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Exit and Voice in the Age of Globalization

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# EXIT AND VOICE IN THE AGE OF GLOBALIZATION

Eyal Benvenisti\*

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I. INTRODUCTION: THE NEED FOR A NEW PARADIGM TO  
ANALYZE GLOBAL MARKET FAILURES

The “globalization” of commerce provides ever-growing opportunities for producers, employers, and service providers to shop the globe for more amenable jurisdictions. While they enjoy a “race to the top,” an international “race to the bottom,” spawned by decreasing relocation costs, threatens to compromise the achievements of the welfare state and lower standards of consumer protection. National governments, weakened by competition that entails leaner budgets, find it increasingly difficult to cooperate in the appropriation of crucial shared natural resources, seriously endangering these assets while damaging the environment. Not only does the growing global competition create both efficiency losses and social-welfare problems, it also challenges principles of democracy and self-determination. As competition constrains nations’ available choices, individuals have fewer opportunities to play a meaningful role in shaping their lives through the national collective decisionmaking process.

Largely pessimistic analyses of these collective action challenges have been dominated by the Westphalian paradigm — a model of international relations that views global conflicts solely in terms of the 200-some sovereign states that constitute the global arena. The paradigm operates on the still-prevailing premise that nation-states are unitary actors engaging in international competition.<sup>1</sup> Even those writers who are themselves aware of the diverse domestic forces that actually shape national policies stop short of identifying the deficiencies — both descriptive and normative — of the Westphalian paradigm.<sup>2</sup>

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1. Only a few legal scholars look behind the veil of sovereignty to analyze international agreements — in particular, trade rules — by reference to domestic politics. See Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999); Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW* 43 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Ernst-Ulrich Petersmann, *Trade Policy as a Constitutional Problem: On the Domestic Policy Functions of International Trade Rules*, 41 *AUSSENWIRTSCHAFT* 405 (1986), reprinted in 1 *THE WORLD TRADING SYSTEM* 121 (Robert Howse ed., 1998). For an analysis of international environmental law from a similar perspective, see Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 *GEO. L.J.* 749 (1999).

2. See, e.g., Andrew T. Guzman, *Is International Antitrust Possible?*, 73 *N.Y.U. L. REV.*

This Article argues that the Westphalian paradigm is inadequate: by focusing exclusively on interstate relations, it obfuscates the crucial role played by competing domestic interest groups in the international arena. This Article advocates a different paradigm — the transnational conflict paradigm — that better explains various collective action failures and points the way toward mechanisms that might correct these problems. At its core lies the observation that states are not monolithic entities; and that many of the pervasive conflicts of interest are in fact more internal than external, stemming from the heterogeneity within, rather than among, states. Indeed, the transnational conflict paradigm shows how domestic interest groups often cooperate with similarly situated *foreign* interest groups in order to impose externalities on rival *domestic* groups. The better-organized, and hence more politically effective, domestic interest groups — usually producers, employers, and service suppliers — cooperate with similar interests in different states to exploit less-organized groups such as consumers, employees, and environmentally vulnerable citizens. Thus, the transnational conflict paradigm attributes many global collective action failures to conflicts among warring domestic groups rather than international competition among states.

The transnational conflict paradigm also exposes how crucial constitutional and international norms actually perpetuate the power imbalance among rival domestic interest groups. Current norms and procedures, both constitutional and international, are inherently slanted in favor of groups with historically stronger domestic political power. Constitutional and administrative legal scholarship has long been alert to the observation that public life consists of “competition among pressure groups for political influence.”<sup>3</sup> Accordingly, public choice theorists have analyzed *domestic* norms, procedures, and institutions as potential tools for regulating this competition. But at the same time, these scholars paid little attention to the domestic ramifications of international law’s laissez-faire framework, which continues to provide a convenient exit option for those finding domestic controls too stringent. Producers can evade tight domestic regulations simply by shifting their activities to a different jurisdiction. In addition, inter-

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1501 (1998) (reaching a pessimistic conclusion due to conflicting national policies that result from the conflicting interests of producers and importers in different states). Other writers continue to impute interests and expectations to states despite awareness of the heterogeneity of domestic politics. See Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1, 20-21 (1999).

3. See Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983). This institutionalized imbalance went unheeded in international legal scholarship, perhaps due to the traditional division between constitutional and international law. A similar departmentalization occurred in political science, with the emergence of international relations as a separate branch of scholarship. See Helen V. Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52 INT’L ORG. 759, 762-67 (1998).

national commercial organizations, such as the International Coffee Organization<sup>4</sup> and the International Tin Council,<sup>5</sup> enable producers and importers to perform a “virtual exit,” whereby they obtain immunity from the jurisdiction of national courts, evade antitrust and other national regulations, and avoid liability in case of insolvency.<sup>6</sup> These exit options, facilitated by constitutional and international law and closely guarded by smaller domestic groups, drive the global race to the bottom as well as other collective action failures.

This Article explores the ramifications of the still dominant Westphalian paradigm from the perspectives of efficiency, democracy, and equity. It then suggests norms, procedures, and institutions to correct the current intergroup imbalance, and thereby offers better prospects for transnational cooperation and more equitable, sustainable, and democratic management of national and global commons.

Part II analyzes the transnational conflict paradigm and examines how sectarian domestic interests shape international negotiations and politics, and consequently influence the development of international law. Part III offers an overview of the systemic outcomes of that sectarian influence, namely the establishment and entrenchment of constitutional and international norms, procedures, and institutions to secure domestic small group influence. Part IV assesses the transnational consequences of the dominant, and essentially unregulated, role played by small interest groups in the formation of those norms. It then shows how the resulting legal bias has contributed to global market failures, current trends away from the welfare state, and the demise of effective citizen voice in collective decisionmaking. Part V then develops a theory of transnational institutions that could limit small interest group capture while offering more effective opportunities for democratic participation in national and transnational decisionmaking.

## II. THE SOVEREIGN STATE AS THE AGENT OF SMALL INTEREST GROUPS

After describing the domestic interaction among the various actors within the state, this Part applies public choice theory to demonstrate the relative edge smaller domestic interests enjoy over larger groups in shaping the outcome of international negotiations. As a result, spe

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4. See *infra* text accompanying notes 63-65.

5. See *infra* notes 48-49.

6. For a discussion of the immunity of international organizations (IOs), see *infra* note 48 and accompanying text. For a more thorough discussion of the inapplicability of antitrust laws and other “long-arm statutes” and the absence of liability of states to IO obligations, see *infra* notes 48-49 and accompanying text.

cific treaties, and international law in general, are skewed in favor of such groups.<sup>7</sup>

### A. *The Transnational Conflict Paradigm*

Political economists long ago demonstrated convincingly that state institutions provide an effective means for certain domestic interest groups to exploit less organized domestic groups in the competitive market for political goods (such as taxes, subsidies, and favorable market regulation).<sup>8</sup> In this market, more organized groups, namely those composed of a relatively smaller number of individuals, can outbid larger groups because the former realize both higher per capita benefits from cooperation with fellow group members and lower costs of monitoring and sanctioning free riders.<sup>9</sup> Hence, other things being equal, smaller groups, such as producers and employers, will obtain collective goods more efficiently than larger groups of consumers or employees, thereby securing a disproportionate share of the aggregate social welfare while externalizing part of their production costs onto the larger groups.<sup>10</sup>

Small groups' greater organizational capabilities also provide them a competitive edge in obtaining and assessing information on policies.<sup>11</sup> More effective monitoring of the government prompts politicians and bureaucrats to bias policy in favor of those who can appreciate their efforts. The larger body of ill-informed voters hardly notices

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7. In fact, the structure of foreign relations and international law ensure even greater small interest group capture than at the purely domestic level. See discussion *infra* Part III.

8. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

9. As a result, the political influence of groups is inversely related to their size. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 22-36 (1965). Ethnic, national, racial, and indigenous minorities are usually excluded from this definition of small groups. Although numerically inferior relative to the larger community, their organizational costs may be relatively higher than those of the majority. But there may be political circumstances in which they in fact obtain political influence that outweighs their relative size. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (suggesting that not all minorities are "discrete and insular").

10. This does not entail that small groups will achieve optimal amounts of a potential collective good. Collective losses still result from the unequal incentive of individuals within that group to contribute to the collective effort (determined by the relative stake each individual has in the collective pie). But it does suggest that "the larger the group, the farther it will fall short of providing an optimal amount of a collective good." OLSON, *supra* note 9, at 35.

11. For an explanation of information as a collective good, see Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92(4) AM. POL. SCI. REV. 809 (1998); see also Michael D. Rosenbaum, *Domestic Bureaucracies and the International Trade Regime: The Law and Economics of Administrative Law and Administratively-Imposed Trade Barriers* (Discussion Paper No. 250 1/99, The Center for Law, Economics and Business, Harvard Law School), available at <[http://www.law.harvard.edu/programs/olin\\_center](http://www.law.harvard.edu/programs/olin_center)> (arguing that administrative procedures that lower the costs of access to information shift power over policymaking from more-organized to less-organized groups).

their relative loss or attributes it to random factors.<sup>12</sup> Thus, the information rationale suggests that small-group policy bias stems not necessarily only from more effective lobbying, but also from more efficient monitoring of the policies once adopted.<sup>13</sup> It also explains the growing influence of Non-Governmental Organizations (NGOs), which advance the cause of larger groups by promoting, for example, human rights or protection of the environment. The information they gather and disseminate improves the effectiveness of monitoring bodies, such as the legislature, and reduces the incentive to adopt policies that are biased against the larger groups.<sup>14</sup>

As Olson elaborates in *The Rise and Decline of Nations*, because smaller groups could organize themselves more quickly within the nascent Westphalian system of sovereign states, they were able to use the states as instruments for obtaining a disproportionate share of resources for themselves.<sup>15</sup> Indeed, the political institutions of the emerging nations reflected just such a skewed power relationship between the smaller and larger groups. Constitutions insulated the smaller groups' share from majority vote<sup>16</sup> without restricting the opportunities for small groups to influence politicians and bureaucrats.<sup>17</sup>

Domestic political dynamics (and consequently, transnational political dynamics) involve not only large and small groups vying for political influence, but also the interests and preoccupations of politicians, bureaucrats, and judges. Politicians, whose immediate interest is election or reelection, broker public goods in exchange for campaign contributions or other political support (in nondemocratic regimes) or personal financial gains (in nondemocratic regimes). The bureauc-

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12. In developed countries, for example, policies are biased in favor of the relatively few farmers, whereas in developing countries the large agricultural sector is heavily taxed. See Becker, *supra* note 3, at 385.

13. See Lohmann, *supra* note 11, at 812.

14. See HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION 247-48 (1997).

15. MANCUR OLSON, THE RISE AND DECLINE OF NATIONS ch. 3 (1982).

16. Landowners were particularly concerned that a landless majority would use its numerical superiority to redistribute property. See THE FEDERALIST NO. 10 (James Madison) (discussing property ownership as a basis for conflict of interests among voters and legislators). The installation of a complex and diversified system of government, supermajority amendment requirements, and judicial review to protect constitutional rights such as the right to property responded to such concerns. See *id.*; THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison) (discussing the political structures for curbing such conflict of interests). NO. 78 (Alexander Hamilton) (explaining the rationale of judicial review); see also William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (presenting constitutional guarantees as securing legislative deals among diverse interest groups).

17. Marx, of course, made a stronger claim — namely that small groups, the bourgeoisie, invented the state system to exploit the masses. For Marxist-oriented historiography of the emergence (and possible demise) of the nation state that corroborates the Olsonian thesis, see generally ERNEST GELLNER, NATIONS AND NATIONALISM (1983); ERIC J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 (2d ed. 1992).

racy, on the other hand, if properly insulated from the political system, is relatively immune to the immediate influence of interest groups;<sup>18</sup> judges even more so.<sup>19</sup> The relative insulation of bureaucrats and judges from political influence provides a useful tool for competing interest groups. In matters where policy shifts due to fluctuating political influence are undesirable, groups may agree to establish administrative agencies comprised of bureaucrats independent from political influence. Thus, for example, by relegating the management of the national monetary system to administrative agencies — the central banks — rival domestic groups have solved a difficult collective action problem.<sup>20</sup> Similarly, constitutional guarantees against, for example, the taking of property have also been used to secure deals among domestic groups.<sup>21</sup>

Greater political independence from interest group influence does not mean that bureaucrats and judges necessarily pursue what they deem to be the “national interest” of their state. Their decisions may reflect certain biases. Thus, in addition to personal status and a comfortable income, bureaucrats are motivated by an interest in ensuring for themselves (and their institution) greater budgetary discretion, thereby gaining latitude to implement policies as they see fit.<sup>22</sup> Judges, on the other hand, hesitate to formulate an independent view of the “national interest,” deferring instead to the visions of politicians and bureaucrats. Not only do they refrain from imposing any strings on extraterritorial activity of the government, private citizens, or domestic firms; they also find myriad ways to rebuff challenges to such activi-

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18. Of course, bureaucracies in many countries may not be insulated, and hence will tend to reflect the interests of the politicians and interest groups. Political control of the appointments process is usually the most effective and pervasive way to ensure a submissive bureaucracy. See Randy Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588 (1989). But the private market, where many regulators eventually find themselves, is another powerful source of influence.

19. That is, if the ideal of independence is being observed in fact. See J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994) (analyzing systems in which judicial dependency on the political branches results from the politicians’ interest in controlling judges’ appointment, assignment, and promotion).

20. See Geoffrey Garrett & Peter Lange, *Internationalization, Institutions and Political Change*, in INTERNATIONALIZATION AND DOMESTIC POLITICS 48, 66-69 (Robert O. Keohane & Helen V. Milner eds., 1996).

21. See discussion *supra* note 16.

22. For an (updated) analysis of bureaucrats’ objectives, see WILLIAM A. NISKANEN, BUREAUCRACY AND PUBLIC ECONOMICS 274-75 (1994) (suggesting that bureaucrats tend to maximize the discretionary budgets of their bureaus). See also Ronald Wintrobe, *Modern Bureaucratic Theory*, in PERSPECTIVES ON PUBLIC CHOICE 429 (Dennis C. Mueller ed., 1995) [hereinafter PERSPECTIVES]. For a discussion of the private benefits (mainly income, prestige, and a peaceful life) and the institutional benefits (larger and more discretionary budgets) that accrue to bureaucrats from participation in international organizations (and which, in turn, account for their proliferation), see Bruno S. Frey, *The Public Choice of International Organization*, in PERSPECTIVES, *supra*, at 106-23.

ties despite seemingly clear language in domestic or international laws that prohibits them.<sup>23</sup> This hesitation is nowhere more evident than in matters involving the state's international relations. Courts in all jurisdictions have developed an array of doctrines — such as the political question doctrine, justiciability, and act of state — to muffle their role as effective keepers of the rule of law in the international arena.<sup>24</sup>

This strong judicial deference hints at the strategy small groups have developed to shield themselves against the vagaries of democratic vote. Whereas no constitution is beyond legislative interpretation and, ultimately, popular amendment to the detriment of small groups,<sup>25</sup> international law and the court's deference in the international arena facilitate the exit option, and hence offer the ultimate protection of their interests.<sup>26</sup> When larger groups have managed to mobilize and impose restrictions on producers and employers, such as antitrust regulations and higher labor standards, the latter have reacted by shifting their activities to foreign markets and societies.<sup>27</sup> When domestic groups attempted to regulate these extraterritorial activities through so-called "long arm statutes," international law provided shelter.<sup>28</sup> The next Section shows how the laissez-faire nature of international law continues to enable smaller groups to evade national regulations and exploit global commons. In fact, these smaller groups have had an even greater influence on the development of international than on domestic law, primarily because information-gathering and assessment costs are much higher in the international arena. Since ancient times, international negotiations have always enjoyed relative secrecy reinforced by public and judicial approval of a Machiavellian-Darwinian view of sovereign states struggling for survival in an anarchic and intimidating global environment. Shielded from public scrutiny, small groups (producers, importers, etc.) exercise great influence on the governments' conduct

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23. Cf. ROGER R. COTTERRELL, *THE SOCIOLOGY OF LAW* 248-49 (1984) ("Judges, however, as state functionaries, *cannot* neglect considerations of state interests and these may, on occasions, demand that doctrinal niceties be given short shrift in order to meet particular governmental emergencies.").

24. See *infra* Sections III.A & III.C and text accompanying notes 88-96, 111-125.

25. Thus, Landes and Posner's suggestion that constitutional guarantees were the tools to secure the interests of the smaller interest groups, notably their property rights, presented only part of the institutional guarantees of small group interests — arguably the less significant part. See *supra* note 16.

26. See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970); cf. Richard A. Epstein, *Exit Rights Under Federalism*, 55 *LAW & CONTEMP. PROBS.* 147 (1992) (discussing exit as a check on states' power in a federal system).

27. See John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903, 910-11 (1996) (noting that the transformation of the Western nation state into a welfare state accelerated its decline).

28. International law did so through the creation of international organizations (IOs), which are immune to national regulation. See *infra* text accompanying notes 46-50.

of external affairs. The edge small groups enjoy can be traced by following the development of international norms. The following section examines the actual influence these groups have had in the formulation of policies in several areas of law.

## B. *The Transnational Conflict Paradigm in Practice*

### 1. *Early Cases*

Smaller groups have been successful in influencing international negotiations and international law since the very inception of the Westphalian order of sovereign states. In fact, a small but effective group of Dutch merchants who sought to secure access to the high seas were responsible for the birth of modern international law. In 1604, these merchants (who formed the Dutch United East India Company) commissioned a legal brief from a young lawyer, Hugo Grotius — now widely regarded as the founder of international law.<sup>29</sup> His opinion, *Mare liberum* (published as a book in 1609),<sup>30</sup> a brilliant defense of the notion of the high seas as a shared resource, transformed the course of development of international law.<sup>31</sup>

The early seventeenth century witnessed several commercial disputes among merchants from different European countries. Grotius's treatise related to a conflict between Portuguese and Dutch merchants over the right to navigate the high seas leading to the coveted spice markets of the Far East.<sup>32</sup> At the same time, Dutch fishing fleets ar-

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29. On the Grotian legacy in international law, see David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1, 76-95 (1986); Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1 (1946). But see the fierce critique in Giorgio del Vecchio, *Grotius and the Foundation of International Law*, 37 N.Y.U. L. REV. 260 (1962).

30. The Dutch company ordered publication of an anonymous version in connection with negotiations between the Netherlands and Spain, and possibly for reasons related to domestic political conflict in the Netherlands. See C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 95, 109 (Hedley Bull et al. eds., 1990). For the background of the treatise, see C.G. Roelofsen, *Grotius and International Law: An Introduction to Some Themes in the Field of Grotian Studies*, in GROTIUS READER 3, 9-10 (L.E. van Holk & C.G. Roelofsen eds., 1983) [hereinafter Roelofsen, *Themes*]. See also HAMILTON VREELAND, HUGO GROTIUS — THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 45-47 (1917); J.K. OUDENDIJK, STATUS AND EXTENT OF ADJACENT WATERS 15-16 (1970).

31. Grotius envisioned a world order based on sovereign states subject to nothing but their free will. State consent, rather than God's commands or Papal grants, was therefore the basis of international obligations. Accordingly, Grotius's reasoning refrained from alluding to religious text and instead emphasized utilitarian arguments, such as economic efficiency: "[W]hen it can be done without any prejudice to his own interests, will not one person share with another things which are useful to the recipient, and no loss to the giver?" HUGO GROTIUS, THE FREEDOM OF THE SEAS 38 (Ralph van Deman Magoffin trans., James Brown Scott ed., Oxford Univ. Press 1916) (1633).

32. See VREELAND, *supra* note 30, at 51-52.

gued with their English competitors over the right to fish in the waters of the North Sea, or what King James I called the "British Seas."<sup>33</sup> When English merchants grew interested in tapping the profitable Far East markets, only to be rebuffed by Dutch competitors who had managed to secure exclusive contracts with the foreign rulers, inter-governmental talks began in London.<sup>34</sup> The merchants arguably could have resolved these commercial disputes themselves through transnational negotiations and contracts rather than interstate agreements.<sup>35</sup> But some influential competitors preferred to alter the game by mobilizing the support of their state and the strength of its army in their efforts to eliminate competition and ensure private capture. In other words, these merchants sought to externalize the costs of creating a trade monopoly on the state apparatus, whose military resources were enlisted to secure the desired goal.<sup>36</sup> This was a cozy deal for the ruling elites: in addition to added prestige, these dignitaries could benefit from their merchants' increased revenues.

In their attempts to elevate commercial disputes to the international level, merchants contracted lawyers who offered different visions of international law. Grotius's *Mare liberum*, with its open-access thesis that benefited Dutch merchants seeking access to ports in Southeast Asia, was soon challenged by other founding fathers of international law. John Selden's treatise *Mare clausum* highlighted the interests of British merchants who could rely on Britain's military superiority.<sup>37</sup> Commissioned to provide the antithesis to Grotius's work,

33. See OUDENDIJK, *supra* note 30, at 33-40; Roelofsen, *Themes, supra* note 30, at 13-14.

34. See OUDENDIJK, *supra* note 30, at 37-40.

35. In those days, merchants across political boundaries had been using a shared law, called *lex mercatoria* or Law Merchant. This law was a cosmopolitan law, beyond states' control. Its development through fairs, its reliance on customs, and its avoidance of formalities reflected a reliance on reputational sanctions and hence close ties between merchants. The Dutch East India and the British East India companies could have resorted to this law for resolving their emerging differences. For a discussion of the Law Merchant, see Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 20, 22-25 (Chia-Jui Cheng ed., 1988) and Daniel R. Coquillette, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, 61 B.U. L. REV. 315, 346-63 (1981). For a discussion of the Law Merchant's underlying logic, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) and Lisa Bernstein, *Opting Out Of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

36. Similar efforts of local merchants to tap the legislative resources of the state to change the rules of the game and drive out foreign competitors can also explain the demise of Law Merchant in England. See 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 332-36 (3d ed. 1945) (describing how, in the latter part of the sixteenth century, English trading companies began to drive out foreign merchants, sharing with Queen Elizabeth their proceeds in return for public regulation of exports and imports); see also Coquillette, *supra* note 35, at 362 & n.271.

37. JOHN SELDEN, MARE CLAUSUM, (Marchamont Nedham trans., London, William Du-Gard 1652) (1635)).

the book pleased King Charles so much that he ordered it to be placed among the public records of the courts.<sup>38</sup> Alberico Gentili, an Italian-born Oxford professor, who represented Spanish interests in the English Court of Admiralty, took a middle course that reflected his clients' objectives.<sup>39</sup> Thus, interest groups formed general arguments to advance their sectarian interests. International law quickly became a tool for externalizing small-group costs upon the larger segments of society.

## 2. *Contemporary Conflicts*

The early seventeenth-century commercial disputes show how quickly the dominant domestic interest groups adjusted to, and learned to exploit, the emerging Westphalian order of sovereign states. For this purpose, they used their strong influence on their states' external relations not only to shape the outcomes of specific treaty negotiations; but more generally, they influenced the development of both domestic and international law to create and maintain a laissez-faire international legal environment. Such an environment facilitates competition among states which small groups, whose relocation costs are relatively low, continue to exploit.<sup>40</sup>

At the end of the twentieth century, international law still provides small groups the same exit options that existed in earlier times. Despite the growing effectiveness of labor conditions and human rights norms, producers can still shop for jurisdictions that provide them with virtually unprotected workforces. Even though early awareness of the need to cooperate in promoting labor standards led to the establishment of the International Labour Organisation in 1919, no machinery yet exists to monitor countries and effectively ensure compliance.<sup>41</sup> Developments in human rights law have emphasized civil and political rights rather than economic and social rights, thereby constraining

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38. See Marchamont Nedham, *Foreword* to SELDEN, *supra* note 37, at 5; Eric G.M. Fletcher, *John Selden (Author of Mare clausum) and His Contribution to International Law*, 19 TRANSACTION OF THE GROTIUS SOCIETY 1, 8-9 (1934).

39. See GEZINA H.J. VAN DER MOLEN, ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW 165-67 (1937).

40. The colonies, and later the developing states, were the prime casualties of that attitude.

41. The idea of international action in promoting labor standards was raised by the British industrialist Robert Owen in the Holy Alliance Congress in 1818. For discussion of labor rights as human rights and the machinery for their protection, see generally HECTOR BARTOLOMEI DE LA CRUZ ET AL., *THE INTERNATIONAL LABOR ORGANIZATION* (1996); HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996); Laura Ho et al., *(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. L. REV. 383 (1996); Klaus Samson, *The Standard-Setting and Supervisory System of the International Labour Organisation*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 149 (Raija Hanski & Markku Suksi eds., 1997).

governments while leaving multinational employers relatively unscathed.<sup>42</sup>

The other exit option — transactions through state-brokered agreements subject to international law — provides small domestic groups with significant benefits. While private law contracts are often costly to negotiate and enforce because of monitoring and compliance problems, reliance on the state machinery for negotiation and monitoring may lower transaction costs, or at least externalize them. Moreover, domestic norms that regulate private law contracts, such as antitrust or consumer-protection regulations, impose significant limitations on certain transactions and hence increase transaction costs dramatically. By signing international treaties, governments can enable producers and other small interests to avoid these cumbersome limitations by shifting certain transactions onto the international plane.<sup>43</sup> International law, which governs these treaties, remains virtually oblivious to the adverse effects treaties might have on the interests of nonstate third parties, such as consumers and workers.<sup>44</sup> Under the influence of the Westphalian paradigm, there has been little effort to adjust the normative framework of international treaty law, which still reflects early nineteenth-century laissez-faire values.<sup>45</sup>

Governments provide small interest groups the greatest level of protection, however, through the establishment of international organizations (IOs) as the locus of particular economic activities.<sup>46</sup> IOs have an independent legal personality under international law.<sup>47</sup> They enjoy immunity from suits in national courts and are not subject to any

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42. See Ho et al., *supra* note 41, for a critical analysis of the employers' impunity under international law.

43. Governments accomplish this shift through the establishment of IOs. For a more thorough treatment of the role of IOs, see *infra* notes 46-50 and accompanying text. For a specific discussion of the International Coffee Organization, see *infra* notes 63-65 and accompanying text.

44. Treaties are subject only to an elusive concept of *jus cogens*, which renders void only those commitments that constitute grave breaches of international human rights law such as slavery, genocide, etc. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 31, 220-21 (1989); Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 219 (1997).

45. The law governing treaties is embodied in the Vienna Convention on the Law of Treaties, May 23, 1969, S. TREATY DOC. NO. 92-1 (1969), 8 I.L.M. 679 [hereinafter Vienna Convention]. Aside from its vague reference to *jus cogens*, only state interests (for example, the coercion of a state by a threat of war) can render a treaty invalid. See *id.* arts. 46-53.

46. An international organization is defined as an organization created by two or more states, usually by a treaty; which has one or more organs that do not depend on the will of one state only; and which is subject to international, rather than to a particular national, law. See HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW §§ 29-45 (3d rev. ed. 1995).

47. See *Reparation for Injuries Suffered in the Service of the United States* (Advisory Opinion), 1949 I.C.J. 173, 178-79 (April 11); PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS 54-61 (1994); SCHERMERS & BLOKKER, *supra* note 46, at §§ 1562-1574.

national rules prohibiting antitrust or protecting creditors against insolvency.<sup>48</sup> More importantly (from the participating states' perspective), international law works together with national statutes and judicial doctrine to further secure state interests at the expense of individuals who interact with IOs. These norms shield state parties to such organizations from direct or vicarious liability for acts of the institutions.<sup>49</sup> Thus, it remains questionable whether such organizations are subject to the same duties states owe for the protection of human rights.<sup>50</sup> In short, international law, through its laissez-faire approach to treaties and IOs, continues to provide a convenient legal environment to domestic small interest groups seeking to pursue transnational

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48. In the wake of the collapse of the London-based International Tin Council, claims of individual debtors were rejected owing to the immunity enjoyed by the organization. See *J.H. Rayner Ltd. v. Dep't of Trade & Indus.*, [1989] 3 W.L.R. 969, 81 I.L.R. 670 (H.L.) [hereinafter *The ITC Litigation*]; see also *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354 (9th Cir. 1981) (dismissing a suit by a U.S. labor union against OPEC and the individual member states of OPEC under the Sherman Act on procedural grounds). For more in-depth discussion of this issue, see generally BEKKER, *supra* note 47; Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53 (1996); and Romana Sadurska & C.M. Chinkin, *The Collapse of the International Tin Council: A Case of State Responsibility?*, 30 VA. J. INT'L L. 845 (1990).

49. See *The ITC Litigation*, *supra* note 48, 3 W.L.R. at 980, 81 I.L.R. at 671; see also *Arab Org. for Industrialization v. Westland Helicopters Ltd.*, 80 I.L.R. 622 (Fed. Sup. Ct. 1989) (Switzerland) (finding the insolvent AOI legally distinct from the state parties and hence finding the latter not liable for the AOI obligations); C.F. Amerasinghe, *Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent*, 85 AM. J. INT'L L. 259 (1991) (suggesting that under international law, it is up to the state parties to the international organization to determine whether or not they would be responsible for its debts, and their choice should be reflected in the IO's constitutive documents). See generally MOSHE HIRSCH, *THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS TOWARD THIRD PARTIES* (1995). Until recently, the International Law Commission's Draft Articles on State Responsibility contributed to the presumed lack of responsibility. Draft Article 13 suggested that:

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

International Law Commission, *Draft Articles on State Responsibility*, reprinted in 37 I.L.M. 440, 445 (1998). In its 1998 decision, the ILC decided to replace Article 13 and all other references to IOs with a saving clause, which removed the entire question of state responsibility to IOs from the scope of the Draft Articles. Draft Article A now reads: "These draft articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization or of any State for the conduct of an international organization." See Bruno Simma, *The Work of the International Law Commission at Its Fiftieth Session* (1998), 67 NORDIC J. INT'L LAW 431, 456 (1998).

50. The E.U. is a prime example of an IO that has consistently refused to view itself as bound by external human rights norms, developing instead, somewhat begrudgingly, its own standards. See EUROPEAN UNION: THE HUMAN RIGHTS CHALLENGE (Antonio Cassese et al. eds., 1991); EUROPEAN UNION AND HUMAN RIGHTS (Nanette A. Neuwahl & Allan Rosas eds., 1995); Philip Alston & Joseph H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights* (Jean Monnet Working Paper No. 1/99, Harvard Law School), available at <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/papers99.html>>.

commercial transactions sheltered from the ever-growing national regulation.

The domestic bureaucracy and political leadership are the firms' willing partners. Similar to their seventeenth-century predecessors, they eagerly engage in such transactions. Together with the emerging transnational bureaucracy, they profit from greater discretion in the reallocation of the surplus resources such agreements generate, in addition to the status and perks these missions provide.<sup>51</sup> The public remains largely unaware of the implications of such transactions; thus, politicians find it politically advantageous to tolerate them.

Domestic influences are particularly noticeable in environmental disputes. From the first international litigation related to transboundary environmental damage — sulfur dioxide emissions from a Canadian smelting company at Trail in British Columbia<sup>52</sup> — to current debates over prevention of global warming and the protection of the ozone layer, sectarian domestic interests hold sway in international negotiations and influence the development (or lack thereof) of international law. Thus, for example, the governments of the upper-riparian states tolerated the continuous pollution of the Rhine River throughout the 1970s and 1980s out of deference to those industries that treated the river as their private backyard dumping area.<sup>53</sup> These governments, yielding to the interests of the domestic industries and their workforce, colluded to stall effective plans to reclaim and protect the river by their sustained support for a largely ineffective international protection system.<sup>54</sup> Similarly, Finland and Sweden, whose co-

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51. See Frey, *supra* note 22, at 106-23.

52. The Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1938).

53. See Aaron Schwabach, Comment, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 *ECOLOGY L.Q.* 443 (1989) (discussing the disastrous consequences of the 1986 toxic waste contamination of the Rhine from a warehouse in Basel and examining the failure of the Rhine treaty regime). For background on the litigation in Dutch courts with respect to pollution of the Rhine by a French mining company in Alsace, see *Handelskwekerij G.J. Bier B.V. and Stichting "Reinwater" v. Mines de Potasse d'Alsace S.A. (MDPA)*, 11 *NETH. Y.B. INT'L L.* 326 (1980); for subsequent litigation in this dispute, see *Handelskwekerij G.J. Bier B.V. and Stichting "Reinwater" v. Mines de Potasse d'Alsace S.A. (MDPA)*, 15 *NETH. Y.B. INT'L L.* 471 (1984), and *Mines de Potasse d'Alsace S.A. (MDPA)/Onroerend Goed Maatschappij*, 19 *NETH. Y.B. INT'L L.* 496 (1988) [hereinafter *MDPA III*]. For similar litigation in the French courts, see *La Province de la Hollande septentrionale contre Etat ministre de l'Environnement, Tribunal Administratif de Strasbourg*, 27 July 1983, reprinted in 4 *REVUE JURIDIQUE DE L'ENVIRONNEMENT* 343 (1983) (annulling the permit to pollute), *overturned Conseil d'État*, 18 April 1986, reprinted in 2-3 *REVUE JURIDIQUE DE L'ENVIRONNEMENT* 296 (1986) (finding no manifest error in granting the permit) [hereinafter *French Pollution Permit Case*]. For a discussion of an "unsatisfactory" 1994 decision of another local court in the Netherlands concerning pollution by a Belgian company of the River Meuse, see Jan M. van Dunné, *Liability in Tort for the Detrimental Use of Fresh Water Resources Under Dutch Law in Domestic and International Cases*, in *THE SCARCITY OF WATER* 196, 205 (Edward H.P. Brans et al. eds., 1997). The fact that these cases of pollution had to be brought to court, and by Dutch NGOs, suggests the political constraints involved.

54. The polluting industries along the Rhine, from Basel, Switzerland, to the heavily

operation is usually cause for envy and emulation,<sup>55</sup> failed to agree on jointly reducing pollution from pulp mills due to the successful resistance to regulation initiatives mounted by their respective pulp industries.<sup>56</sup>

Domestic interest groups also shaped the United States position in international negotiations. U.S. leadership in global efforts to curb production of CFC emissions to protect the ozone layer throughout the 1980s and early 1990s was motivated primarily by the five American CFC producers — producers responsible for thirty percent of the world production, but whose CFC sales did not account for a significant part of their revenue. Once these firms developed substitutes for most CFC uses, they stood to gain from a global CFC ban.<sup>57</sup> In contrast, the contemporaneous U.S. failure to join the Convention on Biological Diversity was a function of the adverse economic consequences it entailed for private American companies.<sup>58</sup> Negotiations over a Biosafety Protocol under the Biological Diversity Convention collapsed in February 1999.<sup>59</sup> The protocol, which would have restricted trade in genetically modified agricultural products, was blocked by a coalition of six states whose industries had strong interests in such trade.<sup>60</sup>

Domestic interest groups shape international trade law and negotiations. They have driven governments into both trade wars and vio-

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industrialized Ruhr in Germany, opposed stringent controls that would increase production costs. Their workers shared this interest, fearing for their jobs. These groups shaped their governments' positions in negotiating the Rhine treaty regime. See Schwabach, *supra* note 53, at 469-70. Following the 1986 major spill of toxic chemicals into the Rhine from the Sandoz warehouse in Basel, the West German opposition party, the Social Democrats, justified its decision to remain silent by the fear of industry relocation: "We can't pull out of the industrial society . . . . We don't want to." Russel Watson et al., *The Blot on the Rhine*, NEWSWEEK, Nov. 24, 1986, at 58 (quoting Harold Schaefer, spokesperson of the Social Democrats). In 1986, the Dutch court of appeal determined that the level of salt allowed by the 1976 Bonn Salt Convention was exceedingly high, damaging the river and the environment in the Netherlands, and constituting a breach of Dutch tort law. See *MDPA III*, *supra* note 53.

55. See *infra* note 161 and accompanying text (discussing the Swedish-Finnish Frontiers River Commission).

56. See Matthew R. Auer, *Geography, Domestic Politics and Environmental Diplomacy: A Case from the Baltic Sea Region*, 11 GEO. INT'L. ENVTL. L. REV. 77 (1998).

57. See TODD SANDLER, GLOBAL CHALLENGES 112-13 (1997); see also RICHARD ELLIOT BENEDICK, OZONE DIPLOMACY (1998).

58. See Kal Raustiala, *The Domestic Politics of Global Biodiversity Protection in the United Kingdom and the United States*, in THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION 42, 48-52 (Elizabeth Economy & Miranda A. Schreurs eds., 1997).

59. See Christopher S. Zalewski & Paul F. McQuade, *A Stalemate on Biosafety Pact*, THE NAT'L L.J., May 24, 1999, at C1; *U.S. and Allies Block Treaty on Gene-Altered Goods*, N.Y. TIMES, February 25, 1999, at A1 [hereinafter *U.S. and Allies*].

60. These states included the United States, Canada, Australia, Argentina, Chile, and Uruguay — all of them major agricultural exporters. See Zalewski & McQuade, *supra* note 59; *U.S. and Allies*, *supra* note 59.

lations of trade agreements.<sup>61</sup> Trade agreements, informal understandings, and even elaborate institutional regimes help producers from different countries establish and maintain cartels to the detriment of consumers.<sup>62</sup> Other treaties reflect complex give and take between producers and bureaucrats. Robert Bates' recent study of the International Coffee Organization (ICO) is an in-depth exploration of a contemporary example of an international market failure that the prevailing Westphalian paradigm is incapable of addressing.<sup>63</sup> The ICO was a cartel of coffee-producing states, controlled by the two leading producers, Brazil and Colombia. During the almost three decades of its operation, from the early 1960s to late 1989, the ICO set quotas for participating states, thereby restraining competition and raising the price of coffee. The United States supported the ICO. In fact, the support of the United States, responsible for over fifty percent of the world's imports of coffee, was integral to the ICO's enforcement because the monitoring and policing of quotas was left to the consuming states' customs offices. In other words, for almost three decades the U.S. government spent public resources to police a scheme that actually imposed a significant but hidden tax on American coffee consumers and encroached on certain U.S. businesses. Political rather than economic reasons motivated this behavior, and these actions cannot be understood without piercing the veil of national sovereignty. The U.S. position was the result of a comfortable deal among a small domestic interest group (the large coffee roasting firms), legislators, and bureaucrats. The higher price for raw materials gave the larger roasters an economic advantage over the smaller ones. In exchange for long-term contracts with deferred rebates, these large

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61. Ongoing trade disputes between the United States and the European Union over E.U. restrictions on the importation of genetically modified food, hormone-treated beef, and bananas from Central America, as well as U.S. retaliatory measures in the form of 100% tariffs on certain E.U. exports to the U.S., reflect competition, rather than collusion, among rival domestic interests. But they also reflect the direct influence these domestic groups have on their respective governments' positions. This influence has prompted the E.U. to disregard the rulings of the World Trade Organization, which had found the E.U. in breach of trade agreements in both the banana and beef hormone disputes. See The WTO Appellate Body Reports: *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, Rep. No. WT/DS27/AB/R, 9 September, 1997; *EC Measures concerning Meat and Meat Products (Hormone)*, Rep. No. WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998 [hereinafter *WTO Appellate Reports*]. These violations persisted despite the findings and the U.S. retaliatory measures. See *U.S. — Europe Trade War Looms over Bananas*, N.Y. TIMES, Dec. 22, 1998, at A1; *Imports Face Higher Tariffs on Beef Issue*, N.Y. TIMES, March 23, 1999, at C1.

62. During the 1980s, protective U.S. trade policies restricted, among others, the import of Japanese cars, of textile and apparel, of steel, and of semiconductors. These policies benefited some U.S. as well as foreign industries, while American consumers bore the costs. See William A. Niskanen, *US Trade Policy*, in 3 REGULATION 34 (1988), reprinted in WILLIAM A. NISKANEN, POLICY ANALYSIS AND PUBLIC CHOICE 183 (1998). For an analysis of the International Coffee Organization, see ROBERT H. BATES, OPEN-ECONOMY POLITICS (1997); *infra* notes 63-65 and accompanying text.

63. See BATES, *supra* note 62.

roasters lobbied and testified in Congress for its endorsement of the ICO regime.<sup>64</sup> A complacent Congress benefited the executive bureaucracy, whose dominant goal was to prevent domestic challenges to the U.S.-backed Latin American regimes, a threat they called “Castroism.”<sup>65</sup> The ICO deal provided an opportunity to shift unnoticed funds from the U.S. economy to Latin America, making some influential producers happy.

A final example in support of the transnational conflict paradigm is the treatment of global tax competition by the Organization for Economic Cooperation and Development (OECD). In view of “the distorting effects of harmful tax competition,” the OECD created a committee in 1996 to report on the situation and recommend possible measures to address it.<sup>66</sup> Two years later, the OECD Council approved the committee’s report and adopted its modest and controversial recommendations.<sup>67</sup> The report makes clear that pervasive tax competition is not only economically inefficient, but also inequitable as it shifts the tax burden from mobile capital to less mobile labor — that is, from the smaller groups to the larger ones.<sup>68</sup> The report specifically identifies domestic business interests as responsible for the ever-expanding competition. The committee, in a rather diplomatic tone, hints at the political complexity of the issue: from 1985 to 1994, foreign direct investment from G7 countries in low tax jurisdictions increased more than five-fold, well above the growth rate of total outbound foreign direct investments.<sup>69</sup> In other words, although the heads of the G7 claim to be troubled by what they see as “harmful tax competition . . . carrying risks of distorting trade and investment [that] could lead to the erosion of national tax bases,”<sup>70</sup> they have not committed to taking effective action that would adversely affect their respective domestic actors.<sup>71</sup> With Luxembourg and Switzerland critical

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64. For the role of the large roasters, see *id.* at 129-33, 150-53.

65. For the motivations of the administration, see *id.* at 121-29. Although one could say that the U.S. executive pursued here a general anti-Soviet interest, this interest was not subject to scrutiny by Congress.

66. See ORGANISATION FOR ECON. CO-OPERATION AND DEV., HARMFUL TAX COMPETITION para. 1, at 7 (1998) [hereinafter OECD].

67. Luxembourg and Switzerland criticized the recommendations and abstained. See *id.* at 73-78. For criticism, see Reuven S. Avi-Yonah, Globalization, Tax Competition and the Fiscal Crisis of the State (1998) (unpublished manuscript, on file with author).

68. See OECD, *supra* note 66, para. 30, at 16. “The Committee is aware that many of the preferential tax regimes referred to in this Report have been put in place in response to pressures by the business community on those parts of government that have the responsibility for economic development.” *Id.* para. 32, at 17.

69. See *id.* para. 35, at 17.

70. *Id.* para. 1, at 7 (quoting Communiqué of the G7 Heads of State in the Lyon Summit, 1996).

71. For criticism of the recommendations’ effectiveness, see Avi-Yonah, *supra* note 67.

about the “partial and unbalanced approach” of the report and recommendations, it remains to be seen whether the rest of the OECD countries will implement the recommendations.<sup>72</sup>

### III. THE TRANSNATIONAL CONFLICT PARADIGM AND THE LAW: SUSTAINING NORMS, PROCEDURES, AND INSTITUTIONS

Smaller domestic interest groups have not only used their relative edge over other domestic groups to secure specific gains and a comfortable international legal environment; they have also invested in establishing a legal framework to ensure their continuing control over international negotiations and secure the durability of negotiated treaties while allowing low-cost, momentary evasions of treaty obligations. This Part will delineate the relevant norms, procedures, and institutions that make up this framework.

#### A. *Treaty Negotiation and Ratification*

Smaller domestic interest groups enjoy a great deal of control over the treaty negotiation process and outcome, and therefore risk little in shifting these transactions from the private to the international sphere. As suggested by Robert Putnam, the structure of international negotiations is a two-level game simultaneously played by government representatives at the international level with the representatives of the foreign governments and at the domestic level with representatives of domestic interest groups.<sup>73</sup> The smaller domestic interest groups, because of their particularly strong influence in the negotiation and ratification processes, are poised to dominate the game at the domestic level. They will capture the executive, or instead stall, water down, or block negotiations that could encroach on their interests.<sup>74</sup> The domestic level of the game is composed of two phases: the negotiation phase, followed by the ratification phase. The smaller interest groups have particularly strong influence during the negotiation phase. At that opaque stage, smaller groups are better positioned than other groups to act collectively in monitoring the government’s representa-

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72. See *OECD*, *supra* note 66, at 73 (reporting statement by Luxembourg); *id.* at 76 (reporting statement by Switzerland).

73. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 436 (1988). On this two-level game, see generally DOUBLE-EDGED DIPLOMACY (Peter B. Evans et al. eds., 1993) (analyzing eleven cases of two-level bargaining); GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION?* (1995); MILNER, *INTERESTS* *supra* note 14. For an argument for a “three-level game” — including an additional “transnational/transgovernmental bargaining” level, see Thomas Risse-Kappen, *Structures of Governance and Transnational Relations: What We Have Learned?*, in *BRINGING TRANSNATIONAL RELATIONS BACK IN* 280, 300 (Thomas Risse-Kappen ed., 1995).

74. See MILNER, *INTERESTS* *supra* note 14, ch. 3.

tives and furnishing them with partial data.<sup>75</sup> Should they fail to persuade the executive, they can revert to the second line of defense — the ratification phase. International agreements usually require national ratification in one form or another,<sup>76</sup> and different ratification forms have bearing on negotiators' available options.<sup>77</sup> Because of the advantage smaller groups have during the negotiation stage, however, the often times more transparent and accessible ratification process is more likely to serve as a check on their gains at the first phase rather than as a shield; but the check is not very effective. During the ratification phase, smaller groups still enjoy a relative edge over larger groups because they can take advantage of the information collected during the negotiation phase, over which they have a virtual monopoly.

The particular vulnerability of the process of treaty negotiation and ratification to interest group influence is made clearer when compared to garden-variety, domestic legislation. In contrast to the relatively transparent and accessible legislative process, international negotiations are less susceptible to serious domestic scrutiny and effective democratic deliberation. Moreover, unlike legislative proposals, which the legislature controls from the initial introduction of bills through the discussion of amendments to the final product, the treaty to be ratified is a completed transaction essentially immune from subsequent unilateral alterations.<sup>78</sup> The sequential process of treaty ratification allows the government a free hand in setting the agenda, formulating the policies, and choosing among alternatives.<sup>79</sup>

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75. See Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 446-47 (1998) (describing the information assistance Kodak and Fuji provided to their governments in their trade dispute).

76. This is true not only in democratic countries in which treaties must be approved by domestic ratification procedure. Nondemocratic regimes must also secure informal ratification by the elites from which they draw support. See Peter B. Evans, *Building an Integrative Approach to International and Domestic Politics*, in *DOUBLE-EDGED DIPLOMACY*, *supra* note 73, at 397, 415-16 (comparing domestic influence on international positions in democratic and nondemocratic regimes); cf. Kurt Taylor Gaubatz, *Democratic States and Commitment in International Relations*, 50 INT'L ORG. 108 (1996) (arguing that democracies can better maintain international commitments than nondemocracies can.).

77. Thus, the different ratification procedures in the United States and Britain, and the different legal status of treaties within the respective domestic legal systems can explain their different attitudes toward the adoption of international environmental standards. Cf. Raustiala, *supra* note 58 (comparing the two countries' attitudes in negotiating international biodiversity standards).

78. For an analysis of the political advantages presidents have over the legislature through the exclusive power to initiate, to make take-it-or-leave-it proposals, and to control information, see MATTHEW S. SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES* 139-40 (1992).

79. There are profound advantages to the party who can decide how to sequence the voting process when there are more than two options open to the voters (and when there are more than two voters). As was formally demonstrated in KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951), the agenda-setter can virtually dictate the final vote simply by deciding the order of votes.

The ex post "take it or leave it" option presented to the ratifying body erects a high hurdle for those who wish to oppose or amend the international transaction.<sup>80</sup>

In many states the ratification process does not require legislative approval and hence permits even fewer opportunities to scrutinize the treaty.<sup>81</sup> In Scandinavia, and in those states following the British tradition, the government, rather than the legislature, ratifies the treaty and thereby commits the state to international obligations.<sup>82</sup> In theory, such ratification does not carry any domestic implications, because ratification cannot change national law. But in fact, unless there is a statute that specifically conflicts with the treaty obligations, the government is not deterred from implementing these obligations domestically through regulations or other acts. Under the *Charming Betsy* doctrine,<sup>83</sup> the onus is on the legislature to pass a statute that would explicitly invalidate the treaty's internal effect. The legislature may hesitate to do so, because such enactment could amount to a breach of the state's international obligations.

In the United States, the interplay between Congress and the Executive in the treaty ratification process is more complicated. On the one hand, the constitutional requirement of a two-thirds majority in the Senate for "advice and consent" to treaties endows a minority of 34 senators with veto power,<sup>84</sup> thereby enabling interest groups to concentrate their efforts on fewer legislators.<sup>85</sup> Executive agreements

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80. Reservations, understandings, and declarations and interpretations, attached to treaties at the time of ratification or made thereafter, could alter somewhat the contours of the agreement without breaching it. Note, however, that such pronouncements may be limited by the treaty or by general international law, which proscribes reservations that are "incompatible with the object and purpose of the treaty." Vienna Convention, *supra* note 45, art. 19(c).

81. See Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 303 (1991). For a comparative survey of the practices of treaty ratification, see THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis G. Jacobs & Shelley Roberts eds., 1987) [hereinafter EFFECT OF TREATIES]; *Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293 (1991).

82. For the British procedure, see R. Higgins, *United Kingdom*, in EFFECT OF TREATIES, *supra* note 81, at 123-24, and Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459 (1991). For the situation in Denmark, see Claus Gulmann, *Denmark*, in EFFECT OF TREATIES, *supra* note 81, at 29-30; in Iceland, see Ragnar Adalsteinsson, *The Current Situation of Human Right in Iceland*, 61/62 NORDIC J. INT'L L. 167, 168-70 (1992-93); in Sweden, see Michael Bogdan, *Application of Public International Law by Swedish Courts*, 63 NORDIC J. INT'L L. 3, 8-11 (1994).

83. See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). On this widely accepted doctrine and its implications, see *infra* notes 99-102 and accompanying text.

84. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 601 (1991).

85. The involvement of Congress does not necessarily result in the representation of the larger constituency. Indeed, sometimes Congress is captured by small interests, while at the same time the Executive promotes general interests.

compromise this strategy, however, by allowing a presidential bypass of the Senate in the conclusion of international obligations.<sup>86</sup> Small groups need therefore invest in influencing the executive. In recent years, the United States has developed a so-called "fast track" procedure with respect to trade agreements in which the President agrees to involve Congress in the negotiation phase in return for a bicameral congressional commitment to vote the agreement up or down without amendment.<sup>87</sup> Congress's involvement at the negotiation phase limits the discretion of government negotiators at the international bargaining process and provides more voice to groups that are less influential with the Executive, although the President continues to control the agenda.

Domestic courts have embraced the pervasive lack of significant legislative supervision of international negotiations. In the celebrated case of *United States v. Curtiss-Wright Export Corp.*, the United States Supreme Court affirmed that

[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.<sup>88</sup>

The logic of this argument holds as long as the distinction between domestic and international affairs remains sharp. But when interna-

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86. Executive agreements take one of two forms: unilateral acts by the President, and executive actions requiring approval by a bicameral majority of Congress rather than a supermajority of the Senate. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §303 & cmt. g (1986) [hereinafter RESTATEMENT] ("Presidents have asserted a broad authority to make many other international agreements [in addition to recognition of states and armistice agreements], at least in the absence of inconsistent legislation or of Congressional action restricting such agreements."). On executive agreements, see generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 215-30 (2d ed. 1996); John H. Jackson, *United States, in EFFECT OF TREATIES*, *supra* note 81, at 141, 142-44; Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); and Riesenfeld & Abbott, *supra* note 84, at 635-41.

87. See Harold H. Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143 (1992); Riesenfeld & Abbott, *supra* note 84, at 637-38; Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40, 41-42 (1995). See generally George A. Bermann, *Constitutional Implications of U.S. Participation in Regional Integration*, 46 AM. J. COMP. L. 463 (1998).

88. 299 U.S. 304, 319 (1936). The Court used Congress's relative lack of information as an argument against its involvement in decisionmaking:

[The President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

*Id.* at 320.

tional negotiations impose significant burdens on domestic policies and on individuals, executive power must be limited.

For the same reasons, courts have been reluctant to assert their own powers to review ratified treaties. As a result, treaties enjoy greater immunity from judicial review than statutes. In some countries, the constitution accords treaties a higher status than statutes, sometimes even higher than the constitution itself, thereby immunizing treaties from judicial scrutiny.<sup>89</sup> In those jurisdictions where treaty ratification is deemed a governmental (formerly a royal) prerogative, treaties are insulated from judicial review, somewhat paradoxically, because they have no direct effect in the domestic legal system and hence no effect on individual rights.<sup>90</sup> In other states, national courts are, in theory, competent to review the constitutionality of treaties (or of statutes implementing treaties), but only the constitutional courts of Italy, Germany, and the United States have asserted such authority, and then only in rare and exceptional cases.<sup>91</sup>

The judicial hesitation to constitutionally scrutinize treaties fits well with the general attitude of national courts to defer to the discretion of the executive in conducting the country's foreign affairs.<sup>92</sup> Ju-

89. See, e.g., J.D. de la Rochère, *France*, in EFFECT OF TREATIES, *supra* note 81, at 42 (discussing article 55 of the French constitution); Henry G. Schermers, *Netherlands*, in EFFECT OF TREATIES, *supra* note 81, at 109, 111 (discussing article 120 of the Dutch constitution).

90. This applies to Britain and other Commonwealth countries, as well as to the Scandinavian countries. See Templeman, *supra* note 82, at 461; sources cited *supra* note 82.

91. The single U.S. case striking down a treaty (domestically classified as an executive agreement) as incompatible with the Constitution remains *Reid v. Covert*, 354 U.S. 1 (1957). *Dames & Moore*, 453 U.S. at 662, however, suggests that the Supreme Court is ready to relax constitutional norms in deference to "the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances . . ." See also *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that Congress and the federal government had power to do by treaty what they could not do by domestic legislation); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 71 (1990) ("Where 'balancing' an individual right against the public interest is deemed to be the constitutional order, courts treat foreign affairs differently: private rights are depreciated, while competing public needs are accorded compelling weight."). But see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing for greater federalism constraints on the treaty power). The German Constitutional Court "will spare no effort and, in fact, will go out of its way, to reconcile Germany's treaty obligations with its internal legal order." Jochen Abr. Frowein & Michael J. Hahn, *The Participation of Parliament in the Treaty Process in the Federal Republic of Germany*, 67 CHI.-KENT L. REV. 361, 385 (1992). Thus, it has found a treaty incompatible with the constitution only once. See *id.* at 384-85. The Italian constitutional court "took the attitude of undervaluing conflicts between treaties and the Constitution." Giorgio Gaja, *Italy*, in EFFECT OF TREATIES, *supra* note 81, at 87, 101. The constitutional courts of Germany and Italy have also upheld their authority to review Parliamentary decisions to transfer sovereign powers to the European Union (but never exercised it). See PAUL P. CRAIG & GRÁINNE DE BÚRCA, EC LAW 262-63, 264-67 (1998). On the German Constitutional Court's decision with respect to the constitutionality of the Maastricht Treaty, see *infra* note 165 and accompanying text.

92. See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International*

dicial interference with treaty obligations is deemed an intervention in international affairs, regardless of the domestic implications. The basic attitude has been that in international affairs, “[o]ur State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another,”<sup>93</sup> and the executive’s voice is preferred because of an inherent “advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to the unilateral action by the courts of one nation.”<sup>94</sup> Hence, only the executive’s voice will be heard. Therefore, not only do courts abstain from reviewing international treaties for compatibility with domestic prescriptions, but when interpreting them they also defer to the executive’s interpretation.<sup>95</sup> Furthermore, a variety of judicially developed “avoidance doctrines” permit the courts to dodge petitions to review treaties against domestic norms, or to review domestic policies against international norms.<sup>96</sup> Such extreme deference to the executive is deeply troubling as it enables a sizable amount of executive activity, having major ramifications on domestic interests, to remain completely beyond judicial reach and effective public scrutiny. As the next two sections will show, the same deferential attitude persists beyond the ratification stage, when attempts are made to terminate unilaterally a treaty or to renege temporarily on it. This ensures the executive branch virtually unfettered discretion in deciding whether to comply with treaty obligations.

### B. *Ensuring Treaty Durability*

Domestic and international norms that insulate treaty obligations from postratification domestic challenges by larger political groups further enhance the stronger domestic effect of treaties vis-à-vis stat-

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*Norms: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT’L L. 159 (1993). This comparative survey proves that the phenomenon is common to all national courts, and therefore cannot be explained by parochial theories. *But cf.* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (explaining judicial acceptance of the constitutionality of “executive agreements” as reflecting a “constitutional moment” that occurred during the 1944 elections); Paul, *supra* note 86 (explaining that and other pro-presidential policies as influenced by the Cold War rhetoric used by the administration).

93. *The Arantzazu Mendi*, 1939 App. Cas. 256, 264 (H.L.) (appeal taken from Eng.) (granting immunity to the nationalist government of Spain by the British House of Lords following recognition by the Foreign Office as a de facto government).

94. *United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992).

95. *See Benvenisti, supra* note 92, at 166-68.

96. *Id.* at 169-73. These doctrines range from the more general ones, such as standing, justiciability, and the political question doctrine, to specific doctrines that reduce the bite of international norms (deference to the executive’s interpretation of treaty provisions, failure to recognize the standing of individuals to seek redress for the violation of international obligations) and protect local and foreign governments from judicial proceedings (through sovereign immunity or “act-of-state” doctrines).

utes. Once ratified, there is neither an opportunity to revoke a treaty through judicial review, nor the possibility of terminating it through unilateral state action by, for example, a statute. Unless the ratifying state chooses to violate the treaty and suffer whatever consequences breach entails, it remains bound until the other signatories agree to modify or terminate it.<sup>97</sup> Herein lies the domestic smaller groups' chief benefit from treaties: the treaty provides their gains greater protection than does a constitutional guarantee. Unlike constitutional guarantees, which are vulnerable to modification through constitutional amendments, no subsequent domestic majority can unilaterally change the state's international obligations. Future governments will therefore continue to be bound by the same obligations.

A combination of constitutional and international doctrines grant this immunity to international treaties. International law ensures treaty durability by rendering irrelevant all subsequent domestic political developments as factors that might affect a state's international obligations.<sup>98</sup> The International Court of Justice (ICJ) recently demonstrated the strength of this doctrine in its 1997 judgment concerning a dispute between Hungary and Slovakia.<sup>99</sup> The ICJ determined that the damming of the Danube River, a mammoth project conceived in the bygone communist era, should go ahead despite the momentous political transformations that had taken place in the two states and the intensive and widespread popular opposition to the project in Hungary. Neither domestic political changes nor strong popular opposition to the project could excuse the unilateral termination of a 1977 treaty.<sup>100</sup> The communist legacy, however inefficient or environmentally dangerous, survived the transformation of both regimes and all unilateral contradictory moves of the two governments.<sup>101</sup> Finding the

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97. See Vienna Convention, *supra* note 45, arts. 39-40.

98. See *id.* art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

99. Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

100. For a discussion of the development of the internal environmental-political opposition in Hungary to the planned project on the Danube River, see FRED PEARCE, GREEN WARRIORS 107-16 (1991); Judit Galambos, *Political Aspects of an Environmental Conflict: The Case of the Gabčíkovo-Nagymaros Dam System*, in PERSPECTIVES ON ENVIRONMENTAL CONFLICT AND INTERNATIONAL POLITICS 72 (Jyrki Käkönen ed., 1992).

101. See Gabčíkovo-Nagymaros Project, 1997 I.C.J. at paras. 144-147, at 79-80. In reaching this conclusion the court deliberately emphasized international undertakings at the expense of domestic pressures. It rejected Hungary's claim that a "state of ecological necessity," even if such existed, precluded the wrongfulness of its unilateral suspension of the project, because Hungary could resort to negotiations to reduce the environmental risks. It similarly rejected Hungary's claims to impossibility of performance, fundamental change of circumstances, and lawful response to Czechoslovakia's earlier material breach (namely, Slovakia's construction of the provisional diversion project). See *id.* at paras. 101-112, at 63-68. The ICJ was also critical of Slovakia's moves. It found the Slovak diversion of the Danube waters as breaching its obligation to respect Hungary's right to an equitable and reasonable share of the river. See *id.* at para. 78, at 54.

agreement flexible and therefore renegotiable, the ICJ imposed the 1977 treaty on both sides, prescribing them to renegotiate its implementation.<sup>102</sup> The judgment clearly seeks to insulate international politics from the influence of domestic politics. Even when one side breaches its obligation to renegotiate in good faith, the government of the other side cannot bow to domestic internal public pressure and adopt a unilateral response. Instead, it must exhaust all possible means to persuade its counterpart to return to the negotiating table.<sup>103</sup>

The international legal doctrine is buttressed in many countries by constitutional or doctrinal guarantees that insulate treaties from efforts of domestic groups to force the government to breach treaty obligations. Aside from the few states where treaty obligations enjoy superior status,<sup>104</sup> statutes can theoretically supercede treaty obligations; the legislature may pass a conflicting law and thereby expose the state to external sanctions. A judicially created rule of statutory interpretation accepted in many jurisdictions — that statutes should be interpreted as much as possible in conformity with the state's international obligations — often preempts these efforts, however.<sup>105</sup> Although the stated justification is the presumed intent of the legislature, courts have resorted to the rule in spite of rather clear indications from the legislature that it wanted the treaty breached. A case in point is the “sad case of the P.L.O. mission,” in which the judge disregarded Congress's clear intent to breach the Headquarters Agreement between the U.S. and the U.N. by preventing the PLO leader from arriving in New York.<sup>106</sup> The court found the statute vague enough to permit an

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102. See *id.* at paras. 138-140, at 77-78.

103. This is the *cumulative* message of the decision, which is captured in President Schwebel's declaration. Although he was “not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach,” the President joined the majority in imposing the resuscitated agreement on the parties. *Id.* at 85 (Declaration of President Schwebel).

104. See *supra* note 89.

105. A comparative survey of this presumption includes: M. Ann Hayward, *International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications*, 23 U. W. ONT. L. REV. 9, 13-16 (1985) (Canada); Gulmann, *supra* note 82, at 36 (Denmark); Regina v. Secretary of State for the Home Dep't, (*Ex parte Brind*) [1991] 1 A.C. 696, 760 (H.L.), and Derbyshire County Council v. Times Newspapers LTD [1992] 3 W.L.R. 28, 44 (Eng. C.A.) (United Kingdom); Jochen A. Frowein, *Federal Republic of Germany, in EFFECT OF TREATIES, supra* note 81, at 63, 68-69 (Germany); Darusz v. Union of India, 92 I.L.R. 540 (Sup. Ct. 1993) (India); C.A. 25/55, 145/55, 148/55, Custodian of Absentee Property v. Samra, 10 P.D. 1825, 1831, 22 I.L.R. 5 (1956) (Israel); Gaja, *supra* note 91, at 100-101 (Italy); Minister of Defence (Namib. v. Mwandighi), 91 I.L.R. 341 (High Ct. 1993) (Namibia); State v. Ncube, 90 I.L.R. 580 (Sup. Ct. 1992) (Zimbabwe). For a critical view of this rule from a constitutional law perspective, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

106. See *United States v. PLO*, 695 F. Supp. 1456 (S.D.N.Y. 1988); W. Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14 YALE J. INT'L L. 412, 429-32 (1989).

interpretation that stultified its aim and prevented an international conflict. Of course, Congress can overcome this hurdle by stating explicitly its breach of a treaty obligation. But only in extreme cases — not even in the PLO case — would Congress issue such an admission.

The combined outcome of these rules insulates many governments from domestic challenges that would require them to renege on treaty obligations against their will. The smaller groups are assured that their gains will last, in one form or another, until the larger groups within all relevant states simultaneously agree to modify their treaty obligations. They also know, as we shall see in the next section, that when *it is* in their interests to commit an international breach, their government will not be effectively constrained from doing so. In other words, the norms pave a one-way street: governments can hardly be *forced* to renege on treaty obligations, but when they choose, they can hardly be *prevented* from doing so. This is exactly what small groups that invest in controlling the governments want.

### C. *Providing Escape Clauses for Unilateral Defections*

Most international treaties are “relational,” in that they create relations between parties that extend well into the future.<sup>107</sup> During the life of such treaties, conditions often change, and therefore state negotiators take pains to ensure that treaty obligations provide efficient mechanisms for adjusting to these changes. Governments prefer to retain control over their reaction to such changes instead of conferring authority on international institutions to determine what adjustments are necessary. Governments ensure their discretion through ambiguous texts, insufficient monitoring tools, or suboptimal enforcement mechanisms. The small domestic groups warrant this discretion as their interests may be affected by strict future compliance with treaty obligations. Thus, as George Downs and David Rocke have explained, international trade law includes weak enforcement norms to accommodate the uncertain future demands of domestic interest groups.<sup>108</sup> Parties design enforcement norms strong enough to encourage signatories to observe the agreement most of the time, thereby preventing, for example, trade wars, “but low enough to allow politicians to break the agreement when interest group benefits are

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107. On the characteristics of “relational contracts,” see IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a “Rich Classificatory Apparatus,”* 75 NW. U. L. REV. 1018 (1981); Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691 (1974); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

108. DOWNS & ROCKE, *supra* note 73, at 88. Downs and Rocke extend their observation to other kinds of international agreements in which states desire the ability to respond periodically to domestic interests. *Id.* at 88-104.

great.”<sup>109</sup> Retaliatory measures will often fail to target only the group responsible for the breach and therefore externalize the costs of breach onto other domestic groups.<sup>110</sup>

Note that escape clauses that offer impunity for the defecting government may not be equally available to a *legislature* that wishes to renege on the treaty. First, the relevant escape clauses are more likely to reflect small group interests. Justifications of the larger groups for breach, such as the interest in sound environmental policies or workers' conditions, are less likely to permit defection with impunity. Second, the legislature is less capable than the government of monitoring other states' violations, a key tool — if only rhetorical — for justifying one's own breach to both the international community and international tribunals. Lastly, because breaches are followed immediately by international negotiations and possibly adjudication, the government is more capable than the legislature in finessing the consequences of breach (or externalizing the costs onto the larger public). Due to the relative edge enjoyed by the government over the legislature, the former is more likely to initiate unilateral defections from international obligations, whereas the latter will likely remain inactive.

Interested small domestic groups also prefer not to seek the courts' protection against their government's decision to renege on its treaty obligations; their political leverage provides sufficient guarantees against the need to do so. In fact, they are more interested in seeing that domestic courts remain uninvolved and refrain from demanding compliance of a reneging government; and courts live up to the expectation. National courts have faced numerous petitions for injunction challenging domestic policies — whether statutes or administrative decisions — on the grounds that they were incompatible with general international law<sup>111</sup> or specific treaty obligations.<sup>112</sup> Parties have likewise brought suits challenging the domestic recognition of foreign

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109. *Id.* at 77.

110. The recent U.S.-E.U. trade wars and the unilateral measures which were adopted, see *supra* note 61 and accompanying text, shows that the WTO regime still conforms to this theory despite its stricter 1994 judicial dispute resolution procedures.

111. This is notably the case with efforts to invoke international human rights standards in domestic courts. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347 (1991). For comparative perspectives, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 *MICH. J. INT'L L.* 1 (1992) and Eyal Benvenisti, *The Influence of International Human Rights in Israel: Present and Future*, 28 *ISR. L. REV.* 136 (1995).

112. See, e.g., *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993) (rejecting claim that repatriation of Haitian refugees at sea violated the U.N. Convention on Refugees); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (finding U.S. government's forced abduction of a Mexican citizen to be compatible with the U.S.-Mexican extradition treaty); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 *YALE L.J.* 2391 (1994) (discussing Haitian Sales case). For a similar decision by a chamber of the German Federal Constitutional Court, see the decision of July 17, 1985 (EuGRZ 1986, 18, at 20) (Federal Republic of Germany).

governments' acts, such as the expropriation of private property abroad, which international law regarded as illegal.<sup>113</sup> National courts have generally reacted negatively to such claims, as judges have invariably chosen to defer to the executive.<sup>114</sup> Courts in virtually all democracies have shown great ingenuity by inventing an arsenal of "avoidance doctrines" that enable them to align their judgments along governmentally perceived national interests.<sup>115</sup> They sidestep questioning the international legality of the executive's activities and the fruits of its negotiations.<sup>116</sup> In some jurisdictions, notably that of the U.S., courts allow the executive lawfully to violate international customary law.<sup>117</sup> It is also widely accepted that the executive may terminate treaties unilaterally without parliamentary or judicial review.<sup>118</sup>

Paradoxically, some have attributed the prevalent deferential attitude to the lack of democratic legitimacy inherent in international treaties and other norms.<sup>119</sup> Because the formulation of international treaties and custom is itself democratically deficient, courts do not

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113. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying act of state doctrine to expropriation of private assets of U.S. citizens in Cuba).

114. See Benvenisti, *supra* note 92.

115. See *supra* note 96.

116. Thus, in the Rhine Pollution case discussed above, see *French Pollution Permit Case*, *supra* note 53, at 298, the French Conseil d'État upheld the permission to pollute as lawful, finding that international norms (including applicable treaties) did not proscribe it. For criticism of the decision, see Alexandre Kiss, 2-3 REVUE JURIDIQUE DE L'ENVIRONNEMENT, 307-09 (1986) (commentary following the case).

117. See *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (holding that cabinet officers, in addition to the President, may violate international customary law); see also Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1568-69 (1984); *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986).

118. On the U.S. law, see RESTATEMENT, *supra* note 86, § 339(b) ("Under the law of the United States, the President has the power . . . to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States."). On German law, see Frowein & Hahn, *supra* note 91, at 363 (stating that treaty termination power is considered to be within the exclusive domain of the executive). In those countries that do not require parliamentary approval of treaty, executive termination power is obvious.

119. The democratic deficiency debate continues to stir scholarly attention. Compare Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997), Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), and Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986), with Harold Hongju Koh, *Commentary: Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998), and Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997). On the probable influence of the democracy argument on the court, see RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL ORDER* (1964); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991); and Thomas M. Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960).

view international obligations as an integral part of the law and hence outside the proper scope of judicial scrutiny. This explanation, however, proves too much. It only highlights the undemocratic consequences of the courts' hesitation: international treaties, which often entail significant domestic ramifications, bypass the courts' muster because they also bypassed regular legislative procedures. Executive power remains supreme.

The courts' deference is not, however, motivated by a concern for democratic legitimacy. Instead, it stems from the same global interjurisdictional competition that affects the other branches of government. An assertive court that is ready and willing to enforce international norms upon recalcitrant governments (which, for example, refrain from imposing environmental standards on polluting industries) enhances the sanctions for dodging international obligations and increases their cost.<sup>120</sup> Potentially affected firms may therefore decide to relocate to another jurisdiction in which courts are more compliant. For the same reason, national courts have little incentive to impinge upon the laissez-faire underpinnings of international law or to develop stringent standards governing the activity of locally based companies that operate abroad. A judicial assertion, for example, that state parties to a bankrupt international organization are responsible for its outstanding obligations to third parties, might lead other international organizations to establish headquarters in jurisdictions where such responsibility is not recognized.<sup>121</sup> Enforcing strict domestic standards on domestic actors operating abroad, such as Union Carbide<sup>122</sup> or Texaco,<sup>123</sup> may prompt them and others to leave the jurisdiction and set up shop near their competitors. National courts, as much as national legislatures and governments, appreciate this threat and join the

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120. For a discussion on the importance of escape mechanisms for domestic interest groups, see *infra* Part IV.

121. See *The ITC Litigation*, *supra* note 48 (refusing to recognize the responsibility of state parties for the debts of the international organization).

122. Gasses released from a pesticide plant owned by Union Carbide India (owned by Union Carbide Corp., a U.S. company) killed about 2100 people and injured over 200,000. Lawsuits were brought by both individual claimants and the government of India in the U.S. District Court of the Southern District of New York against the U.S. parent. The court dismissed the cases for forum non conveniens. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986), *modified*, 809 F.2d 195 (2d Cir. 1986). Despite the Indian government's assertion that Indian courts were unable to cope with the magnitude of this claim, the court opined that litigating in India would better respect Indian sovereignty and judicial self-sufficiency. See *id.* at 867. The real underlying issue was, of course, the possibility of obtaining the higher U.S. standards of damages including punitive damages.

123. Two class action suits filed in U.S. courts by Ecuadorian and Peruvian citizens against Texaco alleged that Texaco had severely polluted rainforests and rivers in Ecuador and Peru as a result of its oil exploitation activities in Ecuador. The suits were again dismissed for forum non conveniens and reasons of international comity. See *Aquinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated*, 157 F.3d 152 (2d Cir. 1998); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

race to the bottom. They behave like any other actor in a prisoner's dilemma scenario as they pursue one dominant strategy: protect domestic interests. Only when international guarantees, such as Article 177 of the Treaty of Rome, provide judges with assurances that *all* of their foreign colleagues will cooperate, can this timidity be overcome.<sup>124</sup> Until such guarantees are assured, potential domestic defectors can rely on a compliant national court.

This thesis also extends to courts of regional organizations, such as the European Court of Justice (the judicial organ of the European Union), where one would expect a similar partisan attitude when dealing with the external relationships of the organization. And indeed, the European Court of Justice has dismissed a number of challenges to the European Commission's and Council's discriminatory policies regarding the "Banana War" involving the E.U., Central American countries, and the United States.<sup>125</sup>

The three characteristics of treaties discussed in this Part — small group domination of the negotiation and ratification of treaties, the lack of opportunities for the larger public to challenge existing treaty obligations, and the opportunities for governments and small groups to evade specific clauses with relative impunity — combine to ensure small groups a significant edge over other domestic groups in securing their sectarian interests. The next Part examines the consequences of this predicament.

#### IV. DOMESTIC INTEREST GROUPS AND GLOBAL MARKET FAILURES

Having identified the mechanisms by which small domestic groups control interstate negotiations, this Part analyzes the consequences of their dominant position. To do so, it may be helpful to contrast the transnational conflict paradigm with the much simpler Westphalian paradigm of unitary state actors. The contrast will serve to highlight

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124. See Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of Their State,'* 5 EUR. J. INT'L L. 423, 426 (1994). Article 177 ensures that the interpretation and implementation of Community law by national courts will not diverge from the policies adopted by the central judicial body, the European Court of Justice. Treaty of Rome, March 25, 1997, art. 177, 298 U.N.T.S. 11, 76-79.

125. See Case C-73/97 P, French Republic v. Comafrika SpA & Dole Fresh Fruit Eur. Ltd. & Co., 1999 ECJ CELEX LEXIS, at \*285 (January 21, 1999); Case C-280/93, Germany v. Council of the E.U., 1994 E.C.R. I-4973. For criticism of this case (and on the Chiquita Italia case, Case C-469/93, Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA, 1995 E.C.R. I-4533), see Meinhard Hilf, *The Role of National Courts in International Trade Relations*, 18 MICH. J. INT'L L. 321, 338-43 (1997). But see Case C-122/95, Germany and Belg. v. Council of the E.U., 1998 E.C.R. I-973, in which the court annulled part of the Council's decision approving the conclusion of a trade agreement with third states because it discriminates between different exporters of bananas to the E.U. Note, however, that at the time of judgment, the relevant agreement was under challenge at the WTO. See *WTO Appellate Reports*, *supra* note 61 (WTO Appellate Body's decision in the banana dispute).

three different global challenges: efficiency, democracy, and social welfare.

The efficiency challenge tests the traditional role of the state in providing essential resources to its population and managing the country's natural resources efficiently and sustainably. It is becoming increasingly difficult for states to succeed in these tasks without enlisting long-term commitments to cooperate from other states. When key domestic actors — bureaucrats, politicians, and the business sector — pursue interests at odds with the long-term interests of the general constituency, it decreases both the possibility of effective international cooperation and the prospects for ample provision and optimal allocation of resources. The democracy challenge addresses the inadequacy of existing domestic and international processes to give voice to voters' preferences and safeguard their interests. Finally, the social welfare challenge addresses the threat to the ideal of the welfare state posed by a global system that promotes a race to the bottom.

#### A. *The Efficiency Challenge: Tragedies of the Global Commons*

This Section argues that in a true Westphalian world of 200-some actors, many collective action problems would have been resolved endogenously. That these problems persist suggests not only that the Westphalian vision is flawed, but that transnational conflicts of interest are themselves responsible.

Let us assume a world of 200 or so actors, as the Westphalian model wants us to imagine. In this world, states act upon their "national interest," which the negotiators internalize. This world must address numerous collective action failures, such as the failure to increase labor standards, the failure to protect against global warming, or the failure to prevent ozone depletion. In this world, a significant number of these failures will remain unresolved, but many other problems — those involving fewer states — would find a satisfactory solution in the form of spontaneous interaction among the relevant actors.

Unitary state actors would still find it difficult to overcome situations where a relatively large number of states, or all of them, are involved and in which many have conflicting incentives.<sup>126</sup> Global warming, for example, creates divergent incentives for different states because some of them actually stand to gain from the expected warming and moistening of their region, while others will suffer a disproportionate loss due to desertification. Their diverging incentives

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126. Conflicting incentives can be expected to exist between developed and developing countries with respect to the desirability of, for example, antitrust laws and high labor standards. See Guzman, *supra* note 2 (antitrust); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 996-97 (1995) (labor).

may preclude an endogenous provision of the public good in the international sphere.<sup>127</sup>

But the Westphalian world would have resolved quite successfully another type of collective action problem: the regulation of international common pool resources (ICPRs), which are shared by only a small number of states but from which other states can be excluded.<sup>128</sup> Rivers, lakes, transboundary oil fields, and specific fish stocks or migratory birds, are all examples of ICPRs. With ICPRs, the shared interest in ensuring long-term enjoyment of the resource, combined with the possibility of excluding outsiders from access to it, provide adequate incentive for the limited number of insiders to coordinate their activities and thereby avert a tragedy of their commons.<sup>129</sup> Recent game-theoretic models and sociological studies have shown that, under similar conditions involving groups of individuals, long-term endogenous cooperation can, and will, emerge without reliance on external enforcement mechanisms.<sup>130</sup> In a world of states as unitary players, states' cooperation in ICPR management should be no less successful than cooperation among individuals in local commons, providing for an optimal and sustainable use of the resource in question. Even when states have different priorities and capacities, one could expect Coasean deals in which a well-off neighbor buys the less wealthy neighbor's cooperation.<sup>131</sup>

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127. See SANDLER, *supra* note 57, at 100.

128. This is based on the definition of Common-Property Resource (CPR). See RUSSELL HARDIN, *COLLECTIVE ACTION* 19 (1982); ELINOR OSTROM, *GOVERNING THE COMMONS* 30-33 (1990); TODD SANDLER, *COLLECTIVE ACTION* 5-7 (1992); MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* 3 (1987).

129. The number of riparians may influence the tendency to cooperate. When there are more riparians, coordination is more difficult to attain. The costs of coordinating actors' activities and monitoring actors' performance are likely to increase as more formal methods for coordination and monitoring are required. See HARDIN, *supra* note 128, at 182-85; SANDLER, *supra* note 128, at 48; TAYLOR, *supra* note 128, at 105; EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 47 (1977).

130. Game-theoretic models suggest that such collective action can emerge without an external enforcement agency through conditional cooperation based on the actors' choice of a friendly "tit-for-tat" strategy. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). These models are supported by impressive and convincing evidence on the emergence of collective action among numerous individual actors, mostly in indigenous communities, that has been accumulated and analyzed in recent years. See OSTROM, *supra* note 128, chs. 3-4; Robert Wade, *The Management of Common Property Resources: Collective Action as an Alternative to Privatisation or State Regulation*, 11 *CAMBRIDGE J. ECON.* 95 (1987). For collective action in agriculture and water management, see Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 *AM. J. INT'L L.* 384, 385-87 (1996), and Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 *CAL. L. REV.* 671 (1993). See also WILLIAM M. ADAMS, *WASTING THE RAIN* 42-50, 70-99 (1992) (discussing dryland agriculture and indigenous irrigation in Africa).

131. Compare the decision of the OECD Committee on Fiscal Affairs suggesting that it would be prepared to engage in a dialogue with "tax havens [that] have chosen to be heavily dependent on their tax industries" and to take account of the "need to encourage the long term development of these economies." OECD, *supra* note 66, para. 16, at 10-11.

So why in our real world, dominated by transnational conflicts of interest, does ICPR cooperation fail miserably? The main reason lies in the heterogeneous character of the state. For collective action to sustain itself, the involved actors must share an interest in an indefinite reiteration of their cooperative moves. This occurs only when they place sufficiently high value on their indefinite future gains — they must have a sufficiently large “shadow of the future.”<sup>132</sup> Herein lies the major obstacle to cooperation among states, which are heterogeneous rather than unitary actors. While the general population within each state has a keen interest in long-term cooperation to ensure long-term resource availability and intergenerational equity, other domestic actors, namely bureaucrats, politicians, and the business sector, tend to discount the long-term national benefits of cooperation while preferring short-term, partisan gains. Bureaucrats myopically focus on their personal conditions and the budgets they manage during their careers in office.<sup>133</sup> Politicians (unless organized in closely knit political parties with long-term interests in survival) usually have an even shorter perspective, which extends little further than the coming elections. Finally, the private sector, which can rather cheaply relocate its activities and investments, has very little interest in the future of specific ICPRs (unless the ICPRs are unique, as in the case of sturgeon fish in the Caspian sea, and the company in question has not diversified its activities). This is especially true with respect to developing countries, whose long-term welfare is of little consequence to the typical foreign investor. Environmental tragedies, such as the major recent dumping of oils into the rivers of Ecuador and Peru,<sup>134</sup> which irrevocably affect the lives of indigenous peoples, occur because the multinational corporation that is directly responsible, and the local politicians and bureaucrats who are indirectly responsible, act rationally. The multinational company has a long-term interest in its investments, not in the future of a particular ICPR. Domestic politicians and bureaucrats pursue their own short-term goals. Their long-term externalities are born by the general population (including, of course, future generations), and particularly by the underrepresented indigenous peoples that live in the affected region.

The transnational conflict paradigm therefore provides an important insight into the causes of particular global collective action failures. When ICPRs are involved, diverging long-term perspectives within states, not conflicts among states, are responsible for many tragic outcomes.

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132. AXELROD, *supra* note 130, at 126 (suggesting that indefinite reiteration is the key to adopting cooperative strategies among actors in a prisoners' dilemma situation).

133. For a discussion of the different motivations of bureaucrats, see *supra* notes 18 and 22.

134. See *supra* note 123 (discussing the class actions against Texaco).

B. *The Democratic Challenge: Ratification as a Democratically Deficient Process*

Public choice literature is replete with analyses of the failure of democratic systems to reflect the actual preferences of the individual voter. The transnational conflict paradigm complements these analyses by showing an even greater decline in voter power as a result of small-group domination of international politics and an increasingly interdependent world economy.

Smaller interest groups enjoy a disproportionate influence over the state's external policies through their involvement in the process of treaty negotiation and ratification. This process permits very little public scrutiny of the negotiators' acts and omissions because ratification does not allow for amendments; thus many alternatives necessarily remain unexplored.<sup>135</sup> Even the domestic debate on ratification often remains clouded because the access of the public and legislators to information concerning international negotiations is invariably limited. Little is known about the options offered and discussed, as negotiators have little incentive to provide accurate information on their performance to the general public.<sup>136</sup> Deficient public scrutiny of treaties, as well as the lack of judicial enthusiasm to scrutinize them,<sup>137</sup> severely handicaps democratic safeguards for ensuring the executive internalization of voter preferences. There exist no institutional oversight mechanisms to protect less successful domestic interest groups, or the interests of future generations.<sup>138</sup>

The globalization of markets in the last two decades has further marginalized the voice of the voters. Due to the lower costs of relocating investments and activities, producers, investors, and employers have fewer commitments to specific jurisdictions. They can therefore fully exploit the global prisoner's dilemma game. As a result of their growing exit options, the voice of larger domestic groups, such as labor unions<sup>139</sup> and environmentalists,<sup>140</sup> has declined considerably.

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135. See *supra* Section III.A.

136. Though negotiators are responsible for what they have agreed upon through the treaty-ratification process, they are rarely rebuked for their missed opportunities simply because those opportunities often remain unknown to the public. See DOWNS & ROCKE, *supra* note 73, ch. 3.

137. See *supra* Section III.C.

138. Protection of less successful domestic interests underpins Ely's theory of judicial review. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980). For a discussion of the increasing efforts to reduce such capture through NGO participation and monitoring of negotiations, see *infra* notes 171-176 and accompanying text.

139. Labor unions have lost voice both in terms of wages and social benefits and in terms of security of the workplace. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE 178-90* (1995) (discussing means to assuage labor dislocation problems subsequent to implementation of an open-trade policy); Stone, *supra* note 126 at 996-97.

Another aspect of modern development further exacerbates the democratic market failure. With the growing capacity to appropriate and use resources which traverse national boundaries, many decisions are no longer within the sole control of national institutions. A single nation cannot usually unilaterally implement its policies with respect to the use of a river which is shared with other riparians, or with respect to the regulation of mineral extraction from a shared mine. Instead, regional cooperation, even joint decisionmaking, is required to prevent an imminent race to the bottom. The more cooperation is required, the less autonomy national institutions and their constituencies have in making their decisions.<sup>141</sup>

### C. *The Social Welfare Challenge: The Threatened Welfare State*

The global prisoner's dilemma, presented by the relatively costless relocation of businesses across the globe, pressures national legislatures to reduce standards for the protection of consumers, employees, and the environment. Lower taxation on capital and caps on public spending (as a result of the openness of monetary markets) require governments to limit their budgets, which in many cases means less public spending on social welfare.<sup>142</sup> The race to the bottom precludes collective action measures that would promote better labor standards,<sup>143</sup> protect consumers<sup>144</sup> and the environment, and allocate shared resources in an optimal and sustainable way.<sup>145</sup> Local and multinational firms exploit these failures and externalize a substantial part of their costs on both their fellow citizens and foreign communities. This outcome can be explained by reference to the transnational conflict paradigm. Under the Westphalian paradigm, with state actors pursuing the national interest in promoting welfare, collective action would have stood a better chance of succeeding.

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140. Cf. Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (critiquing race-to-the bottom arguments in the environmental context).

141. See DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995).

142. See, e.g., Geoffrey Garrett, *Capital Mobility, Trade, and the Domestic Politics of Economic Policy*, in *INTERNATIONALIZATION AND DOMESTIC POLITICS* 79 (Robert O. Keohane & Helen V. Milner eds., 1996). On the impact of monetary markets on governments' budgets, see Stephan Haggard & Sylvia Maxfield, *The Political Economy of Financial Internationalization in the Developing World*, in *INTERNATIONALIZATION AND DOMESTIC POLITICS*, *supra*, at 209.

143. See TREBILCOCK & HOWSE, *supra* note 139, at 187-90 (arguing that increased trade should be linked to compliance with international rights norms).

144. As to the possibility of setting up global antitrust regulations, see Guzman, *supra* note 2 (suggesting a low probability for such action).

145. See Benvenisti, *supra* note 130.

## V. TOWARD A THEORY OF TRANSNATIONAL INSTITUTIONS

The transnational conflict paradigm shows that global market failures are often the result of transnational conflict among interest groups rather than international conflict among unitary states. The Westphalian system ignores this reality, and helps perpetuate inter-group externalization of costs, and as a result, inefficient, nonsustainable, and inequitable outcomes. Moreover, it does disservice to the idea of democratic governance.

This Part offers new tools to accommodate those conflicts better characterized by the transnational conflict paradigm. It calls for a new understanding of the opportunities provided by regional and international institutions to serve as instruments for managing transnational conflicts. Transnational institutions can serve to reduce small-group capture and provide for equitable and sustainable collective action. Opportunities for public participation in the decisionmaking processes within these institutions will offer effective voice for the public and new meaning for democratic participation in the management of global commons.

### A. *Transnational Institutions: A Definition*

A more structured and transparent treaty negotiation and decisionmaking process can significantly limit the opportunities of domestic interest groups, bureaucrats, and politicians to pursue short-term sectarian goals to the detriment of the larger society and future generations. It is my claim that transnational institutions would be capable of responding to a great number of global collective action problems in ways that not only promote efficiency, but democracy and social justice as well. With these purposes in mind, and for reasons to be explained below, I define transnational institutions as treaty-based decisionmaking procedures for the coordination of policies with respect to a specific activity (such as trade, taxation, or antitrust) or a specific shared resource. Such institutions would include, at the very least, permanent bodies and permanent processes for the collection of relevant data, its assessment and dissemination to the public, and the formulation of publicly stated and reasoned policies (in the forms of opinions, recommendations, or decisions) on the basis of that data. As part of their data processing, such institutions should employ mechanisms for monitoring compliance of the various domestic actors with the institution's policies, also by providing access and soliciting input from NGOs representing a variety of interest groups. Such mechanisms will reduce informational asymmetries and allow a more mean-

ingful role for representatives of the larger domestic interest groups, such as consumers, employees, and environmentalists. In short, transnational institutions would mirror the better types of contemporary, domestic administrative agencies on the global level, while preserving and respecting the still-cherished principle of state sovereignty.

Transnational institutions would not replace governments or domestic administrative agencies. Their decisionmaking process will function in tandem with parallel domestic processes and guarantee regard to (all) national interests. For example, domestic administrative agencies in charge of their state's environmental protection could exchange information and coordinate policies with the relevant transnational institution in charge of a transboundary natural resource. Other domestic agencies might serve as the institution's long arm in domestic policy implementation. Domestic laws and institutions could be used to sanction violators of transnational rules. Transnational institutions would not need independent police powers in order to be effective. Their provision of information, formal and accessible decisionmaking procedures, and monitoring go a long way toward an efficient and more democratic allocation of competences and resources.<sup>146</sup> The ratification of the treaty establishing the institution, judicial review of the institutions' decisions (where binding) or the recommending nature of other decisions, and ultimately the possibility of withdrawal as a weapon of last resort, could operate as formal guarantees for protecting national interests.

The definition of transnational institutions is stricter than that of international institutions used by international relations theorists: this definition highlights the specific characteristics of the decisionmaking process as a tool for reducing interest-group capture.<sup>147</sup> As explained in the next sections, these characteristics provide an environment for the evolution of conditional cooperation that can resolve collective action problems and respond to the democracy and social justice challenges of this age of globalization.

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146. For an early assessment of the achievements of institutions in protecting the environment, see generally INSTITUTIONS FOR THE EARTH (Peter M. Haas et al. eds., 1993).

147. According to Stephen D. Krasner's widely accepted albeit rather loose definition, international institutions are "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structured Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983). On different types of international institutions, see generally ORAN R. YOUNG, INTERNATIONAL COOPERATION (1989). For a categorization of regimes according to the process by which they have been established (spontaneous, negotiated, imposed), see Oran R. Young, *Regime Dynamics: The Rise and Fall of International Regimes*, 36 INT'L ORG. 277 (1982). See also Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491, 493-96 (1987) (defining "regime").

### B. *Institutions and the Emergence of Collective Action*

Critics might question the utility of transnational institutions by suggesting that such institutions, being composed of decisionmakers from all participating states, merely reproduce the problems inherent in typical negotiating scenarios between state negotiators.<sup>148</sup> What meaningful role, then, would institutions play? Those following the Westphalian paradigm of unitary state actors, which ignores the problems of small-interest-group capture, have viewed institutions — with their independent bureaucracy, scientific personnel, or courts — as a means to reduce information asymmetries and other transaction costs *among member states*, thereby facilitating more efficient negotiations and enforcement mechanisms.<sup>149</sup> But institutions matter because they operate in a political environment more aptly described by the transnational conflict paradigm. Institutions, as defined earlier, transform a largely unstructured and veiled negotiation process, followed by an insufficiently informed ratification process where the deal is presented as a “take it or leave it” option, into a well defined, widely accessible, and transparent decision-making procedure.<sup>150</sup> They reduce small-interest capture by allowing wide representation and providing scrutiny of the negotiation process throughout its elaboration.

Channeling deliberations through the transnational institution changes the opportunities and relative control that different actors — representative of various domestic interests, politicians, and bureaucrats — have in the decisionmaking process.<sup>151</sup> The structured institutional decisionmaking process counterbalances the relative edge smaller domestic groups have in obtaining information and exerting leverage during the negotiation and ratification process.<sup>152</sup> The institution eliminates

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148. The debate concerning the effectiveness of IOs as opposed to negotiations has haunted IR scholars since the 1980s. See Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729, 742-49 (1998).

149. See Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42(1) J. CONFLICT RES. 3 (1998). Ever-closer interstate cooperation was explained by referring to the influence of “epistemic communities” (i.e., experts sharing common practices and policies), see Symposium, *Knowledge, Power, and International Policy Coordination*, 46 INT'L ORG. 1 (1992), and to the interaction within “government networks.” see Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 390-91 (1998).

150. Witness the slow but steady move of E.U. institutions toward transparency, concurrent with the enlargement of their powers and the need to address public concerns with the democracy deficit. See CRAIG & DE BURCA, *supra* note 91, at 368-71; VEERLE DECKMYN & IAN THOMPSON, *OPENNESS AND TRANSPARENCY IN THE EUROPEAN UNION* (1998).

151. For a similar claim with respect to NGO participation in the World Trade Organization procedures, see Daniel C. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 709 (1998); Daniel C. Esty, *Non-governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998).

152. On the impact of asymmetric information, see *supra* note 11 and accompanying

informational asymmetries by disseminating data collected and assessed within the institution. It further enhances public participation by involving representatives of the larger domestic groups in the decision-making process, allowing them to comment on suggested policies and offer alternative plans.<sup>153</sup> Eliminating the subsequent ratification would reduce the potential of smaller groups to concentrate their capture efforts in the national institutions. Instead of ratification, public scrutiny of the institution's decision will focus on its stated reasons for its decisions. Transnational institutions, in contrast to negotiators and more akin to administrative agencies or even courts, would be required to state reasons for their actions.

An institutionalized process will do more than merely alter the relative leverage of conflicting groups. The personal composition of its employees and officials can, if properly attended, also contribute significantly to an environment that permits less capture. Because the structured decisionmaking process should rely on the accumulation and assessment of data, decisions would involve less-politicized personnel. Scientists would process the data, thereby providing common ground that politicians could not avoid in their deliberations.<sup>154</sup> These institutions would have their own bureaucracy who would in turn identify the institution's success and reputation with their own. As transnational bu-

text.

153. The preamble to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark on June 25, 1998 by member states of the Economic Commission for Europe and other European states, emphasizes these points:

*Recognizing* that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

*Aiming* thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment . . . .

UN Doc. ECE/CEP/43 (1998), available at <<http://www.un.org/Depts/Treaty/collection/notpubl/27-13eng.htm>>.

154. This has proven crucial even in the context of Canada-U.S. relations, in which "informal intelligence gathering [by low level officials] helps to provide an early warning of impending issues, and permits actions before issues become too politicized." David G. LeMarquand, *Preconditions to Cooperation in Canada-United States Boundary Waters*, 26 NAT. RESOURCES J. 221, 232 (1986). For an analysis of the Canada-U.S. International Joint Commission, see *infra* text accompanying notes 159-160. This has also been the experience in the development of the Antarctic Treaty System. See LORRAINE M. ELLIOT, INTERNATIONAL ENVIRONMENTAL POLITICS: PROTECTING THE ANTARCTIC 43-44 (1994); Jonathan Blum, *The Deep Freeze: Torts, Choice of Law, and the Antarctic Treaty System: Is It Adequate to Regulate or Eliminate the Environmental Exploitation of the Globe's Last Wilderness?*, 14 HOUS. J. INT'L L. 597, 673 (1992). Scientific cooperation, however, depends upon shared interests. Ostensibly "scientific" arguments can sometimes be advanced to support noncooperative policies. On the use and misuse of science-based risk assessment in support of states' adoption of strict trade policies under the WTO 1994 Agreement on Sanitary and Phytosanitary Measures, see Robert Howse, *Democracy, Science and Free Trade: Risk Regulation on Trial at the World Trade Organization* (1999) (unpublished manuscript, on file with author).

reaucrats inevitably try to extend their powers, they will naturally push toward more intensified cooperation.<sup>155</sup> The information disseminated to the general public will constrain the range of options open to the politicians on the board, and operate as check on their choices.<sup>156</sup>

These mechanisms will provide a voice for all affected interest groups. As the literature on the emergence of cooperation in the management of common property resources suggests, institutions that provide for equal voice are more likely to resolve the collective action problems they face.<sup>157</sup> In addition to voice, such institutions will be able to hold domestic officials accountable for their acts or omissions by drawing the domestic public's attention to ineffective domestic regulation of private activities.

These institutions would not need independent enforcement powers. Given the transnational nature of the conflicts, enforcement could remain the private initiative of nonstate participants acting within the domestic polity and using domestic forums. Well-informed NGOs could, for example, respond to free-riding attempts by other substate actors (and the governments' compliance with such attempts) by staging domestic public opinion campaigns, thereby exerting effective political pressure on incumbent governments and members of the legislature. They could also, although probably with less success,<sup>158</sup> petition domestic courts for judicial review. In short, NGOs would be able to act equally as effectively as they do in response to entirely domestic policies.

The U.S.-Canada International Joint Commission, entrusted with management of the rivers shared by the two states, is an example of effective regional collective action.<sup>159</sup> In only four of the 110 applica-

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155. In its recent proposal, "The IJC and the 21st century," the U.S.-Canada IJC suggested establishing permanent IJC international watershed boards to manage additional major transboundary basins. See *IJC to Further Examine Watershed Approach* (press release, Nov. 23, 1998) <<http://www.ijc.org/news/h2oshed1198.html>>.

156. See INSTITUTIONS FOR THE EARTH, *supra* note 146, at 14 ("If there is one key variable accounting for policy change, it is the degree of domestic pressure in major industrialized democracies, not the decision-making rules of the relevant international institution."); see also *id.* at 399-400.

157. See OSTROM, *supra* note 128, ch. 6. For examples of a successful institution providing voice to both producers and consumers of water, see Thompson, *supra* note 130, at 687-93. For successful water institutions in ancient societies, see Benvenisti, *supra* note 130, at 385-87.

158. On the reluctance of courts to interfere in issues which constrain governmental activities beyond national borders, see discussion *supra* Section III.C.

159. The IJC consists of three appointees from each side. It has authority to approve all works potentially affecting the level or flow of the U.S.-Canada boundary waters. The IJC also has a dispute resolution function that has never been used. See Treaty Relating to Boundary Waters between the United States and Canada, January 11, 1909, U.S.-Gr. Brit., 36 Stat. 2449. For an analysis of its mandate, see Stephen J. Toope & Jutta Brunnee, *Fresh-water Regimes: The Mandate of the International Joint Commission*, 15 ARIZ. J. INT'L & COMP. LAW 273 (1998). For an assessment of its contribution, see Patricia K. Wouters, *Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States*, 30 CAN. Y.B. INT'L L. 43 (1992).

tions for decisions before 1987 were there any dissenting opinions by Commission members, and in only two of them did the dissent follow national lines. Both governments adopted more than three-quarters of the Commission's decisions.<sup>160</sup> Another example is the Finnish-Swedish Frontier Rivers Commission established in 1977, whose decisions have always been unanimously accepted, despite the fact that only a majority vote is necessary.<sup>161</sup> In both cases, information and voice have been sufficient substitutes for independent enforcement measures.

The International Labour Organisation is an example of a global organization whose effectiveness is enhanced by wide participation. Deliberations follow the concept of "tripartism": each state's delegation to all of the deliberative bodies is comprised of two government representatives, one representative for each the employers and the workers.<sup>162</sup> The latter are instrumental in negotiating the standards and implementing them within the national jurisdictions.<sup>163</sup>

This is not to suggest that transnational institutions would be free of challengers to their authority. In states where small groups enjoy relatively high political leverage, one could expect less commitment to compliance. Deep-seated animosity among rival communities might also overshadow rational considerations and hinder cooperation. But as collective action failures grow more dramatic and individuals more fully grasp their repercussions, popular demand for effective transnational institutions will eventually produce them.

### C. *Institutions and Democracy*

The structured decisionmaking process in transnational institutions also responds to the democratic challenge, providing three essential democratic tools. First, and perhaps most important, the improved information institutions provide to voters counterbalances their inherent deficiency in monitoring the domestic institutions' performance. It exposes both domestic policies and international engagements of the government to voter scrutiny. By informing the voters on their gov-

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160. See Wouters, *supra* note 159, at 78-79 n.186 (citing R.B. Bilder, When Neighbours Quarrel: Canada-U.S. Dispute Settlement Experience (working paper, 1987)).

161. The Commission consists of three appointees from each country. It has authority to approve works affecting the flow and quality of the shared water resources and to adjudicate disputes among individual users. For a comprehensive account of the commission, see Malgosia Fitzmaurice, *The Finnish-Swedish Frontier Rivers Commission*, 5 HAGUE Y.B. INT'L L. 33, 44 (1992).

162. Constitution of the ILO, June 28, 1919, Art. 3(1), 49 Stat. 2712, 225 Consol. T.S. 378-79, available at ILO, ILO Const, (visited Oct. 11, 1999), <<http://www.ilo.org/public/english/overview/iloconst.htm>>.

163. See DE LA CRUZ ET AL., *supra* note 41, at 10 ("Tripartism is the real strength of the ILO."); see also Samson, *supra* note 41, at 151-52.

ernment's performance, transnational institutions increase accountability and offer citizens a more meaningful voice.

Second, open access to the institutions' procedures gives domestic populations an opportunity to influence regional and global policies that affect their interests: it provides a voice without a vote. A cynic might criticize such an imperfect voice as politically meaningless, and indeed it could be. But when strong cross-cultural links exist between communities, voices will matter even when no vote supports them.<sup>164</sup> The German Constitutional Court expressed a strong belief in the effectiveness of such a voice in approving Germany's ratification of the Maastricht Treaty:

If democracy is not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified, and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decisionmaking process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject.<sup>165</sup>

This statement may reflect only the Court's assessment of the political environment in the European Union; but it might also represent an emerging trend to take seriously the deliberative process that precedes the actual taking of votes. According to the argument, the process of reasoning and persuasion that precedes the actual vote is effective in eliminating Pareto-inferior outcomes and providing for more equitable distribution of resources. Such a deliberative process would legitimize the decision taken and thus ensure greater compliance.<sup>166</sup> At

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164. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 522-28 (1995) (presenting the diverse opportunities that exist for exerting political influence across borders within liberal states).

165. Maastricht Treaty 1992 Constitutionality Case, EuGRZ 1993, 429 (Fed. Const. Ct. F.R.G.), translated in 33 I.L.M. 388, 420 (1994) [hereinafter *Maastricht Treaty Case*] (citations omitted) (finding constitutional Germany's signing of the Maastricht Treaty).

166. See James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44, 56 (Jon Elster ed., 1998). This trend has in recent years been developed following Jürgen Habermas's THE THEORY OF COMMUNICATIVE ACTION (vol. 1, 1984; vol. 2, 1987). For background on this trend, see generally the contributions in DELIBERATIVE DEMOCRACY, *supra*; JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17 (Alan Hamlin & Philip Pettit eds., 1989); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEXAS L. REV. 1437 (1993); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329 (1994); Amy Gutmann, *The Disharmony of Democracy*, in NOMOS XXXV: DEMOCRATIC COMMUNITY 126 (John W. Chapman & Ian Shapiro eds., 1993); Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163 (1995). It is beyond

the very least, the requirement that transnational institutions offer reasons for their decisions will increase the accountability of decisionmakers, just as the reasoning of court opinions serves as a constraint on judicial power.<sup>167</sup>

The third democratic tool consists of removing specific matters from interest groups' influence. Venerable democratic institutions such as the courts and central banks are designed to be independent from the immediate influences of the voters and political pressures. To the extent that such insulation from politics is legitimate, transnational institutions can make it happen. Thus, for example, the recent European monetary integration, which entailed a complete loss of sovereign control over monetary policies, is compatible with democracy. In approving the transfer of power to the new institution, the German Constitutional Court accepted the government's "scientifically proven" argument that such a move was necessary to "ensure that the currency is not vulnerable to pressure groups or to holders of political office seeking re-election."<sup>168</sup> Institutions that collect and assess information concerning, for example, the shared environment or other ICPRs, inform, but also constrain, the choices open to politicians. Any sound democratic theory must recognize the crucial role of scientific input to political decisionmaking.<sup>169</sup>

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the scope of this Article to enter into the debate about the merits of this theory. For critical views, see, for example, David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 16(1) INT'L POL. SCI. REV. 45 (1992); James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421 (1996). Suffice it to say that those who subscribe to the theory would find in transnational institutions a forum for deliberation.

167. This constraint is particularly potent when judges consider overruling prior decisions. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.").

168. *Maastricht Treaty Case*, *supra* note 165, at 439. The German Federal Constitutional Court reasoned:

This modification of the principle of democracy, which is designed to secure the confidence of making payment that is placed in a currency, is justifiable, because it takes account of the special factor, established in the German system and also scientifically proven, that an independent central bank is more likely to protect monetary value, and therefore the general economic basis for national budget policy and private planning and disposition, while maintaining economic liberty than are sovereign governmental institutions.

*Id.* at 439-40.

169. See, for example, Justice Breyer's suggestion to establish (domestic) institutions composed of experts to manage health and environmental risks, rather than politicians who thus far have failed to address such risks appropriately. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993); see also *RISK VS. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* (John D. Graham & Jonathan Baert Wiener eds., 1995).

D. *Forging Institutions*

The above discussion demonstrates that great attention be paid to the procedural safeguards within transnational institutions. It also suggests that institutions must give greater recognition to the involvement of NGOs, the modern tribunes of the large domestic groups. It explains why NGO participation is not a matter of grace, but both a matter of right (the democratic right of participation in government) and of interest (obtaining optimal outcomes without externality effects).

So far, despite the increasing recognition of NGOs' positive contribution to negotiation and decisionmaking processes,<sup>170</sup> attempts to give NGOs formal status have thus far been unsuccessful. Thus, for example, attitudes in the World Trade Organization (WTO) towards increased transparency and NGO participation have remained negative.<sup>171</sup> The recent United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses,<sup>172</sup> adopted after *decades* of negotiations, failed to emphasize the importance of institutions and refused any role for NGOs, despite the insistence of some members and scholars.<sup>173</sup> A number of international lawyers have given scholarly support for NGO intervention in international decisionmaking processes, basing these claims in the language of rights.<sup>174</sup> But a for-

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170. One recent example is the role played by the NGOs during the negotiations at the Rome Conference on the International Criminal Court. See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 23 (1999).

171. See Esty, *supra* note 151 (both articles); Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization: Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295 (1996) (discussing the issue of standing for nongovernmental entities); Arie Reich, *From Diplomacy to Law: The Judicialization of International Trade Relations*, 17 J. INT'L L. BUS. 775, 847-48 (1997) (discussing the democratization of WTO procedures); Brian J. Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived at?*, 4 MINN. J. GLOBAL TRADE 103 (1995) (arguing in favor of increased public participation in international trade negotiations).

172. May 21, 1997, 36 I.L.M. 700 (1997).

173. See Stephen S. McCaffrey, *Sixth Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/427/Add.1 (1990) (report of Special Rapporteur). For criticism, see Gunther Handl, *The International Law Commission's Draft Articles on the Law of International Watercourses (General Principles and Planned Measures): Progressive or Retrogressive Development of International Law?*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 123, 124-29 (1992); Constance D. Hunt, *Implementation: Joint Institutional Management and Remedies in Domestic Tribunals (Articles 26-28 and 30-32)*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 281, 284-87 (1992); and Sergei V. Vinogradov, *Observations on the ILC's Draft Rules: "Management and Domestic Remedies,"* 3 COLO. J. INT'L ENVTL. L. & POL'Y 235, 235-41 (1992).

174. See Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259 (1992); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1967-68 (1997).

mal recognition of their role and importance has so far been given only in nonbinding declarations.<sup>175</sup>

Of course, the establishment of transnational institutions presents a collective action problem, which could itself entail attempts to institutionalize opportunistic gains.<sup>176</sup> As soon as the larger domestic groups across political boundaries realize the stakes involved, pressures to reform the law and create responsive institutions should be expected.<sup>177</sup> The process of designing transnational institutions must itself include the participation of the wider public, both through representative NGOs and the dissemination of accessible information — it will not be an easy task. A delicate balance must be struck between governmental, intergovernmental, and nongovernmental representation, thereby ensuring that narrow interests, including those advanced by NGOs, cannot predominate.<sup>178</sup>

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175. The 1992 Rio Declaration notes that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.” Declaration of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Principle 10. Chapter 18 of Agenda 21 calls for active public participation in shared freshwater management, which includes not only the provision of a right of hearing to oppose plans that could be detrimental to certain individuals or groups, but more generally, requires states to aim at “an approach of full public participation, including that of women, youth, indigenous people and local communities in water management policy-making and decision-making,” Agenda 21, Principle 18.9(c), *reprinted in* 4 AGENDA 21 & THE UNCED PROCEEDINGS 357, 363 (Nicholas A. Robinson ed., 1992) [hereinafter AGENDA 21], and suggests the “[d]evelopment of public participatory techniques and their implementation in decisionmaking.” Agenda 21, Principle 18.12(n), *reprinted in* AGENDA 21, *supra*, at 366. *See also* Ellen Hey, *Sustainable Use of Shared Water Resources: The Need for a Paradigmatic Shift in International Watercourses Law*, in *THE PEACEFUL MANAGEMENT OF TRANSBOUNDARY RESOURCES* 127, 133 (Gerald S. Blake et al. eds., 1995). Although the New York Convention mentions neither of these ideas and maintains the stiff separation between the international and the domestic levels by providing only for state-to-state notification and consultation, there are scholars who find it possible to derive such participatory rights from more basic notions of civil and political rights, *see* Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 43, 59 (Alan E. Boyle & Michael R. Anderson eds., 1996), and principles of general environmental law. *See* Boyle, *supra*, at 59-63; James Cameron & Ruth Mackenzie, *Access to Environmental Justice and Procedural Rights in International Institutions*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION*, *supra*, at 134-35; Sionaidh Douglas-Scott, *Environmental Rights in the European Union: Participatory Democracy or Democratic Deficit?*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION*, *supra*, at 112-20.

176. For such gains within the international aviation markets, *see* John E. Richards, *Towards a Positive Theory of International Institutions: Regulating International Aviation Markets*, 53 INT’L ORG. 1 (1999) (demonstrating capture gains by domestic groups in establishing international regulatory institutions in the international aviation market).

177. One radical response to these challenges is the establishment of a “cosmopolitan democracy,” based on an international constitution which provides for separation of different institutional powers and individual rights. *See* HELD, *supra* note 141, at 267-83.

## VI. CONCLUSION

Lowering costs of relocating investments and activities, combined with declining East-West political pressures, have spawned transnational economic activity in which investors and employers are no longer committed to a specific territory or community. The rise of multinational corporations and the globalization of the world economy have increased the interdependency of national markets; new technologies have increased the potential for unilateral appropriation of global commons, and thus raised the stakes involved in influencing governmental decisionmaking. As a result, smaller domestic groups are uniquely positioned to exploit the resulting global prisoner's dilemma; as a result, the relative political power of larger domestic interest groups continues to decline.

Contemporary voters face a process of ever-growing marginalization. First, they are marginalized by the growing interdependency of global markets, which increases the bargaining position of smaller domestic interest groups. Second, they are marginalized because decisions regarding resources — water, clean air, fisheries — no longer depend solely on their vote, but to a growing extent on interstate cooperation with governments sharing access to those resources. These parallel developments have undermined the principles behind the democratic state; the right to participate in elections and influence decisionmakers, although increasingly gaining recognition across the globe, in fact provides right-holders much less than it purports to promise. These and future generations of voters must bear economic externalities their governments do not care or are unable to prevent. The transnational conflict paradigm identifies the domestic mechanisms that shape national attitudes towards transnational cooperation and demonstrates the crucial role of transnational institutions in coordinating national policies. It also explains why relatively few effective institutions have been established thus far.

The laissez-faire environment of the globalization process cannot remain unchallenged. Although larger groups within society find it more cumbersome to join forces, they ultimately succeed. The rise of the welfare state is a clear example. Following Olson's *logic*,<sup>178</sup> the international community can anticipate larger interest groups — consumers, employees, and environmentalists — to grow more assertive in world politics and create pressure to impose global restrictions on trade and resource management.<sup>179</sup> It is thus necessary to design ap-

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178. See OLSON, *LOGIC*, *supra* note 9; OLSON, *RISE AND DECLINE*, *supra* note 15.

179. See, e.g., HELD, *supra* note 141 (calling for "cosmopolitan democracy"); McGinnis, *supra* note 27 (discussing the possible emergence of internationally centralized regulatory control of international trade).

propriate procedures and institutions — not to replace the state system, but to complement and respond to its deficiencies. Designing structures for a more involved global constituency must be done with the utmost care; the progression from city-states to nations to a global community has reached its limit. As opposed to previous attempts to design political institutions, new global institutions will leave few exit options.<sup>180</sup>

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180. See McGinnis, *supra* note 27, at 924.