branched out and developed multiple, partly competing sites, controlled by different governmental and private actors. As we have seen, direct challenges to key concepts of consensual international law remain limited – some movement exists on institutional powers and on jurisdictional limits, but change is still unsettled and circumscribed in scope in both areas. We have also observed, somewhat similarly to the findings on antitrust, a flight into informality and especially into club negotiations as a result of the limited progress in classical multilateral, treaty-oriented settings. This informality, though leaving the form of the treaty intact, places international law as a mode of global regulation under significant pressure.

3. Managing Security: Countering the Financing of Terrorism

International security is not immediately associated with the category of public goods – too much of it is relational, and it is fragmented in both production and consumption. Unsurprisingly, it is often conceived of as 'national', rather than global, security. But national security in part depends on public goods, such as the international regulation of armaments – no state can be excluded from the benefits of a world where nuclear proliferation is controlled.[162] The example I focus on here concerns international terrorism, and 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.[163] Countering the financing of terrorism seeks to tackle a key condition for terrorist operations – resources – but it also has a character that distinguishes it from the global public goods discussed in previous sections. While these were best characterised as 'aggregate efforts' goods (antitrust possibly with elements of a single-best-effort good), this one may be described as a 'weakest-link' good. Efforts at countering the financing of terrorism can be rendered futile if only a small group of governments does not cooperate and terrorist activities can take place – or at least be financed – on their territories, especially since terrorism's operational costs are often quite

[161] See also the 'cosmopolitan pluralist' conception of jurisdiction in Paul Schiff Berman, 'The Globalization of Jurisdiction' (2002) 151 *U Penn L R* 311 at 481-501.

[162] See Barrett (2007) 59-61 and ch 5.

[163] See Anne L Clunan, 'The Fight against Terrorist Financing' (2006) 121 *Pol Sci Qu* 595 at 572; Barrett (2007) 60.

limited.[164] As a result, problem-solving in this area is particularly difficult as cooperation needs to be more or less comprehensive, and unilateral action therefore faces yet greater difficulties than in the example of climate change.

Efforts at international cooperation on terrorism go back to the first half of the 20th century and were intensified in the 1970s. However, disagreement on the definition of terrorism limited progress in rule-making to a set of narrowly circumscribed types of terrorist acts.[165] In the 1990s, greater convergence facilitated a broader approach which 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 (the Financing Convention). The convention requires states to criminalise various forms of financial assistance for terrorist acts, defines jurisdictional rules and provides for judicial and law enforcement cooperation among its parties.[166] 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, it extended the freeze to the funds of bin Laden and his associates.[167]

If these measures were prompted by the attacks on the US embassies in Tanzania and Kenya in 1998, the attacks of 11 September 2001 in New York and Washington, DC, triggered a wave of new efforts.[168] The Financing Convention had only been ratified by four states by that time, and in an unprecedented legislative move, the Security Council, in its Resolution 1373, rendered most Convention provisions mandatory for all UN member states and established an oversight mechanism under its aegis.[169] Today, the Convention has 179 parties[170] and the Security Council's implementation scheme has grown considerably.[171] The

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[164] See Clunan (2006) 570-4; Richard Barrett, 'Time to Reexamine Regulation Designed to Counter the Financing of Terrorism' (2009) 41 *Case W Res J Intl L* 7 at 11.

[165] See Ben Saul, *Defining Terrorism in International Law* (OUP, 2008) ch 3; Christian Walter, 'Terrorism' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP, 2011); also Rosalyn Higgins & Maurice Flory (eds), *Terrorism and International Law* (Routledge, 1997).

[166] See Roberto Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 491.

[167] SCR 1267 (1999); 1333 (2000).

[168] See in general, Ilias Bantekas, 'The International Law of Terrorist Financing' (2003) 97 *Am J Intl L* 315; Clunan (2006); Jae-myong Koh, *Suppressing Terrorist Financing and Money Laundering* (Springer 2006); Thomas J Biersteker, Sue E Eckert & Peter Romaniuk, 'International initiatives to combat the financing of terrorism' in Biersteker & Eckert (2008) 235; Michael Levi, 'Combating the Financing of Terrorism' (2010) 50 *Brit J Criminol* 650.

[169] SCR 1373 (2001).

[170] http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en

[171] See Eric Rosand and Alistair Miller, 'Strengthening International Law and Global Implementation' in in David Cortright and George A Lopez (eds), *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat* (MIT Press, 2007) 51; William B Messmer & Carlos L Yordán, 'A Partnership to Counter International Terrorism: The UN Security Council and the UN Member States' (2011) 34 *Studies in Conflict & Terrorism* 843 at 846-51.

Counter-Terrorism Committee (CTC), a committee of the Council itself, is aided by a standing Counter-Terrorism Executive Directorate (CTED) and promulgates best practices, codes and standards on terrorist financing, provides technical assistance to member states, and assesses progress in the implementation of SC resolutions. Despite its broad powers, the CTC has chosen a relatively cautious approach, seeking not to antagonise governments and emphasising norm creation, persuasion and capacity-building.[172] Its work is complemented by the more operational role of the committee administering the sanctions against Al-Qaeda, which centrally designates suspected Al-Qaeda members and supporters and supervises the financial restrictions (and a travel ban) imposed on them.[173]

International cooperation has also taken place in more informal channels, for example in the Egmont Group, a transnational network of financial intelligence units of initially twenty, now more than one-hundred countries; or the Wolfsberg Group which brings together eleven globally active banks with the purpose of setting industry standards.[174] The most prominent role in the informal realm is that of the Financial Action Task Force (FATF), originally created to tackle money laundering, but after 2001 also tasked with developing policies on terrorism financing.[175] Its eight (later nine) 'Special Recommendations on Terrorist Financing' support the UN standards and expand and specify them in different directions.[176] They have been complemented by numerous best practices and guidance documents[177] and have been integrated into the broader set of rules on money laundering in 2012.[178] Compliance with the recommendations is promoted through various channels: the UN Security Council has urged UN members to implement FATF standards[179]; the World Bank and IMF have used them as a basis in their regular assessments of countries' performance[180]; and they are often linked to bilateral assistance

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[172] 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' (2008) 43 *Cooperation & Conflict* 7.

[173] See, eg, Eric Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions' (2004) 98 *Am J Intl L* 745.

[174] See, eg, Koh (2006) 143-154.

[175] See Kathryn L Gardner, 'Terrorism Defanged: The Financial Action Task Force and International Efforts to Capture Terrorist Finances' in Cortright & Lopez (2007) 157; Biersteker et al, Int'l Inititatives (2008) 239-41; Yee-Kuang Heng & Ken McDonagh, 'The other War on Terror revealed: global governmentality and the Financial Action Task Force's campaign against terrorist financing' (2008) 34 *Rev Int'l Stud* 553; Ian Roberge, 'Financial Action Task Force' in Thomas Hale & David Held (eds), *Handbook of Transnational Governance* (Polity, 2011) 45.

[176] http://www.fatf-gafi.org/topics/fatfrecommendations/documents/ixspecialrecommendations.html.

[177] http://www.fatf-gafi.org/documents/guidance/. On the FATF's emphasis on learning and facilitation see Heng & McDonagh (2008) 568-70.

[178] http://www.fatf-gafi.org/topics/fatfrecommendations/documents/fatfrecommendations2012.html.

[179] See UN SC Res 1617 (29 July 2005).

[180] See Koh (2006) 170-7; Biersteker et al, Int'l Inititatives (2008) 241-2.

schemes.[181] The FATF has also established a compliance mechanism itself. Initially quite confrontational in nature (and therefore highly controversial), it took a more cooperative approach in the mid-2000s.[182] However in the late 2000s, apparently at the request of the G-20, it returned to 'naming and shaming' certain countries with compliance problems, and to recommending counter-measures against countries with serious problems (primarily Iran and North Korea).[183]

International efforts at countering the financing of terrorism, and at bringing governments to engage in their own effective action against it, may have had considerable success – debate reigns on how much success and how to measure it – but it necessarily leaves gaps and has difficulties in overcoming resistance or inertia in countries which do not see enough benefits for themselves while being faced with high compliance costs.[184] It can be expected then that those governments for whom the issue is of higher priority would seek not only to strengthen the cooperative regime but also to add their own, unilateral efforts to it. As pointed out above, unilateralism faces practical obstacles in this area; but to an extent it is also a normal part of the regime today. The Financing Convention, like other terrorism-related conventions, typically predicates jurisdiction on territoriality or nationality, but independently of such factors mandates prosecution by a country 'whether or not the offence was committed in its territory' if the country refuses to extradite an alleged offender.[185] Both the Convention and SC resolution 1373 demand government action on funds implicated in such offences regardless of a particular jurisdictional link; and especially the SC resolution requires countries to freeze all the funds of persons involved in terrorist

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[181] See James Thuo Gathii, 'The Financial Action Task Force and Global Administrative Law' (2010) *Journal of the Professional Lawyer* 197 at 208.

[182] See Gardner (2007) 170-1. 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' (2008) 2 *Regulation & Governance* 459 at 462-6.

[183] See Hülsse (2008) 473; Roberge (2011) 47; FATF, Public Statement of 19 October 2012, 'High-risk and non-cooperative jurisdictions', 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 FATF, 'Statement on Turkey', 19 October 2012, at http://www.fatf-gafi.org/topics/fatfgeneral/documents/outcomesoftheplenarymeetingofthefatfparis17-19october2012.html.

[184] On the impact of the global regime and its limits, see Clunan (2006) 578-83; Biersteker et al (2008) 243-9; Heng & McDonagh (2008) 564-72; Messmer & Yordán (2011) 851-8; Jeanne K Giraldo & Harold A Trinkunas, 'Terrorist Financing: Explaining Government Responses' in Giraldo & Trinkunas (2007) 282 at 291-4; also Richard Barrett, 'Preventing the Financing of Terrorism' (2012) 44 *Case Western Reserve Journal of International Law* 719.

[185] Financing Convention, Articles 7, 10. On the quasi-universal character of such jurisdiction see Cedric Ryngaert, *Jurisdiction in International Law* (OUP, 2008) 104-6. The Convention seeks to avoid jurisdictional conflict by an obligation of countries to 'strive to coordinate' their actions, see Article 7(5).

offences, wherever the funds or offences are located.[186] Under international law, countries are thus entitled to seize the funds of all those persons and entities they deem to fall into this category, and some countries, especially the US, have made ample use of this broad licence.[187] The United States has also in other respects extended the reach of its financial sector regulation beyond traditional jurisdictional boundaries. It has, for example, required foreign banks with correspondence accounts in the US to disclose foreign bank records, including by subpoena, in a way which 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 terrorism financing abroad, and it has barred foreign banks from accessing the US financial system as a result.[188] These actions are linked to US territory through the direct regulatory target – operation on US financial markets – but as they are geared at banking practices that take place entirely abroad, they could raise concerns on jurisdictional grounds in similar ways as, for example, extraterritorial securities regulation does.[189] Yet the permissive regime of the Financing Convention and SC resolutions, coupled with favourable political circumstances, seem to have led to widespread acquiescence.[190]

In a reconfigured way, concerns over jurisdictional limits have provoked stronger criticism with a view to the FATF and its practice of blacklisting countries. The FATF is a classical club organisation, created by the OECD and G-7, and until the late 1990s with no members from outside this exclusive circle. Since then, it has added a number of 'strategically important' countries, such as Brazil, Russia, India, South Africa and China, but it still stands at only 36 members.[191] Its confrontational compliance procedures of the early 2000s were directed at non-members – most aggressively at the Seychelles, Nauru, and Myanmar, but also at Egypt, Russia, and a number of offshore jurisdictions, especially in the Caribbean.[192] For the targets, the blacklisting process appeared as an illegitimate intrusion; as the Chairman of the Caribbean Financial Action Task Force (CFATF) stated, it seemed

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[186] Financing Convention, Article 8; SC Resolution 1373, para 1 (c).

[187] On the US, see Jimmy Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Edward Elgar, 2008) ch 8. For a relatively permissive view on jurisdictional limits to US action see Anthony J Colangelo, 'Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law' (2007) 48 *Harv J Intl L* 121.

[188] See Anne L Clunan, 'U.S. and International Responses to Terrorist Financing' in Jeanne K Giraldo & Harold A Trinkunas (eds), *Terrorism Financing and State Responses* (Stanford University Press, 2007) 260 at 265 at 277-9; Sue E Eckert, 'The US regulatory approach to terrorist financing' in Biersteker & Eckert (2008) 209 at 209-17; Gurulé (2008) 156-72.

[189] On jurisdictional issues in securities regulation see Ryngaert, Jurisdiction (2008) 77-8; Detlev F Vagts, 'Extraterritoriality and the Corporate Governance Law' (2003) 97 *Am J Intl L* 289.

[190] But see also Moyara de Moraes Ruehsen, 'Arab Government Responses to the Threat of Terrorist Financing' in Giraldo & Trinkunas (2007) 152 at 164, 167, on skepticism and charges of bias against the US listing process.

[191] On the 'club' character see Drezner (2007) 142; Hülsse (2008) 461.

[192] See Drezner (2007) 142-4; Hülsse (2008) 461-2.

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'.[193] Some governments complained that the coercive character of the process was a violation of their sovereign right to develop their own economic policies.[194] There was, of course, no open coercion, but blacklisted jurisdictions faced the threat of sanctions ranging from advisories to financial institutions to prohibitions of financial transactions with FATF members, which were, after all, the most potent financial markets in the world. Unsurprisingly, most targets felt the need to comply with FATF 'recommendations', and the blacklisting process was widely seen as extraordinarily effective in inducing change.[195] Even if it was later replaced by less intrusive procedures, the exclusive character of FATF decision-making has not been fundamentally altered. Many non-members are now organised in FATF-style regional bodies (FRSBs), the creation of which the FATF actively promoted; most of the FRSBs, in turn, are 'associate members' of the FATF, which gives them a stronger role than that of mere observers or non-members.[196] 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.[197] However, most non-members of the club are still far from having a relevant say in the process.

The choice of an informal forum, such as the FATF, can be read as a flight from a broader multilateralism which, as in our previous examples, may have seemed unworkable or at least unlikely to produce the standards desired by the most powerful players.[198] Yet here again, it does not formally challenge the consensual structure of international law; it merely subverts it. 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, adding new areas to the SC's purview (e.g., internal conflicts) and new tools to its instrumentarium (e.g., the creation of criminal tribunals and of transitional territorial administrations).[199] The fight against terrorism paved the way for a further, and very significant, leap. If previously the Council's powers seemed to be clearly limited to circumscribed action on particular conflicts and countries, the SC now turned to legislative action that set rules for all UN member states without a limit as to duration or situational scope. It thereby replaced the treaty-making process, which in comparison appears as cumbersome, slow and ineffective, and provided

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[193] Quoted in Huelsse (2008) 464.

[194] See Huelsse (2008) 464-5.

[195] See Drezner (2007) 142-5; Hülsse (2008) 462; Heng & McDonagh (2008) 565-8; JC Sharman, 'The bark is the bite: International organizations and blacklisting' (2009) 16 *Review of International Political Economy* 573; also Giraldo & Trinkunas (2007) 287-8.

[196] See Koh (2006) 177-88; Gardner (2007) 168-70; Hülsse (2008) 470; Heng & McDonagh (2008) 571-2.

[197] http://www.fatf-gafi.org/topics/fatfrecommendations/documents/reviewofthefatfstandards.html.

[198] See the account in Drezner (2007) 142; Gathii (2012) 203-4.

[199] See supra n [xx].

the world with a central rule-making body whose absence is so often decried.[200] The particular crisis situation which allowed for this leap – the days and weeks after the 11 September 2001 attacks – helped to avoid principled concerns about process and powers; in this situation, governments did not want, or could not afford, to stand in the way of effective action.[201] Later attempts at similarly broad legislation have met with stronger criticism, and this may have prevented the consolidation of broader powers as a matter of law.[202] In a future crisis situation, though, pointing to these earlier examples will make it much easier for the Council to act in a similar way.

The SC has sought to mitigate the impact of this shift in law-making through substantive and procedural means. In Resolution 1373, as mentioned above, it largely drew upon a body of rules developed by the General Assembly and enshrined in the Financing Convention.[203] The process leading up to the resolution, however, was short and dominated by the permanent members, as is usual in the Council. A wider set of voices was included at the implementation stage, partly for reasons of effectiveness at a point when the implementation process had stalled.[204] For its next attempt at legislation, almost three years later, the Council invited significantly broader participation, sought to include a wider range of actors at the preparation stage, and held an open debate with contributions from more than fifty governments before adopting the final resolution.[205] This did not assuage all critics, but over time, the resulting regime has found broad support and unanimous reaffirmation in the SC.[206]

Overall, efforts at countering the financing of terrorism have not led to a wholesale remaking of the international legal order, but they have exerted pressures in various ways. Such pressures have remained relatively limited as regards jurisdictional rules, partly because of a permissive conventional 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 marginalised by a turn to both informal and institutional law-making. The latter has given rise to an expansion of institutional powers in the UN Security Council, well beyond what would have been contemplated just a few years earlier. The channels of law- and decision-making on terrorism financing have thus become increasingly 'club'-like, as both the SC and

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[200] See Paul C Szasz, 'The Security Council Starts Legislating' (2002) 96 *Am J Intl L* 901; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *Am J Intl L* 175.

[201] See Ian Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit' (2008) 102 *Am J Intl L* 275 at 284. The reaction in the UN General Assembly has, however, been described as 'tepid' by Szasz (2002) 903. See also the mixed picture in Cathérine Denis, *Le pouvoir normatif du Conseil de Sécurité des Nations Unies: portée et limites* (Bruylant, 2005) 317-40.

[202] See Krisch, 'General Framework' (2012) 1253-4.

[203] See Szasz (2002) 903; but also the nuances in Denis (2005) 151-4.

[204] See Johnstone (2008) 284-9.

[205] See Johnstone (2008) 290-4; also Talmon (2005) 177-8, 186-8.

[206] See SC Res 1977 (20 April 2011).

the FATF are bodies with limited membership, dominated by a few central players. As we have seen, this shift has 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.

III. Beyond and Around Consent: A Picture of Change

For all their diversity, the three case studies in the previous part reveal the contours of a broader picture. They suggest challenges to international legal structures especially as regards jurisdictional boundaries and institutional powers, and they signal that treaty law, itself not formally challenged, is increasingly sidelined through recourse to informal fora and institutional law-making. Taken together, as I will argue below, they point to the emergence of a more hierarchical order, though one 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 present when describing and trying to understand processes of change in this paper. Three case studies can only provide a partial glimpse into much broader practices of global governance, and our findings in them 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, disagreement is more limited, or existing institutional structures are more accommodating. Still, the findings in this paper may indicate a trend that could foreshadow developments in other areas in which global public good problems become more pressing over time.

1. An Emerging Picture

(Limited) Challenges to International Legal Categories

Direct challenges to central categories of international law in our case studies have remained circumscribed. Treaty law does not seem to have come under significant pressure at all; the key role of consent in the creation of new rules, though obviously impeding efforts at law-making, continues to be firmly anchored. If anything, processes of treaty-making may have moved towards broader and firmer inclusiveness, making multilateralism more robust.[207] Mirroring developments in international environmental negotiations more generally[208], multilateralism in climate change negotiations now standardly involves a broad set of actors beyond the 195 state parties to the UNFCCC, especially non-governmental organizations of

[207] See the qualitatively demanding account of multilateralism in John G Ruggie, 'Multilateralism: the Anatomy of an Institution' (1992) 46 *Int'l Org* 561.

[208] See, eg, Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 *Harv Envt'l L Rev* 537. See also Boyle & Chinkin (2007) ch 2 on the increasing participation of non-state actors in international law-making more broadly.

various kinds. The 2009 Copenhagen conference had more than 40,000 registered participants as a result.[209] Negotiations on an international antitrust regime in the WTO were structured by the organization's broad membership and established negotiation practices, in particular settled groups of governments formed through prior adversarial encounters.[210] Such pre-existing default structures do not eliminate logrolling or soft coercion, but they limit the impact of such strategies compared to negotiations in less established or smaller fora. However, in the climate change context we have observed a qualification of the consensual structure in one respect: consensus decision-making in the Conference of the Parties has on some occasions been regarded as possible despite the open objections of single states.[211] This trend is not settled, but it may signal a greater readiness for states to move to (highly qualified) majority voting on pressing issues on which otherwise agreement could not be found, even if majority voting is not foreseen by the rules of procedure.[212] Still, the respective decisions did not purport to create binding obligations for states, nor have there been claims for them to have gained the force of custom.[213] Given the high stakes in climate change, they represent a very limited concession to effectiveness.

Institutional powers have seen greater challenge, especially as regards Security Council powers on anti-terrorism 'legislation' and, to a lesser extent, climate change regulation. In both cases, Council action (or, as regards climate change, merely discussion) was justified as necessary to deal with a global threat[214] – precisely the 'global public goods' perspective that has framed our inquiry here. Yet apart from the SC, there has been little movement. On antitrust, no central institution was available, and the WTO – the site of some hopes – was eventually not used. There was agreement that this would have required a delegation of powers through a new and specific treaty norm, rather than through a mere interpretative move, and such new delegation turned out to be politically out of reach. On climate change, a set of institutions existed under the UNFCCC regime, but there was no move to harness them for broader purposes of law-making, except perhaps for the

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[209] See Bodansky (2010) 230.

[210] 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' (2003) 43 *Virginia J Intl L* 933 at 953-6.

[211] See supra text at n [xx].

[212] Except where otherwise provided, decision-making in the CoP/CMP operates by consensus; see Rajamani (2011) 515. Deviations from consensual decision-making are not infrequent in international institutions; see Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed, 2009) 206-11; Philippe Sands & Pierre Klein, *Bowett's Law of International Institutuions* (5th ed, 2001) 261-75. They are less frequent in the context of multilateral treaty conferences; see Boyle & Chinkin (2007) 157-60. CoPs are hybrids between both institutional types; see Brunnée (2002) 16; also Robin R Churchill & Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 *Am J Int'l L* 623.

[213] On the relation of treaties, consensus and custom, see Boyle & Chinkin (2007) 234-8.

[214] See, eg, UNSC Verbatim Record (18 January 2002) UN Doc S/PV.4453 on anti-terrorism legislation; UNSC Verbatim Record (17 April 2007) UN Doc S/PV.5663 on climate change.

establishment of 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. This may still have transgressed Kyoto provisions, but it hardly represents a broader challenge to the boundaries of law-making powers for international institutions. We may see some such challenges in other areas, for example that of infectious diseases[215], and it is probably right to emphasize the law-making functions of international organisations in contemporary global governance more generally.[216] But apart from judicial institutions[217], much of this law-making remains informal, and where 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 somewhat special case.

Somewhat greater movement is visible when it comes to jurisdictional rules. In all three case studies we have found examples of challenges to classical territorially-based boundaries of prescriptive jurisdiction. They 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 does not embrace a 'global public goods' justification directly, and US courts have recently emphasised the (at least theoretical) limitation of their approach, which excludes US action when direct effects are solely produced elsewhere.[218] In the area of climate change, the EU stance on international aviation similarly contains an extraterritorial element, not directly justified as such by the European Court of Justice. But as we have seen, the Court's Advocate-General relied on the effects doctrine, reformulated for a public 'bad' – CO_2 emissions – the production of which has effects on all countries.[219] The strength of reaction against the EU measures highlights the significance of the shift, but also its highly unsettled character.

The extent and intensity of these challenges may seem limited when seen in the light of the tension between the provision of global public goods and the ineffectiveness of international law so often stressed by observers.[220] But the picture would not be complete if

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[215] See D. Fidler, *SARS: Governance and the Globalization of Disease* (Palgrave, London, 2004) 132-45.

[216] See José E Alvarez, *International Organizations as Law-Makers* (2005).

[217] See Alvarez (2005) ch 9; Boyle & Chinkin (2007) ch 6; Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance* (2012).

[218] See n [xx] (Empagran). On a similar turn in securities regulation, see Merritt B Fox, 'Securities Class Actions Against Foreign Issuers' (2012) 64 *Stanford Law Review* 1173 at 1243-63.

[219] See above [xx].

[220] See above [xx].

it only took into view direct, 'frontal' attacks on international legal structures and not also the ways in which these structures 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 were probably least central to antitrust regulation, where the OECD and the International Competition Network supply a certain degree of coordination and mutual learning but play a secondary role in a structure dominated by unilateral, extraterritorial forms of regulation. Still, these fora have come to provide a channel for y cooperation in lieu of formal multilateral rules and institutions that failed to gain sufficient traction in the WTO context. 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 (MEF) 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 the international financial institutions. The resulting institutional landscape may be summarized as below:

Table 3: Forms of Non-Consensualism in Three Issue Areas (AT: antitrust, CC: climate change, FT: financing of terrrorism)		
	Formal	*Informal*
Collective	Security Council (FT), [Kyoto Protocol CoP (CC)]	FATF (FT)
Multilateral		ICN (AT), MEF (CC), Copenhagen Accord (CC)
Unilateral	Extraterritoriality in US (AT, FT) & EU (AT, CC)	

Elements of Hierarchy

The presence and prominence of informal institutions and norms in global governance has long been documented and analysed.[221] Much of the work in this area has emphasised the functional benefits of informality, especially its greater speed and flexibility, the lower sovereignty costs it entails, and its availability to a greater range of actors than the formal

[221] See, eg, Abbott & Snidal (2000); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004); Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota L R* 706; Joost Pauwelyn, Ramses Wessel & Jan Wouters (eds), *Informal International Lawmaking* (2012); Felicity Vabulas & Duncan Snidal, 'Informal Intergovernmental Organizations (IIGOs)', Paper presented at the APSA Annual Meeting 2011, http://ssrn.com/abstract=1900274.

multilateral process.[222] Typically, these analyses assume that the range of cooperating parties remains the same across institutional forms.[223] 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 of informal structures, noted in some earlier analyses, namely their susceptibility to greater exclusivity – to 'minilateral' forms of cooperation.[224] For the Copenhagen Accord, the MEF and the FATF, this exclusivity was certainly of major appeal to powerful actors and promised them more favourable outcomes than classical multilateralism.

If we see this club informality in conjunction with the shift towards unilateralism in antitrust and towards 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 US and the 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 4, is uneven, and it combines consolidated and formal with unsettled and informal authority. In any event, it is very different from cooperation in the classical forms of international law, with their (at least formal) promise of sovereign equality.

Table 4: Dimensions of Non-Consensualism in Three Issue Areas
(AT: antitrust, CC: climate change, FT: financing of terrrorism)

	Formal	*Informal*
Egalitarian	[Kyoto Protocol CoP (CC)]	ICN (AT)[225]
Hierarchical	Security Council (FT), Extraterritoriality in US (AT, FT) & EU (AT, CC)	FATF (FT), MEF (CC), Copenhagen Accord (CC)

[222] See Charles Lipson, 'Why Are Some International Agreements Informal?' (1991) 45 *International Organization* 495; and the overview in Shaffer & Pollack (2010) 719.

[223] See, eg, the analysis in Abbott & Snidal (2000).

[224] See Slaughter (2004) 227-30; Koppell (2010) [xx]; Viola, Snidal & Zuern (2013) [xx].

[225] The ICN is classified here as 'egalitarian' because of its inclusive membership and consensus-based decision-making. However, commentators also highlight the factual and institutional preponderance of a small group of developed countries in the workings of the ICN. See Fox (2009) 168-71, and Marie-Laure Djelic, 'Transnational Communities and their Role in the Dynamics of Global Governance: The Case of Competition' (2013), manuscript, on file with the author.

The semi-formal structure of the new order is characterised by largely concentric circles of decision-makers – while the US is always part of the 'club', the EU or key European governments are members in most cases (unilateral antitrust, the Security Council, MEF, FATF). Russia and China are central because of their permanent seats on the Security Council and more recently as members of the MEF and the FATF (which they entered only in the 2000s). India, Brazil and South Africa are also now part of the MEF and the FATF, and together with the US and China 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.[226] Australia, Canada, Japan, South Korea and Mexico are also members of the FATF and the MEF. The core decision-makers are quite similar in most of these institutions (and others[227]) – typically the G-7 plus the BRICS countries. Their factual influence is translated into formal or informal institutional structures, establishing hierarchies, though mostly stopping short of creating a truly 'legalised' hegemony.[228]

The rise of non-consensualism, whether in formal or informal guise, necessarily creates more exclusive decision-making structures. It reduces the number of decision-makers, though typically not in an egalitarian fashion but in a way that does not imply a loss of control for the most powerful players. As a result, most forms of non-consensualism that we have observed eliminate consent only for the many, not for the few.[229]

Procedural Mitigation: Towards 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 a host of mechanisms of what we might call 'procedural mitigation', mainly through forms of representation and consultation of outsiders.

*Representation i*s, of course, 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,

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[226] BRICS is a shorthand for Brazil, Russia, India, China and South Africa. On their emergence in world politics see, eg, Andrew Hurrell, 'Hegemony, liberalism and global order: what space for would-be great powers?' (2006) 82 *Int'l Affairs* 1.

[227] On the WTO, see Amrita Narlikar, 'New powers in the club: the challenges of global trade governance' (2010) 86 *Int'l Affairs* 717. On recent quota 'rebalancing' at the IMF see http://www.imf.org/external/pubs/ft/survey/so/2010/NEW102310A.htm.

[228] 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 (2007); David A Lake, *Hierarchy in International Relations* (2009); Ian Clark, *Hegemony in International Society* (2011).

[229] This recalls the justification of a privileged position for the permanent members on the UN Security Council. The UK, for example, argued that the veto power merely continued the unanimity requirement that governed the Council of the League of Nations, while removing unanimity for the non-permanent members for the sake of effective decision-making. See Simpson 2004, [xx].

the lack of continuity in their work on the Council, and the fact that decision-making processes are typically centered on the permanent members or a subset of them. Still, the elected members wield influence through their vote, and they can play important informational roles and channel the views of a wider set of governments into Council deliberations.[230]

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'.[231] As in the context of climate change negotiations, in the shift from the G-8 to the G-20, or recent IMF reforms, including countries such as China, India, Brazil and South Africa helps to integrate the most influential players, but it is also intended to ensure a greater 'virtual' representation of countries, especially in the developing world, that may feel closer – culturally, economically, or strategically – to these newcomers than to the Western-dominated old core.[232] In a similar vein, the MEF has established a practice of inviting around ten (partly varying) countries from different regions to participate in its meetings.[233]

A second device to ensure broader representation in the FATF is, as mentioned, the creation and inclusion of FATF-style regional bodies (FSRBs). These bodies may initially have been conceived mainly as 'transmission belts' for FATF policies in different regions, aiming at the diffusion of the norms and ideas and the creation of regulatory networks to facilitate implementation on the ground.[234] Over time, the FSRBs have created more self-confident constituencies whose positions are sometimes at odds with those of the FATF itself. The above-mentioned critique of the blacklisting practice by the Caribbean Financial Action Task Force is an example here.[235] Initially merely 'observers' in the FATF framework, most FSRBs now hold the status of 'associate members', which suggests a more meaningful participation in decision-making, including the possibility of attending (though not voting

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[230] See Kishore Mahbubani, 'The Permanent and Elected Council Members' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner, 2004) 253.

[231] See Hülsse (2008) 469.

[232] See Jared Wessel, 'Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law' (2006) 13 *Widener L Rev* 169 at 183. On the G20, see Andrew F Cooper, 'The G20 as an improvised crisis committee and/or a contested 'steering committee' for the world' (2010) 86 *Int'l Affairs* 741; Andrew F Cooper, 'The G20 and Its Regional Critics: The Search for Inclusion' (2011) 2 *Global Policy* 203.

[233] See the accounts of MEF meetings at http://www.majoreconomiesforum.org/past-meetings/.

[234] See also the description of their functions in the FATF 2012 Mandate, para 12, http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf.

[235] See n [xx] above.

at) plenary meetings.[236] The FATF claims to have elaborated the latest revision of its key recommendations 'in close co-operation' with FSRBs, but it is difficult to gauge how influential the role of the FSRBs has really been.[237]

Consultation blends with representation as regards FSRBs and their status as associate members, but it also goes beyond it. Since the early 2000s, the FATF has undertaken efforts at increasing its transparency and procedural openness, and beginning from its 2001-3 revision of its key recommendations, it has solicited input from outsiders.[238] This is in line with a growing trend towards public consultations as a standard tool in global regulatory governance[239] and was expanded by the FATF in the latest round of revisions, during which it issued two public consultation papers, provoking 140 written responses.[240] However, the focus of these consultations was the private sector, which is reflected in the fact that they were accompanied by meetings of the body's 'private sector consultative forum'.[241] On the other hand, the FATF also conducts multi-stage consultations with those jurisdictions it considers including in its 'public statement' of high-risk and non-cooperative jurisdictions; in this case, the focus is solely on governments.[242]

The FATF has thus developed specific, formalised strategies for linking up with its different outsider constituencies. Procedural tools in other global governance contexts are less differentiated; consultations often serve to gather views of both the private and governmental sectors.[243] In settings such as the UN Security Council, on the other hand, consultations are geared exclusively at governments. As we saw in Part IV, the SC sought to cushion its move into new issue areas and towards broader legislative powers by inviting non-member governments to speak in open debates, and in both cases, more than fifty governments made use of this opportunity, including representatives of broader groupings,

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[236] FATF 2012 Mandate, http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf.

[237] See the 2012 Recommendations, http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20(approved%20February%202012)%20reprint%20May%202012%20web%20version.pdf, 8.

[238] See Hülsse (2008) 471.

[239] See Benedict Kingsbury, Nico Krisch & Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15 at 37-9.

[240] http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/FATF%20Response%20to%20the%20public%20consultation%20on%20the%20revision%20of%20the%20FATF%20Recommendations.pdf, paras 1-3.

[241] See http://www.fatf-gafi.org/media/fatf/documents/publicconsultation/FATF%20Response%20to%20the%20public%20consultation%20on%20the%20revision%20of%20the%20FATF%20Recommendations.pdf, para 1.

[242] See http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html. On the procedure in the more confrontational variant of the early 2000s, see Wessel (2006) 176.

[243] See Michael S Barr and Geoffrey P Miller, 'Global Administrative Law: The View from Basel' (2006) 17 *EJIL* 15 at 24-8, on the Basel Committee.

such as the Non-Aligned Movement.[244] The Council seemed intent on replicating General Assembly debates – without giving non-members a right to vote.

Consultations also play a role when it comes to the redefinition of jurisdictional limits, especially as regards the exercise of extraterritorial jurisdiction in the area of antitrust. As noted above, the OECD has issued a widely recognised recommendation to the effect that governments should notify their counterparts in another country whenever an investigation or proceeding 'may affect important interests' of the latter.[245] Alternatively, the government of an affected country can request consultations on its own initiative, and its views should be given 'full and sympathetic consideration' by the government that takes the action.[246] Both governments should, according to the recommendation, 'endeavour to find a mutually acceptable solution in the light of the respective interests involved'.[247] If this sounds far-reaching and cooperative, the OECD document also highlights at various points the 'full freedom of ultimate decision' of the country that has begun the investigation, and cooperative procedures have not always been able to avoid friction in substance.[248]

In climate change unilateralism, consultation may play a similar, limited role. The EU emissions trading regime foresees that if a third country adopts measures to tackle CO_2 emissions from aviation, consultations should be held so as to determine to what extent EU measures should be amended.[249] The EU has declared itself to be 'ready to engage constructively in such consultations so as to reach agreement'[250], but so far no amendments have taken place (though the EU has suspended its measure awaiting the outcome of international negotiations). If this unilateralism is 'contingent'[251], it is still unilateralism – as in antitrust, these consultations concern only the implementation of the policy, not its definition. During the policy-making stage, the EU held a public consultation on extending emissions trading to aviation, but it was apparently not used for giving voice to the views of foreign governments.[252]

Neither representation nor consultation may so far have matured into consolidated (or legally required) elements of global governance; too varied are their forms as currently expressed in political practices. Quite significantly, though, we can observe them in most of

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[244] See above n [xx].

[245] See OECD Doc C(95)130/FINAL para 1.

[246] OECD Doc C(95)130/FINAL para 4.

[247] OECD Doc C(95)130/FINAL para 6.

[248] See, eg, Eleanor Morgan & Steven McGuire, 'Transatlantic divergence: GE–Honeywell and the EU's merger policy' (2004) 11 *Journal of European Public Policy* 39.

[249] Art 25a Directive 2003/87/EC.

[250] See Scott & Rajamani (2012) 471.

[251] Scott & Rajamani (2012).

[252] See European Commission, 'Reducing the Climate Change Impact of Aviation: Report on the Public Consultation March-May 2005' pp 4-6, 37-9, at http://ec.europa.eu/clima/policies/transport/aviation/docs/report_publ_cons_en.pdf (accessed 18 July 2012).

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 legitimatory strategies to allay concerns about illegitimate decision-making in the club structures that are increasingly visible in global cooperation.[253] For most states, participation in this mode is far less effective than in classical multilateralism, but they may not have much of an institutional choice. Bit by bit, consent is replaced by representation and consultation.

2. Understanding Change

Different accounts of change would seem to fit the developments I have described. One would be functionalist and would see this transformation driven primarily by changing needs – as in the global public goods discourse – conditioned by the political context in each area. Another would be realist and would regard power as the determining factor: in this reading, the emergence of hierarchies is an indication that institutional structures in areas that matter follow the distribution of power among states. A third would be historical-institutionalist and would stress the important role of existing institutions in shaping the pathways of change.[254]

None of these accounts seems to be able to explain the direction of institutional development alone. A functionalist account hardly suffices to explain the relative lack of non-consensual structures compared to what one would expect, given the need for cooperation in the areas studied. Many of the structures that have emerged are informal and uni- or plurilateral, and though they may make a contribution to problem-solving[255], they are often a far cry from what effective institutions would look like, in particular as regards climate change. And they do not appear as fundamentally different, or indeed stronger, than structures in areas with less pressing cooperation problems.[256] Functionalism may have greater purchase in the long term[257], but its explanatory power in the time frame studied here is limited. A realist approach may help to account for some of its limitations: 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, as in the case of the UN Security Council on terrorism financing. Otherwise, they have preferred unilateral or informal club structures, even if these promised to be less effective at

[253] See also Eckersley (2012) for a normative argument in favour of an 'inclusive' minilateralism with greater elements of representation.

[254] See the discussion above, section I 3.

[255] Informal norms and institutions, in particular, are often seen to provide benefits in terms of speed and flexibility; see text supra at note [xx].

[256] For an overview of institutional structures, see only JGS Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (2010). The research design behind this paper, with its 'most likely' caser study structure, however, not aimed at dissecting the strength of public goods explanations from alternative ones (see supra [xx]).

[257] See Trachtman 2013 [246-8].

problem-solving, and this has conditioned the institutional supply in the issue areas under analysis. To an extent, this seems to confirm Daniel Drezner's conclusion that great power constellations are the driving force behind global governance structures.[258]

Still, the realist account leaves us uncertain about the factors behind much of the institutional variation we have observed. It does explain why powerful states would shun egalitarian institutions and equal obligations[259], but it has greater difficulty with the question of why there is so little formal inequality in the global system. Realism would make us expect institutional design to follow the distribution of power, but most unequal structures we have seen to emerge are unilateral or informal, not firmly institutionalized on a global level – even in areas where the most powerful actors agree. It is plainly difficult to create new unequal institutions[260], just as it is difficult to create formally unequal obligations in treaties[261], and this may be due to ideational factors, such as a sovereign equality norm, but also to institutional contexts. Because international law typically requires consent for formal changes, it creates many veto players that can derail institution-making efforts. Where institutions already embody privileges for the powerful, they become preferred sites for law-making initiatives of all kinds, but using them beyond their traditional scope may provoke significant protest and efforts at delegitimation, as has been the case with the Security Council in the area of climate change.[262] Where unequal institutions do not exist, powerful actors find it far more costly to tap the resource of formally binding international law, and they turn to unilateral solutions (their own, domestic law) or informal structures (soft law) instead. This may be especially true where formal law-making mechanisms come with special hurdles. For example, in international environmental negotiations, the number of recognized players, procedural transparency and the level of inclusiveness have become very high, which not only makes progress difficult in general but also places obstacles in the way of accommodating special interests of powerful states.[263] The same may be said, though to a lesser extent, to negotiations in the WTO framework.[264] This institutional rigidity may drive powerful actors to choose other fora – more restricted and less transparent settings for formal law-making, or informal structures that come with fewer settled procedures.[265]

These observations point to a significant role of path dependence and to the explanatory power of historical institutionalism, which would make us expect a turn to new

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[258] Drezner 2007.

[259] See also Krisch 2005.

[260] Delegation of powers to international institutions in multilateral treaties rarely involves formal voting privileges for powerful countries; see Koremenos (2008) 165-8. Privileges are typically of an informal nature; see Jacob Katz Cogan, 'Representation and Power in International Organizations: The Operational Constitution and its Critics' (2009) 103 *AJIL* 209.

[261] See Krisch 2003; Simpson 2004.

[262] See above [xx].

[263] See above [xx].

[264] See above [xx].

[265] See also fn [xx] above (Hawkins; Viola et al)

institutional settings – 'layering' – when existing institutions are too rigid or blocked by veto players.[266] Yet such new settings cannot always be shaped freely either. First, there may be limits regarding the choice of easier law-making fora within international law. Broadly shared expectations (in the environmental context), first moves (as that of the EU into the WTO in the antitrust case[267]) or social pressures (such as the protests against the negotiation of an investment agreement in the OECD[268]) may prevent a shift away from burdensome multilateral settings. Secondly, procedures cannot be defined freely either. As we have seen, outsiders have quite consistently been granted some form of access through representation or consultation processes. This has often been due to an interest in compliance – the FATF, for example, needed to bring regional bodies into its decision-making structures to make them more willing to go along with FATF policies. What sounds like a simple rationalist explanation may, however, have been influenced by ideational factors. The strength of protest against FATF blacklisting in the mid-2000s – and the resulting need for procedural change to relegitimate the FATF – likely followed in part from a sense that basic norms of sovereign equality had been violated.[269] Sovereign equality may thus lead an afterlife outside formal international law by limiting access to the resource of binding, formal international law, and by raising the costs of institutions that do not at least provide some form of influence for outsiders and targets.[270]

As expected from the outset[271], different factors and approaches contribute to an understanding of the turn to non-consensual structures we have observed. Functional need certainly plays a role, but as we have seen, changed demand translates into institutional change only in limits and under certain conditions. The distribution of power may be most important in shaping these limits, but its effects are likely conditioned by institutional contexts. And while states will often pursue rationalist strategies, ideational factors may well play an important role in some contexts. Precisely how much weight the different factors have in shaping institutional outcomes is not something this paper attempts to answer. It may, however, be a fruitful task to use some of the more intuitive insights developed above as a basis for future, more focused research into the ways of change in international law.

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[266] See Mahoney & Thelen 2010 (ch 1).

[267] See above [xx] and Gerber 2010, 101-7.

[268] See Salzman 2000, 805-31.

[269] See the account in Huelsse 2008.

[270] See Lake (2009) 37-40 on the limitations on empire and hierarchy from the sovereign-equality norm; see also Viola, Snidal & Zuern (2013) on the prospect of 'hybrid' organizing principles for international authority beyond sovereign equality.

[271] See above [xx].

3. The Trajectory of International Law

In this article, I have traced three issue areas to understand how increasing pressures towards global problem-solving generate new institutional forms, especially non-consensual ones. The analysis has revealed a certain degree of change within traditional forms of international law, especially institutional powers and jurisdictional rules, and also a turn towards unilateral, informal and club tools partly outside the international legal system as such. Most of the pressure for change has been absorbed not through new binding rules and obligations on the international level, but through alternative means of regulation, in which consensual elements have a much more limited place.

This picture is in stark contrast with the dominant narrative of a continuing rise and growth of international law in times of global interdependence. This narrative is common among international lawyers – whether sympathetic or hostile to the development[272] – but it is also widely shared among international relations scholars. The group that initiated the influential work on 'legalization in world politics' formulated their starting point quite succinctly: '[i]n many issue-areas, the world is witnessing a move to law.'[273] This diagnosis relates to the spread of universal multilateral treaties, but even more so to the proliferation of international courts and tribunals and the expansion of their dispute-settlement activities.[274] It is also immediately plausible as a direct consequence of a growing need for cooperation on issues characterized by strong international interdependence.[275]

The trajectory of international law found in the present study is markedly different, and it reflects the fact that greater needs for cooperation – obvious in all three issue areas under analysis – may not always, or not even typically, be 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'.[276] But it also suggests that international law faces particular limitations when confronted with highly intractable public goods problems. In that it confirms the views – of many economists and lawyers alike – that the classical international legal order, with its emphasis on consent, is ill-equipped to deal with such problems. Instead of being transformed towards non-consensualism, as expected by many, international law is 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 reflects the place international law has always had. International law and binding obligations have never been the sole form of international cooperation, and they have always been surrounded by politics, informality and

[272] See, eg, [xx] Taming Globalization?

[273] Judith Goldstein, Miles Kahler, Robert O Keohane & Anne-Marie Slaughter, 'Introduction: Legalization andWorld Politics' (2000) 54 *Int'l Org* 385.

[274] Kingsbury, symp on proliferation.

[275] [xx] [mention of other voices?]

[276] Miles Kahler, 'Conclusion: The Causes and Consequences of Legalization' (2000) 54 *Int'l Org* 661.

unilateralism. Minilateralism and multilateralism have coexisted for long.[277] Formal international law has often been seen as problematic by powerful actors, driving them to seek informal solutions – the Concert of Europe is an early example.[278] Weaker states, too, have turned away from formal law-making when confronted with powerful opposition, and have used majoritarian fora with informal powers instead. The role of the UN General Assembly in the attempt to establish a New International Economic Order in the 1960s and 1970s is a reflection of such strategies.[279]

Yet despite such continuities, there are also indications that significant change is underway, especially as regards the respective weights of formal and informal rule-making. By the late 20th century there was a strong sense that 'contractual international law and multilateralism have become the dominant institutional practices governing modern international society'[280], and that states had 'come to accept and internalize treaty-making as the appropriate foundation for both'.[281] The number of new multilateral treaties signed each year had grown exponentially since around 1900, and using a treaty to confront a new problem seemed to have become 'best practice'. Yet this trend stalled around 1960, with exceptions in some areas such as the environment, and the number of new treaties began to decline, despite a smaller peak in the 1990s.[282] This decline seems to have been accentuated since the turn of the millennium.[283] The reasons behind this development are not firmly established, and it may not indicate a 'stagnation' of international law as such[284] but instead a shift from multilateral treaties to other forms of international law-making – bilateralism, secondary rule-making, or adjudication. In any event, it signals that already within international law, the institution in which consent is most firmly anchored is in decline.

At the same time, we are witnessing a radical expansion of global regulation in general.[285] 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

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[277] Kahler (1992).

[278] See Simpson (2004) ch 4.

[279] ´See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP, 2003) ch 4.

[280] Christian Reus-Smit 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions' (1997) 51 *Int'l Org* 555 at 558.

[281] Robert Denemark and Matthew J Hoffmann, 'Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making' (2008) 43 *Cooperation and Conflict* 185 at 186.

[282] Denemark & Hoffmann 2008.

[283] If in previous decades an average of 35 new treaties were deposited with the UN Secretary-General each year, this figure reportedly dropped to around 20 for the period of 2000 to 2009; see Joost Pauwelyn, Ramses Wessel & Jan Wouters, 'The Stagnation of International Law', *Leuven Centre for Global Governance Studies Working Paper* No 97 (2012), 4-5.

[284] This is the conclusion drawn by Pauwelyn, Wessel & Wouters (2012) (Stagnation).

[285] See, eg, John Braithwaite & Peter Drahos, *Global Business Regulation* (2000); [xx] [Koppell]

decades.[286] But much of today's informality looks quite different from that of former times. It often has elaborate institutional structures for rule-making and implementation, and as concerns about institutional legitimacy have grown, it has instituted more formalized procedures and participation rights.[287] Through these procedures, the informal realm slowly becomes more law-like, and some commentators have called for a recognition of the legal character of informal norms under certain circumstances.[288] However that may be, even though it is impossible to quantify the respective weights of the formal and the informal reliably, the combined effect of a decrease in new multilateral treaties and a significant increase in informal regulation is likely a shift away from classical, formal international law.

This corresponds with some of the findings of the present study, and it allows us to characterize more precisely in what sense we may be able to speak of a 'shifting architecture' with respect to international law. The starting point of this article was the hypothesis of a shift towards non-consensualism *within* international law, but we have found only limited evidence for it. Moreover, as I mentioned in the beginning, international law has long embodied non-consensual elements; custom, in particular, has often developed with far less than universal support. In comparison, the changes in the formal international legal order analysed in this article may not be overly remarkable; consent has remained relatively (and perhaps surprisingly) strong, especially as regards treaty-making.

More importantly, though, we may speak of *a shift in the place of international law* within the global order. When observed in the context of the broader universe of transboundary rule-making, formal international law is only one among other institutional normative orders, and from the evidence I have discussed above, it seems that its importance is decreasing. Likewise, we may diagnose a *shift in the role of consent* in global rule-making. As we have seen, this is not so much a shift in the formal place of consent in formal international law as a reconfiguration in which highly consensual structures (such as treaty-making) are increasingly sidelined by less consensual ones (delegated majority rule-making, unilateral action or informal processes), with certain – and rather weak – procedural compensations.

These conclusions are provisional in two respects. First, as we have just seen, it is difficult to speak of shifts in weight in an area in which we can hardly quantify weight at any given point. Secondly, the conclusions are drawn primarily from the analysis of three

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[286] See, eg, Slaughter (2004); Thomas Hale & David Held (eds), *Handbook of Transnational Governance* (Polity, 2011); Joost Pauwelyn, Ramses Wessel & Jan Wouters (eds), *Informal International Lawmaking* (2012). But see also Stefan Voigt, 'The Economics of Informal International Law: An Empirical Assessment', in Pauwelyn, Wessel & Wouters, ibid, 82, who finds a sharp increase in informal agreements concluded by (and reported in) the US in the 1990s and 2000s, though a decrease since 2007.

[287] See also Kingsbury, Krisch & Stewart (2005) 37-41.

[288] See, eg, Alvarez (2005) 588-601; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *EJIL* 23; Pauwelyn, Wessel & Wouters (2012) [Informal International Lawmaking: contribution at end] [xx].

issue areas with a particular problem structure, which are hardly representative for international law in general. In other areas – not characterized by public-goods problems – consensual international law is likely to play a different role. In trade, for example, it does not pose structural problems for the (largely contractual) construction of a regime that can exclude free-riders from its benefits.[289] We should thus be cautious not too generalize the conclusions found here too easily. On the other hand, the broader phenomena mentioned above – the decline of multilateral treaties and the rise of informal governance – point in the same direction, and consent-related problems such as the large numbers of negotiating parties and their relative equality exist in other areas as well. A certain degree of pressure on the consent framework is thus likely well beyond cases of global public goods.

IV. 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 have found consent as a guiding principle inadequate, and they have both called for new, non-consensual forms of law-making and have diagnosed change in this direction. In this article, I have used an analysis of three issue areas to inquire into whether, to what extent and in what forms we can actually find elements of change in the international legal order.

In this analysis, change has turned out to be highly uneven. Somewhat surprisingly in light of the magnitude of the problem, challenges to traditional categories of international law-making have remained relatively limited – treaty-making has developed more, rather than less, inclusive processes, and among international institutions, only very few have undergone a major transformation in their powers beyond their initial delegatory frames. Greater challenge has been on display when it comes to unilateral, extraterritorial regulation, at least for certain countries. However, large part of the regulatory action in the different issue areas has been in the informal realm – through 'soft' norms, often produced in informal institutional settings. The shape of these settings – just as in the international institutions in which movement could be observed, and as in extraterritorial regulation – is often characterized by exclusivity, and the resulting picture is one in which hierarchy is a defining feature. In this picture, consent and sovereign equality are confined to an ever smaller part of formal law-making; in other areas, they are replaced by mechanisms of representation and consultation. Formal international law as a whole often moves to the sidelines, and alternative institutional forms 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

[289] [xx]

thought formal international law-making would return to greater importance with a 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. Where these channels – as in the increasingly inclusive processes of treaty-making and formal international institutional action – become too burdensome, powerful actors shift to other fora which 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 some of the principles underlying international law's consensual structure – especially sovereign equality – is weakened by this turn: outside formal international law, they are less established and while not meaningless, have a lesser institutional pull. Consent is increasingly replaced by forms of representation and consultation.

Whether this is good or bad has not been the question animating this article – there may be arguments for stressing effectiveness, but equally good ones in favour of procedural inclusiveness in decision-making. How the balance between both ought to be struck is not at all clear; in many ways, constructing global order faces a real dilemma here, as is reflected in the intractable debate over input vs output legitimacy.[290] Yet the space that is opened up by such a challenge to existing structures is not necessarily – or hardly ever – filled by normative theorizing. As this article reminds us, it is instead filled by moves of social and political actors, especially powerful ones, who not only seek to build the 'right' order, but also – and perhaps primarily – an order that suits them well. Non-consensualism typically does away only with the consent of the less powerful.

This may leave international law 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 appeal to the many for whom consent and sovereign equality were precisely what distinguished international law from other forms of international politics. In the analysis in this article, we have found elements of both approaches, and change has turned out to be far from uniform across issue areas and institutional forms. International law's architecture – and its place in the broader global institutional universe – is shifting, but we have only begun to understand the shape, direction and momentum of this shift.

[290] See above, I 2.