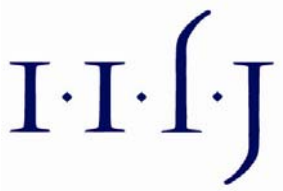

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2012
Convened by Professors Benedict Kingsbury and Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown, unless otherwise noted

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

January 25	Harlan Grant Cohen, *University of Georgia* "Finding International Law, Part II: Our Fragmenting Legal Community"
February 1	Anthea Roberts, *London School of Economics / Visiting Professor at Harvard University* "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System"
February 8	Odette Lienau, *Cornell University* "Rethinking Sovereign Debt: The Politics of Reputation in the Twentieth Century"
February 29	Nico Krisch, *Hertie School of Governance (Berlin) / Visiting Professor at Harvard University* "From Consent to Consultation: International Law in an Age of Global Public Goods"
March 21	Doreen Lustig, *New York University* "History of Responsibility of Corporations in International Law"
April 4	Martti Koskenniemi, *University of Helsinki / New York University / Visiting Professor at Columbia University* [to be held in Pollack Colloquium Room, 9th Floor, Furman Hall, 245 Sullivan St.]
April 17	Horatia Muir Watt, *Sciences Po* "Global Governance and Private International Law" [to be held, exceptionally, on a Tuesday at 4pm; location TBA]
April 18	Armin von Bogdandy & Matthias Goldmann, *Max Planck Institut, University of Heidelberg / New York University* "Sovereign Debt"

From Consent to Consultation

International Law in an Age of Global Public Goods

Nico Krisch[*]

February 2012
Draft for discussion – please do not cite or circulate

Modern international law with its emphasis on sovereign equality has come under pressure for its cumbersome procedures and the resulting difficulty to deliver on global public goods. In this paper, I inquire into how international law has dealt with this challenge and trace processes of change in key institutions of international law – jurisdiction, the powers of international institutions, and treaty-making - driven by arguments from global public goods. I find them to have led to only limited change in formal international law, but a broader shift towards informality and a resulting marginalization of formal law as well as a proceduralisation of the protection traditionally provided by the consent model. Overall, this reflects ambiguity between input- and output-oriented legitimacy frames and signals an important transformation of the international legal order, yet one which also erodes protections for countries from being governed by others.

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I. Introduction

Even though at the centre of modern international law, the consensual structure of the international legal order, with its strong emphasis on the sovereign equality of states, has always lived precarious lives. In different waves since its inception, it has been attacked for its incongruence with the realities of inequality in international politics, for its tension with ideals of democracy and human rights, and for standing in the way of more effective problem-solving in the international community. Often enough, these three strands – in short: challenges from power, morality, and effectiveness – have reinforced each other in the attacks of powerful states.[1]

The consensual structure has proved surprisingly resilient in the face of such challenges, but recent years have seen renewed attacks on it. In the 1990s these were mainly 'moral' in character – they were related to the liberal turn in international law and aimed at weakening principles of non-intervention and immunity in the name of human rights. In the 2000s, the focus has shifted, and attacks are more often framed in terms of effectiveness or of 'global public goods' – classical international law, based as it is on sovereign equality and consent, is regarded as increasingly incapable of providing much-needed solutions for the challenges of a globalised world. As countries become ever more interdependent and vulnerable to global challenges, an order that safeguards states' freedoms at the cost of common policies seems, in this view, anachronistic.

This challenge finds a reflection in the rise of global governance, which on most accounts has brought about a seismic shift in the structure of international authority. It may not have displaced states as the main actors, but it has changed the ways in which states pursue their policies; it has produced institutional forms which channel politics in crucial issue areas; and it has given a range of new actors a place at the decision-making table.[2] Yet international law and its structure seems to have remained largely unimpressed by this shift. The rise of global governance figures – quite predictably – more prominently in treatments of certain issue areas, such as international environmental or economic law, and in the field of international institutional law[3], but it is rarely seen to have altered international legal structures in a fundamental way. Much of global governance continues to be treated by international lawyers as more or less irrelevant informal action, producing nothing more than soft law, and safely belonging into the realm of politics and international relations.[4] With some exceptions[5], the rise of global governance is framed in a similar way as the Concert of Europe was by most lawyers in the 19th century – politically important but of little import for the structure of international law and its focus on sovereign equality.

[1] Simpson 2004; see also Krisch 2003.
[2] [Held - xx]
[3] Alvarez; AvB etc.
[4] A position forcefully restated in d'Aspremont.
[5] Most notably, calls to revisit classical sources doctrines, in Alvarez, Kingsbury.

If this diagnosis were true, it would at the least be surprising. The same reasons typically adduced to explain the rise of global governance should also put pressure on fundamental tenets of classical international law: the need for more effective common problem-solving also militates in favour of smoother processes for international law-making – and for a weakening of the sovereign equality norm that renders these processes traditionally slow and cumbersome. We should thus expect to see pressure on them from states (and other actors) interested in more effective regulation and the provision of common goods. At least some degree of reconfiguration should be the result of such pressure.

In this article, I inquire whether, and to what extent, we can observe such a reconfiguration. In my analysis I focus on three pillars of international law – jurisdiction, law-making, and institutional powers – that we can expect to be at the centre of challenges, and examine the practices and discourses around them for indications of change. Yet in line with the historical-institutionalist approach I adopt, I also study possible shifts into alternative institutional contexts – a potential layering or displacement especially in direction of the informal realm in which much of global governance is conducted and which may have absorbed pressures for greater effectiveness, while leaving the formal structures of international law intact.

The paper begins, in Part II, by sketching previous and current pressures on the consensual structure of international law, especially from an angle of effectiveness, and it establishes a framework for the further inquiry by introducing an account of change in international law based on historical institutionalism. In Part III, the paper examines three central areas of international law – jurisdiction, law-making, and institutional powers – for shifts away from the classical consent-model in the name of stronger outputs, and it also takes a potential turn to alternative contexts – especially informal ones – into view. In Part IV, I draw the findings together to draw a picture of how and to what extent the always tense relationship between effectiveness and consent is being reconfigured, and how legitimacy discourses and legitimating devices are reconceived.

[As readers will notice, this is a very early draft, and many parts are still tentative (or entirely missing). My apologies for this; I hope the general idea still comes across, and the paper provides a basis for discussion. In my future work on the paper, I would like to focus on three issue areas as case studies which would allow for a deeper engagement with the shifts I observe than the general level I operate on at this point. For this I plan to take the regulation of the financing of terrorism, of climate change, and of infectious diseases into view, which reflect different interest constellations and may help clarify the dynamics at work, or at least help to develop more advanced hypotheses for future work. But I would be very interested in comments on the general idea and design of the project.]

II. Continuity and Change in the Structure of International Law

1. The Resilience of Consent

[tbc] [Concert] [Institutionalization of sov inequality: institutions, 1907, 1945] [GA law-making in 1970s] [liberal challenge in 1990s: rights (intervention, immunity), democracy (participation), int'l community – pressure, but no consolidation (R2P, immunities, HI)]

2. The Attack from Effectiveness

Collective action problems have beset international institutions, and international law, throughout their existence. The hurdles for effective cooperation, though not impossible to overcome, are often substantial, and issues of defection and free-riding are commonplace in the creation and operation of most international regimes.[6] The urgency of resolving such problems depends primarily on the importance of the goods in question and on their salience in domestic political discourse, and while for many decades international cooperation seemed to affect largely secondary issues, this has radically changed in recent decades. The (problematic) term 'globalization' captures part of this shift. National polities have become – or have begun to understand that they are – dependent on and vulnerable from outside their own boundaries to an unprecedented extent. This is partly due to the global liberalisation of markets, which leads to greater economic interdependence; partly to the increasingly transboundary nature of security threats, especially terrorism; and partly to the global character of contemporary environmental problems, most notably climate change.[7] Responses to problems of this kind typically need to go beyond national action and require equally transboundary measures.

The Challenge of Global Public Goods

Part of this shift in perception and reality is captured in the rise of the idea of 'global public goods'.[8] If public goods – goods that are non-exclusive and non-rivalrous in their consumption – traditionally remained in the reference frame of the nation-state, the extension of the concept to the global sphere signals the increase on that level in goods from which all benefit and on which (often) all depend. The most influential policy work on the subject, which uses a somewhat broader definition[9], groups issues ranging from market efficiency to the environment, health, peace and security, and more broadly the provision of justice under this heading.[10] More than anything, using the label 'public goods' here points to the difficulties of provision – unlike private and certain other collective goods, public goods are usually seen as prone to underproduction, as

[6] See Keohane 1984; Krasner 1987
[7] [xx]
[8] Kaul etc.
[9] Kaul et al 2003
[10] Kaul et al 1999, 2003.

the costs of provision are high and incentives for free-riding great.[11] In the domestic context, the problem is typically solved through a government equipped with coercive means and – especially – the power of taxation.[12] On the global level, though, public goods exacerbate the ubiquitous collective-action problems ever further.

International law in its classical form appears as particularly ill-suited to tackling this challenge. Its grounding in sovereign equality requires the consent of states for law-making through treaties and the creation of institutions, and it severely limits the possible reach of unilateral action. Even if this does not necessarily prevent effective action on global public goods, it imposes high hurdles – and thus creates a structural bias against such action. Increasingly, commentators have thus urged for an overhaul of the international legal order in favour of a more effective problem-solving mechanism, able to counter problems of free-riding in similar ways as domestic government does. As influential economist, William Nordhaus, has noted,

> 'the Westphalian system leads to severe problems for global public goods. The requirement for unanimity is in reality a recipe for inaction. Particularly where there are strong asymmetries in the costs and benefits (as is the case for nuclear non-proliferation or global warming), the requirement of reaching unanimity means that it is extremely difficult to reach universal and binding international agreements. ... 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. To someone who is an outsider to international law, the Westphalian system seems an increasingly dangerous vestige of a different world. Just as economists recognize that consumer sovereignty does not apply to children, criminals, and lunatics, international law must come to grips with the fact that national sovereignty cannot deal with critical global public goods.'[13]

Not all accounts are equally grim. Some economists, such as Scott Barrett, insist that certain types of global public goods do not involve collective-action problems in the same way and therefore do not suffer as much from the hurdles of 'Westphalian' decision-making processes.[14] They do agree, however, that a substantial subset of global public goods does create the problems Nordhaus describes. The provision of 'weakest link' goods and even more so that of 'aggregate efforts' goods requires cooperation also by states unwilling to shoulder the burden. This holds true also for the funding of such efforts, including in cases such as that of 'single best efforts' goods which may be provided by a single or group of states or other actors.[15] As a result, treaties are often seen as 'inappropriate instrument[s]', and other institutional solutions are called for.[16]

Such accounts are not limited to observers from outside the field of international law. Few international lawyers have addressed the challenge of global public goods directly, but those who

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[11] [xx]
[12] [xx]
[13] William N Nordhaus, 'Paul Samuelson and Global Public Goods' (2005, http://nordhaus.econ.yale.edu/PASandGPG.pdf.
[14] Barrett 2007; Schaffer 2011, 8-13
[15] Barrett [xx].
[16] Barrett 2007, ch 2

do tend to highlight the limitations of the international legal order. Greg Shaffer, for example, holds that 'we increasingly need centralized international institutions' to provide certain global public goods.[17] Laurence Helfer notes that 'as globalization has expanded the need for legal rules to resolve collective action problems transcending national borders, it has become apparent that voluntary treaty making and treaty adherence procedures often produce a problematic result' and observes a turn to nonconsensual international law-making as a response to this problem.[18] Andrew Guzman similarly diagnoses the 'inefficiency of a commitment to consent' and suggests that 'if the global community hopes to make progress, we will have to increase our ability to overcome the consent problem.'[19] Yet the supply of centralised institutions and nonconsensual law-making mechanisms is highly uneven, and this leaves international law deficient as regards the provision of important goods. Moving beyond this state of affairs would require a relaxation of the 'Westphalian' framework with its consent requirement for the creation of obligations and the delegation of powers.

The Rise of Output Legitimacy

Such a relaxation of the principle of consent has affinities with a significant shift in the discourse about the legitimacy of global governance – a shift from input to output legitimacy. This shift has been given its most prominent expression in Fritz Scharpf's account of the legitimacy basis of EU integration policies, which he saw largely justified on the basis of considerations of effectiveness (output) while lacking on the (democratic) input side.[20] Scharpf intended to highlight the resulting limitation of EU decision-making – arguments from output could only ground pareto-optimal solutions but were unable to base measures with greater distributive effects, such as policies in zero-sum games. Still, identifying output legitimacy as the sole, or main, justification even for this limited range of policies went significantly beyond previous frameworks for the legitimacy of political institutions. As Scharpf himself emphasises, even those domestic institutions that formally remain outside of normal democratic channels – such as independent central banks or constitutional courts – are nevertheless politically embedded in a system of indirect political control.[21] Accepting that coordination games, regardless of the uneven distribution of benefits, could in principle be subject to regulation on the basis of effectiveness considerations alone would pave the way for much further-reaching institutional action in the international sphere – unhinged from the strictures of state consent or other forms of broad political input.[22]

[17] Shaffer 2011.
[18] Helfer 2008, 124-5.
[19] Guzman 2011, 34 (WP).
[20] Scharpf 1999.
[21] Scharpf 2004.
[22] See, however, Scharpf 2004 who only focuses on treaty negotiations and their inbuilt limitation to pareto-optimality.

Scharpf's position has received much criticism, not the least for the difficulties in measuring output without corresponding political input processes.[23] Yet it has reshaped the debate on the legitimacy of governance beyond the state, in which similar approaches have gained ground in recent years. One of the most influential contributions to this debate, by Allen Buchanan and Robert Keohane, regards the 'comparative benefits' of an institution as one of the main criteria for assessing its legitimacy.[24] And while their initial account also included the consent of (only democratic!) states as a precondition of legitimate governance, later formulations silently drop this criterion.[25] In fact, in a recent application of this general framework, Keohane bases his (eventually positive) assessment of the UN Security Council almost exclusively on considerations of 'comparative benefit' – effectiveness – at the expense of other, more input-related criteria.[26]

This focus parallels greater flexibility in democratic theory itself, which in light of the structures and challenges of global governance has relaxed strong requirements known from the domestic context in favour of an emphasis on democratic forums[27], contestation[28], deliberation[29]. Often enough, it has gone so far as to limit itself to defining a process of democratization, of 'democratic-striving', rather than standards of democracy themselves.[30] This trend certainly remains contested – Jürgen Habermas's vision of the global order, for example, insists on a strong form of democracy in line with democratic standards in the domestic realm, which leads him to eschew institutions with far-reaching policy-making functions and to restrict global supranational bodies to limited functions of safeguarding peace and human rights.[31] Agreement on the proper normative frame of global governance thus remains elusive. But the classical, central place of sovereign equality in this frame – a place already under challenge, from a different angle, after the liberal turn of the 1990s – has been further eroded by considerations of effectiveness. The urgency of solving global problems, expressed in the notion of global public goods and reflected in the shift to output legitimacy, has placed the sovereign equality norm under ever greater strain.

3. Continuity and Change in International Law

In this paper, I try to understand the effects of these pressures on the structure and role of international law. Yet it is by far not a foregone conclusion that we should be able to observe important effects at all – given the resilience of consensual structures over time, such pressure may well have failed to produce tangible results. Ideational and political change is not always

[23] Eg, Moravcsik & Sangiovanni 2002 WP; Müggle 2011.
[24] Buchanan & Keohane 2006.
[25] Keohane 2011. Consent by all states is, in any event, not required by them.
[26] Keohane 2011.
[27] Held 2004.
[28] Pettit.
[29] Dryzek, Bohman.
[30] See the overview in de Burca 2008.
[31] Habermas 2004, 2007, 2008. [check again: output arguments for UN level?]

reflected in legal norms, let alone in foundational legal norms. Though driven by politics, law is often regarded as semi-autonomous, and further conditions have to be fulfilled for it to follow change in other social systems.

When, where and to what extent we can expect change in international law, though, is not well-established – rather surprisingly, the question of change in international law has found little attention in scholarship. International lawyers often merely point to the formal requirements for the emergence of new norms as treaties or customary international law, but they do not ask under what circumstances such emergence may take place. Scholars more attuned to the field of international relations – as well as international relations scholars interested in international law – have focused most of their attention on questions of compliance, neglecting the issue of change on the way.[32] And when they have looked at the making of international law, they have often portrayed it as if taking place on a clean sheet – as if choices as regards new norms were largely independent from existing norms and institutional settings.[33] This typically follows from the rational-choice orientation of such accounts, which understands current institutional and normative constellations as the result of a 'rational design'.[34] This may capture the basis of processes of law-making and legal change in the interests of central actors – especially states – but it obscures the particular questions raised by the interplay of existing norms, changing interests and newly arising normative propositions. From a rationalist perspective, change is only natural, but most likely too natural if we consider how much continuity we can observe in world politics.

More constructivist-minded scholars who go beyond studies of compliance approach the issue of change more directly, but often with a focus on norms in general, rather than legal norms in particular. The widely-influential work of Martha Finnemore and Kathryn Sikkink is exemplary here. Key to their account is the work of 'norm entrepreneurs' – activists that promote new understandings and build coalitions for change. If the efforts of such entrepreneurs have sufficient success to reach a tipping point, the following 'norm cascade' spreads the new norm and helps institutionalize it both on the international and the domestic level.[35] While helpful, this account leaves the conditions for success underspecified, and it does not address the particular difficulties that arise for displacing a previous legal norm which, despite ideational change, widespread critique and opposition, may remain – and may be accepted to remain – in force.

A more direct attempt at explaining change in international law can be found in the recent work of Wayne Sandholtz and Kenneth Stiles. They also use a broadly constructivist starting point and construct a cycle of norm change in which arguments over existing norms, triggered by tensions

[32] Eg, Guzman, Simmons. This is true for change in international relations; see the remark in Keohane 2008: 710 (big questions).
[33] Legalization; Hathaway.
[34] Rational Design of International Institutions.
[35] Finnemore & Sikkink; many works since.

between them and states' action, produce changed meanings and new norms as a result.[36] While this approach has the virtue of taking past norms seriously, it may actually overstate their role and grant change an overly limited place, as is the case in much constructivist work.[37] The emphasis on analogical reasoning and the compatibility of new arguments with old, widely-accepted norms may underestimate the potential of outright change theorized by Finnemore and Sikkink and taken for granted in most rational-choice accounts. In the view of Sandholtz and Stiles, new norms largely emerge out of a relatively organic recasting of existing norms.[38] While reminiscent of the common law (and in international law, of customary law), it offers few insights for more conscious and directed efforts at legal change.

Some better understanding of when new norms may successfully challenge old ones has recently been sought by studies of the 'degeneration' of norms. Diana Panke and Ulrich Petersohn, for example, have argued that such degeneration – spurred initially by a conflict between states' interests and an existing norm – is conditioned by the stability of the norm's environment as well as the character of the norm itself, namely its precision. Challenges to norms in unstable, rapidly changing contexts are seen as more promising, and degeneration is expected to take the form of incremental change in the case of vague norms, while precise norms either survive a challenge or disappear entirely.[39]

This argument connects with the analysis of institutional change in the historical strand of institutionalist thought. Unlike its rationalist and sociological counterparts, historical institutionalism has found only limited reception in the study of international relations, and even less in the study of international law.[40] It does, however, focus precisely on those phenomena – the interaction of existing institutions with pressures for change – which we have found to be neglected in much internationalist scholarship. In particular, its emphasis on path dependence and its causes helps explain why in many cases change does not come about despite a changed constellation of interests that would suggest a different result.[41] Lock-in and feedback effects, highlighted by historical institutionalism[42], may help to account for the relative stability of international legal rules and of the broader framework of international law. Through this prism, we may better understand the resilience of the sovereign equality norm, which in today's world hardly matches political realities. Its development in 18th and 19th-century Europe as a means of creating order despite political and religious diversity, then its extension to the rest of the world in the process of decolonisation, created states and recognised them as equal players and thereby brought about a situation in which for many of them (and the domestic actors behind them)

[36] Sandholtz & Stiles book.
[37] [critique?]
[38] This portrayal is maintained even for cases in which new norms radically depart from old understandings; see [plunder example].
[39] Panke & Petersohn EJIR 2011.
[40] Fioretos 2011; but see March & Olsen; Ikenberry 2001; Evolution of Trade Regime; Raustiala 2009. Check RB Baker, 'The New Institutionalism and IR' (paper 2011)
[41] For a discussion of the different institutionalisms, see Hall & Taylor 1996
[42] See Fioretos 2011

change would be highly detrimental. The institutional veto power of these actors within the international legal order has likely contributed much to the maintenance of a norm that today neither reflects power relations nor an unquestioned normative commitment.

If historical institutionalism helps explain continuity, it has also developed a nuanced approach to change. As in rationalist institutionalism, institutional change is seen as driven first and foremost by change agents – actors who have an interest in change and sufficient power to mobilise a coalition in its favour.[43] The success of such efforts (and the way in which it occurs), however, is seen to depend on further conditions in cases where continuity is favoured by path dependence and other such effects. Change is most likely during 'critical junctures' – at times when the balance of power tilts, paradigms shift, and the broader environment becomes unstable.[44] Yet even though this suggests the dominance of punctuated equilibria, change is also seen to be possible in a more incremental fashion through gradual processes of adaptation and/or challenge.[45] Wolfgang Streeck and Kathleen Thelen have proposed a typology of modes of institutional change, which ranges from the outright 'displacement' of an institution to its 'conversion', the reinterpretation of its rules in a new fashion; and from 'layering' – the accumulation of competing rules – to 'drift' of an institution because of failure to adapt it to new circumstances.[46] Which mode prevails, depends for historical institutionalists on characteristics of the institution and its rules – most notably, their rigidity and precision, which determines the possibility of gradual, interpretive change – and the political context, namely the degree to which defenders of the status quo enjoy the (formal or factual) possibility to veto efforts at change.[47]

4. Constellations of Change

This framework can help us structure our inquiry into the reconfiguration of international law's consensual base. I assume that globalization and the rise of the global-public-goods discourse have produced something akin to a 'critical juncture' – an unstable environment that invites change. I also assume that there is a related general rise in the interest of states (and other actors) to provide for a more effective provision of global public goods – and more effective regulation to achieve it – than the strictures of the consensual model typically allow. Yet these interests are unevenly distributed, and there are likely to be differences among issue areas as regards change agents and coalitions, and among the different expressions of the consensual model as regards interest constellations as well as institutional preconditions with a view to change.

Issue Areas

[tbc – focus on financing of terrorism, climate change, infectious diseases]

[43] [xx]; and Hall.
[44] Capoccia & Kelemen 2007
[45] Mahoney & Thelen 2010.
[46] Streeck & Thelen 2005.
[47] Mahoney & Thelen 2010.

Institutional Contexts

The second dimension on which we can expect significant variation in outcomes – at least on the historical institutionalist account – is the institutional context for change. As discussed above, the precision of existing rules and institutional settings is often seen to condition the mode in which change is likely to manifest itself, with vague rules open to gradual, internal change and precise rules attracting forms of displacement and layering through the emergence of alternative rules. Variation on this dimension is reflected in three key expressions of the consensual model of international law – jurisdiction, institutional delegation, and consensual treaty-making. These three contexts also relate to three modes of global regulatory action – unilateral, institutional, and multilateral ones.

Jurisdiction denotes the international legal limits to unilateral action; it generally restricts unilateral action to events that take place (or have a significant effect) on a state's own territory or that are linked to individuals or companies of their nationality or incorporation. Only in very few cases, typically related to egregious violations of individual rights, can states go further and exercise 'universal' jurisdiction. Still, the norms governing these issues are of customary, non-written provenance, and their edges are accordingly vague and often contested, especially as regards extraterritorial regulatory action. *Institutional delegation* is governed by a somewhat more precise set of rules, even though these equally flow from customary international law. At the undisputed core of these rules lies the assumption that international institutions cannot exercise powers over a state beyond what the state has consented to. Vagueness comes back in as regards the interpretation of delegated powers, and concepts such as the 'implied powers' doctrine or an emphasis on dynamic, evolutionary interpretation have helped to keep interpretation of institutional powers even more open than is the case for ordinary treaties. *Consensual treaty-making* – founded upon the idea that treaty obligations can only arise for states that have expressly consented to them – is subject to the clearest rules, codified also in the 1969 Vienna Convention on the Law of Treaties, which prescribes procedures, governs modes of interpretation and rules out effects on third states.

If we can expect change to play out differently across these three dimensions of consent, we can also expect that the consent element in them sets them clearly apart from forms of normativity *outside* the international legal order. One important element in historical-institutionalist analyses, as mentioned above, is the inquiry into potential shifts into alternative contexts which allow to break free from the strictures an existing institution imposes. In this paper I focus on informal law-making as such an alternative context in which the consent element has a much more limited effect and where rules and standards can be set without broad participation, yet often with far-reaching effects. A guiding hypothesis here is that we should be able to observe a stronger turn towards informality in settings in which – as in treaty-making – the strictness and precision of existing rules about consent, coupled with the veto power this affords to individual states, render law-making initiatives difficult.

We should, however, not lose sight of the fact that these contexts are also characterized by important differences other than precision or vagueness of their guiding rules. On any given issue, states' interests in changing jurisdictional rules are likely to differ from those in changing rules on law-making or institutional powers. These differences will often reflect concerns about generalization and reciprocity. Moves away from consent in law-making may come to haunt a state at a later point, when it may be sidelined by other states' regulatory endeavours. Such 'boomerang' effects are less likely when it comes to powerful states' exercises of unilateral jurisdiction, as the possibility of such exercise depends on the – unevenly distributed – capacities to enforce such action. Depending on the characteristics – and voting rules – of the institutions in question, such effects may or may not occur when institutional powers are unmoored from delegatory shackles. Therefore, not all 'nonconsensual law-making'[48] is equally attractive to states. On the other hand, multilateral action through treaties or institutions will often promise to solve collective action-problems more effectively than unilateral action or informal standards. And within some international institutions, the set of veto players – another focus of historical-institutionalist accounts of change – is more restricted than in others, thus producing significant variation also on that dimension.

Aims and Limitations

Such 'impurities' would cause serious problems if this paper aimed at adjudicating between different theories of change in international law. But this is not its goal. Instead, it seeks to understand whether and how international law's consensual structure is reconfigured at a time that may be seen as a major environmental shift, a critical juncture – the age of global public goods. The theory introduced here helps to guide this inquiry and to create a map that captures as much as possible the relevant aspects of this reconfiguration and may help generate hypotheses for future, more detailed work.

III. Elements of a Challenge

1. Jurisdiction

Jurisdictional rules in international law have traditionally been rather restrictive, limiting the reach of states' legislation and enforcement in principle to their own territories. In an ever more interdependent world, the underlying idea that affairs in one state could be neatly separated from those in another is increasingly untenable, though, and normatively, there is a growing demand for effective regulation of transboundary, or even global, issues – as regards trade, finance, the movement of persons, etc. This public good is, however, hard to come by, and it is therefore unsurprising that pressure has mounted in favour of relaxing the strict jurisdictional regime in certain areas and to allow for a broader use of unilateral measures to provide such public goods.

[48] Helfer.

This path is especially appealing in areas in which unilateral action promises effective action – when the character of the problem makes unilateral solutions possible[49] or when links with trade or aid conditionalities are likely to induce change well beyond the boundaries of the acting state.

Yet not all states – or all other actors – have an equal interest in the relaxation of jurisdiction rules. Some depend more than others on particular goods – small-island states' vulnerability to climate change is an obvious example. And some stand to lose more than others from softening jurisdictional limits – weak states are far more likely than powerful ones to be on the receiving end of an exercise of jurisdiction, if only because their own efforts in this direction are unlikely to have much effect on other, stronger countries. As Scott Barrett notes,

> '[w]hen one or a few states have an incentive to supply a global public good, these providers cannot be counted on to take into account the interests of other countries. If global public goods were unambiguously to be desired, this would not matter. But the provision of some global public goods may introduce new risks, or harm some countries even while benefiting the providers, or reduce the provision of other global public goods that may be of even greater benefit.'[50]

As generally with norms about consent and sovereign equality, we can thus expect pressures for change to emanate mostly from the powerful, and resistance to change from weaker states. Even powerful states may be hesitant to touch jurisdiction rules, though, if they have to fear an equal exercise by similarly powerful counterparts. The risks involved in such a move are limited only in a hegemonic situation, when one player dominates others by a large margin (or can count on allied countries going along with its own policies). Otherwise, broader rights to unilateral action for oneself can produce a boomerang effect when used by others, too.

Towards Softer Jurisdictional Limits?

If we can thus expect pressures for softer jurisdictional limits to stem most centrally from the US in its most dominant phase – the second half of the 20th century – initial evidence seems to provide confirmation. Most discussions of controversial exercises of jurisdiction in the last decades concern the US, and most focus on action in the late 20th century. In part, this is due to the establishment and increasingly liberal application of the 'effects' doctrine, initially conceived in the antitrust context and used there since 1945.[51] This doctrine claims jurisdiction no longer only for acts taking place on the territory itself, but also for acts that produce effects there, and it has been much criticized for its potential breadth of application. Yet stronger resistance has been the result of the pursuit of broader policy goals through extraterritorial jurisdiction, as in the attempt to restrict the sale of military technology to the Soviet Union in the early 1980s[52] or the Helms-Burton Act in 1996, which sought to enforce sanctions against Cuba through action on foreign companies.[53] Critique has also accompanied extraterritoriality in securities regulation,

[49] See, eg, Barrett 2007, ch 1.
[50] Barrett 2007, ch 1 (loc 977).
[51] Ryngaert 2008, 62.
[52] Lowe 2007, 179.
[53] Lowe 1997.

most notably around the Sarbanes-Oxley Act in 2002, which set stringent corporate governance standards also for foreign companies listed on US markets.[54]

The general focus on effects, which has found increasing sympathies in the EU, in principle allows for far-reaching regulatory action in global markets, where many market-related acts produce worldwide effects. Scholarly commentators in the US have taken this further and called for a liberal interpretation of the effects doctrine with a view to allowing US courts and regulators to regulate global markets in the absence of other fora able to do so.[55] Yet such a role – effectively the unilateral provision of a global public good – has been rejected by US courts in recent judgments, in which they have sought to limit their jurisdiction to situations with a clear and demonstrable effect on US markets, both as regards antitrust and securities cases.[56] And in other areas where broader action by the courts would have been conceivable – such as environmental regulation – their traditional stance already included a stronger presumption against extraterritoriality.[57]

A broader role was, however, assumed by US courts in the context of the Alien Tort Statute, under which foreign nationals can sue for violations of the law of nations before US domestic courts. Mostly, however, the related cases concerned human rights violations and were thus reflective of the liberal turn in international law, rather than of a potential turn to protect global public goods.[58] They share this characteristic with the exercise of universal jurisdiction in criminal matters, most vigorously pursued by a number of European countries since the 1990s.[59] A certain set of cases under the Alien Tort Statute, however, concerned environmental matters and could be seen as a broader attempt at extraterritorial regulation of a matter with global implications. Despite calls for greater activism, though, US courts have been hesitant to see international environmental law as a sufficient basis, and litigation in this area so far have been largely unsuccessful.[60] Overall, thus, attempts at softening jurisdictional rules linked to global public goods have remained limited in the US, while most other countries appear to take a generally more reluctant stance as regards broader jurisdictional claims.

Regulating Others Informally

In an interconnected economy, however, indirect forms of influence may be even more consequential than direct exercises of extraterritorial jurisdiction. Conditions for market access and development aid are used widely to influence policies of the target countries, and they are often the prime tools to further global public goods.

[54] But see Vancea (2003-4) 53 DukeLJ 833.
[55] Eg, Berman 2005; Buxbaum 2006; Michaels 2011.
[56] SCt, Hoffmann La Roche (2004); Morrison (2010).
[57] Ryngaert 2008, 69.
[58] See Donovan & Roberts 2006.
[59] Ryngaert 2008, 100-27.
[60] See Jaeger 2010.

This is perhaps most clearly on display for environmental issues, where governments seek to bring other countries' policies in line with theirs in order to tackle transboundary environmental problems. Traditionally, international law did not have much to say about this; unless there was a right to demand trade access or aid, conditionality was regarded as unproblematic – this certainly since the attempts of the 1960s and 1970s to define unlawful intervention also in economic terms had faltered. Unilateral development aid, for example, still is hardly subject to international law disciplines. While multilateral development cooperation, through the World Bank and regional banks, has been increasingly subject to stricter normative expectations as regards accountability and procedure[61], national measures in this regard remain generally discretionary. And yet, development aid increasingly functions as a main tool for donor countries' attempts at changing environmental policy abroad, including on global environmental problems such as biodiversity or climate change.[62]

The situation is somewhat different today as regards the pursuit of global environmental (or other global public good) goals through trade-restrictive measures, especially conditions on market access. Through the GATT and the WTO, trade relations have been lifted out of the discretionary into a more legalized sphere of foreign policy, and the *Tuna/Dolphin* litigation was an attempt to restrict efforts at regulating others in a similar way as jurisdictional rules had done before – in this vein, trade law seemed to help international law catch up with new challenges. This result did not stand, though, and the *Shrimp/Turtle* report, though exhibiting some of the same concerns as the previous *Tuna/Dolphin* one, proceduralized the protection – unilateral regulation through trade conditionality of environmental matters outside a country's jurisdiction was admitted if only it followed sincere efforts at consensus-building, multilateral cooperation and negotiations and consultation with affected countries.[63] Indirect, partly informal national regulatory action – for example, labelling in function of process and production standards – has thus come under scrutiny through the trade regime, and this is seen to impose limits on how, for example, countries can implement market barriers on products from countries not participating in a climate-change regime. Yet these limits are softer and more procedural in nature than those classically associated with jurisdictional boundaries.

2. Institutional Powers: Crisis and Transformation

The powers of international institutions have long been conceptualized as more dynamic than other norms of international law – capable of adaptation through practice, their evolutionary nature unmoored them somewhat from the treaty-making processes through which they were founded and in which consent and sovereign equality had a central place. And in the interpretation of institutional powers, functionalist arguments loomed large and at times sustained far-reaching arguments in the framework of so-called 'implied powers'. Even so,

[61] Dann.
[62] See RL Hicks, *Greening aid? Understanding the environmental impact of development assistance* (2008), ch 2.
[63] Shrimp/Turtle report.

processes of adaptation required general acceptability by the membership – or at least an absence of sustained opposition, and the use of implied powers seemed to be in decline in the 1990s.[64] The idea of universal consent as the procedural pillar on which institutional powers rested was thus (at least formally) maintained.

Stretching the Boundaries of Delegation

Recent years have seen a number of developments that signal transgressions of this framework in the name of global public goods, especially peace, the environment, and global health. These may not all have led to legal change, but they reflect the pressure exerted on traditional forms of law-making by demands for effective action in these areas.

The UN Security Council is the most striking example for an expansion of its powers beyond their original conception.[65] Bit by bit since 1990, it has not only invented many new tools for its action but has also redefined the meaning of international peace in a broader fashion that includes both the absence of domestic conflict and the absence of certain less direct causes of conflict, thus taking it into more preventative areas. Much of this action met with concern by influential member states at the beginning and was branded as 'unique' or 'exceptional' to avoid formal resistance. Over time, though, the accretion of discreet responses to crises has sedimented into legal change. Certain reservations remain in principle, such as the concern by many states that SC action against the illicit exploitation of natural resources went too far in the direction of social and economic regulation. Yet such reservations have been easily outweighed when responses to particular conflicts were needed and no other mechanism stood ready to act quickly and effectively to safeguard important goods. The same pattern is visible when it comes to quasi-legislative measures by the Council, which are regarded with suspicion by many UN members for encroaching upon the powers of the General Assembly and for circumventing treaty-making processes. But such concerns have been largely set aside for action on terrorism and non-proliferation, where the need for regulation seemed more weighty than concerns about process. A similar contest in principle exists for action on climate change – seen by many as safely outside the realm of the SC, but by many others as necessary to remedy the institutional weakness otherwise existing in the area. No more than debate has occurred on this latter issue so far, and a change of SC powers in this direction is not (yet) in sight, but many commentators have greeted this first, cautious move with exceptional enthusiasm.

In other institutions, similar developments may be observed. For example, the SARS crisis provoked unprecedented action by the WHO, which issued health warnings and travel advisories well beyond the powers it enjoyed under its constitution or the International Health Regulations. After initial complaints by member states, the IHR were later amended to allow for such action in the future, thus implicitly sanctioning the initial transgression.[66] In the context of the Kyoto

[64] Klabbers.
[65] See Krisch 2012, forthcoming.
[66] Fidler 2004 book (and http://www.jci.org/articles/view/21328#B22)

Protocol, law-making on significant issues has been shifted from formal amendment processes to majority decisions of the plenary body - the compliance procedure, for example, was so enacted (in a formally non-binding decision) in order to avoid the cumbersome amendment route prescribed for the matter in the Protocol itself.[67] These are, of course, limited examples, and a fuller study would need to investigate more systematically into a broader range of institutions and action as well as inaction in order to discern the existence and strength of a trend. Yet the examples mentioned suggest that the formal powers of international institutions have come under significant pressure from arguments from global public goods, and that principled concerns about legality and procedure have been put aside for the sake of outcomes and effectiveness in a number of instances, especially in crises that required powerful responses.

Flights into Informal Institutions

If change in the powers of formal international institutions provides increasingly broad opportunities for governance in the name of global public goods, a broader expansion may yet be triggered by the rise and growth of informal regimes, both public and private. Remaining below the threshold of binding obligation, informal action has typically not been seen as subject to international law disciplines – it did not require formal delegation (though action of formal institutions had to remain within the bounds of their constitutional documents) and could target members and non-members alike. For long, this may not have caused serious concern, but with the rise of informal governance structures and their increasing importance in interconnected markets, this lack of constraint has become increasingly consequential, and it has facilitated both the provision of public goods and the exercise of power.

This shift is most obvious in the growing importance of informal 'clubs' in global governance, often in the form of government networks.[68] These are, of course, not a new phenomenon, and arrangements such as the Concert of Europe in the 19th century are important examples from earlier periods. But during much of the 20th century, when the guiding aspiration was for universal international institutions and many states resisted formal privileges, clubs were difficult to institutionalize. Exceptions, such as the UN Security Council or the Bretton Woods institutions, required important efforts of persuasion and pressure on the part of the privileged powers.[69]

Outside the realm of formal institutions, the creation of clubs is much easier. The G-7 (later G-8 and G-20) is an example of an informal gathering which has matured into a body whose decisions are routinely implemented not only by member governments but also by other international institutions, such as the IMF. Club structures are particularly pronounced in the area of financial regulation, where the Basel Committee, the Financial Action Task Force, and the more recently created Financial Stability Board, all operate on the basis of limited membership

[67] See Brunnee & Toope 2010: 201, also for a defence of this approach.
[68] Slaughter 2004
[69] Simpson 2004

and grant access only to a select group of governments (or government agencies). Yet they set rules designed for broader, global (or quasi-global) application with the aim of creating a stable global financial system. Non-members are drawn towards compliance either through the respective market structure (especially in coordination-game situations), through outright sanctions (as formerly in the FATF), or through the implementation and enforcement processes in other institutions, such as the IMF or (for terrorist financing) the Security Council. Such a reach beyond the boundaries of the institutions - action, albeit often informally, on third parties - has provoked criticism but has not led to a full opening of the institutions, only to the inclusion of a few important players from emerging economies. The argument from effectiveness - a classical topos in the justification of clubs, though for long less compelling to many - outweighed broader procedural concerns.

3. Treaty-Making

[tbc: so far no evidence of stretching consensual frame for formal law-making, perhaps even of restrictions to treaty-making with effects on outsiders: MAI – turn to informal accords to overcome problems of treaty-making: Copenhaguen Accord, ...]

IV. International Law in an Age of Global Public Goods

1. A Picture of Change

The picture of change that emerges from the (very provisional) findings in the previous section is highly varied. In terms of formal international law, the classical structure seems to be under greatest pressure as regards institutional powers – an area in which we have observed different instances of a far-reaching reinterpretation of institutional powers so as to make them more effective in dealing with pressing global problems. Compared to that, movement on jurisdictional boundaries is much more circumscribed, and as regards treaty-making, attempts to break out of the classical, consent-based framework have not been noted.

This latter finding would correspond to the initial assumption, derived from general historical-institutionalist theory, that in an area where institutional rules are clear and precise and where veto players are strong, change through reinterpretation is difficult, and we are more likely to see a shift towards other institutional contexts in the form of 'layering'.[70] On the other hand, the bounds of institutional delegation – typically more imprecise and open to interpretation – seem to have lent themselves better to processes of 'conversion' in which an existing institutional framework is reconceived through practice if strong veto players are absent. The Security Council is a case in point: limited in membership and thus less subject to resistance from those (weaker) countries that stand to lose from a weakening of the consent model, its powers have

[70] See Mahoney & Thelen 2011.

been subject to sustained (and successful) efforts at reinterpretation. The third area, jurisdiction, however, does not fit easily into this model. Its rules are the least precise of the three areas studied here, and because of the dominance of unilateral action in reshaping them they are least subject to the action of veto players – and nonetheless, pressures for change have remained limited. This finding may be better explained through the limited effectiveness of unilateral action in advancing global public goods, or through the risk of generalization that may lead to reluctance among states.

In all three areas, however, we can observe a strong prevalence of informal regulatory action. (For treaties, this observation is obviously even more provisional than for the other areas.) For unilateral action, such informal action may avoid boomerang effects that would result from the creation of broader, generalized jurisdictional boundaries. For institutions and law-making more broadly, informal structures likewise avoid the risk of countries being subjected to binding decision-making by others.[71] In most areas, this consideration seems to be more important than concerns about a lack of effectiveness. The main exception, the UN Security Council and its powers, is also the prime example of an institution in which, because of the formalized veto of the permanent members, a boomerang effect from majority decision-making is excluded. Otherwise, as non-consensual decision-making processes with similar institutional privileges are typically not available in the egalitarian structure of international law, action to tackle global problems moves into the alternative, relatively unstructured context of the informal.

2. From Consent to Consultation

If this picture of change is accurate, the role of consent in global regulation is being reconfigured to a significant extent. Consent and sovereign equality seem to persist in central areas of international law – treaty-making, jurisdiction – but their influence on outcomes is reduced by the shift towards non-consensual and informal modes of regulation. Some of the norms emerging from these processes are binding; many others may be non-binding, but because of market structures and political dynamics their effects will often be as important.

Unsurprisingly, this reconfiguration has provoked criticism, and I have already sketched instances of resistance in the examples of the Security Council and global financial regulation. These critiques have triggered various forms of formal and informal institutional responses, which largely have in common a turn towards procedural devices for bridging effectiveness and right process, or, more realistically, for appeasing those that no longer (fully) sit at the decision table.

These devices include, first, forms of *representation.* As mentioned above, the expansion of membership in the G-7 and the regulatory bodies in global finance has been the result of a need for relegitimation, but it has not resulted in actual membership of all affected countries. It has

[71] On the reasons for the use of soft law, see Abbott & Snidal 2000, etc.

instead institutionalized a form of representation (or perhaps trusteeship) by a limited number of powerful governments, similar to the arrangements already in place in the international financial institutions, and typically to the benefit of countries such as China, Brazil, India, Indonesia, South Africa and a handful of other important (or 'emerging') players. This is replicated in WTO negotiations by a focus on the G20 group of developing countries; in the follow-up to the Kyoto protocol, an even more limited number of governments drafted the Copenhagen accord when broader negotiations had stalled. In other contexts, such as the FATF, outsiders (especially outsider organizations) have been granted associate or observer status in order to give them a place in the regulatory process.

A second widespread tool to counter criticism of expansive regulation has been recourse to *consultation*. Consultation has been identified as a broad trend in global rule-making in general[72], but in our context we see it used specifically as a compensatory mechanisms for the weakening of the classical strictures of consent. For example, in the field of antitrust – the main example of broader jurisdictional claims by the US – the OECD has recommended consultations with other countries' authorities in competition cases that affect them.[73] Under WTO rules, unilateral rule-making on process and production standards abroad has been accepted if it follows efforts at negotiation as well as consultations with affected governments.[74] In the Basel Committee, standards for banking supervision are now adopted after extensive notice-and-comment procedures, so as to include actors – also third countries – in a decision-making process which in its first iterations had excluded them.[75] Other bodies with informal regulatory powers, such as the Codex Alimentarius Commission, operate in a similar way. And in the UN Security Council, steps beyond traditional powers – towards quasi-legislation, preventive action, and consideration of climate change as a security issue – have been buffered by open debates in which non-Council members could voice their views.

Representation and consultation are typical features in the design of regulatory institutions, and especially consultation has often been seen as a key element in securing procedural legitimacy in global regulatory governance.[76] It is quite another matter, though, for such mechanisms to compensate for the move away from consent in global governance – a break, even if often an informal one, with a central structuring element of modern international law.

3. Legitimacy in Global Governance: Reconfigured?

The processes outlined in the previous section are far from complete - new powers are largely unsettled, legal transformations still tenuous, and informal governance structures remain contested. Moreover, absent a broader inquiry, they represent limited developments which may

[72] GAL.
[73] OECD recommendations: Zerk 102.
[74] Shrimp/Turtle.
[75] Barr & Miller.
[76] GAL.

or may not provide insights into broader phenomena. However, they seem to reflect, to some extent at least, the broader changes in the legitimacy frames of global governance and international law I have sketched in section II. Output legitimacy carries greater weight in that decision-making has shifted away from established, consent-oriented procedures with reference to substantive aims. This has also led to compensatory mechanisms, through both representative and consultative means, but these mechanisms do not align with ideas of input legitimacy that rest on national self-government, autonomy or democracy – and thus national control over international procedures. They are closer to a number of alternative approaches that emphasize deliberation, contestation or participation as the procedural basis of decision-making – approaches that reinterpret democratic requirements or focus primarily on accountability as a basis for legitimate global governance.[77] In this way, output considerations, which because of their contested nature are largely seen as unable to base decisions alone, are coupled with procedural mechanisms that would not, in and of themselves, provide a sufficient ground for far-reaching decisions. This shift may indicate a readjustment of the respective weight of input and output forms of legitimacy in the global context, quite distinct from the relationship they are typically seen in domestically.

Such a shift may be welcomed by the governments driving it, and certainly also by champions of the substantive goals at stake – environmental NGOs, for example, tend to downplay procedural concerns if only environmental protection can be substantially enhanced. However, settlement on a shift to outputs has not been reached, largely because the move away from strong procedures – input legitimacy through consent – continues to be viewed critically by a number of actors. Most typically, concerns are raised by governments of countries whose consent is dispensed with – this is the classical constellation in the UN vis-à-vis the respective powers of the Security Council and the General Assembly, but it has been replicated, for example, in the context of the FATF which had to drop its more confrontational policies because of sustained resistance.[78] This represents a predictable response to a power shift towards a more oligarchic institutional structure.

Yet critique stems also from another set of actors disfavoured by a turn towards outputs rather than (classical) inputs – domestic ones. Domestic courts have sent warning shots at the Security Council for human rights deficits, but if their stance in the European Union is any indication, their focus may soon shift to democratic concerns and could reach other areas too. In a sense, this is foreshadowed by a distancing of domestic from international law, for example in the WTO context, often justified by courts by an intention of leaving space for (domestic) political actors.[79] Among academic commentators, it is certainly constitutional lawyers – far more than international lawyers – who decry legitimacy problems in global governance.

[77] See Section II above.
[78] Hülsse (also newer paper).
[79] See Krisch 2010, ch 5 and 6.

This observation points to a plurality of legitimacy conceptions, in which different output- and input-oriented notions compete for dominance and at the moment find their homes in different social and institutional discourses. Differences are distributed geographically as well as between domestic and international discourses and likely also between participants in different issue-area regimes. More powerful actors will tend to favour output; less powerful ones input arguments. International actors will tend to prefer arguments from effectiveness, while domestic actors will often insist on right process vis-à-vis global institutions. And as regards output, participants in the trade regime are likely to prioritise wealth production (through trade), those engaged in environmental regimes will favour environmental goals. This is likely to produce a three-way split, and future iterations of this paper will seek to substantiate this intuition by analysing the corresponding discourses more carefully and with a view to particular issue areas.

V. A (Provisional) Conclusion

In this paper, I have sought to sketch what I believe is a shift in structures of law and legitimacy in global governance, driven by arguments from global public goods. I have sought to show (or so far: merely begun to indicate) that consent-based structures of international law have been challenged by arguments from effectiveness in the provision of goods that are deemed important to all. Rules on jurisdiction and the powers of international institutions have come under pressure in the name of substance, yet by and large not to the extent one would assume given the urgency of the political challenge. However, we can observe a marginalization of formal international law in new regulatory efforts – a shift of the centre of action towards the informal realm, in which consent and sovereign equality play a lesser role. In effect, this leads to a significant decline of consent, and one which has been remedied only to a limited extent through new forms of representation and consultation.

These findings – however provisional – suggest that the historical-institutionalist account of change, which I have used to frame my inquiry, helps us to understand the institutional dynamics by which the structures of international law are transformed ('conversion') and sidelined ('layering'). They also indicate a significant shift in the legal and legitimacy frames of global governance – a shift from input-legitimacy grounded in consent and sovereignty towards a mix of output legitimacy with (weaker) input considerations; a mix that would also contrast with ideas about the legitimacy of political institutions typically held in the domestic realm.

For global public goods, such a shift may be good news – a move away from the cumbersome process of international law-making would allow for decision-making mechanisms more adequate for realising such goods. Yet the resulting new authority structure would not only allow 'governance' to be stronger but also 'governing' – and oligarchic governing at that. In the search for effectiveness, the (few) protections international law contained against power would be scattered, and the power to define what 'global public goods' mean would shift to those with

sufficient institutional and ideational resources. The legitimacy of outputs may then turn out to be, in part, the legitimation of the ways of the powerful.