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

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

The Challenge of Global Public Goods

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] Olson, *supra* note 8, at 13–16.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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