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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 Article we argue that the problem of fragmentation is more serious than is commonly assumed because it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the reputation of international law for integrity. It is also more resistant to reform. Powerful states labor to maintain and even actively promote fragmentation because it enables them to preserve their dominance in an era in which hierarchy is increasingly viewed as illegitimate, and to opportunistically break the rules without seriously jeopardizing the system they have created.

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 for weaker actors to build the cross-issue coalitions that could potentially 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

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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 the major role in creating. The result is a regulatory order that reflects the interests of the powerful that they alone can alter.

INTRODUCTION

In recent years there has been a growing debate in international legal circles about the importance of what is termed "fragmentation": the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries. Practicing jurists, in particular, have expressed the concern that increasing the number of international courts will lead to forum shopping, create inconsistency within case law, and "may jeopardize the unity of international law and, as a consequence, its role in inter-State relations."[1] By contrast, academic international legal scholars have tended to dismiss such concerns. Some point out that, despite the appearance of fragmentation, regulatory coordination among institutions is now better than ever before as a result of the growth in informal, market-like coordination mechanisms such as networks of governmental organizations. Others argue that fragmentation is a largely harmless side effect of the "institutional expression of political pluralism internationally,"[2] or of the increased demand for expertise in international institutions.[3] From this perspective, the ongoing competition among international regulatory institutions for jurisdiction and influence will

1. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 555 (2002) (citing H.E. Judge Gilbert Buillaume, President of the Int'l Court of Justice, Speech to the General Assembly of the United Nations (Oct. 30, 2001)).

2. *Id.* at 553.

3. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 4 (2007).

ultimately be as beneficial for the international regulatory regime as the competition among political interests is for democracy.

In what follows, we argue that fragmentation is a more serious problem than either group suggests because it operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law. Fragmentation does this in three ways. First, it limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states. Weaker actors are, in addition to being far more numerous, more institutionally, economically, and geographically diverse than powerful states, suggesting that their preferences are also more diverse. This diversity of preferences makes it more difficult for them to achieve a consensus on a particular issue. At the domestic level weaker actors often manage to overcome this problem by logrolling or trading votes across issues. However, logrolling requires a venue such as a legislature where policy decisions are made on a wide range of issues, which is rare at the international level.

To the extent that powerful parties are able to forestall the emergence of such multi-issue venues by creating a fragmented system of multiple, issue-specific treaties, they can preserve and even increase the bargaining advantages that they currently possess.[4] Decentralized mechanisms such as networks possess a host of virtues and are capable of greatly facilitating coordination among states within a given regulatory arena. However, as we shall see, they are not well suited to promoting coalition building across issues in a fragmented system.

Second, by creating a multitude of competing institutions with overlapping responsibilities, fragmentation provides powerful states with the opportunity to abandon—or threaten to abandon—any given venue for a more sympathetic venue if their demands are not met. This further exacerbates the competition between institutions and effectively marginalizes the role of weaker states, which do not enjoy the same leverage. This is not the kind of environment in which a bottom-up process of constitution making on the part of international tribunals is likely to thrive.

Third, a fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality. As a result, it is often considered to be solely the accidental byproduct of historical events and broad social forces. This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both

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4. 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: THE DELUSIONS OF GLOBAL CAPITALISM 18 (1998).

closely reflects their interests and that only they have the capacity to alter.[5] In recent years, as hierarchical strategies have become 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. Historical contingency 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 1930s and in the aftermath of WWII was, for the most 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 each required a high degree of expertise that could be found only in 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 considerable extent, fragmentation was unavoidable.

Yet even during this early stage in the international system's post-war development there were strategic considerations at work. Historical accounts of the period make it clear that the Western powers wanted to insulate key regulatory institutions, particularly economic ones, from the influence of other states, from the newly created United Nations, and from potential cross-contamination from other policy spheres.[6] Paul Kennedy's history of the UN 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. The great powers did nothing to facilitate the UN Charter's requirement 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 UN and coordinated through the ECOSOC. Instead, they chose to preside passively over a growing overlap and confusion among the UN's growing number of newly created bodies.[7]

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5. 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, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. 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.

6. *See* PAUL KENNEDY, THE PARLIAMENT OF MAN 113-42 (2006).

7. *See id.* at 114-15 ("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

In the intervening decades a host of new regulatory problems have emerged and numerous multilateral agreements and institutions have been created to deal with them. This has led to a growing number of jurisdictional disputes and mounting concerns about the international regulatory regime's lack of consistency and coherence that are the forerunners of the current preoccupation with fragmentation. In response, at each step along the way there have been frequent calls for better policy integration and coordination, and in recent years these calls have increasingly been accompanied by demands on the part of the developing states for better representation of their interests in key regulatory institutions.

Yet progress towards a more integrated and democratized international regulatory system and the redistribution of influence that it would entail has been virtually nonexistent. We believe that this lack of progress stems from the fact that the powerful states, particularly the United States, which have disproportionately shaped the international regulatory agenda, have chosen to rely on four strategies that have the effect of promoting fragmentation. These four "fragmentation strategies" include (1) avoiding broad, integrative agreements in favor of a large number of narrow agreements that are functionally defined; (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 policymaking authority and circumscribing such authority when its creation is unavoidable; and (4) creating or shifting to an alternative venue when the original one becomes too responsive to the interests of weaker states and their agents.

These four strategies increase the transaction costs that weaker states have to pay to engage in the political coordination necessary to form a coalition that could more effectively bargain with their more powerful counterparts. 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 all testify to the impact that these strategies have had.

Weaker states and those bureaucrats and judges who staff international institutions have not remained completely passive as fragmentation has increased. They have occasionally 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

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themselves at the heart of the new system through their permanent membership and veto powers."). Kennedy goes on to make clear that weighted voting in the IMF and the permanent membership of the world's five largest economies in the World Bank ensure great power dominance of economic policymaking as effectively as the Security Council ensures it in the security sphere.

institutional context, expanding the independence and role of tribunals and the bureaucratic components of multilateral institutions, and creating linkages between agreements that can serve to create coalitions. The fact that these strategies are at least intermittently successful is supported by the growing frequency with which powerful states resort to the fourth strategy of venue shifting.

This Article is organized into five Parts. In Part I, we briefly review the international legal literature dealing with fragmentation. In Part II, we examine 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 we 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 Part III, we employ this theoretical framework to understand the operation and impact of four of the most prevalently employed fragmentation strategies. In Part IV, we describes the countervailing efforts of weaker states, international bureaucrats, and judges, and assess their impact. We conclude with an analysis of the conditions that facilitated the success of anti-fragmentation strategies and the likelihood that these conditions will reemerge in the near future.

I. 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. . . .
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> 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.[8]

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.[9] The term fragmentation denotes a degree of isolation and lack of coordination that simply do not apply to today's increasingly networked world. William 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."[10]

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.[11]

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.[12] 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,

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8. Jonathan 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).

9. *See* 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).

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

11. *Id.* at 971-73.

12. Koskenniemi & Leino, *supra* note 1.

increasingly reliant on technical expertise carried out in specialized international institutions.[13] 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 by the President 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."[14] Rather than constituting a legitimate source of anxiety, fragmentation and the proliferation of courts are "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."[15]

Although the full impact of the resulting system of competing normative structures is not yet clear, its appearance is viewed as a positive development. As Koskenniemi states in his essay *What Is International Law For?*, "[T]he proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a 'postmodern' social condition and a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflect shifts of political preference and the fluctuating successes of hegemonic pursuits."[16]

Despite their significant differences in emphasis, each of these defenses of fragmentation displays a tendency to embrace assumptions that are widespread among international legal theorists 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.[17] 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.

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13. *See* Koskenniemi, *supra* note 3, at 2 ("[T]he problems faced by public international law today—marginalization, lack of normative force, a sense that the diplomatic mores that stand at its heart are part of the world's problems—result in large part from [the] strategy, the effort of becoming technical.").

14. Koskenniemi & Leino, *supra* note 1, at 553.

15. *Id.* at 575.

16. Martti Koskenniemi, *What Is International Law For?*, *in* INTERNATIONAL LAW 89, 110 (Malcolm D. Evans ed., 2003) (internal citation omitted).

17. *See, e.g.*, Burke-White, *supra* note 10, 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.").

At both the domestic and international levels, 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 United States, the protracted "war on drugs" and its associated legislation are 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)—already 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.[18]

Equally prevalent is the implicit assumption that fragmentation represents a major advance over hierarchy because the multiplicity that it embodies is inherently pluralistic and hence a harbinger of the emergence of a more democratic international legal order. Yet 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.

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

18. KENNEDY, *supra* note 6, at 120.

quotes above[19] 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. 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 played—and continue to play—a major role in fostering fragmentation, and their motivations for doing so are quite similar.

II. STRATEGIC COORDINATION IN THE DOMESTIC AND INTERNATIONAL CONTEXT

This Part 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 framework for examining how fragmentation strategies help powerful states perpetuate their dominance at the international level.[20]

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, fundraising, 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 from power.[21]

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 lack of public funding of elections, and the requirement of permits for public demonstrations and assemblies, have accomplished the same goal more indirectly by increasing the cost of engaging in political coordination.

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19. *See supra* notes 12-15 and accompanying text.

20. Barry R. Weingast, *The Constitutional Dilemma of Economic Liberty*, J. ECON. PERSP., Summer 2005, at 89, 91-96.

21. *See* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 62-63, 197-98, 269-78 (1997).

Strategies such as the gerrymandering of legislative districts, requiring a large number of signatures in order for a candidate to 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 Rokkan describes how 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.[22] More recently, Carles Boix has shown that the strategies employed by elites were even more refined and context dependent than Rokkan suspected.[23] Instead of embracing proportional representation 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 a result, the suppression of political coordination takes a different form. In these states, political opponents tend to operate outside the formal political process that they view as illegitimate and try to topple the government by sowing political discontent among the general population or by organizing a political or military coup during a political or economic crisis.[24] Since structural strategies involving electoral and legislative rules are inadequate in the face of such threats, leaders of autocratic regimes and illiberal democracies concentrate on the direct suppression of what can be termed "coordination goods."[25] This is a category of public goods or quasi-public goods that 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 that these leaders can successfully restrict the supply of these coordination goods, they increase the likelihood of their political survival.

In only the past few years, there have been numerous examples of

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

23. *See* CARLES BOIX, POLITICAL PARTIES, GROWTH AND EQUALITY (1998).

24. 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 ET AL., THE LOGIC OF POLITICAL SURVIVAL 354-402 (2003).

25. Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, FOREIGN AFF., Sept.-Oct. 2005, at 77, 80-83.

coordination goods suppression on the part of both autocrats and the leaders of emerging democracies. 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 Khodorvosky, one of the government's most prominent critics. The Vietnamese government has imposed strict controls over religious organizations and branded leaders of unauthorized religious groups as subversives. 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.[26]

Given this history, it would be surprising if powerful states did not also engage in a variant of coordination suppression to preserve their dominance at the international level and if the strategies that they employed to accomplish this did not involve the use of international law.[27] As Krisch observes in his insightful analysis of how hegemons shape and instrumentalize international law, international law provides major powers (and the interest groups that shape their foreign policies)[28] with a powerful tool for pacification and for the stabilization of their dominance.[29] Unfortunately, as Krisch also points out, even the international norms that hegemons 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."[30]

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, an environment as rapidly changing as today's can potentially jeopardize a powerful state's dominance. The norms that a powerful state has itself created can limit the state's ability to respond quickly to changing conditions and to use the law to selectively reward friends and punish emerging rivals. The requirement that new rules must be created in a relatively egalitarian setting is even more problematic in a dynamic environment because it threatens to provide a series of opportunities for weaker states to engage in political coordination and act collectively.

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26. *Id.* at 81-85. Such strategies appear to be surprisingly effective. Bueno de Mesquita and Downs show that leaders who suppress civil liberties and reduce the freedom of the press increase the chance that they will survive for another year by fifteen to twenty percent. *See id.* at 84.

27. *See* Krisch, *supra* note 5. For related analyses, see G. JOHN IKENBERRY, AFTER VICTORY (2001); JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER (2002); and Robert Jervis, *The Remaking of a Unipolar World*, WASH. Q., Summer 2006, at 7.

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

29. Krisch, *supra* note 5, at 378.

30. *Id.*

To understand the strategies that a dominant group of states might employ to cope with such challenges, it is useful to consider a simple three person game devised by Weingast.[31] The game was originally designed to illustrate the barriers to cooperation faced by citizens who wish to limit the power of a sovereign, but it is equally useful in understanding how a hegemon or a group of powerful states might employ international law to prevent weaker states from cooperating in order to erode the hegemon's 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. 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.[32]

The basic game involves a sequence of two moves. S moves first and may choose to honor both citizens' rights or to transgress against the rights of 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 the opportunity to choose whether to acquiesce or challenge the sovereign. If A and B both choose to challenge the sovereign (i.e., if they cooperate), the attempted transgression fails and the game ends. If one or both chooses to acquiesce (i.e., fails to cooperate), S's transgression succeeds and the game ends.

Similar to the outcome in the familiar Prisoner's Dilemma, there are three non-cooperative equilibria in which S challenges either one or both of the citizens and they both acquiesce. The cooperative outcome in which A and B cooperate to maximize their collective gain is not an equilibrium.[33] However, if the game is repeated, the game becomes more complicated and virtually any equilibrium is possible, because A and B might find that it is worth incurring the costs of cooperation in the one-time game to avoid a string of future transgressions.[34] Weingast singles out two equilibria arising from the repeated game as being especially noteworthy. One is an asymmetric equilibrium in which S and one of the citizens repeatedly exploit the second citizen. The other is the cooperative equilibrium in which both citizens cooperate and challenge the sovereign.[35]

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 hegemons and coalitions of powerful states frequently enjoy at the international level, where the final outcome of multilateral negotiations is usually strongly anchored to their initial bargaining

31. *See* Weingast, *supra* note 20, at 91.
32. *Id.*
33. *Id.* at 93.
34. *Id.* at 94.
35. *Id.*

position.[36]

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 requires two 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 specific package of rights that leaves each 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 revealing that over fifty percent of the twenty-four interwar European democracies failed prior to World War II.[37]

For our purposes, the primary significance of Weingast's game lies in its message that a hegemon (or small group of powerful states) interested in preventing weaker states from cooperating can do so by using 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 Part, there are a number of strategies that hegemons and powerful states can use to accomplish each goal. 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 existing one are effective ways to accomplish the second. Fragmentation of one sort or another is a hallmark of each of these strategies.

We believe that the growing pace with which fragmentation has taken place in the last decade and its coincidence with the expansion of U.S. power testify to the fact that powerful states appreciate the benefits that fragmentation provides them and are constantly seeking new avenues by which to promote it. The Part that follows attempts to document this intentionality using selected examples. However, we want to reiterate that we are not claiming that all or even most fragmentation arises as the direct result of conscious strategizing on the part of powerful states—only that some of it does and that this has important consequences.

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36. For a discussion of the role of bargaining power in bargaining, see KEN BINMORE, GAME THEORY AND THE SOCIAL CONTRACT II: JUST PLAYING 78-80 (1998). For a historical analysis of the dominant role of the great powers in shaping the Universal Declaration of Human Rights, see MARY ANN GLENDON, A WORLD MADE NEW (2001).

37. Weingast, *supra* note 20, at 89.

We also think that too great a preoccupation with the role of intentionality can have its own pitfall of leading to an underestimation of the impact and importance of fragmentation. As we have seen, much of the existing literature tends to downplay the significance of fragmentation by stressing the comparative innocence and even praiseworthiness of the forces that have brought it about. The message seems to be that to the extent that fragmentation is the result of generally beneficial processes such as a competition among pluralist interests or the application of expertise as opposed to having been the intentional result of a malevolent state's strategy, it would be foolish to be overly concerned about it and probably futile as well.

While this principle might lead to the correct conclusion in a particular case, it clearly fails to hold true in general. A host of problems that plague modern societies ranging from global warming to legislative gridlock have also arisen as side effects of largely positive processes rather than through the active malevolence of a set of actors or as the result of a well-defined strategy. This raises the possibility that each of the hegemonic or powerful state "strategies" that we will be discussing in the next Part could have a similarly detrimental impact on weaker state cooperation regardless of whether it was intended or not.

Not only is the effect of fragmentation not necessarily a direct reflection of whether it is the product of great power calculation or the side effect of a process that is generally beneficial (such as the heightened role of expertise in recruiting judges for international tribunals), but the genesis of a particular instance of fragmentation may have little or no bearing on how it might be reversed or even the likelihood that it will be. The fact that a substantial amount of fragmentation emerged more or less naturally does not prevent powerful states from recognizing over time that it serves their interest and acting to maintain it. For example the United States played no role precipitating the dissolution of the Multilateral Agreement on Investment and the initial fragmentation that immediately followed. Once it occurred, however, the United States quickly discovered that it stood to benefit disproportionately from the ensuing rush to replace it with bilateral and mini-lateral agreements.[38] Now the United States has emerged as a staunch supporter of the current fragmented system.[39] Because we suspect that the role that intentionality plays in both the genesis and maintenance of fragmentation varies directly with the concentration of power, we believe that this pattern has become increasingly common as the United States has attempted to consolidate its position as the world's sole superpower.

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38. *See infra* notes 61-63 and accompanying text.

39. On the evolving U.S. policy regarding the protection of foreign investments, see Gilbert Gagné & Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT'L ECON. L. 357 (2006).

III. FOUR FRAGMENTATION STRATEGIES

1. *The Creation of a Large Number of Narrow, Functionally-Defined Agreements*

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 for whom that issue is very important in exchange for her doing the same in connection with a different issue.

Thus, to the extent that 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 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.[40] 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 powerful states' desire 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

40. For the list of conventions see the ILO's website at http://www.ilo.org/ilolex/english/subjectE.htm#s22.

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.[41] 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.[42]

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 (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.[43] 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 that "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."[44] As a result, powerful states and arbitral tribunals are beginning to treat the similar BIT terms as reflecting customary international law.[45] Should this continue to be the case in the future, arbitrators are likely to assume

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41. 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 Multilateral Agreement on Investment (MAI), 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. *See infra* notes 56-63 and accompanying text.

42. *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).

43. 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.

Id.

44. *Id.*

45. *Id.* at 114-15 ("[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.").

that the BIT reflects that customary law standard unless the weaker party successfully and explicitly contracts out of those standards, in which case foreign investment law will have succeeded in affecting not only states that are currently parties to BITs but also those states that might become parties in the future.

2. *Agreements Formulated in Specially Convened One-Time or Infrequently Convened Settings*

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 they raise little prospect that weaker states will have an opportunity to modify the agreement in the future. While in theory the weaker states 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 the World Trade Organization (WTO) (for example, General Agreement on Tariffs and Trade (GATT), General Agreement on Trade on Services (GATS), Sanitary and Phytosanitary Measures Agreement (SPS), Technical Barriers to Trade (TBT), Trade-Related Aspects of Intellectual Property Rights (TRIPs)) all contain detailed provisions that insulate the features that powerful states value from strategic misinterpretation at a later time by national courts 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.[46] 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.[47] The one important exception is the Appellate Body that gradually assumed a legislative role in addition to its dispute settlement activities.[48] However, the subsequent, if vain, attempts by

46. *See* Armin von Bogdandy, *Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship*, *in* 5 MAX PLANCK Y.B. OF U.N. LAW 609, 633-41 (J.A. Frowein & R. Wolfrum eds., 2001) (referring to "outsourced rule-making").

47. *Id.* at 626.

48. *See* Sol Picciotto, *The WTO's Appellate Body: Legal Formalism as a Legitimation of Global Governance*, 18 GOVERNANCE 477 (2005); Joel P. Trachtman, *The Domain 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.[49]

The multilateral agreements concerning the laws of war in general (the Hague Regulations of 1907,[50] The Geneva Conventions of 1949,[51] and the Additional Protocols of 1977[52]), and the agreements concerning the use of specific weapons in particular provide another set of examples of agreements that lack mechanisms to update them to the changing circumstances (for example, terrorism or the privatization of the military) and to new technological developments.[53]

WTO Dispute Resolution, 40 HARV. INT'L L.J. 333 (1999).

49. On the composition of the Appellate Body, see the discussion *infra* notes 77-78 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* 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."); J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* 11 (Harvard Jean Monnet Working Paper No. 9/00, 2000), *available at* http://www.jeanmonnetprogram.org/papers/00/000901 ("From interviews with many delegations I have conducted it is clear that . . . 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 [sic] 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."); *see also* Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System* (Maastricht Faculty of Law, Working Paper No. 2005/1, 2005), *available at* http://ssrn.com/abstract=836284 (analyzing the success of the Appellate Body despite the early modest expectations).

50. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

51. *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.

52. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *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 (Protocol II), *adopted on* June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.

53. The United Nations 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 tend 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.

3. *Narrowly Circumscribing the Authority of Treaty-Based Agents*

A third coordination suppression strategy that powerful states employ is to avoid, whenever possible, the creation of a bureaucracy or judiciary with significant, independent policymaking 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 as transparency and the desire to avoid excessive bureaucratization, and to some extent, these concerns are real. However, powerful states often appear more attracted to the political advantages of minimizing the power and creation of independent policymaking bodies, 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 state parties. As mentioned above, the WTO regime does establish several councils and committees that discuss various aspects of the WTO law, but the rule-making competence of these committees is significantly curtailed compared to that which was delegated to the General Agreement on Tariffs and Trade 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.[54]

4. *Threatening to Exit a Regime or Switching Regimes*

Finally, in the event that these three strategies described above fail to accomplish their goal, such that 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 Krisch has noted, from a historical standpoint one of the most prominent aspects of hegemonic behavior has been that 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."[55] 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.

54. *See* von Bogdandy, *supra* note 46.

55. Krisch, *supra* note 5, at 371.

More typically, it manifests itself in the use of less aggressive strategies such as delays in compliance, partial noncompliance, regime switching, and objections about the appropriateness of venue, which possess the great virtues of being far more flexible and generating 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 can take place during any point in the life cycle of a given agreement. It most frequently takes place when a 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 become dissatisfied with the trajectory of negotiations and decide to exit the negotiations and exploit their agenda-setting power to set up a parallel and competing set of 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 United Nations Convention on the Law of the Sea (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 landlocked. 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.[56] Although it was too late for the United States to obstruct the finalization of the Convention in 1982, the United States set about undermining the Convention's seabed-mining regime by creating a parallel regime through the promotion of comparable domestic legislation within a group of "like minded states" (e.g., the United Kingdom, West Germany, France, Japan, Italy and USSR) that conflicted with it.[57] The resulting conflict had to be resolved through negotiations that culminated in a so-called Implementation Agreement, signed in 1994, which basically replaced

56. 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 Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Environment and Public Works Comm.*, 107th Cong. (2004) (testimony of John F. Turner, Assistant Secretary of State, Oceans, and International Environmental and Scientific Affairs), *available at* http://www.state.gov/g/oes/rls/rm/2004/30723.htm.

57. *See* R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 232-35 (3d ed. 1999).

the arrangement under UNCLOS with one that was more attuned to the interests of the developed states.[58] A second example involving the renegotiation of existing treaties took place during the move from the GATT to the WTO. The United States and European Union 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 United States, desired.[59] 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.[60]

Another example of shifting venues—this time from multilateral to bilateral regimes—involves the protection of foreign investments. Following the end of the Cold War, the Western powers mounted an effort to push for a multilateral agreement on the protection of foreign investments, an area they regarded as having the same paramount importance as trade or intellectual property protection. In 1995, the United States initiated, under the auspices of the Organisation 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 nongovernmental organizations that together managed to create a divide within the ranks of Northern governments. As a result the negotiations

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58. Agreement Relating to the Implementation of Part XI of the Convention on the Law of the Sea, July 28, 1994, 33 I.L.M. 1309; *see also* Peter Prows, *Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law* (NYU Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 06-19, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=918458. According to Prows, "[t]he [Implementation] Agreement abrogated many of the operating provisions most problematic for industrialized countries." *Id.* at 30.

59. *See* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

60. Steinberg, *supra* note 49, 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 United States and the European Commission 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 59, at 349.

on MAI collapsed.[61] The BITs, described above,[62] were the response. Through bilateral negotiations of essentially similar contracts, the powerful states managed to set new global standards. The opposition to the MAI crumbled once the developing countries were forced to negotiate separately.[63]

Recently, the powerful states' quest for flexibility to cope with the rapidly changing policy environment has been coupled with a growing technological capacity on the part of their national bureaucracies to more closely and effectively coordinate with each other. The availability of and need for communications bring diverse parts of national bureaucracies into direct contact, almost on a daily basis, with their foreign counterparts, leading 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. The 2006 National Security Strategy of the United States uses the term "partnerships" to indicate a strategic preference for flexible arrangements over institutions based on international law.[64] 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 German federal government instructing all ministries to avoid international obligations as much as possible. The directive stipulated that negotiators should explore alternatives to formal international undertakings before they commit to such.[65]

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61. DAVID HENDERSON, THE MAI AFFAIR: A STORY AND ITS LESSONS (1999).

62. *See supra* notes 43-45 and accompanying text.

63. *See* Salacuse & Sullivan, *supra* note 43, at 75-78 (describing the dramatic increase in BITs signed between developed and developing states during the late 1990s and the motivations of both groups of states for concluding them); Zachary Elkins, Andrew T. Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, U. ILL. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1001169 (arguing that the spread of BITs is driven by international competition among potential host countries—typically developing countries—for foreign direct investment).

64. *See* NAT'L. SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2006). The report states that one of the three priorities of the U.S. government abroad is: "Establishing results-oriented partnerships on the model of the PSI [Proliferation Security Initiative] to meet new challenges and opportunities. These partnerships emphasize international cooperation, not international bureaucracy. They rely on voluntary adherence rather than binding treaties. They are oriented towards action and results rather than legislation or rule-making." *Id.* at 45-46.

65. *See* DIE BUNDESREGIERUNG, GEMEINSAME GESCHÄFTSORDNUNG DER BUNDESMINISTERIEN [Common Agenda of the Federal Ministries] (2006).

> 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

Such alternatives to formal international law are plentiful. They include: (a) informal government-to-government coordination that characterizes 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, which 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.[66]

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 are often associated with soft law, but the character of operation is far less subtle. Their requirements are usually

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> 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.]

Id. § 72(1), *available at* http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Broschueren/2007/GGO,templateId=raw,property=publicationFile.pdf/GGO.pdf (translated by the authors). We thank Armin von Bogdandy for the reference.

66. On these alternatives, see SLAUGHTER, *supra* note 9; Eyal Benvenisti, *"Coalitions of the Willing" and the Evolution of Informal International Law*, *in* "COALITIONS OF THE WILLING"—AVANTGARDE OR THREAT? (C. Calliess et al. eds., forthcoming 2007), *available at* http://ssrn.com/abstract=875590.

unambiguous and the costs of ignoring them all too tangible.

IV. COUNTERVAILING EFFORTS TO REDUCE THE FRAGMENTATION OF INTERNATIONAL LAW

In the preceding Parts, 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 invest a much lower portion of tax revenue on the provision of public goods like education and healthcare than their democratic counterparts.[67] 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 groups that stand to benefit far more from receiving special government subsidies, contracts, and tax privileges than they would from the increased provision of general public goods.[68] This same logic suggests that with the exception of free trade, which often disproportionately benefits elites, 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, these differences in the priorities of democratic versus nondemocratic small states leave the group of mostly democratic developing states and the NGOs 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; consequently, such tactics are 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

67. *See* BUENO DE MESQUITA ET AL., *supra* note 24, at 174-213.

68. *Id*. at 8, 174-213, 279.

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 perspectives, 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.[69] More generally, the developing countries have used the UN and its subsidiary bodies to assist them in this matter. 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 WTO's AB decision in the Shrimp/Turtle case, which held 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,[70] are strong encouragement for the continuation of such efforts.

Weaker states also employ a strategy that resembles that of "divide and conquer," such as the tactic of trying to opportunistically exploit temporary divisions among the core group of powerful states when such divisions appear. The negotiations of the UNCLOS, GATT, and the Additional Protocols of the Geneva Conventions[71] show developing countries' ability to exploit East/West competition. One of the most significant successes of this strategy was the recognition under UNCLOS that the deep ocean resources are 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

69. Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 27-28, 51-52 (2004).

70. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 129-30, WT/DS58/AB/R (Oct. 8, 1998).

71. 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 56-58 and accompanying text. On the WTO negotiations, see *supra* notes 59-60 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, 13-17, 24-33 (2006).

Cold War East/West tensions.[72] Recently, and under similarly idiosyncratic conditions, a coalition of developing governments and developed states headed by Canada and France emerged at the UNESCO Convention on Cultural Diversity aimed at impeding the spread of American culture.[73]

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, structures, and procedures that are embodied in the domestic institutions of democratic states. It is far more difficult for powerful states to object to the institutionalization of such widely held ideals as equality, democracy, and procedural due process than to the adoption of specific reforms such as reduced agricultural subsidies.[74]

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.[75] The fruits of the first strategy

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72. *See* Wertenbaker, *The Law of the Sea-I*, *supra* note 71, at 49-54 (describing the coordination during the negotiations of UNCLOS among the United States and the Soviet Union who became members of the informal and secretive so-called "Group of Five"). According to Wertenbaker, both superpowers wished to keep their coordination secret (each side being concerned with criticism from its allies). *See id.* at 50. This might explain why they did not at that time exit the UNCLOS to form together a new venue for negotiations. Another explanation might be that the Cold War competition between the United States and the Soviet Union for the allegiance of developing states put the two superpowers in a Prisoners' Dilemma in connection with the treaty. Although each would have been better off cooperating with the other to exit the agreement and create one that they jointly preferred, both were fearful that the other would back out of such a scheme at the last minute in order to appear to be the champion of the developing states and score a major political victory. As a result, both states remained in the treaty.

73. U.N. Educ., Scientific, & Cultural [UNESCO], *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, U.N. Doc. CLT-2005/Convention Diversite-Cult Rev. (Oct. 20, 2005), *available at* http://www.unesco.org/culture/culturaldiversity/convention_en.pdf; *see also* Joost Pauwelyn, *The UNESCO Convention on Cultural Diversity, and the WTO Diversity in International Law-Making*, ASIL INSIGHT, Nov. 15, 2005, http://www.asil.org/insights/2005/11/insights051115.html.

74. 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. PROBS. 15, 15-18 (2005).

75. *See* Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?* (Am. Law & Econ. Ass'n Annual 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 states, the states whose political system was similar to that of the judges'

are evident 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."[76] The panelists in the WTO panels also reflect different nationalities and interests. The 417 panelists recruited between 1995 and 2004 included individuals of 46 different nationalities, 32% of whom came from developing countries, and another 54% from developed countries other than the European Union and the United States.[77] Of the seven members of the WTO's Appellate Body, the European Union and the United States have had one national each, while the other appointees have come from both other developed countries (Japan, New Zealand, Australia) and from larger developing countries (Egypt, the Philippines, India, Uruguay, South Africa, Brazil).[78] 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 the policymaking roles of international organizations.[79] Expanding the role of judges and of

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own states, and the states whose culture (language and religion) was similar to that of the judges' own states).

76. *See* Eric A. Posner, *The Decline of the International Court of Justice* 23 (John M. Olin Law & Econ. Working Papers, 2d Series, No. 233, 2004), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_226-50/233.eap.icj.pdf.

77. Henrik Horn & Petros C. Mavroidis, The WTO Dispute Settlement System 1995-2004: Some Descriptive Statistics 23, 24 tbl.13 (Jan. 31, 2006), http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/HornMavroidisWTODSUDatabaseOverview.pdf.

78. WTO Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm. These informal quotas are not determined by the text of the agreement which states that "[t]he Appellate Body membership shall be broadly representative of membership in the WTO." Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1125, 1236 art. 17(3), *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.doc.

79. Evidence that developing countries seek judicial assistance in protecting their

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, will inevitably 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.[80]

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*," which 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.[81] Economic coercion is still legitimately employed by powerful states to elicit concessions from weaker states, and the norms protecting human rights stop short of recognizing responsibilities among states.[82] The developing countries' efforts to obtain

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rights and promoting their interests more often than strong states suggests that this pattern of tacit cooperation may be producing a reciprocal symbiosis that will continue to strengthen over time. See the discussion, *supra* notes 74-77 and accompanying text, on the use of international tribunals by developing countries. 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. Strong states prefer to litigate in venues where they can closely control the composition of the arbitrators. These can be special tribunals (such as the United States/Iran Claims Tribunal), or ad hoc arbitration panels (such as 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 Permanent Court of Arbitration, Cases, http://www.pca-cpa.org/showpage.asp?pag_id=1029. For a typical arbitration between two developed countries by arbitrators from developed countries, see Iron Rhine ("IJZeren Rijn") Railway (Belg. v. Neth.) (Perm. Ct. Arb. 2005), *available at* http://www.interarbitration.net/pdf/ PCA_IronRhine_May05.pdf.

80. U.N. Int'l Law Comm'n, Study Group, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 176, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (*finalized by* Martti Koskenniemi) ("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).").

81. A preemptory norm is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331. Treaties conflicting with a peremptory norm of general international law, namely with the so-called *jus cogens*, are void. What constitutes *jus cogens* is extremely vague, and hence is relegated for the courts to decide.

82. *See* Benvenisti & Downs, *supra* note 42, at 21-22.

more control over foreign investments have failed,[83] and their calls for recognizing a so-called "New International Economic Order"[84] have been without effect. Stronger parties increasingly prefer to use informal mechanisms and norms to cement the weaker parties' commitments.[85]

Nonetheless, despite this limited success and the continued efforts of powerful states to restrict their autonomy, the bureaucracy and judiciary of various international institutions continue to have 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 from uncertainty about the nature of problems that these institutions are asked to address and irresolvable disagreements among powerful states, which lead to the creation of agreements with ambiguities and omissions that need to be resolved by bureaucrats and tribunals before policies can be implemented.[86] 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, threatening to cut funds, or even exiting. 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 and that this tendency should work to their benefit 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 in a particular venue will have wide-ranging implications.

Finally, weaker states know 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 a multi-polar environment in which they are viewed as a critical part of any

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83. See the discussion on the standards set by the BITs, *supra* notes 43-45, 62 and accompanying text.

84. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, U.N. Doc. A/9559 (May 1, 1974).

85. *See* discussion *supra* notes 65-66 and accompanying text.

86. 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 policymaking authority to bureaucrats and judges. *See* Eyal Benvenisti, *The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions*, 68 LAW & CONTEMP. PROBS. 319, 329 (2005).

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.[87]

Ultimately, of course, there is a limit to the extent to which the coincidence of interests between international bureaucrats and judges and those of weaker states can reduce 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, those individuals would find that fragmentation has made the task of promoting political coordination among them very difficult.

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 the post-war order that preceded it. In contrast, we have argued that the functional specialization and atomistic design of fragmentation 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.

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87. 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); Eyal Benvenisti, *Party Primaries as Collective Action with Constitutional Ramifications: Israel as a Case Study*, 3 THEORETICAL INQUIRIES L. 175 (2002) (suggesting that the Israeli Supreme Court was supporting the legislature in its relationship with the government).

Regulatory responsibility is virtually never assigned to ongoing, deliberative bodies that are systematically representative, and whenever possible, significant, independent policymaking 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 institution or venue.

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 they are hostile to redistribution. Instead of operating to promote greater democratization as many had hoped, the resulting order has effectively undermined any movement toward it.[88]

Faced with hierarchy's declining legitimacy, powerful states have increasingly turned to fragmentation to maintain their control.[89] 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 un-orchestrated 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

88. 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 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.

United Nations Millennium Declaration, G.A. Res. 55/2, at 4, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/55/49 (Sept. 9, 2000), *available at* http://www.ohchr.org/english/law/millennium.htm. In this declaration the state parties also resolve "[t]o work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries." *Id.* ¶ 25.

89. Hierarchy's declining normative legitimacy is arguably not the only reason that powerful states, and particularly the United States, 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 a club of great powers that would be larger and more competitive than it was in the past.

sophistication of 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 be, and it reduces the likelihood that any given institution will grow independent enough to pose a serious challenge to their discretion.

One implicit message of Doha's collapse is that however disadvantaged weaker states may feel in connection with the character of the 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 of threatening to exit a given regime unless its demands are met served the United States well in forcing the world trade regime to incorporate services (GATS) and intellectual property (TRIPs).[90] When the United States encountered resistance in expanding the regulatory agenda of the GATT, it withdrew and instead formed, together with the European Union, an alternative venue—the WTO—that fits all its conditions. The ensuing "take it or leave it" offer that the United States and the European Union 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

90. Steinberg, *supra* note 49, at 265 ("[T]he European Communities and the United States entered into the Agreement Establishing the World Trade Organization, which included the GATT 1994 and its most-favored-nation (MFN) guarantee, and required adherence to all the WTO multilateral agreements, including TRIPs, which most developing countries had previously refused to sign.").

regime."[91] 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.

Tactics such as forum shopping and regime switching, and the international legal system's apparent absence of design, permit powerful states to shift the reputational consequences of their actions from themselves to international law. For example, the ability to create a new venue or to select from a range of venues and choose the one where it is most likely to obtain favorable rulings allows powerful states to achieve a higher rate of compliance—and gain a better reputation—than they would otherwise: they have less reason not to comply.

It is difficult to imagine that weaker states, which lack such options, have failed to notice the increased rate with which rulings are going against them and not worried that the international legal regime is becomingly increasingly arbitrary and even biased against them. Other aspects of fragmentation, such as the increasing tendency of international institutions to outsource enforcement to ad hoc coalitions of the willing, which provides wealthier and more powerful states but not poorer and weaker ones with the ability to legitimately resort to coercion, seem likely to further increase weaker states' frustration. Over time, these effects of fragmentation threaten to erode international law's reputation as a system that strives to ensure normative integrity and even-handedness.

The irony, unfortunately, is that if this fragmentation leads weaker states to stop viewing international law as a source of hope, it is likely to be they who will be the losers in the long run. As potentially the most important "coordination good"[92] available to weaker states, international law is one of the few tools that, as the German law professor August Wilhelm Heffter suggested in 1855, provides an association of unequal states with the opportunity to collectively resist the "supremacy of one."[93]

The likelihood that the current trend toward fragmentation will be reversed in the near term is relatively poor. Neither the United States, 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 European Union

91. *See supra* notes 59-60 and accompanying text.

92. *See* de Mesquita & Downs, *supra* note 25.

93. AUGUST WILHELM HEFFTER, DAS EUROPAISCHE VOLKERRECHT DER GEGENWART 7 (3d ed., Berlin, E.H. Schroeder, 1855) (translated by the authors).

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, expanding accountability, increasing 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.[94]

It seems unlikely that the European Union'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 European Union's comparative success in developing region-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 characters give them as much, if not more, in common than most regional collections of developing states, but the size of their economies would also 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 (for example, withdrawing from aspects of the 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.

Finally, weaker states should continue to benefit in the future, as they have

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94. Redistribution is one of the stated goals of the European Union. Treaty Establishing the European Community, art. 158 (consolidated version), Nov. 10, 1997, 2002 O.J. (C 325) 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 or islands, including rural areas.

Id.; *see also* Mikko Mattila, *Fiscal Transfers and Redistribution in the European Union: Do Smaller Member States Get More Than Their Share?*, 1 J. EUR. PUB. POL'Y 34 (2006) (noting that the European budget is redistributive both on the revenue and on the expenditure side).

in the past, from the efforts of international bureaucrats and judges to expand their discretion through their roles 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.[95] The concept of *jus cogens* obligations, now the generally accepted evidence of the hierarchical nature of international law,[96] and endorsed by several international and national courts as such,[97] 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, Verdross had the opportunity to introduce the same concept into the text of the treaty.[98]

Any serious effort on the part of international tribunals to define the nature of these state obligations and the overarching principles of the international community from which they are derived will inevitably bring these bodies into 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 that 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 identify the values and goals of less powerful

95. 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).

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

97. 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, 258 ¶ 83 (July 8), and by several national courts, including the House of Lords, Regina v. Bow St. Metro. Stipendiary Magistrate, *Ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 197-99 [1999], and the Supreme Court of Canada, Suresh v. Canada, [2002] S.C.R. 3, ¶¶ 46-61.

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

states in order to justify their decisions 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, especially in light of recent criticism that has begun to question its legitimacy.[99] It seems clear, however, that its future depends on a willingness to confront the extent to which fragmentation jeopardizes the future of the international community by enshrining the atomization of international law and the unequal distribution of global power. It will also depend on the willingness of the international legal community to collectively discuss the moral legitimacy of the constitutionalist project and the grounds for regarding any consensus that it might reach as preferable to more democratic alternatives.

99. *See, e.g.*, JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 14-17 (2005).