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**The Empire's New Clothes:
Political Economy and the Fragmentation of
International Law**

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The Empire's New Clothes: Political Economy and the Fragmentation of International Law^{*}

Eyal Benvenisti and George W. Downs

Abstract:

The decades following the end of the Cold War have witnessed the growing proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries. Practicing jurists have expressed concern about the effects of this increased fragmentation of international law, but for the most part international legal theorists have tended to dismiss such concerns as unwarranted. Indeed, many regard the resulting competition for influence among institutions as a generative, market-like pluralism that has produced more progress toward integration and democratization than could ever have been achieved through more formal means.

In this Essay we argue that the problem of fragmentation is more serious than it is commonly assumed to be and also more resistant to reform by the various decentralized mechanisms that operate in international law such as governmental networks. Fragmentation's resistance to reform stems from the fact that it is only partly the accidental byproduct of broad social forces such as globalization. It also represents an ongoing effort on the part of powerful states to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to reduce their accountability both domestically and internationally. Fragmentation accomplishes this in three ways. First, by creating institutions along narrow functionalist lines and restricting the scope of multilateral agreements, it limits the opportunities that weaker actors have to build the cross-issue coalitions that are necessary to increase their bargaining power and influence. Second, the ambiguous boundaries and overlapping authority created by fragmentation dramatically increase the transaction costs that international legal bodies must incur in trying to reintegrate or rationalize the resulting legal order. Third, by suggesting the absence of design and obscuring the role of intentionality, fragmentation frees powerful states from having to assume responsibility for the shortcomings of a global legal system that they themselves have played a preponderant role in creating. The result is a regulatory order that both reflects powerful state interests and that only they can alter

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The Empire's New Clothes: Political Economy and the Fragmentation of International Law

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I. Introduction

The end of the Cold War suggested to many international legal theorists that the international system was undergoing a process of economic and political transformation that would soon result in the creation of a more integrated, democratized and egalitarian global legal order. Now almost twenty years later this expectation has gone largely unfulfilled. Serious political integration remains confined to Europe. More broadly, there has been a growing fragmentation of the international regulatory order as an ever-increasing number of regulatory institutions with overlapping jurisdictions compete for influence. Progress in connection with the democratization of international institutions has been all but negligible.

Strangely, this apparent lack of progress has generated little interest among those who held these expectations. Indeed, as we show below, many legal theorists regard it as largely an illusion. They grant that formal, EU-like integration may not be occurring outside Europe. However, they contend that something that is functionally similar continues to take place through the operation of more informal, decentralized processes involving networks of governmental organizations and the ongoing competition among international regulatory institutions for jurisdiction and influence. What others term fragmentation and equate with a growing dissolution of the international regulatory order is, in reality, a generative process of creative destruction that has produced as much if not more progress than could have been achieved through more formal integration, and the resulting system is far more resilient and adaptive to changing circumstances. Coupled with the higher levels of legalization and institutionalization that have already been achieved, this process continues to propel the international legal order forward toward greater democratization, equality, and the further erosion of sovereignty.

In what follows, we argue that the problem of fragmentation is more serious than it is commonly assumed to be because it functions to maintain and even extend the disproportionate influence of a handful of powerful states—and the domestic interests that shape their foreign policies—on the international regulatory order, and it tends to undermine the operation of the decentralized processes described above. It does this in three important ways. First, fragmentation limits that the ability of weaker states to form a countervailing coalition by engaging in logrolling. Weaker actors are invariably more numerous than powerful ones in any political context and their preferences are typically more diverse. This makes it difficult for them to achieve a consensus on a particular issue. At the domestic level, they frequently overcome this problem by logrolling or trading votes across issues. However, logrolling requires a venue that fosters reciprocity such as a legislature where policy decisions are made on a wide range of issues within a given session or over a relatively short period of time. To the extent that powerful parties are able to forestall the emergence of such a venue by creating a fragmented system of multiple, issue-specific venues that compete with each other or sabotage the operation of an existing one (e.g., the UN General Assembly) they preserve the bargaining advantage that they currently possess.¹ Decentralized mechanisms such as networks are capable of greatly facilitating coordination among states within a given regulatory arena but, as we shall see, are not well suited to promoting coalition building across issues in a fragmented system.

¹ John Gray makes a related point in connection with the creation of free trade: “Those who seek to design a free market on a worldwide scale have always insisted that the legal framework which defines and entrenches it must be placed beyond the reach of any democratic legislature. ...The rules of the game of the market must be elevated beyond any possibility of revision through democratic choice.” JOHN GRAY, FALSE DAWN 18 (1998).

Second, fragmentation creates a multitude of competing institutions with overlapping responsibilities that dramatically limit the ability of international legal bodies to reintegrate the system. It raises the costs of negotiating a detailed agreement dramatically and makes it more difficult to achieve even an informal consensus. Worse, fragmentation provides powerful states with the opportunity to abandon—or threaten to abandon—any given venue for a more sympathetic one which further exacerbates the competition between institutions. This is not the kind of environment in which the bottom-up process of constitution-making on the part of international tribunals is likely to thrive.

Third, the system's piecemeal character suggests an absence of design and obscures the role of intentionality, which frees the powerful states from having to assume responsibility for the system's shortcomings (e.g., its democratic deficit). However, fragmentation is only partly the accidental byproduct of historical events and broad social forces. It is also the result of a calculated strategy on the part of powerful states to create a legal order that closely reflects their interests and that only they have the capacity to alter.² In recent years, as hierarchical strategies have become increasingly contested and delegitimized, powerful states have increasingly relied on fragmentation strategies as an alternative means of achieving the same end in a less visible and politically costly way.

Practical considerations and the strategic self-interest of powerful states have long been intertwined in connection with fragmentation. The narrow, functionalist design of the institutions that the Allied Powers created during the 1930's and in the aftermath of WWII was in part an accident of history. The policy problems that they were designed to address (e.g., economic stabilization, collective security, containment) emerged at different times in connection with specific historical events, and the experts involved in their construction were drawn from the domestic bureaucracies of the Allied Powers that were themselves organized along functionalist lines. In such an environment it was natural to respond to problems in a piecemeal way and to repeat the process as new problems and issues emerged. To a certain extent fragmentation was unavoidable.

Yet even during this early stage in the international system's post-war development fragmentation was often as much a byproduct of strategic considerations as practical ones. Historical accounts of the period make it clear that from the outset that the Western powers wanted to insulate key regulatory institutions, particularly economic ones, from the influence of other states, the newly created UN, and from potential cross-contamination from other policy spheres.³ Hierarchy and fragmentation were the two main tools that they used to accomplish this goal.

With respect to hierarchy, Paul Kennedy argues in his history of the UN that it was clear from the beginning that the weighted voting in the IMF and the permanent membership of the world's five largest economies in the World Bank were designed to insure great power dominance in the realm of economic policy making as effectively as the Security Council would insure it in the security sphere. Kennedy's account also suggests that the great powers selectively employed fragmentation from the outset to prevent the Economic and Social Council (ECOSOC) from competing with the Security Council for dominance and fostering the integration of security and economic policy. Although the text of the UN Charter suggests that all of the various specialized agencies such as the International Monetary Fund, the International Labour Organization, and the Universal Postal Union were to be "brought into relationship" with the United Nations and coordinated through ECOSOC, the great powers did nothing to facilitate this.

² Although our account of how powerful states employ international law emphasizes the role of fragmentation strategies, it shares much in common with other instrumentalist-oriented accounts of hegemonic behavior. This is particularly true of Nico Krisch's account (Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order* 16 EUROP. J. INT'L. L. 369, 371 (2005)) which provides what in many ways is a complementary account of how powerful states employ international law to stabilize their dominance and adapt to changing conditions.

³ See PAUL KENNEDY, *THE PARLIAMENT OF MAN* 113-142 (2006).

Instead, they chose to preside over a growing amount of overlap and confusion among the UN's growing number of newly created bodies that operated to undermine it.⁴

In the intervening decades accelerating globalization, growing state failure, and increased civil war have combined to produce a host of new regulatory problems and the creation of still more multilateral agreements and institutions to deal with them. Inevitably, this led to still more fragmentation and growing calls for greater coordination and integration to cope with it.⁵ These calls have been increasingly accompanied in recent years by demands for more effective representation of developing state interests in dealing with such governance issues, and the growing power of the large developing democracies such as India, Brazil, and South Africa that represent major markets for the products of the great powers and well as major investment opportunities have given these demands more force. Yet a more integrated and democratized international legal order continues to hold few attractions for the majority of powerful states outside the EU. Such an order raises the prospect that a significant subset of weaker states led by the large developing democracies such as India and Brazil might be able to resolve their differences through the same process of cross-issue logrolling that has enabled the diverse domestic interests within them to cooperate.

To prevent this happening, powerful states—particularly the United States, Russia, and China—have increasingly sought to head off efforts to increase integration and democratization through the use of four fragmentation strategies: (1) avoiding broad, integrative agreements in favor of a large number of narrow, functionally designed agreements; (2) formulating agreements in the context of one time or infrequently convened multilateral negotiations; (3) avoiding whenever possible the creation of a bureaucracy or judiciary with significant, independent policy making authority and circumscribing such authority when its creation is unavoidable; and (4) creating or shifting to an alternative venue when the original one becomes responsive to the interests of weaker states and their agents. The extensive archipelago of narrowly-focused and poorly coordinated treaties and multilateral organizations that characterizes the international legal system, the slow rate with which international institutions have been democratized, and the lack of redistribution between North and South testify to the considerable success that these strategies have usually enjoyed.

Weaker states and those bureaucrats and judges who staff international institutions have not remained passive during this process of fragmentation. They have frequently attempted to resist it by developing countervailing or "anti-fragmentation" strategies. These strategies are designed to lower rather than raise the transaction costs associated with strategic coordination. They operate by increasing the repeated game aspects of the institutional context, expanding the independence and role of tribunals and the bureaucratic components of multilateral institutions, and creating linkages between agreements

⁴ See *id.* at 114:

Without being completely cynical about the motives of the Great Powers, then, it is obvious that their governments really did not regard the Economic and Social Council as a principal organ that was a full equivalent to the Security Council. All of them were heavily invested in international security matters, as they showed by putting themselves at the heart of the new system through their permanent membership and veto powers.

Kennedy goes on to make it clear that weighted voting in the IMF and the permanent membership of the world's five largest economies in the World Bank insure great power dominance of economic policy making as effectively as the Security Council insures it in the security sphere.

⁵ This is not to argue that weaker states have not frequently contributed to the problem of fragmentation themselves. However, they have often done so out of frustration with the refusal of great powers to address their problems. See Kennedy, *supra* note 3, at 120:

Concerned in part by what it saw as unmet needs and frustrated by its own restricted powers, the General Assembly was already developing the habit of creating newer bodies that would report to it, even if this created policy overlap and bureaucratic overload. Moreover, at least two of the Assembly's own main committees the Second Committee (economic and financial) and the Third Committee (social) could not resist the temptation to move from being broad framers of policy to making executive recommendations in those domains and thus duplicating the ECOSOC. All were in danger of choking the system.

that can serve to create coalitions. The fact that these strategies are at least intermittently successful is attested to by the frequency with which powerful states resort to the fourth strategy of venue shifting.

This Essay is organized into six sections. Following the introduction, in section 2, we briefly review the international legal literature dealing with fragmentation. Section 3 examines the strategies that incumbent elites use to maintain their dominance at the domestic level. We argue that many of these strategies operate by suppressing political coordination and provide a theoretical framework for analyzing how powerful states use fragmentation to suppress the ability of weaker states to engage in political coordination at the international level. In section 4 we employ this theoretical framework to understand the operation and impact of four of the most prevalently employed fragmentation strategies. Section 5 describes the countervailing efforts of weaker states and international bureaucrats and judges, and assesses their impact. Section 6 concludes with an analysis of the conditions that facilitated the success of anti-fragmentation strategies and the likelihood that these will reemerge in the near future.

II. The Effects of Fragmentation

As we have already noted, few legal theorists would view growing fragmentation as a serious problem despite the theoretical centrality of institutional integration in international law's self-narrative and its historical role in connection with the European Union. International legal theorists in the neoliberal institutionalist tradition argue that it is not so much a problem as part of a gradually evolving solution to the demands imposed on the international system by globalization. Globalization has put a premium on efficiency and decentralized processes are simply more efficient than more formal, centralized ones.

Charney is one of the theorists who views fragmentation as a market-like response to pluralist diversity that is vastly superior to more hierarchical alternatives:

"In conclusion, I am not troubled by the multiplicity of dispute settlement systems established by the [Law of the Sea] Convention. I encourage all to embrace and nurture them so that they may fulfill their laudable objectives. We should celebrate the increased number of forums for third-party dispute settlement found in the Convention and other international agreements because it means that international third-party settlement procedures, especially adjudication and arbitration, are becoming more acceptable. This development will promote the evolution of public international law and its broader acceptance by the public as a true system of law. [...] Hierarchy and coherence are laudable goals for any legal system, including international law, but at the moment they are impossible goals. The benefits of the alternative, multiple forums, are worth the possible adverse consequences that may contribute to less coherence. This risk is low and the potential for benefits to the peaceful settlement of international disputes is high."⁶

Other theorists in the institutionalist tradition who stress the growing role of intergovernmental and other social networks also consider the problem of fragmentation to be overblown.⁷ The term fragmentation denotes a degree of isolation and lack of coordination that simply do not apply to today's increasingly

⁶Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L. L. 69, 73-75 (1996)

⁷See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004). Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law* 43 VA. J. INT'L L. 1 (2002).

networked world. Burke-White acknowledges that the rise of multiple international courts "does increase the possibility of conflicting judgments, but it does so within the context of a more, rather than less, important role for international law."⁸

Burke-White goes on to describe how this interconnected system operates:

"Counterbalancing the danger of fragmentation is an increasingly loud interjudicial dialogue. This dialogue has important implications for the unity of the international legal order as it provides actors at all levels with means to communicate, share information, and possibly resolve potential conflicts before they even occur. This interjudicial dialogue has been relatively well documented and occurs at three distinct levels. Supranational courts are engaged in dialogue with one another, national courts are citing to supranational courts, and national courts are in direct conversation with one another. [...] The significance of this interjudicial dialogue cannot be overstated, for it has the potential to preserve the unity of the international legal system in the face of potential fragmentation. Such dialogue, of course, relies heavily upon international judges themselves. If national and supranational judges consider themselves part of a common enterprise of international law enforcement, they can, through informal agreements, dialogue, and respect, avoid conflicts before they occur, help to minimize their effects when they do arise, and ensure the development of a unified system."⁹

Legal theorists coming from a post-modernist or constructivist tradition have tended to view fragmentation even more positively as a welcome alternative to the formal, top-down driven integration advocated by mainstream theorists.¹⁰ The latter, they argue, allowed themselves to be trapped in the ideational framework of domestic law. As a result, they had created a concept of integration that privileged hierarchy and stasis over pluralist competition and adaptation. Such a structure was fundamentally unsuited to meeting the needs of a rapidly changing and more egalitarian international environment. Worse, by suggesting that the progress of international law was inextricably bound to the degree to which the international system was formally integrated, neoliberals had created a standard that critics of international law could seize upon to mistakenly judge it a failure.

Given the imperfections of formal integration, post-modernist theorists are dismissive of practicing jurists' anxieties regarding fragmentation's potential ill-effects. Thus, in response to what they clearly view to be excessive concern displayed of the Presidents of the International Court of Justice in making "three consecutive speeches before the United Nations General Assembly," Koskenniemi and Leino lament that "...one may feel puzzled that among all aspects of global transformation, it is this they should have enlisted their high office to express anxiety over."¹¹ Rather than constituting a legitimate source of anxiety, fragmentation and the proliferation of courts is "either an unavoidable minor problem in a rapidly transforming international system, or even a rather positive demonstration of the responsiveness of legal imagination to social change."¹²

Although the full impact of the resulting system of competing normative structures is not yet clear, their appearance is viewed as a positive development. As Koskenniemi states in his essay "What is International Law For?," "...the proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a postmodern social condition and a beneficial prologue to a pluralistic

⁸ William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963, 967 (2004).

⁹ *Id.* at 971-72.

¹⁰ Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties* 15 LEIDEN J. INT'L L. 553 (2002).

¹¹ *Id.*, at 553.

¹² *Id.* at 575.

community in which the degrees of homogeneity and fragmentation reflect shifts of political preference and the fluctuating successes of hegemonic pursuits.”¹³

Despite their significant differences in emphasis, each of these defenses of fragmentation displays a tendency to embrace assumptions that are wide-spread among international legal theorist but which we believe to be suspect. The first of these assumptions is that the rate at which international law and international institutions are being created is a reliable indicator of the strength and importance of international law, and that the problems associated with fragmentation represent little more than transient costs of adjustment.¹⁴ The fact that this assumption is often appropriate when viewing the evolution of international law over long time periods does not mean that it is true generally. At both the domestic and international level, the proliferation of regulatory laws and institutions often signals incapacity and ineffectiveness as institutions generate new bodies and mandates in response to the failure of existing ones. In the U.S. the protracted “war on drugs” and its associated legislation is a classic domestic example of this, and there are countless examples of this same tendency at the international level as well. Consider the following description by Paul Kennedy of how the General Assembly added to the problem of fragmentation out of frustration with its own incapacity:

“Concerned in part by what it saw as unmet needs and frustrated by its own restricted powers, the General Assembly was already developing the habit of creating newer bodies that would report to it, even if this created policy overlap and bureaucratic overload. Moreover, at least two of the Assembly’s own main committees the Second Committee (economic and financial) and the Third Committee (social) could not resist the temptation to move from being broad framers of policy to making executive recommendations in those domains and thus duplicating the ECOSOC. All were in danger of choking the system.”¹⁵

Equally prevalent is the implicit assumption that fragmentation represents a major advance over hierarchy because the multiplicity that it embodies is inherently pluralistic which, in turn, is a harbinger of the emergence of a more democratic international legal order. While it is reasonable to argue that the proliferation of multilateral agreements has created an institutional environment that is less hierarchal than that which existed during the Cold War, it is not clear that resulting order is any more pluralistic with respect to the range or even the number of interests that it represents. At the national level, no one would argue that the number of domestic laws a state possesses is a reliable indicator of the number or range of interests that influenced their creation. Autocracies that by definition represent a narrow set of interests frequently have elaborate legal systems and countless regulations.

Similarly, there is no reason to believe that the number of agreements or even the number of multilateral institutions that exists at the international level are any more reliable indicators of the existence of pluralism at the international level, particularly with the respect to the number of states whose views are represented. Still less does it suggest that these are likely to be representative of the underlying diversity that exists within the international system. The existence of large number of international institutions could easily be indicative of the nothing more than the fact that the societies and economies that orchestrated their creation were themselves pluralistic, in which case a handful of powerful and highly developed states could easily spawn a complex international legal order.

For similar reasons, the assumption that greater fragmentation will be characterized by a heightened level of connectedness which will, in turn, lead to greater democratization is also tenuous. One

¹³ Martti Koskenniemi, *What is International Law For*, in INTERNATIONAL LAW 89, 110 (MALCOLM EVANS ed., 2003).

¹⁴ See, e.g., Burke-White, *supra* note 8, at 967:

An alternate perspective on the increasing number of fora for international legal adjudication is that international law is today more relevant than it has ever been in the past.

¹⁵ See Kennedy, *supra* note 3, at 120.

can acknowledge the growing and often positive role played by transgovernmental networks and still remain concerned about the extent to which the right of traditionally marginalized actors to participate actually leads to their being able to significantly influence policy decisions. As we shall see in the next section, while the decentralized coordination processes that emerge organically out of a fragmented institutional structure might lead to improvements in the quality of policymaking in a given issue area, these processes are not particularly well-suited to the task of building coalitions across issue areas which is necessary if weaker actors are to bargain on a more equal footing with powerful states.

Finally, there is the assumption reflected in the Koskeniemi and Leino quotes above¹⁶ that the fragmentation of international law is either an unintended side effect of the natural evolution of the international system or the result of judicial creativity in the face of change.¹⁷ While both of these factors have played an important role in creating fragmentation, no broad aspect of international law is likely to emerge without being shaped in a significant way by the strategic interests of powerful states. Just as the strategic preoccupations of powerful states played a major role in determining and reifying the hierarchical character that still persists within many international institutions, so they also play—and continue to play—a major role in fostering fragmentation and their motivations for doing so are quite similar.

III. Strategic Coordination in the Domestic and International Context

This section describes the strategies that domestic elites use to suppress political coordination among potential competitors. We argue that a simple game devised by Barry Weingast to account for the problematic emergence of political rights in a simplified three actor “state” also provides a useful theoretical framework for examining how fragmentation strategies help powerful states perpetuate their dominance at the international level.¹⁸

To effectively challenge the political status quo in any institutional environment, marginalized groups and individuals must collectively engage in a host of political coordination activities. These vary considerably from one context to another, but they characteristically involve such tasks as recruiting new members, fund raising, selecting leaders, establishing strategic goals, and building coalitions with other groups. Incumbent groups and elites maintain their relative power by devising strategies that directly or indirectly limit the ability of prospective opponents to engage in these activities or by increasing the level or “threshold” of coordination that must be achieved in order to remove them power.¹⁹

Over the past two centuries political elites within democratic states have tended to rely heavily on the manipulation of electoral and legislative rules to accomplish these tasks. Complicated voter registration procedures, lengthy residency requirements, and literacy tests directly limit the ability of marginalized groups to participate in elections. Devices such as poll taxes, the absence of public funding of elections, and the requirement of permits for public demonstrations and assembly, have accomplished the same goal more indirectly by increasing the cost of engaging in political coordination. Strategies such as the gerrymandering of legislative districts, requiring a large number signatures in order for a candidate

¹⁶ See notes 10-12 above and accompanying text.

¹⁷ There is, of course, no necessary connection between absence or presence of intentionality that underlies an act and the character of its effect. At best the fact that fragmentation may have been the unintended side effect of the natural evolution of international system or the fact that it resulted from judicial creativity is frail grounds for assuming that its effects are benign. Global warming's roots are arguably more innocent still. Similarly, any evidence that we may present that powerful states have supported initiatives that have led to the fragmentation of the international system does not by itself mean that fragmentation has impeded the democratization of international system. However, the case evidence connecting particular fragmentation strategies such as the pursuit of bilateralism on the part of powerful states with poor outcomes for weaker states is suggestive of a causal link.

¹⁸ Barry R. Weingast, *The Constitutional Dilemma of Economic Liberty*, 19 J. ECON. PERSP. 89, 91-96 (2005).

¹⁹ See GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* (1997).

appear on a ballot, the creation of a bicameral versus a unicameral legislature, the choice of a presidential rather than a parliamentary system, and the adoption of majority rule rather than proportional representation tend to perpetuate the political status quo by increasing the effective threshold of coordination that must be achieved in order to wrest control of the government.

A substantial “institutionalist” literature in political science and economics describes how incumbents in different countries during different historical periods have employed these and similar strategies to protect their political power in the face of expected changes in political demand. For example, Stein Rokkan²⁰ describes how that ruling elites in European states supported a shift to proportional representation to protect their power in the face of growing demands for universal suffrage and the threat of working class solidarity. More recently, Carlos Boix²¹ has shown that the strategies employed by elites were even more refined and context dependent than Rokkan suspected. Instead of embracing PR systems wholesale, incumbent parties would condition their strategies on the strength and coordinating capacity of the new parties relative to that of their own.

Autocratic incumbents and leaders of emerging democracies operate in a different context than do their counterparts in liberal democracies and, as result, the suppression of political coordination takes a different form. In these states, political opponents tend to operate outside the formal political process which they view as illegitimate, and try to topple the government by sewing political discontent among the general population or by organizing a political or military coup during a political or economic crisis.²² Since structural strategies involving electoral and legislative rules are inadequate in the face of such threats, leaders of autocratic regimes and illiberal democracies adopt the more direct, regulatory strategy of suppressing what can be termed “coordination goods”.²³ This is category of public goods or quasi-public goods whose availability facilitates political coordination among potential opponents of the incumbent regime. It includes political rights and civil liberties, media freedom and access, freedom of assembly, and government transparency and freedom of information. To the extent to which these leaders can successfully restrict the supply of these coordination goods, they increase the likelihood of their political survival.

Recent examples of coordination goods suppression on the part of modern autocrats and the leaders of emerging democracies are plentiful. In only the past few years, China has introduced a host of web-restricting activities such as blocking access to Google's English language news and the creation of a special police unit; Russia has nationalized the major television networks and placed them under strict government control and Putin has engineered the arrest and prosecution of Khodorkovsky, one of the government's most prominent critics; the Vietnamese government has imposed strict controls over religious organizations and brands leaders of unauthorized religious groups as subversives; and Venezuela has passed the Law of Social Responsibility in Radio and Television that critics charge will allow the government to ban news reports of violent protests or government crackdowns.²⁴

It would be surprising if powerful states did not employ similar coordination suppression strategies to lock-in their influence at the international level and if those strategies did not involve the use of international law.²⁵ As Kirsch observes in his insightful analysis of how hegemony shape and

²⁰ See STEIN ROKKAN, *CITIZENS, ELECTIONS, PARTIES: APPROACHES TO THE COMPARATIVE STUDY OF THE PROCESSES OF DEVELOPMENT* (1970).

²¹ See CARLOS BOIX, *POLITICAL PARTIES, GROWTH, AND EQUALITY* (1994).

²² In such societies leadership transitions usually take place as the result of a political or military coup following a political or economic crisis. See BRUCE BUENO DE MESQUITA, ALASTAIR SMITH, RANDOLPH M. SIVERSON & JAMES D. MORROW, *THE LOGIC OF POLITICAL SURVIVAL* 354-402 (2003).

²³ Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, 84 *FOREIGN AFF.* 77, 80-83 (2005).

²⁴ *Id.* at 83-85. Such strategies appear to be surprisingly effective. Downs & Bueno de Mesquita (*id.*) show that leaders who suppress civil liberties reduce the likelihood that they will be deposed in the coming year by more than twelve percent relative to leaders who do not. Those who limit the freedom of the press reduce their risk of deposition within a year by twenty-eight percent.

²⁵ See Kirsch, *supra* note 2. For related Analyses see Robert Jervis, *The Remaking of Unipolar World*, 29 *WASH. Q.* 7 (2006); G. John Ikenberry, *AFTER VICTORY* (2000); JOSEPH S. NYE, *THE PARADOX OF AMERICAN POWER* (2002).

instrumentalize international law, international law offers major powers (and, we the interest groups that shape their foreign policies)²⁶ with an excellent tool for international regulation and for the pacification and stabilization of their dominance.²⁷ Unfortunately, as Kirsch also points out, even the international norms that hegemonies play a dominant role in creating come with significant drawbacks. They place constraints on the hegemon as well as weaker states and new rules can only be created in a “relatively egalitarian setting.”²⁸ Neither of these drawbacks is particularly important in a relatively static international environment of the sort that existed during much of the Cold War. However, in an environment that is as rapidly changing as today’s both can potentially jeopardize a hegemon’s dominance. The need to abide by the norms that it has created can limit its ability to respond quickly to changing conditions and limits the extent to which it can employ the law selectively to reward friends and punish emerging rivals. The requirement that a new rule must be created in a relatively egalitarian setting is even more problematic in a dynamic environment because it raises the prospect that new rules will have to be made to deal with changing conditions. The need for new rules requires the creation of a series of negotiation venues each of which provides an opportunity for weaker states to potentially engage in political coordination and act collectively.

To understand the challenges that such an environment poses for a hegemon or group of dominant states and what kind of international legal system they are likely to design in response, it is useful to consider a simple three person game devised by Weingast.²⁹ The game was designed to illustrate the barriers to cooperation that two citizens face in trying to limit the power of a sovereign, but it is equally useful in understanding how a hegemon might be able to employ international law to prevent weaker states from cooperating in order to erode its dominance. The three players in the game are a sovereign, S, who is the most powerful figure in the three person “society” and two citizens A and B. As productive members of the economy, A and B produce a social surplus, the size and distribution of which depends on the choices that the players make. In order to remain in power the sovereign needs the support of at least one of the two citizens. If both citizens oppose him he is deposed and loses power.

The basic game involves a sequence of two moves. S moves first and may choose to honor both citizens’ rights or to transgress against one or both. If S chooses to honor both citizens’ rights the game ends, and S remains in power. If S violates the rights of either or both, A and B have opportunity to choose whether to acquiesce or challenge the sovereign in a second stage game that is equivalent to the familiar Prisoner’s Dilemma. If A and B both choose to challenge the sovereign (i.e., if they cooperate), the attempted transgression fails and the game ends. If they one or both chooses to acquiesce (i.e., they fail to cooperate), S’s transgression succeeds and the game ends.

In the one shot version of the game, there are three noncooperative equilibria in which S challenges either one or both of the citizens and they both acquiesce. As in the case of the familiar one-shot Prisoner’s Dilemma the cooperative outcome in which A and B cooperate to maximize their gain is not an equilibrium. However, if the game is repeated, the game becomes more complicated and virtually any equilibrium is possible. Weingast singles out two as being especially noteworthy. One is an asymmetric equilibrium in which S and one of the citizens exploit the second citizen. The other is the cooperative equilibrium in which both citizens cooperate and challenge the sovereign.

Weingast’s stylized game possesses two features that correspond to important aspects of the contemporary international system—and its impact on international law—as well as the domestic context of an earlier era. The first is that the Sovereign possesses a notable first mover advantage. This corresponds to the agenda setting power that hegemonies and coalitions of powerful states frequently enjoy

²⁶ On the shaping of international norms by domestic interests see GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION?* (1995); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999).

²⁷ Kirsch, *supra* note 2, at 378.

²⁸ *Id.*, *id.*

²⁹ See *supra* note 18.

at the international level where the final outcome of multilateral negotiations is usually strongly anchored to their initial bargaining position.³⁰

The second feature of the game that is characteristic of the international system is that the task facing the two citizens is far more difficult than that of the sovereign, so cooperation only emerges under special conditions. One such condition is the familiar requirement that the game must be repeated; cooperation is never an equilibrium in the single shot version of the game. Another more subtle requirement is that the citizens must be able to resolve any differences between them about the rights they prefer and agree on a package of rights that they leaves them each both better off than they would be by colluding with S. These can be very difficult conditions to meet when there are a number of different rights to choose from and the preferences of the citizens differ. In fact, Weingast views them as being so formidable that the most likely outcome of the game is one in which the citizens fail to cooperate, and S and one of the citizens exploit the other citizen. Weingast supports this expectation with data that he has gathered that reveals that over 50 percent of the 24 interwar European democracies failed prior to World War II.³¹

For our purposes the significance of Weingast's game lies in the message that a hegemon (or small group of powerful states) interested in preventing weaker states from cooperating should use its first mover advantage to 1) limit the perception of weaker parties that they are involved in a repeated game, and 2) limit the opportunities that weaker states have to resolve the differences in their preferences. As we shall see in the next section, there are a number of strategies that hegemon and powerful states can use to accomplish these two goals. Creating detailed agreements in one time multilateral settings and avoiding the creation of permanent bureaucracies or tribunals with independent policymaking authority are effective ways of accomplishing the first goal. Creating a large number of narrowly focused or bilateral agreements and switching to a competing venue when weaker states threaten to gain control of an exiting one are effective ways to accomplish the second. Fragmentation of one sort or another is a hallmark of each of these strategies.

IV. Four Fragmentation Strategies

The first of four prominent fragmentation strategies that we will examine is the deceptively simple one of creating a large number of narrowly focused agreements rather than a small number of broad agreements each of which oversees regulation in a number of functional areas (e.g., a single agreement that regulates trade, labor standards, and the environment). Powerful states are drawn to this strategy because they know that weaker states are not only more numerous than they are, but they are also far more diverse with respect to size, wealth, and their level of development. This diversity makes it difficult for weaker states to agree on any particular issue. At the domestic level, the traditional way to surmount this problem and achieve cooperation is through logrolling: a given legislator agrees to support the policy position of another legislator in connection with an issue that is important to her in exchange for her doing the same in connection with a different issue.

It follows that to the extent to which powerful states can narrow the range of issues that will be negotiated in connection with a given agreement and isolate the negotiation of different agreements from each other, they can reduce the likelihood that weaker states will be able to create a countervailing

³⁰ For the role of bargaining power in bargaining *see* KEN BINMORE, *JUST PLAYING* 78 (1998). For a historical analysis of the dominant role of the great powers in shaping the Declaration of Human Rights *see* MARY ANN GLENDON, *A WORLD MADE NEW* (2001).

³¹ Weingast, *supra* note 18, at 89.

coalition by logrolling. Over time this strategy has the further advantage for powerful states of creating a world legal order composed of a maze of narrow agreements that would be enormously costly for weaker states or their bureaucratic and judicial allies to reintegrate in the future.

Examples of narrow multilateral agreements are prevalent in virtually every area of international law. There are dozens of environmental treaties dealing with specific issues. In connection with labor standards, The International Labour Organisation alone has produced more than two hundred or so treaties. In the security area there are numerous agreements related to the banning of specific weapons and numerous conventions prohibiting different types of terrorist actions. The popularity of the treaty-protocol that is widely used in a number of these areas simply compounds the problem. This proliferation of narrow agreements with few if any linkages makes logrolling among weaker states and cooperation virtually impossible.

As we have already noted, this maze of agreements is the result of any number of factors and it is rarely possible to reliably isolate the impact of the desire on the part of powerful states to create narrow negotiation venues as a means of limiting the ability of weaker states to form countervailing coalitions. Yet the tendency of powerful states to engage in what might be termed serial bilateralism—the negotiation of separate bilateral agreements with different states all dealing with the same issue—when multilateral negotiations threaten to get out of control suggests that fragmentation is often strategic.³² Serial bilateralism is being used with increasing frequency by powerful states to shape the evolution of norms in areas such as intellectual property protection and drug pricing where they have vital interests at stake and where their position on issues is far different from those of the vast majority of states.³³

The impact of serial bilateralism is particularly significant in the sphere of protection of foreign investments. Between 1988 and 2004 about 1900 bilateral investment treaties or BITs were signed. The breadth of their effect stems from the fact that while each BIT is negotiated separately (and thus reflects the bilateral power relations between the negotiating parties) the outcomes of the various BITs are largely consistent with one another.³⁴ This similarity in the nature of their provisions establishes a claim that their terms reflect an emerging customary international law as does the fact that the rulings of arbitral tribunals that enforce these BITs issue decisions “although not systematically made public, tend to take the form of lengthy, reasoned, and scholarly decisions that form part of the jurisprudence of this emerging international investment law and serve to solidify and give force to BIT provisions.”³⁵ As a result, powerful states and arbitral tribunals are beginning to treat the similar BIT terms as reflecting customary international law.³⁶ Should this continue to be the case in the future, arbitrators are likely to assume that the BIT reflects that standard unless the weaker party was successful to explicitly contracting out of those

³² The negotiation histories of regimes such as the Third United Nations Convention on the Law of the Sea (UNCLOS), the World Trade Organization (WTO), and the failed MAI, which we provide below, also attest to the intentionality and creativity with which the powerful states have structured venues in order to frustrate weaker state cooperation in recent years.

³³ See Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs* 36 CASE W. RES. J. INT'L L. 21 (2004) (discussing the impact of the unregulated intellectual property regime on drug pricing policies of Northern countries).

³⁴ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* 46 HARV. INT'L L.J. 67, 89 (2005):

[D]espite divergences among individual treaties, BITs as a group also demonstrate many commonalities, including their coverage of similar issues and their use of equivalent or comparable legal concepts and vocabulary. It is these commonalities that are contributing to the creation of an international framework for investment. Moreover among more recent BITs, one detects increasing consensus on certain points; for example, all BITs now require the payment of compensation for expropriation.

³⁵ *id.*

³⁶ *id.*, at 114-115:

[T]he process of creating an international law of investment has seemingly evolved from a situation where the absence of appropriate custom prompted the creation of over 2200 BITs, which in turn has led to the creation of custom.

See also Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123, 129 (2003):

[T]he BIT movement has moved beyond *lex specialis* (or better, *leges speciales*) to the level of customary law effective even for non-signatories.

standards in which case foreign investment law will have succeeded in affecting not only those states who are parties to BITs but also prospective ones as well.

A second fragmentation strategy that powerful states use to limit political coordination among weaker states is to create detailed agreements in one time multilateral settings with little prospect that they will be renegotiated or significantly amended in the near future. Such venues provide a less congenial setting for engaging in political coordination than does the ongoing legislative process that takes place within most states. They limit the amount of time that weaker states have to discover common ground between them as the agreement is being created, and raise little prospect that weaker states will have an opportunity to modify it in the future. While in theory they have the right to propose convening another round of negotiations to update or amend the agreement, actually doing so is rarely possible without the support of the powerful states. In effect, this strategy transforms what is formally a repeated game into what for all practical purposes is a one shot game.

The web of agreements that collectively constitute WTO (e.g., GATT, GATS, SPS, TBT, TRIPs) all contain detailed provisions that insulate the features that powerful states value from strategic misinterpretation at a later time by domestic courts in other states or by international bureaucrats and tribunals. Whatever is left unregulated is relegated to private and semi-private standard setting institutions, which the stronger states dominate.³⁷ While it is the case that the WTO regime establishes several councils and committees that discuss various aspects of the WTO law, the rule-making authority of these committees is significantly curtailed compared to that enjoyed by the original GATT 1947 bodies.³⁸ The one important exception is the Appellate Body which gradually assumed a legislative role in addition to its dispute settlement activities. However, the subsequent if vain attempts on the part of the major powers to reduce the Appellate Body's independence by careful attention to the appointment process suggest that this expanded role does not represent what they intended.³⁹

Multilateral agreements concerning the laws of war in general (the Hague Regulations of 1907,⁴⁰ The Geneva Conventions of 1949,⁴¹ and the Additional Protocols of 1977⁴²), and the agreements

³⁷ See Armin von Bogdandy, *Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship* 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 609, 630-633 (J.A. Frowein & R. Wolfrum eds., 2001).

³⁸ *Id.*, at 633-640 (referring to "Outsourced Rule-Making")

³⁹ On the composition of the Appellate Body see the discussion *infra* notes 62-64 and accompanying text. There is ample evidence to suggest that many government negotiators failed to realize the constitutional and distributive implications of creating this institution: See Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 9 (Jean Monnet Working Paper No. 9/00), available at <http://www.jeanmonnetprogram.org/papers/00/000901>:

From interviews with many delegations I have conducted it is clear that, as mentioned above, they saw the logic of the Appellate Body as a kind of Super-Panel to give a losing party another bite at the cherry, given that the losing party could not longer block adoption of the Panel. It is equally clear to me that they did not fully understand the judicial let alone constitutional nature of the Appellate Body.

Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints* 98 AM. J. INT'L L. 247, 251, n. 27 (2004):

A few WTO DSU negotiators contemplated the possibility that in interpreting WTO agreements, the Appellate Body would engage in expansive lawmaking. However, most trade ministers consistently underestimated or dismissed that possibility, focusing instead on the virtues of its function of applying the rules.

See also Peter Van den Bossche, *From and Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* (Maastricht Faculty of Law Working Paper 2005/1) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=836284 (analyzing the success of the Appellate Body despite the early modest expectations).

⁴⁰ Regulations Concerning the Laws and Customs of War on Land, annexed to the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

⁴¹ See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S.

concerning the use of specific weapons in particular, provide another set of examples of detailed rules concerning the conduct of hostilities. There has been no real effort to supplement the relatively detailed rules with institutional mechanisms that would result in the broadening of these norms to cover additional weapons systems or to adapt them to changed circumstances.⁴³

A third coordination suppression strategy that powerful states employ is to avoid whenever possible the creation of a bureaucracy or judiciary with significant, independent policy making authority and to carefully circumscribe their authority when their creation is unavoidable. Like the previous strategy, this one is easy to justify in terms of widely held values such transparency and the desire to avoid excessive bureaucratization and to some extent these concerns are real. However, powerful states often appear more attracted to its political advantages such as reducing the likelihood that bureaucrats and judges will have the opportunity to independently influence the implementation of an agreement or its subsequent interpretation. This, in turn, limits what weaker states can achieve if they are able to successfully cultivate these actors as allies and convince them to work on their behalf.

The powerful states' aversion to regulatory independence and formal institutional infrastructure is illustrated by the WTO agreements. References to judicial proceedings are rare and they establish "Panels" and "Bodies" rather than courts. "Members" rather than offices issue "Reports" that are then "adopted" by the States parties. As mentioned above, the WTO regime does establish several councils and committees that discuss various aspects of the WTO law, but their rule-making competence of these committees is significantly curtailed compared to that which was delegated to the GATT's bodies, and much of the institution's standard-setting is, as suggested above, relegated to private and semi-private institutions that are dominated by the stronger states.⁴⁴

Finally, in the event that these three strategies described above fail to accomplish their goal and weaker states and their agents are successful over time in altering the character of a particular agreement or institution so that it better reflects their interests, powerful states resort to the fourth strategy of withdrawing from it or, as is now more commonly the case, switching to a competing venue.

As Kirsch has noted,⁴⁵ from a historical standpoint one of the most prominent aspects of hegemonic behavior has been the same powerful actors who employ the law as a handmaiden withdraw from it when they find themselves faced with "the hurdles of equality and stability that international law erects."⁴⁶ This same tendency still exists, but in today's world the act of withdrawal is less visible and only rarely takes the form of formal abrogation. More typically, it manifests itself in the use of less aggressive strategies such as delays in compliance, partial noncompliance, objections about the appropriateness of venue, and regime switching possess the great virtue of being far more flexible and generate fewer political and legal side effects. When tied to the agenda setting power the dominant states possess, these strategies enable them to escape the consequences of a particular ruling without seriously undermining an agreement that for the most part continues to benefit them disproportionately.

Regime or venue shifting has become increasingly common and it can take place during any point in the life-cycle of given agreement. It most frequently takes place at the time particular agreement is initially negotiated or during the renegotiations that have been convened to deal with a new problem or political crisis. Typically, one or more powerful states becomes dissatisfied with the trajectory of negotiations and decides to exit the negotiations and exploit its agenda setting power to set up a parallel

609, 16 I.L.M. 1442.

⁴³ The UN is, of course, the most prominent exception to the rule that powerful states resist creating international organizations that are organized along the lines of a national legislature. However, its uniqueness in this regard and the democratic promise that it suggests tends to be more than offset by the UN hierarchical character which is exemplified by the disproportionate power of the Security Council and the veto power wielded by the five permanent members. The UN Charter also contains a host of detailed rules concerning the responsibilities of the various institutions within the UN system that are difficult to amend

⁴⁴ See von Bogdandy, *supra* note 37.

⁴⁵ See Kirsch, *supra* note 2, at 371.

⁴⁶ *Id.*, *id.*

and competing set negotiations with other powerful states. Once they have created the alternative venue and reached a consensus among themselves about the character of the agreement they desire, they approach weaker states with a proposal to restart negotiations. This simple two-step maneuver or some closely related variant has enabled the powerful states to break the coordinated resistance of the weaker parties during several multilateral negotiations.

One example occurred in connection with the negotiation of UNCLOS. Following nine years of negotiation, an ambitious agreement was drafted which included elaborate redistributive provisions designed to benefit developing states including those that were land-locked. The Reagan administration, upon entry to office, expressed its dissatisfaction with these provisions and decided to walk away from the final technical rounds of negotiations.⁴⁷ Although it was too late for the US to obstruct the finalization of the convention in 1982, the US set about undermining the convention's sea-bed mining regime by creating a parallel regime through the promotion of comparable domestic legislation within a group of "like minded states" (e.g., the UK, West Germany, France, Japan, Italy and USSR) that conflicted with it.⁴⁸ The resulting conflict had to be resolved through negotiations that culminated in a so-called Implementation Agreement, signed in 1994, which basically replaced the arrangement under UNCLOS with one that was more attuned to the interests of the developed states.

A second example, involving the renegotiation of existing treaties, took place during the move from the GATT to the WTO. The US and EU soon realized that the Uruguay Round negotiations which were open to all GATT members and where decisions were subject to the tradition of consensus would never produce the kind of agreement on the protection of intellectual property rights that they, and especially the US, desired.⁴⁹ To overcome this resistance the two powers agreed to exit the GATT. They set up the WTO as a "modified" GATT regime with the features that they desired and then invited the remaining GATT members to join the new body. The two powers made it clear that they would have no obligations towards countries that did not join the new regime. As Steinberg describes, "This maneuver, which closed the Uruguay Round by means of a single undertaking, presented the developing countries with a fait accompli: either sign onto the entire WTO package or lose the legal basis for continued access to the enormous European and U.S. markets. From the time the transatlantic powers agreed to that approach in 1990, they definitively dominated the agenda-setting process, that is, the formulation and drafting of texts that would be difficult to amend."⁵⁰

Another example of shifting venues -- this time from a multilateral to bilateral regimes -- involves the protection of foreign investments. Following the end of cold war, the Western powers mounted an effort to push for a multilateral agreement on the protection of foreign investments, an area which they regarded as sharing the same paramount importance as trade or intellectual property protection. In 1995 the US initiated, under the auspices of the Organization for Economic Cooperation and Development (OECD), negotiations on a Multilateral Agreement on Investment (MAI). However, these efforts were frustrated by a coalition made up of Southern governments and Northern NGOs that together managed to create a divide within the ranks of Northern governments. As a result the negotiations on MAI collapsed.

⁴⁷ In his Oceans Policy Statement issued in 1983, President Reagan announced that the United States would act in accordance with the Convention's principles relating to traditional uses of the oceans, but would not abide by the provisions in Part XI concerning deep seabed mining (see testimony of John F. Turner, Assistant Secretary of State, Oceans and International Environmental and Scientific Affairs before the Senate Environment and Public Works Committee, March 23, 2004, available at <http://www.state.gov/g/oes/rls/rm/2004/30723.htm> (last visited February 5, 2007)). See also Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law* (NYU Law School, Public Law Research Paper No. 06-19, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918458, last visited Feb. 20, 2007).

⁴⁸ See ROBIN R. CHURCHILL AND A. VAUGHAN LOWE, *THE LAW OF THE SEA* 232-235 (3d ed. 1999).

⁴⁹ See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining at the GATT/WTO*, 56 INT'L ORG. 340 (2002).

⁵⁰ See Steinberg, *supra* note 39, at 265. It is worth noting that the story of the establishment of the WTO regime itself reflects another exercise in fragmentation, that of the World Intellectual Property Organization (WIPO) regime. The US and the EC incorporated the TRIPs agreement into the new WTO regime after they had failed, in the early 1980s, to obtain similar protection for intellectual property under the auspices of WIPO with its wide membership (see Steinberg, *supra* note 49, at 349).

The BITs, described above,⁵¹ were the response. Through bilateral negotiations of essentially similar contracts the powerful states managed to set new global standards. The opposition mounted to the MAI crumbled once the developing countries were forced to negotiate separately.

Recently, the powerful states' quest for flexibility to cope with rapidly changing policy environment has been coupled with a growing technological capacity on the part of their national bureaucracies to closely coordinate their activities. The availability of communications and the need to use them bring diverse parts of national bureaucracies into direct contact, almost on a daily basis, with their foreign counterparts has led to an increasing reliance on informal arrangements that facilitate coordination without entailing long term commitments and rigid rules that might constrain them in the future. As a result, there is a growing temptation to evade the formal requirements of international treaty-making (and of the domestic law that requires formal ratification of treaties) and to operate outside the boundaries of international law. The governments of powerful states exhibit a growing tendency to consciously avoid both international legal claims and multilateral agreements. An example of this growing aversion on the part of powerful states for formal legal processes and institutions can be found in a 2000 directive of the federal German government instructing all ministries to avoid international obligations as much as they could. The directive stipulated that negotiators should explore alternatives to formal international undertakings before they commit to such.⁵²

Such alternatives to formal international law are plentiful.⁵³ Intergovernmental action among powerful states can be based on the authority that they individually possess under their respective domestic laws or on their relegating authority to private actors. The coordinated practices that emerge do not betray *opinio juris*; in fact, the participating governments emphasize the opposite, namely their self-interest and lack of legal commitment. Outsiders to these clubs, the uninvited governments, adapt to these practices and rules not because they are formally bound to do so, but because there are incentives that are tacitly attached to their observance and disincentives attached to their non-observance. Over time, these informal rules modify the expectations of other actors and the range of possible actions open to them in the same ways that

⁵¹ *Supra*, notes 34-36.

⁵² See § 72 Gemeinsame Geschäftsordnung der Bundesministerien (2000) [Collective standing order for all federal ministries of 2000]:

Vor der Ausarbeitung und dem Abschluss völkerrechtlicher Übereinkünfte (Staatsverträge, Übereinkommen, Regierungsabkommen, Ressortabkommen, Noten- und Briefwechsel) hat das federführende Bundesministerium stets zu prüfen, ob eine völkervertragliche Regelung unabweisbar ist oder ob der verfolgte Zweck auch mit anderen Mitteln erreicht werden kann, insbesondere auch mit Absprachen unterhalb der Schwelle einer völkerrechtlichen Übereinkunft. [Before the planning and the conclusion of international agreements (international treaties, agreements, interministerial or interagency agreements, notes and exchanges of letters) the responsible federal ministry must always inquire whether the conclusion of the international undertaking is indeed required, or whether the same goal may also be attained through other means, especially through understandings which are below the threshold of an international agreement.

(We thank Armin von Bogdandy for the reference).

⁵³ There are four types of alternatives to formal international law: (a) Informal government-to-government coordination that characterize most spheres of activity of contemporary governmental action, including many government agencies such as central bankers, antitrust regulators, securities regulators, criminal enforcement agents, and environmental protection agencies, who harmonize their activities through informal consultations in informal venues, and implement them through their authorities under their domestic laws; (b) non-binding institutions that enable governments sharing common interests to coordinate activities vis-à-vis other states (prevalent in the context of non-proliferation of weapons, such as most recently the Financial Action Task Force (FATF) and the Proliferation Security Initiative (PSI)); (c) joint-ventures between governments and private actors, like in the case of the Global Fund to Fight AIDS, Tuberculosis and Malaria, an entity that is constituted as an independent Swiss foundation; and finally (d) the delegation of authority to set standards to private actors, in areas where governments have been reluctant to act, or have simply preferred to let private actors perform such tasks, ranging from letters of credit and insurance to facilitation of transnational trade, safety standards, accounting standards, and even the setting of core labor rights for developing countries. On these alternatives see Eyal Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law, in "COALITIONS OF THE WILLING" - AVANTGARDE OR THREAT? (C. Calliess, Georg Nolte and Tobias Stoll, eds., forthcoming 2007); Slaughter, *supra* note 7.

are often associated with soft law, but the character of operation is far less subtle. Their requirements are usually unambiguous and the costs of ignoring them all too tangible.

V. Countervailing Efforts to Reduce the Fragmentation of International Law

In the preceding sections we have argued that the ability of weaker states to cooperate in order to stay or reverse the fragmentation process is undermined by multiple factors: the substantial agenda setting power of the dominant states, the high transaction costs that fragmentation has already brought about, and the wide diversity that exists among weaker states with respect to their policy preferences. One important source of this diversity that we have not yet discussed is whether the government is democratic or not. Apart from the area of defense spending where the resources are often used for the purpose of maintaining internal rather than external security, nondemocratic regimes in developing states generally to invest a much lower portion of tax revenue on the provision of public goods like education and healthcare than do their democratic counterparts.⁵⁴ Bueno de Mesquita et al. argue that this is the case because the power base of nondemocratic incumbents consists of small economically-privileged and/or militarily powerful elite that stands to benefit far more from receiving special government subsidies, contracts, and tax privileges than it would from the increased provision of general public goods.⁵⁵ This same logic suggests that with the exception of free trade which often benefit elites disproportionately, autocratic developing states will also be less interested than their democratic counterparts in supporting or even influencing those international institutions that provide global public goods such as peacekeeping, public health services, or environmental regulation.

Combined with their lack of agenda setting power, such divisions leave the group of mostly democratic developing states and the NGO's that support them at a distinct strategic disadvantage in attempting to expand their policymaking role in international institutions. Like citizens living under an authoritarian regime that controls the media and lacks representative institutions, weaker states are forced to resort to strategies and tactics that are more reactive and opportunistic than those employed by more powerful states and consequently less likely to succeed. Because the odds that any given strategy will fail are relatively high, weaker states tend to employ a number of them at the same time and are constantly revising them as the situation changes.

One such strategy employed by weaker states is a counterpart to the regime switching on the part of stronger states. Rather than promote policies in venues that are currently the focus of powerful state attention, they turn to preexisting ones that developed states have largely abandoned but whose decisions they remain formally committed to following. The fact that they are no longer competing directly with stronger states reduces the level of cooperation that they must engage in to have their collective presence felt, and it makes it easier for them to cultivate agency bureaucrats who may be nervous that the "flight" of the developed states will irreparably damage the prestige of their organization.

Laurence Helfer has described how developing states, in order to minimize what from their perspective are the adverse consequences of the TRIPS agreement, have employed this tactic in connection with a number of preexisting institutions including the Convention on Biological Diversity, WIPO, and the World Health Organization.⁵⁶ The UN and its subsidiary bodies have also been employed in this role more generally. The law that emerges from these institutions on such occasions typically has little binding force. However, it can engender claims about "soft law" that subsequently shape the "evolutionary" interpretation of treaty obligations and international law in general. Outcomes such as the

⁵⁴ See Bueno de Mesquita *et al.*, *supra* note 22 at 86-87.

⁵⁵ *id.* 174-213.

⁵⁶ Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking* 29 YALE J. INT'L L. 1 (2004).

WTO's AB decision in the Shrimp/Turtle case ruled that the GATT agreement had to be interpreted "in the light of contemporary concerns of the community of nations" reflected in non-GATT related treaties and even in nonbonding declarations,⁵⁷ are a strong encouragement for the continuation of such efforts.

Weaker states also employ a strategy that resembles that of "divide and conquer" the tactic of trying to opportunistically exploit temporary divisions among the core group of powerful states when they appear. The negotiations of the UNCLOS, GATT, and the Additional Protocols of the Geneva Conventions⁵⁸ show the developing countries' ability to exploit East/West competition. One of the most significant success was the recognition under UNCLOS of the concept of the deep ocean resources as the "common heritage of mankind" and of the principle that these resources should benefit all states. Like other such cases, this achievement depended on the existence of a unique and atypical negotiating environment where the regular divisions between states collapsed, and where the developing countries could exploit the Cold War East/West tensions.⁵⁹ Recently, and under similar idiosyncratic conditions, a coalition of developing governments and developed states headed by Canada and France emerged at the UNESCO Convention on Cultural Biodiversity aimed at impeding the spread of American culture.⁶⁰

Developing democratic states also employ their own unique brand of "soft-balancing" strategies. These are designed to produce a gradual shift in practices and eventually outcomes that will benefit weaker states in the long run but which are politically unthreatening and even attractive to powerful states because they embody principles that they have publicly embraced and which would be costly to renounce. For example, weaker states might advocate that a given international institution be designed to reflect the same overarching principles, structure, and procedures that are embodied in the domestic institutions of democratic states. The institutionalization of such widely held ideals as equality, democracy, and procedural due process is far more difficult for powerful states to object to than the adoption of specific reforms such as reduced agricultural subsidies.⁶¹

The two most prominent and successful of these strategies which are closely interrelated involve pushing for more inclusive and representative personnel policies on the part of international institutions and judiciaries and for an expansion of their policymaking roles.⁶² The fruits of the first strategy are evidenced in the composition of multi-member international tribunals such as the International Court of Justice (ICJ) and the WTO Appellate Body, where the composition of the court is expected to be broadly representative of the membership of the institutions. Today, the ICJ "reflects complex cleavages: north versus south; east versus west; wealthy versus poor; and so forth."⁶³ The panelists in the WTO panels also reflect different nationalities and interests. The 417 panelists recruited between 1995 and 2004 included

⁵⁷ WTO Appellate Body Report on United States - Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (Oct. 8, 1998), paras. 129-30.

⁵⁸ On the negotiations leading up to the Law of the Sea Convention see William Wertenbaker, *The Law of the Sea - I*, THE NEW YORKER, Aug. 1, 1983, at 38 and William Wertenbaker, *The Law of the Sea - II*, THE NEW YORKER, Aug. 8, 1983, at 57; See also *supra* notes 47-48 and accompanying text. On the WTO negotiations see *supra* notes 49-50 and accompanying text. On the success of the developing countries during the drafting of the 1977 Additional Protocols (and the subsequent reinterpretation of the same norms by international courts) see Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War* 59 VAND. L. REV. 1 (2006).

⁵⁹ See Wertenbaker, *supra* note 58.

⁶⁰ The Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20 2005, available at http://www.unesco.org/culture/ culturaldiversity/convention_en.pdf. (last visited February 5, 2007). See also Joost Pauwelyn, *The UNESCO Convention on Cultural Diversity, and the WTO: Diversity in International Law-Making*, ASIL Insight, Nov. 15, 2005.

⁶¹ The study of the possibilities for structuring the decision-making processes in international institutions—the project on global administrative law—reflects and assesses such efforts: see Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law* 68 LAW & CONTEMP. PROB. 15 (2005).

⁶² See Eric Posner and Miguel de Figueiredo, *Is the International Court of Justice Biased?* (Am. L. & Econ. Ass' Ann. Meetings Working Paper No. 36, 2005) available at <http://law.bepress.com/alea/15th/art36> (discussing evidence that judges in the ICJ have favored the states that appoint them, the states whose wealth level was close to that of the judges' own state, and some evidence that these judges favored states whose political system was similar to that of the judges' own state, and that the judges favored states whose culture (language and religion) was similar to that of the judges' own state.)

⁶³ *id.*, at 23.

individuals of 46 different nationalities, 31 percent of whom came from developing countries, and another 54 percent from developed countries other than the EU and the US.⁶⁴ Of the seven members of the WTO's Appellate Body, the EU and the US have had one national each, while the other appointees came from other developed countries (one national of either Japan, New Zealand, or Australia) and the other three from larger developing countries (Egypt, The Philippines, India, Uruguay or Brazil).⁶⁵ Arguably, this helps explain why the influence of weaker states in international institutions that have central bureaucracies and tribunals, while still small in proportion to their number and populations, has been growing in recent years, and it attests to the soft-balancing strategies mentioned earlier.

Weaker states are aware that even when bureaucrats and judges are drawn from developing states they will bring their own personal and professional interests to bear. These can range from a personal or professional commitment to promoting greater equality in the international system to narrower interests such as expanding the influence of the institutions that they represent and enhancing their own careers. Weaker states have learned, however, that in the pursuit of such goals these agents will often take actions that erode the discretion of powerful states.

The expectation that this will continue to be the case is the basis for the second weaker state strategy of supporting the expansion of their role.⁶⁶ Expanding the role of judges and of international law in general promises all actors -- sovereign states weak and strong -- equal formal status as participants in the international lawmaking process, and equal protection via an impartial decision making process that is based on a coherent and consistent interpretation and application of the law. More generally, any legal system that is based on a hierarchical order of norms as well as accepted "rules of recognition" that describe how law is made and interpreted, inevitably will operate to reduce the ability of powerful states to contract out of the system and reduce the benefits that venue manipulators could achieve by jumping from one fragmented subsystem to another. In fact, an assertion that international law is resilient to escape routes has recently been made by a study group of the UN International Law Commission (ILC) on the fragmentation of international law.⁶⁷

This argument should not be overdrawn. It is not possible to argue that international law in general has accepted basic norms that regularly constrain powerful states in their negotiations with weaker states. The problematic concept of "jus cogens" that recognizes "preemptory norms" that are binding on all states remains confined to a small set of morally abhorrent practices such as torture, genocide and slavery.⁶⁸ Economic coercion is still legitimately employed by powerful states to elicit

⁶⁴ Henrik Horn & Petros C. Mavroidis, *The WTO Dispute Settlement System 1995-2004: Some Descriptive Statistics*, Jan. 31, 2006, available at <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/HornMavroidisWTODSUDatabaseOverview.pdf> (last visited Jan. 25, 2007).

⁶⁵ Source: WTO website http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited January 25, 2007).

⁶⁶ Evidence that developing countries seek judicial assistance in protecting their rights and promoting their interests more often than do strong states provides some evidence that this pattern of tacit cooperation may be producing a reciprocal symbiosis that will continue to strengthen over time. See the discussion *supra* on the use of international tribunals by developing countries (*supra* notes 61-64 and accompanying text). While the WTO Appellate Body entertains some disputes between strong parties, such parties tend to shun litigation. The ICJ conspicuously has not engaged in such litigation for many years. The strong prefer to litigate in venues where they can closely control the composition of the arbitrators. These can be special tribunals (such as the US/Iran Claims Tribunal), or ad hoc arbitration panels, such as, for example, arbitrations set up under the auspices of the Permanent Court of Arbitration in The Hague (for a list of pending arbitrations and recent awards see the website of the Permanent Court of Arbitration at <http://www.pca-cpa.org/ENGLISH/RPC/> (last visited Jan. 25, 2007)); for a typical arbitration between two developed countries by arbitrators from developed countries see the Arbitration regarding the Iron Rhine (JZEREN RIJN) Railway (Belgium v. Netherlands) (award of May 24, 2005), available at <http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20240505.pdf> (last visited Jan. 25, 2007)).

⁶⁷ U.N. International Law Commission, Study Group on the Fragmentation of International Law, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 176 U.N. Doc. A/CN.4/L.682 (2006) (finalized by Martti Koskeniemi):

States cannot contract out from the *pacta sunt servanda* principle - unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie).

⁶⁸ A preemptory norm is defined as "a norm accepted and recognized by the international community of States as a whole as a

concessions from weaker states, and the norms protecting human rights stop short of recognizing responsibilities among states.⁶⁹ The developing countries' efforts to obtain more control over foreign investments have failed⁷⁰ and their calls for recognizing a so-called "New International Economic Order"⁷¹ have been without effect. Stronger parties increasingly prefer to use informal mechanisms and norms to cement the weaker parties' commitments.⁷²

Nonetheless, despite this limited success and the continued efforts of powerful states to restrict their autonomy that was described in the previous section, the bureaucracy and judiciary of various international institutions continue to have ample opportunities to increase their influence and discretion both as ends in themselves and as vehicles by which they can implement their preferred policy agenda. Such opportunities arise because uncertainty about the nature of problems that these institutions are asked to address and irresolvable disagreements among powerful states lead to the creation of agreements that possess ambiguities and omissions that need to be resolved by bureaucrats and tribunals before policies can be implemented.⁷³ Of course, after an agreement is created powerful states do what they can to constrain the extent to which these agents exert this discretion by controlling the process by which judges and high-level bureaucrats are appointed, threats of cutting funds, or exit. However, the effectiveness of these tools is limited and the cost of invoking them is substantial.

Weaker states—particularly democratic weaker states – recognize that international bureaucrats and judges possess a vested interest in rationalizing their environments that should in their favor over time. By creating generalizable principles and by privileging consistency and precedent, these actors not only reduce their own decision costs and increase their efficiency, they also reduce the coordination costs of weaker states by reducing the level of fragmentation. This process of rationalization provides weaker states with a stable hierarchy of claims that they can then employ in a variety of venues, and it increases the likelihood that a victory that they achieve in a particular venue will have broad ranging limitations.

Finally, weaker states know that that international bureaucrats and judges will tend to support their claims because any erosion in the hegemony of the powerful developed states increases their own discretion and authority. The interests of bureaucrats and judges are best served when they are operating in multi-polar environment in which they are viewed as a critical part of any winning coalition rather than as the mere agent of the great powers. Supporting the claims of weaker states is a strategy that promotes the emergence of such multi-polarity even if it does not guarantee it. This phenomenon has been observed in national legal systems, where the courts systematically supported the weaker political branch of government in its conflicts with the relatively stronger branch in order to enhance their own prestige.⁷⁴

Ultimately, of course, there is a limit to the extent to which the coincidence of interests that exists between international bureaucrats and judges and those of weaker states can reduce

norm from which no derogation is permitted" (Article 53 of the Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679). Treaties conflicting with a peremptory norm of general international law, namely with the so-called *jus cogens*, are void. What constitute *jus cogens* is extremely vague, hence relegated for the courts to decide.

⁶⁹ See Benvenisti & Downs, *supra* note 33.

⁷⁰ See the discussion on the standards set by the BITs, *supra* notes 34-36, 51 and accompanying text.

⁷¹ See the United Nation General Assembly Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 3202, U.N. GAOR, S-VI, Supp. No. 1, U.N. Doc. A/9559 (1974).

⁷² See the discussion in *supra* notes 52-53 and accompanying text.

⁷³ The fact that the transaction and bargaining costs of initiating a new round of negotiations to deal with changing conditions are often prohibitively high also forces member states to delegate substantial policy making authority to bureaucrats and judges. See Eyal Benvenisti, *Factors Shaping the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS. 319, 329 (2005).

⁷⁴ Eyal Benvenisti, *Party Primaries as Collective Action with Constitutional Ramifications: Israel as a Case Study* 4 THEORETICAL INQUIRIES IN LAW 175 (2002) (suggesting that the Israeli Supreme Court was supporting the legislature in its relationship with the government); Nicos C. Alivizatos, *Judges as Veto Players*, in PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 566 (HERBERT DOERING Ed., 1995) (suggesting that divisions between the political branches strengthen the courts).

the democratic deficit. Bureaucrats and judges, especially those recruited from weaker states, may retain a considerable measure of sympathy for the welfare of weaker states generally and support policies that reflect their interests, but they do not formally “represent” those interests. From the standpoint of democratic theory weaker states lack agency and remain effectively disenfranchised in many contexts. They are, at best, privileged wards of a system that they played little or no direct role in creating and over whose future they continue to have little control. Moreover, even if it were possible to staff international institutions and their tribunals with individuals that were explicitly designated to represent the interests of weaker states, they would find that fragmentation has made the task of promoting political coordination among them very difficult.

VI. Conclusion

International legal theorists have tended to view fragmentation as either a harmless byproduct of broad social forces or as embodying a new pluralist legal order that better represents the diversity of global interests than that post-war order that preceded it. In contrast, we have argued that its functional specialization and atomistic design are, at least in part, the product of a calculated effort on the part of powerful states to protect their dominance and discretion by creating a system that only they have the capacity to alter. Fragmentation helps them accomplish these goals by making it difficult for weaker states to create coalitions through cross-issue logrolling and by dramatically increasing the transaction costs that international bureaucrats and judges face in trying to rationalize the international system or to engage in bottom-up constitution building.

The strategies that powerful states use to promote fragmentation are familiar and well-developed. Regimes are constructed out of narrow, functionally based agreements that are negotiated in separate, one time settings. Regulatory responsibility is virtually never assigned to ongoing, deliberative bodies that are systematically representative, and whenever possible significant, independent policy making authority is withheld from those bureaucracies or judiciaries whose creation cannot be avoided. When these strategies fail to accomplish their goal and weaker states or agents of international institutions appear to be gaining enough control to threaten their interests, powerful states switch to a competing one.

The pluralism produced by this fragmentation is less representative, less diverse, and less generative than that term normally implies. With only a few exceptions, the design and operation of the resulting international legal order reflect the interests of only a handful of developed states and their internal constituencies, and it is hostile to redistribution. Instead of operating to bring about democratization in a more decentralized way as many have hoped, it has effectively undermined any movement toward it.⁷⁵

⁷⁵ Fragmentation erodes democratization within states as well as obstructing attempts to promote it at the international level. By resorting to informal mechanisms to coordinate their policies, rather than treaties that are subject to domestic ratification processes, the stronger powers prevent their own citizens as well as those in other countries from having the opportunity to voice their opinions and influence outcomes that shape their lives. Such mechanisms cannot possibly fail to undermine the realization of goals such as the principle of effective participation of all states and all citizens in decisions which was recently reemphasized in the UN Millennium Declaration. Principle 5 of the declaration declares in part:

[O]nly through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation.

In this declaration the state parties also resolve:

To work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.

In recent years and in the face of hierarchy's declining legitimacy, powerful states have increasingly turned to fragmentation to maintain their control.⁷⁶ Unlike hierarchy which highlights the role of intentionality and the locus of responsibility, fragmentation obscures both. The system's piecemeal character and unclear boundaries suggest the absence of design. This fosters the perception that it evolved naturally, as the result of a series of unorchestrated responses to problems as they arose, rather than through the calculated use of power. This helps account for why the issue of intentionality is often omitted from discussions of fragmentation and why international legal theorists often dismiss it as a harmless side effect of progress, or even as a sign of growing sophistication of a responsiveness to social changes.

The role of powerful states in constructing the current fragmented legal order is further obscured by the fact that once an international institution is created—and often well before—it acquires its own constituency of supporters that has a substantial professional or financial stake in its future survival. The presence of this constituency relieves the dominant states of much of the burden of defending the institution's policies. Over time, it is not unusual for such constituencies to be more closely identified with the institution in the eyes of the international community than the powerful states that created it in the first place, and they can often be counted on to fight being reintegrated in order to maintain their power and discretion.

A fragmented legal order provides powerful states with much needed flexibility. In a rapidly changing world where even they are uncertain about where their future interests might lie, the existence of multiple contesting institutions removes the need for them to commit themselves irrevocably to any given one. This helps them to manage risk, and it increases their already substantial bargaining power. International institutions operating in this sort of environment cannot help but be aware of the fact that a powerful state might refuse to accept a ruling if it goes against them and go elsewhere in the future. This vulnerability leads the institutions to be more accommodative to the interests of powerful states than they otherwise might have been, and it reduces the likelihood that any given institution will grow independent enough to pose a serious challenge to their discretion.

Fragmentation also reduces the negative externalities associated with opportunistic noncompliance on the part of powerful states. In a tightly integrated legal system, the more powerful states would be forced to confront the possibility that their strategic "withdrawal" and regime switching might precipitate a broader erosion in the legitimacy of a particular institution or even of international law more generally—a system that they have created and in which they continue to be the chief beneficiaries. In a fragmented system the impact of withdrawal or regime shifting is more localized, so the cost of employing these tactics is considerably less. There is even the possibility that the decline in prestige suffered by one institution as a result of withdrawal will be offset by a corresponding increase in the prestige of the institution selected by the powerful states to replace it.

Powerful states have even employed fragmentation to fight off or temporize attempts to reform existing, often hierarchically designed regulatory institutions. One implicit message of Doha's collapse is that however disadvantaged weaker states may feel in connection the character of WTO, they will fare no better and probably much worse if it ceased to exist. Powerful states might lose too, but they tend to lose less and they possess the resources to pay the cost if they have to. This strategy had served the U.S. well in forcing the world trade regime to incorporate services (GATS) and intellectual property (TRIPS).⁷⁷

See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (Sep. 9, 2000), available at <http://www.ohchr.org/english/law/millennium.htm> (last visited Jan. 25, 2007).

⁷⁶ Hierarchy's declining normative legitimacy is arguably not the only reason that powerful states, and particularly the U.S., decided to abandon it. The end of the Cold War, the reintegration of Russia and China into the global economy, and the emergence of regional powers like India threatened to loosen the security-based ties between the Western Allies and create club of great powers that would be larger and more competitive than it was in the past.

⁷⁷ David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 7 (2002):

[T]he roughly four years spent negotiating the agenda for the Uruguay Round of Multilateral Trade Negotiations were

When it encountered resistance in expanding the regulatory agenda of the GATT, it withdrew and instead formed, together with the EU, an alternative venue – the WTO – that fit all its conditions. The ensuing "take it or leave it" offer that the US and the EU presented to the rest of the world was successful, and it reinforced the fact that despite the multilateral trappings, the interests that mattered were those of the two economic superpowers and neither placed a high priority on achieving the stated goal of creating a "self contained regime." Consistent with the underlying logic of fragmentation the text of the WTO treaties were not burdened with provisions pertaining to "unrelated" issues such as human rights, labor rights or environmental protection. More recently, an implicit threat of withdrawal and regime shifting has continued to hover in the background of ongoing and largely futile efforts to introduce democratic reforms at the UN and to increase the role of poorer states in the IMF and World Bank.

The likelihood that the current trend toward fragmentation will be reversed in the near term is relatively poor. Neither the U.S., Russia, nor China has evidenced any sustained interest in integrating or democratizing the international regulatory system. There are, however, some grounds for hope that a more integrative trajectory could eventually be reestablished. The continued success of the European Union is one. Despite its many ongoing problems and the recent failure of the constitutional treaty, the EU has continued to expand, and it has largely resisted pressures to fragment. Notwithstanding its infamous "democratic deficit," it has made considerable progress in areas such as improving access to decision-making, accountability, the transparency of committee activities, and enhancing the significance of the European Parliament. Its existence continues to testify to the potential willingness of strong developed states to form a democratically governed union with less developed and weaker states that benefits them both and is capable of adopting redistributive policies that would have previously been dismissed as utopian.⁷⁸

It seems unlikely that the EU's success will inspire the creation of something comparable in Asia, Latin America, or Southern Africa any time soon, but it keeps the model of incremental, economic-driven regional integration alive as a possible future option for regional organizations such as Mercosur or the African Union. It is also conceivable that the EU comparative success in developing regional-wide regulatory policy might lead other developed states to the realization that solutions to problems such as climate change and access to energy require the negotiation of more integrative regional agreements that link trade, environmental, and security issues and the development of more representative institutions to oversee their implementation.

It is also possible that the major developing democracies such as India, Brazil, South Africa, and South Korea could evolve into an anti-fragmentation coalition. Not only do their roughly similar colonial histories, level of development, and democratic character give them as much, if not more, in common than most regional collections of developing states, but the size of their economies would give such a coalition considerable clout. Such a coalition could collectively press for more democratization, and it might be able to pressure major powers to reduce their reliance on the tactics of regime shifting and withdrawal by threatening to retaliate in kind (e.g., withdrawing from aspects of WTO's intellectual property regime). Such a coalition would also be a natural ally of international bureaucrats and judges in their attempt to promote greater integration generally.

largely devoted to deciding which subjects were fairly encompassed within the rubric of trade.

⁷⁸ Redistribution is one of the stated goals of the EU, as provided by Article 158 of the Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, 2002 O.J. (C 325), 33, 103:

In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions, including rural areas.

See also Mikko Mattila, *Fiscal Transfers and Redistribution in the European Union: Do Smaller Member States Get More than their Share?* 13(1) J. EUROPEAN PUB. POL'Y 34 (2006) (Noting that the European budget is redistributive both on the revenue and on the expenditure side).

Finally, weaker states should continue to benefit in the future, as they have in the past, from the efforts of international bureaucrats and judges to expand their discretion as well as through their role as interpreters of international law and legal scholarship. As we mentioned above, international legal scholars, particularly in Europe, have traditionally viewed international law and international institutions as part of a coherent, multi-tiered global legal order that is rooted in the international community as a whole and characterized by its own internal logic and to a somewhat lesser extent hierarchy. This constitutionalist vision has not been confined to theoretical conceptualizations. As active members in legal bodies set up to progressively develop international law, such as the UN International Law Commission, lawyers have managed to introduce concepts and principles that would later aid them in arguing that the international legal system possesses an emergently constitutional character that imposes obligations on states in return for recognizing their legitimacy.⁷⁹ The concept of *jus cogens* obligations, now the generally accepted evidence to the hierarchical nature of international law,⁸⁰ and endorsed by several international and national courts as such,⁸¹ was promoted by Alfred Verdross while a law professor in Austria during the interwar era. Later, as one of the ILC members working on the drafting of the Vienna Convention on the Law of Treaties, Mr. Verdross had the opportunity to introduce the same concept into the text of the treaty.⁸²

Any serious effort on the part of international tribunals to define the nature of these state obligations and the overarching principals of the international community from which they are derived will inevitably bring these bodies in conflict with the fragmentation strategies of powerful states. By creating a cacophony of isolated functionally-specific venues that reduce the prospects for weaker states cooperation, these strategies create a system which permits powerful states to stave off the emergence of any obligation that they do not expressly impose on themselves. Constitutionalism, even in its gradualist Habermasian form, jeopardizes this system. It provides international tribunals with the ability to endogenously expand their authority and independence, and it gives them an incentive to attend to identify the values and goals of less powerful states in order to justify their decision about what constitutes the values of the international community. The result is likely to be an erosion in the discretion of powerful states and an increase in the extent to which the international legal order reflects the preferences of weaker states.

How quickly this gradual constitutionalism will continue to evolve is a matter of speculation. Recently, perhaps in reaction to its initial successes, this project has been attracting criticism from scholars who have begun to question its legitimacy.⁸³ In any event, it seems clear that it will depend on a willingness on the part of international tribunals and international legal theorists to confront rather than dismiss the extent to which fragmentation jeopardizes the international community's realization of its own values by enshrining the atomization of international law and unequal distribution of global power. It will also depend on the willingness of international legal community to collectively discuss the moral legitimacy of the constitutionalist project and the grounds for regarding any consensus that it might reach regarding the nature of international community as preferable to more democratic alternatives.

⁷⁹ Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223, 235 (2006) (suggesting that according to the hierarchical understanding of the international community, states have legitimacy only to the extent that they respect and implement the fundamental obligations of international law).

⁸⁰ *id.* (*erga omnes* and *jus cogens* obligations reflect the acknowledgement that the international community is a community of values).

⁸¹ The concept of *jus cogens* as a higher norm of international law has been referred to as such by the ICJ (*see, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226), and by several national courts, including the House of Lords (*R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (No 3), [2000] 1 A.C. 147, 197-199) and the Supreme Court of Canada (*Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3).

⁸² Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law* 6 EUR. J. INT'L L. 1, 19-22 (1995).

⁸³ *See, e.g.*, JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).