"Coalitions of the Willing" and the Evolution of Informal International Law

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In 2000 all federal German ministries were ordered to avoid international obligations as much as they could. The directive stipulated that negotiators should explore alternatives to formal undertakings based on international law. Bureaucrats in other administrations report similar expectations if not explicit directives. This new attitude toward international obligations reflects both the availability of novel ways for governments to interact across political borders, as well as new concerns about international legal tools, especially the formal international institutions. This preference for informal lawmaking suggests that international cooperation can be achieved without recourse to international legal tools and that the informality offers significant benefits to some governments. The aims of this paper are to explore some of the new modalities for international cooperation that avoid the formal tools of international law, and then to reflect on the motivations for their use as well as on the consequences of their proliferation.

I. Introduction

The term “coalitions of the willing” has been used increasingly during the last decade to denote the collective efforts of a group of states led by the U.S. to disarm Iraq of weapons of mass destruction. But the term encompasses several other coordination efforts of “like-minded states.” This phenomenon entails coalitions of states that pursue collective goals, such as combating money laundering and terrorist financing, fighting AIDS and other pandemics in developing countries, and facilitating transnational trade.

* Professor of Law, Tel Aviv University. A previous draft was presented at a symposium on “Coalitions of the Willing”- Avantgarde or Threat?” at the Institute of International Law and European Law, University of Göttingen. I am grateful for the comments of the participants, and in particular to Pierre d’Argent, Heike Krieger, Georg Nolte and Brad Roth.
These coalitions may or may not use the tools provided by international law. They will need to resort to negotiating treaties or making claims about customary international law when they wish to constrain other states from acting or to preserve their own freedom of action. They have to make claims about the law when, for example, they want to preserve their right to humanitarian intervention, or when they wish to oppose an emerging custom concerning the law of the sea. But often coalitions can benefit from the “Lotus presumption” of freedom of action unless constrained by law. In most spheres, these states have discretion whether or not to use international law as the basis for their coordination efforts. This essay suggests that coalitions increasingly seek to avoid international law altogether and instead explore other modalities. Governments that initiate coordination efforts across national boundaries, consciously avoid making any claims about international law, and do not use treaties as the means for coordinating their activities. Thus, they shape international law, but only indirectly, through informal processes that offer sticks and carrots to the non-participating states. Such coordinated practice does not betray *opinio juris*; in fact, the participating governments emphasize the opposite, namely their self-interest and lack of legal commitment. They sign no formal treaties, set up no international organizations, and sometimes mask public functions as private initiatives subject only to private law. They consciously try to disengage from traditional international law. The common denominator of this increasing number of coordinated governmental efforts is their effort to pass below the radar screens of international law. The uninvited governments adapt to the new standards not because

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those rules bind them, but because there are carrots attached to them, and sticks attached to their non-observance.

The phenomenon that will be called here “coalition of the willing” includes different types of intergovernmental coordinated action that make use of the participating governments’ existing powers under international law. Such action does not involve the signing of new treaties, the creation of international organizations that are subjects of international law, or novel assertions of authority under customary international law. Such intergovernmental action can focus on these governments’ domestic policies, like the harmonization of the policies of their central banks. The coordination can be aimed also at third parties (other states or their nationals), and may include coordinated security measures to prevent the proliferation of weapons to third countries or global criminal networks. The coordination can be designed to allocate regulatory competences between governments, such as, in the context of antitrust regulation, to share responsibilities in the fight against common causes, such as the proliferation of weapons of mass destruction, or to allocate resources, such as humanitarian aid, for example, in third countries. This essay describes these types of coalitions, explores the motivations for their proliferation, and examines the implications for the future evolution of international law.

II. Coalitions – a Typology

This section presents different types of coalitions, attempting to distinguish between them on the basis of key characteristics. This exposition will serve as the basis for the assessment of the motivations of the relevant actors and the implications of their actions.
(a) Informal Government-to-Government Coordination

The phenomenon of intergovernmental coordination of policies was noted and analyzed in 1974 by Robert Keohane and Joseph Nye. Anne-Marie Slaughter has elaborated extensively on the various modalities of such efforts, which she collectively calls government networks. These networks encompass most of the spheres of activity of contemporary governmental action, and include a variety of government agencies, such as central bankers, antitrust regulators, securities regulators, criminal enforcement agents, and environmental protection agencies.

To examine some of the questions raised by such cooperation, I will briefly discuss intergovernmental coordination in the area of antitrust. Despite scholarly criticism, national antitrust regulators, and the regulators of the European Commission, insist on coordinating their activities through what we might call a coalition, rather than through a WTO-like international institution. Due to differences in national policies in this sphere, the regulators prefer to harmonize their activities through informal consultations in informal venues such as the U.S./EU merger working group, the Competition Law Committee, the Global Competition Forum of the OECD, and the International Competition Network (ICN).

3 Anne-Marie Slaughter, A New World Order (2004).
The various antitrust regulators face conflicts because they operate under national
dependent regulations that seek different goals and provide different outcomes. Thus, for
example, in 2001, the Antitrust Division of the U.S. Department of Justice approved a
merger between G.E. and Honeywell (two U.S. aviation companies) while the
European Commission prohibited the merger, finding it incompatible with its
policies.7 A more famous recent example is Microsoft, which survived proceedings in
the U.S. only to face regulatory action by the European authorities. In the aftermath of
such incidents, regulators try to coordinate their activities more closely. They refuse
to consider more formal commitments, including the setting up of international
institutions.8

(b) Formal but Non-Legally Binding Institutions: the Financial Action Task Force
and the Proliferation Security Initiative

(1) Combating Money Laundering and Terrorist Financing through the Financial
Action Task Force9

The Financial Action Task Force (FATF) is more than an informal forum of
administrative agencies from like-minded states. It has formal institutions and
procedures. Yet it is not based on a formal legally binding treaty between the
participants. Rather, it is an intergovernmental body. Its aim is the development and

7 Fox-Global Markets, supra note 5.
8 As Elinor Fox recounts, (Fox-Global Markets supra note 5), at 463-464: “in the aftermath of the
decision [on the GE/Honeywell deal], both sides softened their rhetoric. The United States continued to
maintain that the Antitrust Division analyzed the merger in the only right way. European officials
defended their analysis within the U.S. paradigm, apparently preferring to join the issue on grounds of
economics rather than on grounds of the wider European view of ‘harm to competition.’ … Officials on
both sides of the ocean vowed to work more closely together on the harmonization of competition law,
and reaffirmed their view that closer cooperation would avert inconsistent outcomes in the future.”
9 On the FATF see its official website at http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1_1,00.html
encouragement of policies and rules – at national as well as international levels – to combat money laundering and terrorist financing. It was created in 1989 by the G-7 summit in Paris as a policy-making body in response to growing concerns over money laundering, in order to promote and generate the necessary political will to enact national legislative and regulatory reforms related to these specific issues. A catalogue of forty recommendations containing suggestions for best practices in anti-money laundering legislation was developed over the years. In 2001, the participating states decided to add the fight against terrorist financing to the mission of the FATF. For this purpose a separate set of recommendations – the so-called Nine Special Recommendations – was established. The number of participating states has increased from the original sixteen to thirty-three members (thirty-one states and two international organizations) and a growing number of states and international organizations that participate as observers. But the standards set by the FATF have almost universal impact. As the FATF website declares, “[t]he 1996 Forty Recommendations have been endorsed by more than 130 countries and are the international anti-money laundering standard.”

The FATF meets on a regular basis several times each year. Decisions are made on the basis of either papers prepared by the Secretariat or oral or written reports from delegations. The decision making process is ruled by the principle of consensus. Therefore, all participants have to work actively to reach an agreement on the specific issues. Policy, direction, and initiatives are discussed during the three annual plenary meetings. These meetings address issues such as money laundering and terrorist financing trends and countermeasures, status of implementation, and future activities to promote the establishment of a world-wide network against money
laundering and terrorist financing. The meetings are a forum for law enforcement and regulatory experts from participating countries to discuss new developments in money laundering techniques and terrorist financing, including prevailing methods, emerging threats and effective countermeasures. In addition, the ad hoc groups examine specific issues more in depth than during the plenary meetings. Each group has a specific mandate and reports the results of its work to the plenary.

The presidency and the secretariat serve as administrative and coordinating bodies. The presidency of the FATF is a one-year position held by a high-level government official appointed from among FATF members, and the secretariat services the Task Force and assists the president. It is housed at the headquarters of the Organisation for Economic Co-operation and Development (OECD) in Paris. Although the FATF secretariat is based at the OECD, the FATF itself is an independent international body and not a part of the OECD.

The monitoring and compliance control mechanism of the FATF is divided into two categories: The first one applies to participating states and the second one addresses non-participating countries within the so called Non-Cooperative Countries and Territories Initiative. With regard to participating states, the primary instruments for monitoring the implementation of the forty recommendations are self-assessment and mutual evaluation procedures. In the self-assessment exercise, each year every member state provides information on the actual status of its implementation efforts of the forty recommendations and the nine special recommendations on terrorist financing by responding to a standard questionnaire. The information is then compiled and analyzed, and provides the basis for assessing the extent to which the recommendations have been implemented. The mutual evaluation process contains an examination of each member country by the FATF conducted by way of an on-site
visit by a team of three or four selected experts in the legal, financial and law enforcement fields from other member governments in order to evaluate the respective country’s implementation progress. Graduated measures are used in response to shortcomings in implementation. These measures could include: requiring a report about the progress of the improvement of the legislation, sending high-level missions to the non-complying country, giving “special attention to business relationships and transactions with persons, including companies and financial institutions, from countries that either do not apply the FATF Recommendations or insufficiently apply them,”12 and finally, suspending membership in the FATF.

In 2000, the FATF started a new initiative, the Non-Cooperative Countries and Territories Initiative (NCCT Initiative), to review the anti-money laundering legislation of non-participating states. The FATF publishes a list of non-cooperative countries and territories that have critical deficiencies in their anti-money laundering systems, and urges them to adopt recommended measures to improve their anti-money laundering system on the national level. On the international level the FATF recommends that financial institutions pay special attention to financial transactions with persons and entities from those named countries. If a listed state fails to comply with the recommended improvements or is unwilling or unable to comply, the FATF recommends to its members to “condition, restrict, target or even prohibit financial transactions with such jurisdictions” as the “ultimate recourse.”13

(2) Controlling the Proliferation of Weapons of Mass Destruction through the

Proliferation Security Initiative

12 Recommendation 21: http://www.fatf-gafi.org/document/28/0,2340,en_32250379_32236930_33658140_1_1_1_1,00.html#r4
The Proliferation Security Initiative (hereinafter: PSI) was initiated by the U.S. government in 2003. As President George W. Bush proclaimed in a speech prior to the G8 Summit, the PSI was a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI is based on the authorities individual governments have under existing treaties and customary law; it does not necessarily attempt to directly introduce changes into the law, but has the indirect effect of establishing a certain benchmark for “appropriate” practices.

The primary objective of the PSI is the prevention of WMD trafficking at sea, in the air, and on land. In order to reach this objective, initiative participants are expected to carry out cargo interdictions at sea, in the air, or on land with the aim of making it more costly and risky for proliferators to acquire the weapons or materials they seek. The PSI is limited solely to seizing shipments of WMD and dual-use goods (i.e., those that both have civilian, peaceful purposes and can be used to make weapons) held by those countries and non-state actors viewed as threats by PSI participants. The decision making process within the framework of the PSI relies on high-level meetings of representatives of the participating governments, which are the only recognizable structure within the initiative.

14 On the PSI see http://www.state.gov/t/np/c10390.htm
15 Michael Byers Policing the High Seas: The Proliferation Security Initiative 98 A.J.I.L. 526, 543 (2004) (“The advent of PSI will soon introduce more state practice with respect to the issue of high seas interdiction via the various bilateral and multilateral treaty initiatives now under way. The widespread conclusion of treaties allowing for the search and seizure of suspected weapons-trafficking vessels could conceivably generate a new rule of customary international law in parallel to the treaty obligations. The development of a new customary rule by way of treaty practice, however, may be made more difficult if the treaties in question are designed as exceptions to an established customary rule … It should not be assumed, however, that the United States is seeking to change customary international law in this area, even if it envisages a possible need to engage in high seas interdictions of vessels flagged by nonconsenting states.”) See also infra, notes 38-39 and text.
To coordinate their efforts in this respect, the eleven core participants developed a set of principles on September 4, 2003. This “Statement of Interdiction Principles” calls on all PSI participants, as well as other countries, not to engage in WMD-related trade with “countries of proliferation concern” and to permit their own vessels and aircraft to be searched if suspected of transporting such goods. The principles further demand that information on suspicious activities be shared quickly to enable possible interdictions, and that all vessels "reasonably suspected" of carrying dangerous cargo be inspected when passing through national airports, ports, and other trans-shipment points. The initiative is also open for other states’ suggestions. Initially ten states joined the initiative, and today more than 60 countries have expressed their support for the PSI.

In addition to these measures, which the states are urged to implement on the national level, participating states negotiate and conclude ship-boarding agreements with other states (especially with states which are known as flag of convenience states). So far, the United States has signed ship-boarding agreements with Belize, Croatia, Cyprus, Liberia, the Marshall Islands, and Panama. For example, the agreement with Liberia allows U.S. personnel to enter a suspicious ship under the Liberian Flag unless the Liberian authorities deny access within two hours after the boarding request. Similar agreements with other states are in the negotiating stages.

The PSI has neither a coordinating body nor a compliance control mechanism or any other characteristic of an international organization (not even an official

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16 The Statement of Interdiction Principles can be found on the website of the State Department: http://www.state.gov/t/np/rls/fs/23764.htm (last visited on April 25, 2005)
17 “While the Principles have been agreed, the PSI is a dynamic initiative. If countries have ideas that are not reflected in the Statements on Principles that would contribute to a more robust, effective initiative, we want to hear from them. In that way, the PSI is an initiative open to contributions from all states that want to support interdiction efforts.” (http://www.state.gov/t/np/rls/fs/32725.htm)
18 The core participants include: Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, the UK, and the US.
website!). There is also no legally binding treaty regarding these matters. Furthermore, the PSI is meant to be a group of states pursuing a common aim instead of being an international organization with firm structures. This lack of formal mechanisms is considered an advantage allowing the PSI to react to new developments promptly.

(c) Public/Private Coordination: The Global Fund to Fight AIDS, Tuberculosis and Malaria

The purpose of the Global Fund to Fight AIDS, Tuberculosis and Malaria\(^\text{19}\) is to attract, manage and disburse additional resources through a public-private partnership that will make a sustainable and significant contribution to the reduction of infections, illness and death, thereby mitigating the impact caused by HIV/AIDS, tuberculosis, and malaria in countries in need. This initiative was inspired following the 2000 G8 summit that called for a new approach to fight these diseases, and the 2001 summit of African leaders. Later on in 2001, the idea of creating a fund involving both the public and the private sector was then actively supported by the United Nations General Assembly Special Session on HIV/AIDS. After the G8 summit of the same year endorsed this idea, a transitional working group consisting of nearly forty representatives of developing countries, donor countries, NGOs, the private sector, and the UN system was formed to develop a framework to determine the structure of the Global Fund and to operate it on an ongoing basis. The structure of the fund was set up in January 2002.

The Fund was constituted as an independent Swiss foundation comprising the following bodies: the Foundation Board, the Secretariat, the Technical Review Panel

\(^{19}\) http://www.theglobalfund.org/en/
and the Partnership Forum. The Foundation Board is the main organ of the Fund consisting of eighteen voting and four nonvoting members. The voting members consist of seven representatives from donor states, seven from developing countries and five members representing civil society and the private sector. Each of these groups determines its own process for selection of its representatives. They are formally appointed by the Foundation Board. A Swiss citizen and representatives delegated by the WHO, the UN and the trustee serve as nonvoting members. The Foundation Board deals with all constitutive tasks including: the modification of the by-laws, the determination of guidelines governing the allocation of funds, and the approval of applications for the funds after they are evaluated by the Technical Review Panel. The Technical Review Panel is an independent, impartial team of experts appointed by the Foundation Board to guarantee the integrity and consistency of an open and transparent review process.\textsuperscript{20} The Secretariat is based in Geneva and headed by the Executive Director who is appointed by the Foundation Board. The Partnership Forum provides a forum for general discussion open to all, inviting public debate.

The functioning of the Fund is based on the principle of operating as a financial instrument, not an implementing entity. So far, 3.4 billion US dollars have been raised, 1.1 billion by the U.S., 450 million by the European Commission and one billion by EU countries. One hundred and fifty million dollars have been spent by the private sector, and 1.1 billion dollars have already been disbursed. Grants amounting to 3.2 billion dollars have already been approved. The disbursement of funds is proposal-based. The proposals are prepared by a country coordinating mechanism (CCM), which is a country-level partnership with representatives from the public and

\textsuperscript{20} Article 9, by-laws.
private sectors, including: governments, multilateral or bilateral agencies, non-
governmental organizations, academic institutions, private businesses and people 
living with the diseases. After a positive review process the Secretariat contracts with 
one Local Fund Agent per country, who certifies the financial management and 
administrative capacity of the principal recipients. The Secretariat and the principal 
recipients then negotiate and sign the grant agreement.

In addition to criteria ensuring the efficiency of the funds spent and maxims of 
non-discrimination and complementarity, the guidelines for the disbursement of the 
funds include the principle that all proposals must be consistent with international 
law, especially with the Agreement on Trade-Related Aspects of Intellectual Property 
Rights (TRIPs) as it is understood by the WHO's Doha Ministerial Declaration. This 
declaration affirms that the TRIPs agreement “can and should be interpreted and 
implemented in a manner supportive of WTO Members' right to protect public health 
and, in particular, to promote access to medicines for all.”

(d) Setting Standards by Private Actors

Much of the international regulation of individual action is the product of the 
coordination of private actors. In areas where governments have been reluctant to act, 
or have simply preferred to let private actors perform such tasks, private initiatives 
have emerged that set standards for various transnational activities, ranging from 
letters of credit and insurance to facilitation of transnational trade, safety standards, 
and even the setting of core labor rights for developing countries. For example, the 
International Organization for Standardization (ISO) sets global safety standards. It is 
a nongovernmental organization comprised of safety standard-setting bodies and 
organizations from over 146 countries, with some members affiliated with
governments, other members with roots in the private sector, and still other members who are industry associations.\textsuperscript{21} The Fair Labor Association, a group set up by the Clinton administration\textsuperscript{22} that describes itself as “multi-stakeholder coalition of companies, universities and NGOs,” sets labor standards for the apparel industry.\textsuperscript{23} The Uniform Customs and Practice for Documentary Credits sets transnational rules that commercial banks uniformly follow in their letter-of-credit practices, created by the Commission on Banking Technique and Practice of the International Chamber of Commerce, a private entity.\textsuperscript{24} Finally, the International Union of Credit and Investment Insurers (the so-called Berne Union) codifies technical rules that circumscribe the nature and scope of members' export credit insurance policies.\textsuperscript{25}

The standards set in the financial context are adopted because it makes no economic sense to insist on other standards, much as it makes no sense to drive on the right when everybody drives on the left. When necessary, these standards are also recognized by domestic courts as reflecting the relevant parties’ intentions.\textsuperscript{26}

\textsuperscript{21} See International Organization for Standardization: Introduction, at http://www.iso.org/iso/en/aboutiso/-introduction/index.html. ISO promulgates rules, which are firmly rooted in industry practice and market experience. On ISO see Janet Koven Levit A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments 30 Yale J. Int'l L. 125 (2005) ("ISO develops only those standards for which there is a market requirement. The work is carried out by experts on loan from the industrial, technical and business sectors which have asked for the standards, and which subsequently put them to use. These experts may be joined by others with relevant knowledge, such as representatives of government agencies, consumer organizations, academia and testing laboratories.") ISO then codifies and interprets these standards, and they are often effectively incorporated into international agreements (Levit, supra note 21, at fn. 197).

\textsuperscript{22} The fact that it was set up by the Clinton administration is not mentioned in the official web site of the FLA. See Human Rights First, Fair Labor Association Releases Public Reports on Rights Conditions in Overseas Factories at http://www.humanrightsfirst.org/workers_rights/wr_fla/wr_fla.htm ("The FLA evolved out of the Apparel Industry Partnership which was initiated by President Clinton in 1996; its mission is to address workers’ rights issues in the U.S. and abroad."); The Clinton/Gore Administration: New Efforts to Fight Sweatshops and Child Labor Around the World & Put A More Human Face on the Global Economy, January 16, 2001 (http://clinton5.nara.gov/library/hot_releases/January_16_2001_1.html ).

\textsuperscript{23} http://www.fairlabor.org/all/about/index.html. See Workplace Code of Conduct and Principles of Monitoring, Fair Labor Ass'n, at http://www.fairlabor.org/html/CodeofConduct (providing a "set of standards defining decent and humane working conditions.").

\textsuperscript{24} Levit, supra note 21, at 137-139.

\textsuperscript{25} Id., at 147 et seq.

\textsuperscript{26} Id., at 141.
The monitoring and enforcement of the Labor Code of Conduct of the Fair Labor Association (FLA) is a much more complex task. It requires elaborate measures that consist mainly of so-called “naming and shaming.” Being an NGO, the FLA can conduct monitoring on site in other states without stirring up negative emotions about foreign government officials interfering in domestic matters.27

III. Explaining the Phenomenon

In 2000 in Germany, a new internal policy was directed at the federal German ministries. It stipulated that formal international undertakings should be avoided as much as possible. Instead, negotiators should explore other modalities.28 Bureaucrats in other administrations indicate similar expectations if not formal directives. There can be several explanations for this emerging trend of acting through informal coalitions. I will explore here four explanations that seem to me to be the most significant. They are complementary rather than contradictory. They add up to what may be a growing trend that is only at its early stages.

27 See the FLA’s Monitoring Guidelines (http://www.fairlabor.org/docs/monitoring.pdf) (“In practice in these cases, monitors conducting factory visits for Participating Companies must gather and incorporate into the monitoring process information from the types of organizations described in the Charter. The purposes of this element of the monitoring process include: gathering local information about general and, if available, site-specific working conditions from reliable sources, and gathering information about the most effective and appropriate means of communicating with workers locally. This information will be used to prioritize and focus monitoring of compliance with the FLA workplace Code in applicable factories.”)

28 See § 72 Gemeinsame Geschäftsordnung der Bundesministerien of 2000: (1) “Vor der Ausarbeitung und dem Abschluss völkerrechtlicher übereinkünfte (Staatsverträge, übereinkommen, Regierungabkommen, Ressortabkommen, Noten- und Briefwechsel) hat das federführende Bundesministerium stets zu prüfen, ob eine völkervertragliche Regelung unabweisbar ist oder ob der verfolgte Zweck auch mit anderen Mitteln erreicht werden kann, insbesondere auch mit Absprachen unterhalb der Schwelle einer völkerrechtlichen übereinkunft.” (Collective standing order for all federal ministries of 2000: “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.”) (I thank Armin von Bogdandy for the reference).
(a) Overcoming Bureaucratic Hurdles

Since coalitions need not be based on formal and hard to modify commitments, governments can resort to them when the relevant national policies leave significant gaps. Thus, for example, the inconsistencies between U.S. and European antitrust policies preclude coordination through strict agreements. But loose coordination, making use of the respective bureaucrats’ discretion under their respective national laws, is capable of bridging the gaps. Such discretion enables the recurring coordination of policies. The bureaucrats do not exceed their powers because they are authorized to exercise discretion and, no less important, because they retain the authority to change their minds and modify their attitudes at any time in the future.

Compared to coordination through international institutions, government-to-government coordination reduces the need to manage the interface between the international organization and the national governments. Intergovernmental coordination makes use of already existing domestic enforcement mechanisms. The use of such domestic mechanisms may be more effective than international ones, and may be deemed more acceptable to domestic constituencies.

At times, acting through coalitions reduces governmental costs of monitoring and sanctioning violations. This is especially the case with regulation through private actors. When standards are set and enforced by banks, insurers, or by NGOs (as mentioned in section 2(d) above) governments are not implicated directly. When, for example, the Fair Labor Association sends monitors to investigate complaints against an apparel factory in a developing country, the monitors are not foreign state agents whose very presence on foreign soil could have been politically problematic, and the

29 See infra Part II(a)
U.S. government is not viewed by the developing country as interfering in domestic affairs. The U.S. government can play the good cop while the bad cop (the NGO) names and shames the foreign government.

(b) Institutional Competition
Coalitions of the willing are primarily the product of the corresponding executive branches. These branches have apparently come to realize that the exercise of their authority under domestic law must be based on international cooperation. Indeed, one could say in general, that in today’s conditions, most administrative functions have international components. Put differently, administrative law has been internationalized. Such internationalization threatens the bases of power of the domestic bureaucracies. They fear a substantial loss of power. There are two reasons why executive control is compromised by internationalization. First, by signing treaties, executives have to engage the respective legislatures when they wish to ratify or modify an agreement. Perhaps even more threatening is the loss of authority to international organs, either to an international bureaucracy or, much worse, to an international adjudicative body.

As legislatures become more and more keen on being involved in international cooperation, and as the organs of international organizations begin to assert themselves, national bureaucracies realize that it is in their collective interest (i.e. their interest and the interest of other national bureaucracies) to cooperate to exclude their national competitors. In this sense, the growing interest of legislators in getting involved in international law-making, and the increasingly assertive voice of international organizations and courts, has lead national bureaucracies farther and farther away from such international commitments and international organizations.
Finally, the lack of formal treaties may make it more difficult for individuals who are affected either by the adopted policy or by the deviation from that policy, to challenge it (in the former case), or invoke it (in the latter case), in domestic courts. These institutions are carefully designed so as not to be the object of legal regulation by IL norms. Legally, these institutions are transparent (or this at least is the goal).

(c) Coalitions and coordination: Imposing global standards

When governments confront the need to coordinate their activities, it is always helpful if they can control whom they include and whom they exclude in that exercise. This is why only a pre-selected group of like-minded governments is initially created. Others may be admitted later, once they agree to comply with the standard. As we saw in the PSI context, according to the US Administration, the quick development of principles was possible merely because of the fact that just a small group of like-minded states was involved.30 The logic is the opposite of the treaty/protocols approach where the basic treaty is formulated to allow maximum participation, while those interested in more demanding commitments can choose to opt for additional protocols.

The exclusion of third party states is not motivated only by the wish to facilitate the setting of standards. Another consequence is the increasing ability to adversely impact third countries. As Fox points out, in their antitrust coordination, the U.S. and the EU manage to keep out the developing countries. 31 Given the fact that antitrust regulators care only about the impact on their domestic markets, such coalitions do not close the gap that exposes developing countries to uncompetitive practices. As Fox observes, “Many of these nations either do not have an antitrust law, or they have an antitrust law that is not given serious regard by their polity, or

30 US Department of State, Fact Sheet (January 11, 2005), see http://www.state.gov/t/np/rls/fs/32725.htm (last visited on April 24, 2005).
31 Fox-Doha Dome, supra note 3.
they simply do not have the resources to enforce the law. Particularly, they do not have the resources and credible deterrence power to control the anticompetitive acts of multinational corporations. In other words, they are easy targets.”  

(d) Coalitions and Collective Action: Providing Public Goods

Coordination between like-minded states facilitates collective action among the members of the coalition when such action is required to respond to collective action problems in the global context. As is well known, collective action failures can be overcome if a sufficiently strong group of actors, among the many idle ones, is able and willing – for its own sake – to contribute collectively to the collective effort.  

Each one of the coalition members can then rely on the cooperation of the other members in the collective effort to obtain global goods, such as security, elimination of money laundering, or pandemics. Coalitions exclude governments that do not contribute to the collective effort, and perhaps promise rewards to their members. Coalitions can of course also punish non-participating states.

IV. Difficulties with Coalitions

The benefits of the activities of coalitions, described in the previous sections, come with discernible costs. The costs to the traditional system of international law will be

32 Id., at 922: “Global mergers may have harmful effects in nations that constitute separate markets and lack the power to protect themselves. This is particularly true for developing countries, whose voices are not heard and who must live with whatever the industrialized countries decide is good for them. In Mannesmann/Italimpianti, Italian and German makers of specialized pipes for oil drilling operations suitable only for developing countries merged to form a monopoly. China was the principal buyer of this stage of technology. Unusually, Italy conditioned merger clearance on the firms' acceptance of licensing obligations that could ease China's monopoly problem (if potential producers in Europe should seek a license). More typically, Germany declined to enforce the German law, allowing the merger because the German market - like the Italian market - was not hurt. While Italy's conditions on this proposed merger benefited China in this case, another China cannot count on any protection at all. It may become more, rather than less, common that multinational mergers impact developing nations with no voice.”

discussed in section V below. In this section I wish to mention the adverse effects on the objectives of accountability and transparency, which undermine the effort to ensure that the adopted policies are not captured by narrow interest groups but instead take larger constituencies into account. There are also obvious costs to the less powerful actors, those who are invited to join coalitions at a later stage, if at all. Their initial bargaining position, which was poor to begin with, is made much weaker when they join coalitions for which the standards have already been set.

This does not necessarily mean that coalitions have only negative effects on non-coalition members. First, non-members may actually enjoy the fruits of the cooperation of the coalitions without investing any resources of their own. Second, even when such non-coalition members are forced to comply with standards set by coalitions, they may not necessarily suffer from them. This is because a closer look may reveal that within a state there are domestic groups that may benefit from pressure coming from powerful states. Take, for example, the question of improved transparency in WTO decision-making processes. As I discussed elsewhere, this question has become a bone of contention between the North and the South. Northern governments have suggested increasing transparency and allowing voice for civil society NGOs. Southern states demurred, however, and continued to insist on restricting public participation to the passive role of receiving information from WTO bodies rather than communicating it to the WTO. It is unclear who will benefit from

34 On these concerns see Slaughter, supra note 3, at 219.
35 id
37 See e.g., the position of Hong-Kong, China on this matter, elaborating on the distinction between external transparency and direct participation (“we are not convinced of the desirability of adopting proposals which seek to make provisions for direct participation of the civil society in the Organization in this exercise. Such proposals go against the inter-governmental nature of the WTO, risk politicising the operations of the Organization due to sectoral and electoral interests, and undermine the rights and
more transparency: the Southern workers, as Northern governments maintain, or the
North’s poorest workers, as the Southern governments claim.

V. Coalitions and the Evolution of International Law

Two main groups of actors participate in the making of traditional international law,
that law that is identified by the doctrine of sources as articulated by Article 38 of the
ICJ statute. These two groups are: (1) the states that ratify treaties and contribute by
their actions to the creation of custom, and (2) international adjudicators and
bureaucrats that interpret the treaties, identify the customs, and thereby fill gaps and
progressively develop the law. This section examines the impact of the coalitions on
international lawmaking by these two groups.

(a) The Contribution of States to the Evolution of the Law

If the reasons for the formation of policies are those indicated above, it is safe to
predict that the alternative to coalition-making constitutes an important check on
pressures to expand states’ obligations under international law. As National
governments become increasingly affected by international law, they react by
contracting out of its constraints.

International lawmaking, through treaties and state practice, is a process that
entails relatively high bargaining costs for governments. These governments have
different interests, different domestic constraints and, as a result, different
expectations for the outcome of the bargain. This often leads to vague treaty
provisions and indeterminate state practice that calls for interpretation by bureaucrats
and adjudicators. Coalition-makers do not engage directly in this international

obligations of individual WTO Members”). See WTO: External Transparency, Communication from
Hong Kong, China, 31 October 2000, WT/GC/W/418.
lawmaking game. Their coordination does not aim at advancing or detracting from accepted standards of international law. Nor do their coordinated policies amount to treaty-making. Although the very coordination of governmental action by a significant number of states could lend support to a claim concerning state practice as relevant in the determination of customary international law, it may be argued that due to the intention not to invoke international law, these practices lack the necessary opinio juris, and hence cannot be deemed assertions concerning customary international law.38

To the extent that coalitions wish to adapt international law to contemporary challenges, they may try to circumvent cumbersome traditional lawmaking processes by resorting to effective legislation through the UN Security Council acting under Chapter VII of the UN Charter, as in the context of the efforts to combat global terrorism. Resolution 1540 is a good example of such indirect lawmaking, because it complements the efforts of the Proliferation Security Initiative examined above. The Resolution does not specify what measures states are required to make. Instead it repeatedly refers to “appropriate” or “effective” measures that states should adopt.39

38 See Byers, supra note 15.
39 In Resolution 1540, the Security Council “Decides also” that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them; 3. Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall: (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport; (b) Develop and maintain appropriate effective physical protection measures; (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law; (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;” (my emphasis).
No doubt, those who follow the PSI standards can safely assume that they are operating within parameters that the Security Council considers “appropriate” or “effective.” The standard is thereby set indirectly, but effectively.

(b) The Contribution of International Decision-Makers to the Evolution of the Law

As mentioned above, international lawmaking, through treaties and state practice, is a process that entails relatively high bargaining costs for governments. These governments have different interests, different domestic constraints and, as a result, different expectations for the outcome of the bargain. This often leads to vague treaty provisions that call for interpretation by international bureaucrats and adjudicators. Even more importantly, once a treaty has come to life, it takes the unanimity of the parties to it to amend it. Hence, the relatively wide room for judicial activism in the international context. As a result, international judicial organs, where they exist, contribute significantly to the evolution of international lawmaking.40 Once empowered for this task, these organs can exploit the legislative impasse created by the diversity of governments’ interests and the requirement of consensus to change the treaty provisions. The more diverse the membership in a treaty, the greater the

Resolution 1373 used similar terms: “[The Security Council] 2. Decides also that all States shall: “(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; … (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; (g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;…” (my emphasis).

legislative impasse that will be created, and the more room for discretion of those bureaucrats and adjudicators that can draw on the silence of the lawmakers and the divergence of opinion among state parties to develop the law as they deem fit.

This lawmaking power of international bureaucracies and adjudicators is limited not only by the possibility of the state parties’ consent to undo the unwelcome new rules. Another significant limitation is created by the concern that some parties might react to a decision by withdrawing from the institution and thereby weakening it. In the context of the ICJ, a bold judicial move could cause some governments to challenge what they perceive as a newly declared customary norm or a peculiar interpretation of a treaty, thereby affecting the court’s authority. Because relatively stronger parties are more likely to make such threats in a credible manner, it is expected that when exit from an institution is an option, lawmaking by international bureaucrats and adjudicators will be biased in favor of the stronger parties. Similarly, the ICJ can be expected to heed to the concerns of stronger states. However, it is important to note that this contingency hinges on the credibility of unilateral exit, where it is available.

Another factor that would tend to weigh in favor of stronger states’ success in international litigation is their greater tendency to bring claims before the tribunal, which is apparent in the context of the WTO (but no longer the ICJ)41. But this pull in favor of stronger states has its own limits, because of the counter concern that the judicial body would lose credibility and alienate the weaker parties. This is why such tribunals would not go all the way to satisfy the stronger parties’ interest. This art of

41 Eric Posner, The Decline of the International Court of Justice (working paper, December 2004, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341). Posner documents the disillusionment of the stronger states with the ICJ. He offers two explanations: The first is that the ICJ judges did not apply the law impartially; the other is that the stronger parties stopped using the ICJ because it did not cater enough to their interests.

http://law.bepress.com/taulwps/art31
walking on a tight rope, trying to steer a course between two opposing concerns is complicated and may sometime fail. It certainly narrows judges’ discretion.

What is important in the context of this essay is the impact of coalitions on the discretion of international adjudicators. As the art of coalitions becomes more prevalent, the possibilities of strong states exiting existing international law-based institutions and forming their privatized arrangements will grow. The increasing “threat” of exiting from international institutions will no doubt influence international adjudicators seeking to keep the formal institutions afloat. They may, as a result, refrain from pursuing what they deem legal and just, if that would conflict with the desires of stronger states.

In particular, the evolution of administrative law within international institutions may create a pull away from such institutions and towards coalitions. Generally speaking, it can be said that constraints on the decision making process tend to reduce power disparities between strong and weak actors. Hence, disparity in power relations among state parties to an international institution is a key factor influencing the parties’ inclination to adopt administrative norms that constrain collective decision making. Whereas stronger parties may wish to use their muscle

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42 Alter, supra note 40, at 23 “The goals of building a court’s reputation through legal fidelity and endeavoring compliance can be in tension with each other. The art of judging is to balance these two objectives and the correct balance of the two is something that judges, politicians and pundits will often disagree about.” See also Eyal Benvenisti, The Interplay Between Actors as a Determinant of the Evolution of Administrative Law in International Institutions, 68 Law & Contem. Probs. 319 (2005).
45 Benvenisti, supra note 42.
to impose their will at the bargaining table, accountability and transparency might hamper their efforts. Sheer power can never be a valid justification for decisions. Hence an obligation to give reasons for a decision has a certain – if only marginal – effect on reasoned decisions. Power does not translate easily into law. The growing prevalence of coalitions could therefore check the inclination of international lawmakers to promote procedural laws within international organizations.

In other words, the proliferation of coalitions may lead to a diminishing inclination of strong states to engage in traditional international lawmaking, and to effectively reduce the possibilities of international lawmakers restraining strong states through the evolution of procedural and substantive norms. By choosing to act through coalitions, the traditional doctrine of sources may yield ossified norms that are not capable of addressing contemporary challenges. Such gaps may then be filled by decisions of the UN Security Council that effectively prescribe new laws.

VI. Conclusion: The Implications of Coalitions for International Law

If the above analysis is correct, we face a transnational legal environment in which the traditional norms of international law, as defined in the doctrine of sources under Article 38 of the ICJ statute, reflect only a portion of the relevant norms that regulate transnational human conduct. Informal standards set by coalitions of states, and even
by private actors indirectly supported by states, increasingly shape the opportunities and constraints of governments and private actors.46

Perhaps the most striking feature of the law made by coalitions of the willing is that its claim for legitimacy is not based on the idea of a coherent legal system in which states are equally sovereign and like cases are treated alike. States are not equal, and like cases are not necessarily treated alike, as coalition members may retain their discretion to distinguish on an ad hoc basis. Instead, this type of law’s claim for legitimacy is based on the perceived justness of the cause pursued by the coalition, whether it is enhanced security (i.e. fighting global terrorism) or promoting human rights (i.e. setting core labor rights). Affected governments and private actors will comply with these laws, not out of sense of legal obligation to do so, but rather out of fear of the adverse effects of non-compliance. The myths of sovereign equality, that international law promises to treat like cases alike, which may be seen as the necessary lubricant on the wheels of contemporary international cooperation, could be affected.

The question that remains is what should be the attitude of traditional international law to these new types of lawmakering. Should it constrain it, and if so, how? To respond to this question one can compare the global legal environment to the national one, and ask how national legal systems regulate relationships between strong actors and weaker ones. In national law we encounter three basic sources of restrictions: constitutional guarantees that apply to private actors as well as public institutions, the doctrine of ordre public, and specific laws that intervene in the private market to protect the weaker party from the stronger. In contrast, international law has only a limited set of restrictions, which consist of the doctrine of jus cogens

and the concept of coercion that is restricted to violations of Article 2(4) of the UN Charter. But whereas some may feel the need to develop and refine these doctrines to accommodate the new challenges, it is unlikely that the strong would acquiesce to such constraints.