CHAPTER 3

THE LAW AND POLITICS OF INTERNATIONAL ORGANIZATIONS

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International organizations inhabit a dynamic space at the intersection of international law and international politics. Today hundreds of these bodies—intergovernmental entities established by international treaty and governed by international law—populate the international landscape, addressing issues of war and peace, economics, environment, and virtually every other field of human endeavor, including many once considered to be exclusively matters of domestic law such as education and health. In short, as international relations have become increasingly institutionalized, international organizations have become key actors in the evolving architecture of global governance.

Given their significance, international organizations (IOs) have been subject to sustained study by international lawyers and international relations scholars. An impressive body of research from both disciplines has enriched our understandings of the creation and operations of IOs, how IOs promote compliance with legal norms, and the various ways that they influence lawmaking processes and outcomes. Despite important advances, however, we still have much to learn about processes of change in IOs, how to measure and improve IO effectiveness, and why the turn to institutionalization has sputtered in recent years.

It is not possible in this brief essay to review comprehensively the legal and social science literatures on the law and politics of international organizations. Instead my more modest goal is to describe the contours of the international law (IL) and international relations (IR) scholarship on IOs, as well as some of its key characteristics and debates. To do so, this chapter proceeds in three parts. The first part briefly surveys the major theoretical approaches to the creation and functions of international organizations found in the IL and IR literatures. The second part analyzes the most important conceptual debates that have occupied IO scholars in recent years, including debates over the autonomy, accountability, and legitimacy of international organizations. The third part explores a cluster of policy dilemmas, including the political implications of institutional fragmentation, how to manage IO interactions, and, finally, why IOs increasingly seem unable to effectively address matters of pressing international concern. A brief conclusion follows.

Theory

This section introduces leading theoretical approaches to questions such as why IOs are formed and what purposes they serve. These approaches are differentiated principally by the variables they emphasize and the causal mechanisms assumed to drive state behavior. However, these approaches are not necessarily mutually exclusive and much research on IOs draws from more than one theoretical tradition.

Given space constraints, the paragraphs that follow serve only to delineate general orientations. A fuller treatment would require a more extensive discussion of vastly more complex and nuanced positions, many of which do not fit neatly into the simple typology set out below.

Realism

While realism comes in many varieties, most realist approaches to international relations share a handful of core commitments, including that (i) states are the central actors in an anarchic international environment; (ii) states are endowed with interests that are often conflictual; and (iii) each state has material power capabilities that shape the substance and structure of international law and organizations. Given these assumptions, many realists minimize the

importance of IOs, reasoning that "international institutions are shaped and limited by the states that found and sustain them and have little independent effect."[1]

For this and other reasons, realism is "the theory that international lawyers love to hate."[2] But realist approaches are not invariably dismissive of IOs. For example, one strand of realist thought advanced a "hegemonic stability theory" (HST) that purports to explain the success of certain IOs. Building on insights regarding the provision of collective goods, HST argues that dominant powers will provide the "public good" of international regimes in particular issue areas; hence Britain and, thereafter, the United States assumed the political costs of creating and maintaining liberal international trade regimes during the mid nineteenth and mid twentieth centuries. Hegemonic states undertake this effort because the benefits they enjoy from the legal regime exceed the costs of creating it; weaker states likewise benefit as they share the benefits of the regime but bear none of the costs of its provision.[3] More broadly, nothing in realist commitments implies that IOs are necessarily weak; rather realism suggests that "whether institutions have strong or weak effects depends on what states intend."[4]

Core realist claims that the incidence and structure of IOs reflect power distributions in the international system, and that IOs can generate outcomes that are Pareto improving but still skewed distributively toward powerful states, yield important insights into the nature and structure of a densely institutionalized international domain. Legal scholars from diverse scholarly traditions, ranging from the New Haven school to critical approaches, have drawn on realist insights about the role of power to analyze developments in a variety of IOs, ranging from the World Trade Organization (WTO) to the United Nations (UN) to international financial institutions.[5]

Despite its undoubted utility, realism sheds little light on the origins of the interests thought to drive state behavior and does little to predict or explain important shifts in the structure of the international system (i.e., the rise and fall of the Arab Spring or the collapse of the Soviet bloc) or to account for the ways that IOs impact state interests and behavior.[6] Moreover, realism has difficulty explaining why, if IOs

[1] e.g., Kenneth N. Waltz, "Structural Realism after the Cold War," *International Security* 25 (2000): 5–41.

[2] Richard H. Steinberg, "Wanted—Dead or Alive: Realism in International Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 146–72, 146.

[3] Later, HST would be critiqued on both empirical and theoretical grounds. See generally Duncan Snidal, "The Limits of Hegemonic Stability Theory," *International Organization* 39 (1985): 579–614.

[4] Waltz, "Structural Realism after the Cold War."

[5] For an overview, see Richard H. Steinberg and Jonathan M. Zasloff, "Power and International Law," *American Journal of International Law* 100 (2006): 64–87.

[6] Steinberg, "Wanted—Dead or Alive: Realism in International Law."

have little independent effect, states spend substantial time and resources to create and maintain them.

Functionalism

Functionalism provides a compelling rationale for states to create and maintain IOs. Its basic premise is that states create IOs to solve cooperation problems that cannot be resolved as well unilaterally or via decentralized solutions. Many functionalist writings draw on game theoretic insights to argue that IOs help states overcome collective action problems by reducing transaction costs, providing information, facilitating issue linkages, increasing transparency, and lengthening the shadow of future.[7] In 1989, Ken Abbott introduced these insights to international law scholars,[8] triggering a substantial literature that used functionalist and, later, economic analyses to explain scores of international legal norms and institutions.[9]

The Rational Design (RD) project is an important extension of functionalist approaches. RD views the elements of IO design as rational responses to the underlying cooperation problems that states seek to solve. Early contributions to this literature developed systematic accounts of five design features (membership, scope, centralization, control, and flexibility) in light of recurrent cooperation problems states face, such as information problems, distribution problems, enforcement problems, etc.[10] Roughly contemporaneously, IL writings drew on similar insights to explore the systemic trade-offs that exist among different features of international agreements, with particular attention to the diverse levels of institutionalization found in different international agreements.[11]

The dependent variables in early RD work were quite broad; "centralization" included a wide range of discrete executive, legislative, and judicial functions, and "flexibility" covered reservations, duration, escape, and exit clauses. More recent extensions of this research project disaggregate categories such as centralization

[7] See, e.g., Robert Keohane, *After Hegemony: Cooperation and Discord in World Political Economy* (Princeton: Princeton University Press, 1984); Stephen D. Krasner (ed.), *International Regimes* (Ithaca: Cornell University Press, 1983).

[8] Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus for International Lawyers," *Yale Journal of International Law* 14 (1989): 335–411.

[9] See, e.g., Jeffrey L. Dunoff and Joel P. Trachtman, "The Law and Economics of International Law," *Yale Journal of International Law* 24 (1999): 1–59; Joel P. Trachtman, *The Economic Structure of International Law* (Cambridge, MA: Harvard University Press, 2008).

[10] Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," *International Organization* 55 (2001): 761–99.

[11] Kal Raustiala, "Form and Substance in International Agreements," *American Journal of International Law* 99 (2005): 581–614; Andrew T. Guzman, "The Design of International Agreements," *European Journal of International Law* 16 (2005): 579–612.

and flexibility in useful ways.[12] Legal analysis can suggest important refinements to this work, in particular toward analysis of design features that RD either overlooks or unhelpfully aggregates. For example, where RD focuses on "dispute resolution," lawyers might foreground more finely tuned design elements—such as compulsory vs. noncompulsory jurisdiction, available remedies, whether private parties can initiate proceedings, the length and terms of judicial appointment—that states carefully negotiate. These and other significant features of IO design have not, to date, been part of the RD project, but represent a potential research agenda for future RD work.[13]

Constructivism

Constructivists provide a fundamentally different account of the "state interests" that drive realist and functionalist accounts of international organizations. Constructivists reject the claim that state interests exist *prior* to social interaction; rather interest and identity are a *product* of social interaction.[14] As IOs provide focal points for state interactions, a large body of constructivist writings explores how IOs help to construct both issue areas and state interests. For example, constructivist writings detail how the World Bank helped redefine the concept of "development,"[15] how the Organization for Security and Co-operation in Europe helped reconceptualize the idea of a "security community,"[16] and how the Organisation for Economic Co-operation and Development (OECD) helped invent the concept of trade in services (a particularly impressive feat given that services were long thought to be inherently incapable of being traded across national borders).[17]

[12] Barbara Koremenos, "If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?," *Journal of Legal Studies* 36 (2007): 189–212; Laurence R. Helfer, "Flexibility in International Agreements," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 175–96.

[13] Jeffrey L. Dunoff and Mark A. Pollack, "What Can International Relations Learn from International Law?," Working Paper, Temple University Legal Studies Research Paper No. 2012-14, 2013 (available on SSRN).

[14] For excellent introductions to constructivist thought, see, e.g., Ian Hurd, "Constructivism," in *The Oxford Handbook of International Relations*, ed. Duncan Snidal and Christian Reus-Smit (Oxford: Oxford University Press, 2008), 298–316; Alexander Wendt, "Anarchy is what states make of it: the social construction of power politics," *International Organization* 46 (1992): 391–425.

[15] See, e.g., Martha Finnemore, "Redefining Development at the World Bank," in *International Development and the Social Sciences*, ed. Frederick Cooper and Randall Packard (Berkeley: University of California Press, 1998), 203–27.

[16] Emanuel Adler and Michael Barnett (eds.), *Security Communities* (New York: Cambridge University Press, 1998).

[17] William Drake and Kalypso Nicolaidis, "Ideas, Interests, and Institutionalization: 'Trade in Services' and the Uruguay Round," *International Organization* 46 (1992): 37–100.

Early constructivist writings illuminated the macrofoundations of state behavior and identity but were less successful in explaining the microprocesses of how actors receive, internalize, and act upon norms. To address these shortcomings, scholars have explored whether and how IOs contribute to policy diffusion,[18] promote state acculturation to international legal norms,[19] and persuade states to comply with legal rules.[20] An international legal process school complements these approaches by highlighting how those who seek compliance with international legal norms can trigger interactions intended to yield legal interpretations that, in turn, are internalized by states and other actors.[21]

More recently, constructivist scholars have utilized a "communities of practice" approach. "Communities of practice" refers not only to "intersubjective social structures that constitute the normative and epistemic ground for action," but also to the actual practices of individuals "who—working via network channels, across national borders, across organizational divides, and in the halls of government—affect political, economic, and social events."[22] Brunnée and Toope utilize this approach in their theory of "international interactional law." They claim that legal texts are merely the start, rather than the conclusion, of legal dialogue, and that IOs help to foster the density of continuous interactions that are necessary to make, remake, or unmake international law.[23]

Liberalism

Liberal approaches open up the "black box" of the state to foreground the roles of individuals and social groups, and their relative power in society, as drivers of state policy. Liberalism's central insight is that states are embedded in domestic and international civil society, which shapes the underlying preferences upon which state policy is based. Thus "state" foreign policies represent the interests of a subset

[18] Martha Finnemore, "International Organizations as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organization and Science Policy," *International Organization* 47 (1993): 565–97.

[19] Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54 (2004): 621–703.

[20] Steven R. Ratner, "Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 568–90.

[21] e.g., Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181–207.

[22] Emanuel Adler and Vincent Pouliot, "International Practices: Introduction and Framework," in *International Practices*, ed. Emanuel Adler and Vincent Pouliot (Cambridge: Cambridge University Press, 2011), 3–35.

[23] Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010). On the IR side, a provocative application of the communities of practice approach to international law can be found in Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014).

of domestic political actors, and interstate behavior is driven primarily by patterns of state preferences, not state power.[24]

Moravcsik uses the nature and evolution of the international trade regime to illustrate liberal approaches.[25] Over time, shifts in comparative advantage and intra-industry trade generate strong variations in social preferences. In industrial trade, strong producer interests in developed states generally benefit from trade liberalization, and these interests successfully lobbied their governments to advocate for significant liberalization. In contrast, a lack of international competitiveness by agricultural interests in, for example, the United States, the European Union (EU), and Japan, has meant that powerful interests in these states often oppose liberalization, and international rules in this sector permit much greater amounts of protectionism. More recently, intellectual property owners in the United States and the EU, dissatisfied with status quo approaches to international intellectual property lawmaking at the World Intellectual Property Organization, successfully lobbied their governments to include internationally enforceable intellectual property norms in the trade system, eventually resulting in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).[26]

Liberal approaches invite focus not simply on how domestic interest groups shape international rules and institutions, but also on how those rules and institutions, in turn, are used to shape domestic policy. For example, domestic political actors can use membership in international organizations to "lock in" long-term reform goals; thus some argue that the Mexican government joined the North American Free Trade Agreement and the Chinese government joined the WTO, in part to advance domestic reform proposals and make policy reversals more difficult. Liberal approaches likewise shed light on state decisions to join human rights treaties. For example, in examining the origins of the European human rights system, Moravcsik argues that potentially unstable democracies are more likely than established democratic nations or dictatorships to join binding human rights treaties, as doing so can enhance their credibility and stability against nondemocratic political threats.[27]

Liberal approaches present important challenges to international legal theory and doctrine, which typically do not take the nature of regime-type or domestic preferences into account. Legal scholars may find liberal perspectives to be fruitful when analyzing IOs that are intended to link with or impact domestic politics

[24] Andrew Moravcsik, "Liberal Theories of International Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 83–118. See also Andrew Moravcsik, "The New Liberalism," in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2008), 234–54.

[25] Moravcsik, "Liberal Theories of International Law."

[26] e.g., Laurence R. Helfer, "Regime Shifting, the TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking," *Yale Journal of International Law* 29 (2004): 1–83.

[27] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54 (2000): 217–52.

or institutions. Thus, liberal approaches can inform debates over the design and effectiveness of human rights systems, how domestic constituencies can enhance compliance with IO rules and decisions,[28] and whether and how IO membership impacts the quality of domestic democracy.[29]

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IR's disciplinary history reveals that conceptualizing the field in terms of competing theoretical traditions runs the risk of sparking a gladiatorial and unproductive "isms-war." Aware of this risk, recent scholarship on IOs employs a pragmatic and eclectic approach to problem-driven research and draws insights from different traditions, as appropriate.[30] For example, Johnstone analyzes IO lawmaking through alternative lenses offered by different theoretical traditions,[31] and Koremenos and Betz use a pragmatic "toolkit" approach to analyze the design of the dispute resolution systems found across different IOs.[32] Underlying debates over "the end of theory,"[33] however, are important—and largely unexplored—questions regarding the type of knowledge the discipline ought to pursue and how such knowledge is best attained.

Conceptual Issues

This section explores three of the most prominent conceptual issues IO scholars have addressed in recent years, namely the distinct—though intersecting—issues of autonomy, accountability, and legitimacy.

[28] For a good overview of the literature, see Joel P. Trachtman, "Open Economy Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 544–67.

[29] Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, "Democracy-Enhancing Multilateralism," *International Organization* 63 (2009): 1–31.

[30] Jeffrey L. Dunoff and Mark A. Pollack, "Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 626–61; Peter J. Katzenstein and Rudra Sil, "Eclectic Theorizing in the Study of International Relations," in *The Oxford Handbook of International Relations*, ed. Christian Reus-Smit and Duncan Snidal (Oxford: Oxford University Press, 2008), 109–30.

[31] Ian Johnstone, "Law-Making by International Organizations: Perspectives from IL/IR Theory," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 266–92.

[32] Barbara Koremenos and Timm Betz, "The Design of Dispute Settlement Procedures in International Agreements," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 371–93.

[33] Colin Wight, Lene Hansen, and Tim Dunne (eds.), "Special Issue: The End of International Relations Theory?," *European Journal of International Relations* 19 (2013): 405–665.

Autonomy

Much IR theory views IOs as reflecting the overlapping interests of, and power dynamics among, member states. As a result, IOs are understood as fora for interstate policy cooperation (or competition). In recent years, however, a substantial literature argues that IOs routinely act in ways unanticipated by their founding documents and not formally authorized by their members. These claims, in turn, have sparked theoretical debates over the extent to which IOs can usefully be considered autonomous actors.

Although the issue was not always free from doubt, international legal doctrine has long recognized IO autonomy, at least in the sense of independent legal personality. The landmark 1949 advisory opinion of the International Court of Justice (ICJ) in the *Reparations* case found that the UN possessed international legal personality and could bring a legal claim on its own behalf, notwithstanding the UN Charter's silence on both issues. The Court reasoned that "[u]nder international law, the [UN] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance of its duties."[34] In adopting this functionalist logic, the Court:

> structured the entire modern discourse on the limits of powers of international organizations … It recognized not only the notion of implied powers for entities, unchaining the institution from the literal text of its constituent instrument. It also acknowledged that these organizations were evolving creations, capable of expanding their rights and duties and living their international life to the fullest.[35]

IR scholarship did not foreground IO autonomy until later, as traditional realist approaches that view IOs as reflections of state interests leave little room for IO independence. Rationalist approaches, on the other hand, emphasize that states have substantial interests in conferring some measure of autonomy on IOs, as doing so enables states to make credible commitments that enhance international cooperation. More particularly, a degree of autonomy permits IOs to act as neutral mediators or in a judicial or quasi-judicial capacity, such as the WTO's Appellate Body and International Centre for Settlement of Investment Disputes arbitral tribunals; as focal points for information and action in cases of natural or man-made disasters, such as the International Atomic Energy Agency's role after the Fukushima accident; and as sources of authoritative data on controversial or contentious issues, such as the Intergovernmental Panel on Climate Change's influential scientific assessments of climate change and a September 2013 UN report on the use of chemical weapons in Syria.

[34] Reparation for Injuries Suffered in the Service of the United Nations, 1949 ICJ 174 (Advisory Opinion of April 11).

[35] David J. Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel," *Virginia Journal of International Law* 36 (1996): 275–377.

In addition, constructivists and others have detailed how IO officials can influence negotiation agendas and act as epistemic communities that develop and transmit new ideas about international governance. For example, IR scholars have debated how and when the UN Secretary-General can act as a "norm entrepreneur,"[36] and lawyers have contributed important case studies on the ways that international officials shape agendas and impact international outcomes, such as Hudec's classic study of the General Agreement on Tariffs and Trade (GATT) Secretariat's role in the reform of dispute resolution processes.[37] Finally, as noted below, scholars from both disciplines have explored the ways in which large IOs can use knowledge and expertise, as well as their capacity for organized behavior, to influence state behavior.

One common theoretical approach to analyzing IO autonomy has been principal–agent (PA) theory. This approach usefully directs attention to a recurrent set of problems that exist in PA relationships, as the interests of the principal and those of the agent can diverge in predictable ways.[38] PA theory also identifies a number of strategies that (state) principals might use to control their (IO) agents, such as detailed treaty provisions, screening and selection of IO officials, reporting requirements, budgetary controls, and sanctions. PA approaches have fruitfully been applied to describe the historical and functional patterns of delegation to EU institutions,[39] the processes and causal mechanisms of institutional reform at the World Bank,[40] the motivations that lead states to create international tribunals,[41] and, subsequently, to variations among delegations to IOs more generally.[42]

[36] Ian Johnstone, "The Secretary-General as Norm Entrepreneur," in *Secretary or General? The UN Secretary-General in World Politics*, ed. Simon Chesterman (New York: Cambridge University Press, 2007), 123–38.

[37] Robert E. Hudec, "The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure," in *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel*, ed. Jagdish Bhagwati and Mathias Hirsch (Berlin: Springer-Verlag, 1998), 101–20.

[38] See, e.g., Darren G. Hawkins et al. (eds.), *Delegation and Agency in International Organizations* (New York: Cambridge University Press, 2006).

[39] See, e.g., Mark A. Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the European Union* (New York: Oxford University Press, 2003).

[40] Daniel L. Nielson and Michael J. Tierney, "Delegation to International Organizations: Agency Theory and World Bank Environmental Reform," *International Organization* 57 (2003): 241–76.

[41] As to whether international courts are more usefully considered to be "agents" or "trustees," compare Manfred Elsig and Mark A. Pollack, "Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization," *European Journal of International Relations* 20 (2012): 391–415; Karen J. Alter, "Agents or Trustees? International Courts in their Political Context," *European Journal of International Relations* 14 (2008): 33–63. For thoughtful reflections from legal scholars on how states can control international tribunals, see Jacob Katz Cogan, "Competition and Control in International Adjudication," *Virginia Journal of International Law* 48 (2008): 411–49; Laurence R. Helfer, "Why States Create International Tribunals: A Theory of Constrained Independence," in *International Conflict Resolution*, ed. Stefan Voigt, Max Albert, and Dieter Schmidtchen (Tubingen: Mohr Siebeck, 2006), 255–76.

[42] Hawkins et al. (eds.), *Delegation and Agency in International Organizations*.

The legal literature distinguishes among different ways that states can confer powers on IOs, including agency, delegation, and transfer,[43] but has generally focused on the concept of "delegation."[44] This analytic focus, in turn, has triggered lively debates over whether delegations to IOs impair or enhance state sovereignty,[45] the different types of delegation that exist,[46] and even whether much delegation occurs in the first place.[47]

Significantly, the debates that animate the literature in both disciplines view IO autonomy, and delegations to IOs, largely through the lens of state interests. But these state-centric approaches risk introducing at least two distortions. First, they presuppose that states and IOs are locked into a competition where specific powers are allocated to either the domestic or international level,[48] in much the same way that national and sub-national governments are sometimes understood to compete for authority. But seeing only a zero-sum antagonism between states and IOs elides the extent to which participation in IOs can enhance state authority and the ways in which IO autonomy can shield states from accountability. More importantly, conceptualizing IO competence as simply a result of powers transferred by states provides an incomplete and potentially misleading analysis of IO powers. As Alvarez notes:

> It is contestable whether … those present at the creation of particular IOs thought that they were establishing organizational agents or vessels for the delegation or transfer of their own powers. Those who established the United Nations or the IMF would appear to have consciously devised institutions with a capacity to take action—and to devise forms of lawmaking—unique to these representatives of the international community. IOs, on this view, are capable of taking legal action because they are organs of the collective and, because of this feature, enjoy powers that only they can exercise. They are not the product of any one state's delegation or transfer of power, and their powers are not those of those "sovereigns" as these are traditionally understood. And even if that was not the original intent, IOs have since deployed considerable implied lawmaking powers *not capable of being exercised* by traditional state sovereigns.[49]

[43] Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (New York: Oxford University Press, 2005).

[44] See, e.g., Curtis A. Bradley and Judith G. Kelley, "The Concept of International Delegation," *Law & Contemporary Problems* 71 (2008): 1–36.

[45] e.g. Oona Hathaway, "International Delegation and State Sovereignty," *Law and Contemporary Problems* 71 (2008): 115–49.

[46] See, e.g., Ian Johnstone, "Law-Making by International Organizations," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 266–92 (surveying different definitions of delegation and suggesting that the concept of delegation may be overly reductive).

[47] Andrew T. Guzman and Jennifer Landsidle, "The Myth of International Delegation," *California Law Review* 96 (2008): 1693–724.

[48] Jan Klabbers, *An Introduction to International Institutional Law* (New York: Cambridge University Press, 2002), 336 (conceiving states and IOs as caught in a zero-sum conflict "is the one thought that dominates the field").

[49] Jose Alvarez, review of *International Organizations and Their Exercise of Sovereign Powers*, by Dan Sarooshi. *American Journal of International Law* 101 (2007): 674–9.

The insight that an IO can be greater than the sum of its constituent parts suggests an alternative—and underdeveloped—approach to IO autonomy that begins with IO, rather than state, interests. IO preferences can result from an organization's social context and internal culture, which produce "a set of collectively held prescriptions about the right way to think and act."[50] Barnett and Finnemore pursue this line of analysis in their treatment of IOs as bureaucracies that exercise particular institutional forms of social authority that follow their own internal logic. They use this approach to analyze how, for example, the International Monetary Fund (IMF) used technical advice and conditionality programs to become deeply involved in domestic economies in ways that its founders rejected, and how the UN High Commissioner for Refugees (UNHCR) over time greatly expanded both the categories of people it assists and the types of assistance it can provide.[51]

Historically, many leading international lawyers viewed autonomous IOs as essential to securing the rule of law in international affairs. However, as IOs began to exercise increasing powers, critics argued that IO policy choices and agendas were not necessarily as normatively desirable as international lawyers traditionally supposed. Recognition of the ambiguities and tensions associated with IO autonomy have led to increasing pressures for accountability with respect to the exercise of IO legal and political power, a topic to which we now turn.

Accountability

As suggested above, calls for IO accountability follow from the enhanced exercise of power and authority by IOs. A number of high-profile incidents, ranging from the oil-for-food scandal in Iraq to the role of UN peacekeepers in triggering a cholera outbreak in Haiti, have intensified these demands, which now come from states, nonstate actors impacted by IO activities, and other IOs. Given the substantial institutional and structural differences between international and domestic systems, accountability mechanisms on the international plane are quite different from their national-level analogues; these emerging practices have prompted a rethinking of the concept, aims, and forms of accountability.

International legal scholarship has traditionally approached accountability via the doctrines of state responsibility and state liability. A large literature, discussed in several chapters in Part VIII of this volume, explores the conceptual and practical difficulties of extending these doctrines to IOs. Rather than revisit those

[50] Jeffrey Legro, "Which Norms Matter? Revisiting the Failure of Internationalism," *International Organizations* 51 (2007): 31–63; see also Alastair Iain Johnston, "Treating International Institutions as Social Environments," *International Studies Quarterly* 45 (2001): 487–515.

[51] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in World Politics* (Ithaca: Cornell University Press, 2004).

debates here, I seek to supplement those discussions by identifying some alternative approaches to accountability that have recently emerged in the literature.

International law provides no definition of "accountability"; both IL and IR scholars have employed a notion of accountability that "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met."[52] Accountability mechanisms thus operate after the fact: reviewing, judging, and sanctioning IO actions.[53]

Keohane and Grant broadly distinguish between two different models of accountability: a "delegation" and a "participation" model, which differ fundamentally in the identity of the actors entitled to hold accountable those who wield power. In the delegation model, performance is evaluated by those delegating powers to the IOs; in the participation model, it is judged by those who are affected by IO actions. These different models have implications for the design of accountability mechanisms. Consider, for example, the World Bank and IMF. From the perspective of the delegation model, the international financial institutions are properly accountable to the major financial powers that created and fund them. The competing participation model argues that accountability should run to the populations of states impacted by World Bank or IMF programs. In practice, effective accountability mechanisms contain elements of both models, and IOs are now measured and ranked in terms of their transparency, participation, evaluation of operations, and quality of complaint and response mechanisms.[54]

In legal scholarship, an influential approach to IO accountability is found in the "global administrative law" (GAL) literature. The central insight of GAL scholars is that much contemporary global governance takes the form of regulation and administration, and GAL writings examine:

> [the] legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make.[55]

[52] Robert O. Keohane and Ruth Grant, "Accountability and Abuses of Power in World Politics," *American Political Science Review* 99 (2005): 29–43, 29. See also Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20 (2006): 405–37 (accountability mechanisms must facilitate principled, factually informed deliberation over revising the terms of accountability).

[53] Keohane and Grant, "Accountability and Abuses of Power." Of course, they can exert effects ex ante, as the anticipation of review and potential sanctions may deter certain actions from occurring in the first place.

[54] Perhaps the best-known report on IO accountability is that of the nongovernmental organization One World Trust. See Robert Lloyd, Shana Warren, and Michael Hammer, *The 2008 Global Accountability Report* (London: One World Trust, 2008).

[55] Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *European Journal of International Law* 17 (2006): 1–13.

GAL highlights what might be called "intra-regime accountability," or mechanisms designed to ensure that the various components of IOs perform their appointed roles and conform to the IO's internal law. Accountability mechanisms that have been explored through a GAL lens include the World Bank's Inspection Panel,[56] evolving administrative mechanisms related to UN sanctions lists,[57] and the use of notice and comment processes by the Basel Committee on Banking Supervision.[58]

In addition, IR and IL scholars have devoted significant attention to the role of courts as accountability mechanisms, with particular focus on the political dynamics and doctrinal developments that enabled the European Court of Justice (ECJ) to review acts of other EU organs for conformity with EU law (giving rise, in turn, to questions whether the ECJ is accountable), and the normative desirability of having the ICJ or other courts review acts by the Security Council.[59] Another strand in the literature explores whether judicial review of IO acts by domestic courts can contribute to securing the accountability of international organizations.[60]

While accountability is desirable for its own sake, it is often understood as a critical element of the legitimacy of international organizations. Legitimacy is thoroughly analyzed in Dominic Zaum's contribution to this volume. However, given its prominence, legitimacy deserves mention in any survey of conceptual issues prominent in recent IO scholarship, and a brief discussion follows.

Legitimacy

Historically, questions concerning the legitimacy of IOs did not receive sustained scholarly attention. But as IOs have expanded their powers and reach, and as claims of state "consent" to IO decisions and rules seem ever more attenuated, questions of legitimacy have come to the fore.[61] Key questions in these debates include the conceptual issue of what the term legitimacy means, the normative issue of which criteria mark an IO as legitimate, the descriptive issue of which standard(s) different

[56] Daniel D. Bradlow, "The Reform of the Governance of the IFIs: A Critical Assessment," *The World Bank Legal Review* 3 (2012): 37–58.

[57] Ian Johnstone, "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit," *American Journal of International Law* 102 (2008): 275–308.

[58] Michael Barr and Geoffrey Miller, "Global Administrative Law: The View from Basel," *European Journal of International Law* 17 (2006): 15–46.

[59] e.g., José Alvarez, "Judging the Security Council," *American Journal of International Law* 90 (1996): 1–39; Gráinne de Búrca, "The European Court of Justice and the International Legal Order After *Kadi*," *Harvard International Law Journal* 50 (2010): 1–49.

[60] e.g., August Reinisch, *Challenging Acts of International Organizations Before National Courts* (Oxford: Oxford University Press, 2010).

[61] See, e.g., Ian Hurd, *Legitimacy and Power in the United Nations Security Council* (Princeton: Princeton University Press, 2007); Rüdiger Wolfrum and Voker Röben (eds.), *Legitimacy in International Law* (Berlin: Springer, 2008).

actors use in assessing the legitimacy of IOs, and the causal issue of what explains why some IOs are accepted as legitimate while others are not.[62]

As a conceptual matter, legitimacy is often understood as related to the justification and acceptance of political authority.[63] Thus, a legitimate institution or leader has a right to exercise authority (or govern); an illegitimate one does not. Legitimacy thus fundamentally differs from two other bases of influence: persuasion and power.[64] *Rational persuasion* convinces based on the merits of a decision. Legitimacy also differs from *compulsion*, even though both may produce compliance. Unlike compulsion, legitimacy has a normative quality: a legitimate institution is "morally justified in attempting to govern."[65]

The IL and IR literatures distinguish between the sociological and normative dimensions of legitimacy. An institution has sociological legitimacy "when it is widely *believed* to have the right to rule":[66] when its decisions are accepted not out of compulsion or self-interest but because actors accept the institution's right to rule.[67] Normative legitimacy, in contrast, rests on the justifications or rationales offered in support of an institution's right to rule. It reflects the "worthiness of a political order to be recognized."[68]

Early normative work questioning the legitimacy of IOs, including prominently the EU and WTO, focused on their "democratic deficit."[69] However, more recent writings move away from democracy as a touchstone for IO legitimacy—in part because many believe that the conditions for global democracy are impossible to realize under any realistically foreseeable set of conditions, and in part because IO authority is less than that of domestic governments, and therefore requires a less robust normative justification.

[62] Daniel Bodansky, "Legitimacy in International Law and International Relations," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 321–41. This section of the chapter draws heavily upon Bodansky's excellent overview of the relevant literature.

[63] David Beetham, *The Legitimation of Power* (Basingstoke: Macmillan, 1991).

[64] Bodansky, "Legitimacy in International Law and International Relations." An important body of literature questions whether legitimacy can or should be sharply distinguished from persuasion, in so far as both rest upon justificatory efforts to ground political authority. See, e.g., Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (New York: Oxford University Press, 2011); Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).

[65] Allen Buchanan, "The Legitimacy of International Law," in *The Philosophy of International Law*, ed. John Tasioulas and Samantha Besson (Oxford: Oxford University Press, 2010), 79–96, 85.

[66] Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20 (2006): 405–37, 405.

[67] Ian Hurd, "Legitimacy and Authority in International Politics," *International Organization* 53 (1999): 379–408.

[68] Jürgen Habermas, *Communication and the Evolution of Society*, trans. Thomas McCarthy (Boston: Beacon Press, 1979), 178.

[69] Eric Stein, "International Integration and Democracy: No Love at First Sight," *American Journal of International Law* 95 (2001): 489–534. An influential critique of the "democracy deficit" literature

Scholars have identified a wide array of procedural and substantive factors that arguably contribute to normative legitimacy. IR writings often classify these factors in terms of whether they contribute to *input-* or *output-based legitimacy*.[70] Input-based approaches view IO legitimacy as deriving from the procedures IOs follow in reaching decisions. Output-based legitimacy looks at results: does the IO solve the problems it was designed to solve? Are its outcomes equitable and rights-respecting?

International lawyers supplement these approaches with theories that often focus more on the legitimacy of rules and rule systems than on that of organizations. For example, Franck argued that the legitimacy of international law rests on four properties of legal rules: determinacy (clarity of content), symbolic validation (including ritual and pedigree), consistency, and adherence (conformity with the legal system's procedural norms about rule creation).[71] More recently, Brunnée and Toope developed a theory of legal legitimacy influenced by Fuller's notion of the "internal morality of the law," requiring features such as generality, public promulgation, prospectivity, intelligibility, consistency, stability, and congruence with official action. [72]

As Bodansky notes, much of the scholarship in both disciplines seems to assume a single or universal criteria against which IO legitimacy can be measured. But the diverse goals and functions of IOs invite consideration of whether a general theory of IO legitimacy is available.[73] Indeed, going forward, "political scientists and international lawyers may … need to take a more differentiated, contextual approach in studying [the] normative legitimacy [of international organizations]."[74]

To be sure, some eminent international lawyers have resisted the emphasis on legitimacy, focusing on the term's semantic ambiguity and its supposed tendency to displace legal discourse.[75] Whatever the force of these critiques, international lawyers would ignore debates over IO legitimacy at their peril. Legitimacy continues to occupy a central position in our understanding and evaluation of governance institutions. The concept also offers a powerful rhetorical frame for debates over whether particular IOs deserve our support. Thus, questions about legitimacy will continue to be at the heart of popular and scholarly debates over IOs.

is found in Andrew Moravcsik, "Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis," *Government and Opposition* 39 (2004): 336–63.

[70] Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

[71] Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990).

[72] Brunnée and Toope, *Legitimacy and Legality in International Law*.

[73] See, e.g., Monica Hlavac, "A Developmental Approach to the Legitimacy of Global Governance Institutions," in *Coercion and the State*, ed. David A. Reidy and Walter J. Riker (New York: Springer, 2008), 203–23.

[74] Bodansky, "Legitimacy in International Law and International Relations," 332.

[75] See, e.g., Martti Koskenniemi, "Miserable Comforters: International Relations as the New Natural Law," *European Journal of International Law* 15 (2009): 395–422; James Crawford, "The Problems of Legitimacy-Speak," *ASIL Proceedings* 98 (2004): 271–3.

Policy Dilemmas

This section examines policy dilemmas that have preoccupied IO scholars in recent years as well as some that will become more salient in the near future. All relate to the dramatic postwar proliferation of IOs that serves as the springboard for many of the chapters in this volume. This proliferation is sometimes celebrated as a concrete manifestation of the increasing legalization of international affairs. But proliferation is also potentially problematic. The jurisdictional ambits of different IOs increasingly overlap and, at times clash. Different—and potentially conflicting—legal rules emanating from different IOs invite forum shopping and undermine legal certainty. These dangers are magnified by the realities that IOs generally have nonhierarchical relationships with each other and that international law has few rules that address normative and institutional conflicts. For these reasons, the related issues of proliferation, overlap, and fragmentation pose a variety of practical and policy challenges.

This section begins with an exploration of the political implications of the institutional fragmentation of the current international legal order. In short, does a densely institutionalized order produce distinctive politics and, if so, who benefits? The second issue to be addressed is how IO interactions in a highly fragmented order can best be managed. A more abstract version of this question asks whether the traditional focus on conflicting treaty norms and inconsistent judicial decisions adequately captures the way international regimes interact, and whether more fruitful conceptualizations are available.

The final issue to be explored is the growing gap between the need for global solutions to pressing global issues and the apparently eroding ability of IOs to fill that need. Across a range of issues of international concern—prominently including the environment, the economy, and security—international bodies have in recent years been stymied by deep and seemingly intractable disagreement. The question that arises is why institutionalized international cooperation appears to be breaking down at precisely the moment it is most needed.

The Political Implications of Fragmentation

International lawyers have long recognized the institutional and doctrinal fragmentation that marks the international legal system.[76] However, diplomatic and scholarly concerns over fragmentation did not become prominent until a series of

[76] In 1953, Jenks wrote that "the conflict of lawmaking treaties … must be accepted as being in certain circumstances an inevitable incident of growth [of international law]." C. Wilfred Jenks, "The Conflict of Law-Making Treaties," *British Yearbook of International Law* 30 (1953): 401–53.

high-visibility cases—including a European Court of Human Rights decision on the effect of territorial reservations that diverged from the ICJ's treatment of the issue, and an International Criminal Tribunal for the former Yugoslavia (ICTY) decision on state responsibility that rejected ICJ jurisprudence on the issue—underscored the inconsistencies and uncertainties that can flow from proliferation and fragmentation. The ICJ's President Judge encapsulated these concerns when he declared that "[t]he proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations."[77]

Scholars were quick to jump into the fray.[78] Political scientists had long been interested in regime complexity, and now turned their attention to explaining why institutional overlap and fragmentation were not evenly distributed across issue areas. At one end of a continuum are "fully integrated institutions that impose regulation through comprehensive, hierarchical rules,"[79] for example, the trade regime centered upon the GATT/WTO (at least until the recent proliferation of preferential trade agreements). At the other pole are "highly fragmented collections of institutions with no identifiable core," such as the international investment regime, with its over 2,500 separate bilateral investment treaties and no centralized treaty or institution. In the middle are "regime complexes" that are characterized by "connections between the specific and relatively narrow regimes but the absence of an overall architecture or hierarchy that structures the whole set."[80] A good example is the climate-change regime, which has important multilateral bodies and treaties, such as the Intergovernmental Panel on Climate Change, the UN Framework Convention on Climate Change and Kyoto Protocol, but also includes increasing numbers of bilateral and regional arrangements, as well as climate programs at a number of other IOs, such as the World Bank.

Keohane and Victor theorize that three factors help determine the level of integration of particular legal regimes. The first is the distribution of interests; when powerful actors share common interests, they will seek an integrated institution with no rivals. A second factor is uncertainty; when the costs and benefits of cooperation are uncertain, states will favor smaller, club-like entities over large integrated institutions. The third factor is linkage. Linkage between issues can enable trade-offs that enhance cooperation. When linkage is difficult, fragmentation is more likely.[81] Although states often devote substantial diplomatic effort to creating

[77] Speech by H. E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations, October 30, 2001.

[78] For a comprehensive literature review, see Kal Raustiala, "Institutional Proliferation and the International Legal Order," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 293–320.

[79] Robert O. Keohane and David G. Victor, "The Regime Complex for Climate Change," *Perspectives on Politics* 9 (2011): 7–23.

[80] Ibid. [81] Ibid.

fully integrated regimes, Keohane and Victor note that loosely coupled sets of narrow regimes—that is, regime complexes—offer the advantages of flexibility across issues and adaptability over time, and hence may be more effective in addressing certain types of international problems.

International lawyers have been less concerned with divergent levels of institutional fragmentation across different issue areas than with fragmentation's normative and doctrinal implications. In response to the concerns that fragmentation threatens legal certainty, a number of legal scholars claim that fragmentation's dangers have been exaggerated.

Some lawyers view fragmentation and proliferation as a desirable market-like response to diversity that is preferable to more centralized and hierarchical alternatives. For example, Charney declared that he was "not troubled by the multiplicity of dispute settlement systems," because:

> hierarchy and coherence are laudable goals for any legal system, including international law, but at the moment they are impossible goals. The benefits of the alternative, multiple forums, are worth the possible adverse consequences that may contribute to less coherence. The risk is low and the potential benefits to the peaceful settlement of international disputes is high.[82]

Related arguments, also sounding in market rhetoric, view proliferation positively. Thus, some argue that proliferation permits a healthy "competition" among international tribunals that will ensure that they act within their assigned mandates.[83] Others suggest that aggrieved parties, such as human rights victims, benefit from being able to file claims in one of several available fora, at least in a context where no global body exists that can reliably be counted on to interpret and apply the law.

Others claim that, whatever fragmentation's potential dangers, traditional legal doctrine provides tools sufficient to address any difficulties. For example, an influential International Law Commission Study Group report argued that the Vienna Convention on the Law of Treaties and general international legal doctrine contains several rules that promote harmonization and manage conflicts, including norms governing conflicts between special and general rules, between prior and subsequent rules, between rules that operate on different hierarchical levels, and norms directing the rules be interpreted in light of the general system of international law.[84] Crawford and Neville adopt a similar approach, and argue that, to date, international tribunals have generally managed to use interpretative techniques

[82] Jonathan I. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea," *American Journal of International Law* 90 (1996): 69–75.

[83] Cogan, "Competition and Control in International Adjudication."

[84] Study Group of the ILC, "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law," A/CN.4/L682 (April 13, 2006).

that minimize the dangers associated with rule conflicts.[85] However, others have sharply questioned whether international courts possess the doctrinal tools or the normative authority to resolve conflicts between rules originating in different international legal regimes.[86]

Finally, both IL and IR scholars have addressed who benefits from proliferation and fragmentation.[87] Much of the analysis centers on the fact that proliferation creates the possibility of forum shopping, and for states even to exit one institution for another. In an early contribution to this literature, Helfer detailed how the expansion of intellectual property rights in the WTO's TRIPs agreement prompted developing states to raise their concerns over intellectual property protections in a variety of international venues, including the World Health Organization (WHO), Food and Agricultural Organization (FAO) and UN Commission on Human Rights.[88] Helfer argues that developing states consciously pursued a strategy of "regime shifting"—moving substantive issues from the agenda of one IO to that of another—in order to challenge, undermine and, ultimately, revise TRIPs norms.

Subsequent studies argue that more powerful states will more commonly benefit from institutional fragmentation.[89] For example, given their greater resources and bureaucratic capacity, powerful states will have greater ability to exit—or threaten to exit—any given venue in the event its interests are not satisfied. Weaker states will generally not enjoy the same leverage.[90] Paradoxically, then, a very densely institutionalized international legal order may provide great powers as much freedom of movement as an anarchical order.[91] More broadly, fragmentation benefits powerful actors in a more general sense as it threatens "the fundamental ability of the international order to remain—or become—a rule-based system that constrains the strong as well as the weak."[92] In short, greater degrees of fragmentation imply greater ambiguity about the content of relevant rules, which hampers efforts to use law to restrain powerful actors.

[85] James Crawford and Penelope Nevill, "Relations between International Courts and Tribunals: The 'Regime Problem'," in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret Young (Cambridge: Cambridge University Press, 2012), 235–60.

[86] Jeffrey L. Dunoff, "A New Approach to Regime Interaction," in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret Young (Cambridge: Cambridge University Press, 2012), 136–74.

[87] For a review of the literature, see Raustiala, "Institutional Proliferation and the International Legal Order."

[88] Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking."

[89] Eyal Benvenisti and George Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review* 60 (2007): 595–631; Daniel Drezner, "The Power and Peril of International Regime Complexity," *Perspectives on Politics* 7 (2009): 65–70.

[90] Benvenisti and Downs, "The Empire's New Clothes."

[91] Raustiala, "Institutional Proliferation and the International Legal Order."

[92] Ibid., 314.

The recognition that a densely institutionalized order benefits stronger states suggests that fragmentation may not be an accidental or path-dependent response to increasing interdependence. Benvenisti and Downs argue that:

> a fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality. As a result, it is often considered to be solely the accidental byproduct of historical events and broad social forces. This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the capacity to alter.[93]

As Raustiala notes, this argument suggests a deeply ironic coda to the exercise of postwar institution-building. After World War II, the United States created a distinctive type of international order. Although the United States was the dominant state, the postwar IOs it helped found served not only the United States, but also a broader range of interests. Moreover, because of its formal and law-based nature, this order imposed some constraints upon even the most powerful states. As Ikenberry famously explains, "The United States sought to take advantage of the postwar juncture to lock in a set of institutions that would serve its interests well into the future, and, in return, offered … to restrain and commit itself by operating within an array of postwar economic, political, and security institutions."[94] But, if Benvenisti and Downs are correct about fragmentation being a conscious strategy pursued by powerful states, then the United States today may have shifted tactics. Raustiala suggests that, instead of devoting diplomatic energies to building multilateral institutions, the United States may now be pursuing a strategy of proliferation and fragmentation that has the effect of weakening IO restraints—thereby creating greater latitude for the United States to pursue whatever policies it desires.[95]

Mismanaging—and Misunderstanding—Regime Interaction

The policy challenges posed by proliferation and fragmentation are much broader and deeper than suggested by the standard debates in this area. As noted above, the literature has approached proliferation as presenting problems of rule conflict and coordination. The scholarly focus on high-profile litigations involving the intersection of legal regimes—such as the *Tadic* or *Kadi* cases[96]—leads to a conceptualization

[93] Benvenisti and Downs, "The Empire's New Clothes," 597–8.

[94] G. John Ikenberry, *After Victory* (Princeton, NJ: Princeton University Press, 2001), 164.

[95] Raustiala, "Institutional Proliferation and the International Legal Order."

[96] In its *Tadic* decision, the ICTY Appeals Chamber rejected a test for the attribution of state responsibility that the ICJ developed in its *Nicaragua* decision and articulated an alternative test. In *Kadi*, the ECJ found that the guarantee of fundamental rights under the EU treaties could not be trumped by a binding obligation arising under the Security Council's Chapter VII powers.

of regime interaction in terms of discrete transactions or disputes. This "transactional" model of regime interaction has exercised immense direct and indirect influence on efforts to understand regime interactions.

However, the "transactional" model is highly misleading. The overwhelming majority of regime interactions—and the most significant interactions—do not arise out of discrete transactions, and do not give rise to high-profile litigation. Rather, most of the regime interaction resulting from proliferation occurs in ongoing relationships among actors from different regimes that take place far outside international courthouses. For ease of exposition, we might label these "relational" interactions[97] as "regulatory," "operational," and "conceptual" interactions.

Regulatory interactions include a wide range of regulatory and administrative decisions and management that involve more than one IO. One controversial example involves efforts to ban the pesticide DDT. During negotiations over the Convention on Persistent Organic Pollutants (POPs Convention), a broad coalition of environmental groups lobbied to ban use of DDT. Many developing states and public health advocates opposed this effort, arguing that DDT was highly effective against malaria, a disease that imposes significant costs in developing states, and that no feasible alternative was available. The WHO played an active role in the negotiations and argued that a ban was premature. This position prevailed; the treaty restricts but does not ban use of DDT.

More importantly, the treaty expressly contemplates an ongoing series of interactions between actors from the WHO and the POPs Convention. The treaty provides that parties can only use DDT in accordance with WHO guidelines; hence changes generated by one IO, the WHO, will automatically produce regulatory changes in another international regulatory regime. In addition, the treaty provides that every three years treaty parties will consult with the WHO to determine whether there is still a need to permit the use of DDT.

Other examples abound. A number of IOs—including the WHO, OECD, FAO, International Labour Organization (ILO), UN Environment Programme (UNEP) and others—created the Inter-Organization for the Sound Management of Chemicals, which has created a globally harmonized system for the classification and labeling of chemicals. The ILO, the International Maritime Organization and the Basel Secretariat were centrally involved in efforts to negotiate a treaty addressing the issue of ship scrapping. Actors from the WTO, UN Convention on the Law of the Sea, the FAO, Convention on International Trade in Endangered Species, and regional fisheries management organizations have engaged in a continuing and iterative exchange designed to reduce fisheries subsidies.[98]

[97] In drawing a conceptual distinction between "transactional" and "relational" interactions, I draw upon and extend insights found in Daryl Levinson, "Framing Transactions in Constitutional Law," *Yale Law Journal* 111 (2002): 1311–90; Ian Macneil, *Contracts: Exchange Transactions and Relations*, 2nd ed. (New York: Foundation Press, 1978).

[98] Margaret Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge: Cambridge University Press, 2011).

As these examples suggest, IOs frequently engage in ongoing, collaborative interactions that can be understood as forms of regulatory and administrative lawmaking. To date, however, this frequently productive and often underappreciated form of international lawmaking by IOs has been virtually ignored by scholars.

Moreover, IOs also increasingly engage in *operational interactions*. Perhaps the best known example is UNAIDS, a joint venture of ten 'co-sponsors' constituting a broad array of IOs, including the UNHCR, the UN Children's Fund, the ILO, the UN Development Programme (UNDP), the UN Educational, Scientific and Cultural Organization, the WHO, and the World Bank. These IOs coordinate their operational activities in addressing the HIV/AIDS problem to minimize duplication and maximize the efficient and effective use of international resources. In the environmental area, the Global Environment Facility was started as a partnership among the World Bank, UNEP and UNDP to fund efforts to fulfill global environmental objectives. It has been restructured over the years, and now not only includes more partners, but also works closely with the secretariats of a number of treaty bodies, including the Convention on Biological Diversity, the UN Framework Convention on Climate Change, UN Convention to Combat Desertification, and the Mercury Convention. In the economic area, the "Aid for Trade" program provides technical assistance to developing states to help them develop trade strategies, negotiate more effectively, and implement WTO commitments. Developing states can access funds for these purposes through the Enhanced Integrated Framework, a partnership among the WTO, World Bank, UNDP, UN Conference on Trade and Development, International Trade Centre, IMF, and the UN Industrial Development Organization. And in the humanitarian area, the UNHCR and the UN Relief Works Agency have collaborated on operational relief for Palestinian refugees in ways that arguably extend beyond their mandates. In each of these areas—and many others—IOs work together in ways that not only impact operations on the ground, but in many cases that make policy and generate new norms.

Finally, IOs work together not only to produce rules and standards, but to produce knowledge. As noted above, scholars have already explored how IOs create social knowledge, such as when the World Bank redefines the meaning of "development," or the UNHCR changes our understanding of the term "refugee." Increasingly, IOs engage in collaborative undertakings designed to advance and change our understandings of salient policy areas.

Notably, these *conceptual interactions* are not intended to create new rules or resolve particular disputes. Instead, they operate at a higher level of generality, and often reflect efforts to reconceptualize difficult or controversial policy domains. Thus, they are designed to offer new ways of understanding our world, as a precursor to acting in the world. By way of example, review of several recent initiatives involving the WTO provides a sense of how widespread this form of IO interaction is.

One of the most intellectually ambitious projects is the "Made in the World" initiative, which centers around a joint OECD–WTO trade database. This initiative seeks to create new statistical frameworks and accounting systems to measure world trade. At one level, this is a technical exercise in data gathering and analysis of interest to statisticians and economists at these two IOs, and few others. But beneath the technocratic surface, this initiative aims to substantially revise our understanding of international trade—and potentially to transform international trade politics.[99]

Enthusiasm for new trade liberalization initiatives in the United States and the EU—the traditional drivers of global trade policy—has cooled considerably in recent years. In the United States, in particular, concerns have grown over trade's impact on domestic employment and on large and growing trade imbalances, particularly with emerging markets such as China. Recognizing that persistent reports of large trade imbalances have sapped public support for trade liberalization efforts, the WTO has embarked on a sustained effort to reconceptualize trade flows. As the WTO's Director-General explained:

> As recently as 30 years ago, products were assembled in one country, using inputs from that same country. Measuring trades was thus easy. 2011 is very different. Manufacturing is driven by global supply chains, while most imports should be stamped "made globally" not "made in China", or similar … With trade imbalances causing friction between leading economies, the measures we use can gravely exacerbate geopolitical tensions at a time when cooperation is more vital than ever.[100]

The new model substantially redefines bilateral trade flows. In the words of the WTO's Director-General, "such politically relevant imbalances like the US trade deficit with respect to China are reduced by more than 30%" under the new model.[101] Moreover, the new statistical model emphasizes the role of high value-added services in global value chains; in so doing it underscores where developed states enjoy a comparative advantage and "where trade has created jobs for them."[102] Clearly, whatever its other merits, the new model is intended to change understandings of international trade's impact in developed states, such as the US, that have traditionally been the engines driving trade liberalization. As the Director-General summarizes, the point of the exercise is that "better statistics today will contribute to better policies tomorrow."

The WTO has engaged in similar conceptual interactions designed to produce "better policies tomorrow" with other IOs as well. For example, in 2009, the WTO

[99] Jeffrey L. Dunoff, "China's Role in the Evolving Global Order: Reflections on Ten Years of Membership in the World Trade Organization," *(Chinese) Journal of International Economic Law* 18 (2012).

[100] Pascal Lamy, "'Made in China' Tells Us Little about Global Trade," *Financial Times*, January 24, 2011.

[101] Pascal Lamy, "Better Statistics Today Will Contribute to Better Policies Tomorrow" (speech presented at OECD, Paris, January 16, 2013), https://www.wto.org/english/news_e/sppl_e/sppl261_e.htm.

[102] Ibid.

and UNEP jointly published a report addressing the linkages between trade and climate change. Issued at a critical time in negotiations over a post-Kyoto climate treaty, the joint WTO/UNEP report challenges the conventional wisdom that efforts to liberalize trade are in considerable tension with efforts to combat climate change. The report argues that trade liberalization can have a positive effect on greenhouse gas emissions by, inter alia, accelerating the transfer of clean technologies. The report also discusses, at length, two controversial pricing mechanisms that can be used to control greenhouse gas emissions: taxes and emissions trading systems. Like the joint undertaking between the WTO and OECD, the joint WTO/UNEP report does not purport to generate new rules or dispense policy advice. Rather it is designed to introduce new concepts and to shift the debate over the relationship between trade and climate change; in the report's own words, its "aim is to promote greater understanding of [the interaction between trade and climate change policies] and to assist policymakers in this complex policy area."[103]

The purpose of these relational interactions differs fundamentally from the purposes of transactional interactions. Unlike the litigations that are the focus of the fragmentation scholarship, the conceptual interactions between the WTO and other IOs are not intended to settle jurisdictional boundaries, to identify conflicts of law principles, or to privilege or subordinate one norm or another. There is much more going on here than forum shopping or regime shifting; these conceptual interactions are intended to shape the narrative, or the social meaning, of international trade or of climate change. Despite the importance—and ubiquity—of these IO interactions, to date they have largely escaped scholarly notice.[104] However, they represent a productive area for future research.

Institutional Gridlock

The postwar institutional order that is the focus of this volume can claim many important successes. While the UN obviously has not eliminated global conflict, it has facilitated the settlement of many regional conflicts, played a central role in the decolonization process, and greatly elevated the prominence of human rights in international legal and political discourse. IOs at the center of functional regimes have also overseen significant achievements: the GATT/WTO and Bretton Woods institutions have spearheaded an enormous expansion of the global economy that has helped to lift millions out of poverty, the WHO was instrumental in virtually

[103] UNEP and WTO, "Trade and Climate Change," (2009), http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf.

[104] For rare exceptions, see Jeffrey L. Dunoff, "Mapping a Hidden World of International Regulatory Cooperation," *Law and Contemporary Problems* 78 (2015): 267–99 (forthcoming); Laurence Boisson de Chazournes, "Relations with Other International Organizations," in this volume.

eliminating polio and smallpox and reducing infant mortality, and the UNHCR has assisted over 30 million refugees fleeing war, persecution, and famine. Finally, technically oriented IOs, like the International Civil Aviation Organization and International Telecommunications Union, help make the conveniences of modern life possible.

Nevertheless, the pace of formalized international cooperation in general, and of institutionalization in particular, has slowed considerably in recent years. Perhaps more importantly, several of the most important IOs seem to have entered a state of gridlock and, perhaps, decline. To mention just a few prominent examples, multilateral efforts to address global climate change, perhaps the planet's most pressing challenge, have proven largely unsuccessful to date; the current round of global trade talks, launched in 2001, have long been stalemated and seem unlikely to make substantial progress anytime soon; and the international response to the global financial crisis was not centered in an IO, but rather in the relatively informal and ad hoc Group of 20, which lacks an administrative structure and functional bureaucracy. These and related developments have caused some to ask whether the age of international organizations has started to ebb, and, relatedly, why global cooperation seems to be failing just when it is needed most.[105]

Scholars have advanced a number of theories to explain the current stasis in IOs. One prominent explanation highlights a *lack of global leadership*. The claim is that the United States lacks the resources or will to continue as the primary provider of global public goods; Europe has been preoccupied with the Eurozone crisis and, more recently, the refugee crisis; Japan is fully occupied with severe domestic political and economic problems; and emerging powers are too focused on domestic growth to assume leadership positions.[106] In the "G-zero" world, no state or group of states is willing to step forward to create or maintain the public good of an institutionalized international order.

A more subtle version of this claim emphasizes the *growing multipolarity of international relations*. This approach foregrounds an international landscape in which power is diffusing and politics diversifying.[107] The trade regime provides a representative example: at its inception, the GATT consisted of twenty-three members, mostly European; today's WTO consists of 162 members representing a wide variety of economic and political systems. Indeed, today's WTO includes at least four distinct

[105] For a sampling of scholarship that asks—and attempts to answer—these questions, see, e.g., Thomas Hale, David Held, and Kevin Young, *Gridlock: Why Global Cooperation is Failing When We Need It Most* (Cambridge: Polity Press, 2013); David Victor, *Global Warming Gridlock* (Cambridge: Cambridge University Press, 2011); Amrita Narlikar, *Deadlock in Multilateral Negotiations* (Cambridge: Cambridge University Press, 2010).

[106] Ian Bremmer, *Every Nation for Itself: Winners and Losers in a G-Zero World* (New York: Penguin, 2012).

[107] Charles A. Kupchan, *No One's World: The West, the Rising Rest, and the Coming Global Turn* (New York: Oxford University Press, 2012).

groups of states: the old OECD states; a group of powerful 'emerging economies' that aggressively pursue their interests at the WTO, such as China, India, Brazil, Korea, Mexico, Argentina, and a handful of others; the other developing states; and the least developed states. Each of the four groups has its own trade interests and agenda. The wide diversity of interests renders reaching any agreement—let alone one that substantially advances global interests—increasingly difficult.

Similar patterns of multipolarity characterize other policy domains. During the Cold War, the US and the USSR dominated the security realm. Today, an increasingly broad range of states and nonstate actors (including terrorists, pirates, cyber-hackers, and others) are key players on security issues. Similarly, the areas of environment and investment are marked by sharp and persistent North–South conflict, where no particular actor or region can impose its will. In short, IOs are increasingly embedded in a world marked by numerous power centers and without a political center of gravity.

Another strand of the literature emphasizes that IOs' *institutional structures*, such as voting and membership rules, undermine their ability to respond to changing political and economic realities. The most well known example is the UN Security Council. The original granting of permanent membership and veto power to China, France, the Soviet Union, the United Kingdom, and the United States reflected the postwar global distribution of power.[108] However, the P5 system seems increasingly outmoded as power relations have evolved over time and as other states, including Japan, Germany, and India, have risen to prominence. Despite a variety of reform initiatives, efforts to restructure Security Council membership—which require the approval of the P5—have repeatedly stalled. The Council's "sticky" structure virtually assures stalemate on almost all issues that affect P5 interests and resistance to the emergence and influence of new powers.[109] More importantly, the Security Council's lack of representativeness in an increasingly multipolar world threatens to undermine its legitimacy and effectiveness. Nevertheless, it seems virtually impossible to substantially reform this system, as doing so requires the assent of the P5.

The WTO provides another example. Whatever the merits of a consensus-based decision-making system when the GATT consisted of twenty-three like-minded, market economy states, today this rule gives each of its 162 members effective veto power. As a result, legislative efforts have effectively ground to a halt, producing at least two pernicious consequences. First, states seek to resolve through the WTO's powerful dispute settlement system contentious issues that they are unable to resolve through negotiation. Whether the dispute system is well designed to resolve these highly politicized issues, or to resist the political pressures that inevitably accompany these issues, remain open questions.[110] Perhaps more importantly, gridlock in

[108] Hale, Held, and Young, *Gridlock*. [109] Ibid.

[110] Jeffrey L. Dunoff, "The Death of the Trade Regime," *European Journal of International Law* 10 (1999): 733–62.

Geneva has encouraged a proliferation of regional and bilateral trade agreements. The dramatic increase in these agreements, in turn, likely produces less economic growth, imposes greater restrictions on developing state policy space, and contributes to the fragmentation discussed above.

To be sure, not all IOs have been totally resistant to structural reform, as changes to voting rules at the IMF and World Bank illustrate. However, in general, IO structures have not kept pace with changes to the global order. As Hale, Held and Young colorfully note, "existing institutions are not just sticky, they have become stuck."[111]

Finally, the challenges IOs confront today are substantially more difficult than those faced previously. Again, trade provides a good example. For decades, trade officials bargained almost exclusively over mutual tariff reductions. These negotiations would impact specific industries and firms, of course, but were generally of low political salience. Today, trade officials negotiate over a wide range of high-salience issues, ranging across intellectual property, food safety, services trade, and environmental protection. These issues reach much more deeply into the domestic domain, are substantially more politicized, and do not easily lend themselves to the quantifiable trade-offs associated with tariff reductions.

For all of these reasons, states and other international actors are experimenting with other forms of governance, including networks, public–private partnerships, informal groupings, regional frameworks, and a variety of cross-institutional collaborations.[112] These alternatives can be useful, but have their limits. More importantly, given the scale and scope of current and looming global challenges, these alternative efforts are unlikely to permanently displace rules-based, inclusive multilateral institutions. As a result, it will be necessary to revitalize international organizations to generate enhanced and more effective international cooperation.

Ironically, many of the "causes" of stalemate and stagnation flow from previous IO successes. Growing multipolarity reflects, in part, the system's success in generating and sharing economic prosperity across a range of states, and the increasing prominence of a wide range of states in international affairs, and IOs confront harder problems today not only because easier problems have already been addressed, but also because IOs have enabled deeper forms of interdependence. Thus, as Hale, Held, and Young note, many of the problems that afflict IOs today are "second order" issues that reflect not simply difficulties in international cooperation, but a cycle of self-reinforcing interdependence that IOs have made possible in the first place.[113]

Whether considered individually or in the aggregate, the policy issues identified above pose formidable challenges to IOs and those who study them. They also provide an opportunity for scholars representing a range of methodologies, perspectives, and substantive areas of expertise to contribute to their solution.

[111] Hale, Held, and Young, *Gridlock*, 42.
[112] Dunoff, "Mapping a Hidden World of International Regulatory Cooperation."
[113] Hale, Held, and Young, *Gridlock*, 42.

Conclusion

If the international community is to successfully resolve the pressing global problems of today and tomorrow, international organizations will play key roles. Thus, it is critical for international law and international relations scholars to understand the law and politics of international organizations. The purpose of this brief *tour d'horizon* of contemporary thinking about the law and politics of IOs has been to outline some of the key debates that have preoccupied international law and international relations scholars in recent years, as well as some of the most important ideas, concepts, and assumptions that shape those debates. It is also intended to reflect the vibrancy, creativity, and richness of contemporary research on the law and politics of international organizations and to highlight areas for productive new research.