

THE TRAGEDY OF THE GLOBAL INSTITUTIONAL COMMONS

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ABSTRACT

In recent years there has been a proliferation of international rules, laws and institutional forms in world politics. Some policymakers, lawyers, and international relations scholars posit that institutional proliferation will lead to a more rule-based world in world politics. This paper suggests a contrary position: institutional thickness has a paradoxical effect on global governance. Institutional proliferation erodes the causal pathways through which regimes ostensibly strengthen international cooperation. After a certain point, therefore, the proliferation of regimes shifts global governance from rule-based outcomes to power-based outcomes. To demonstrate these effects, the paper examines two cases: the aftermath of the 2001 Doha Declaration on intellectual property rights and public health, and recent efforts to create an WMD interdiction regime that permits the boarding of ships on the high seas. These cases show that there is little “viscosity” within global governance structures.

Introduction

In recent years there has been a proliferation of international institutions, and the current global financial crisis has spurred calls for even more global regimes. This spike in supply and demand has been matched by renewed attention to the role that forum-shopping, nested and overlapping institutions, and regime complexes play in shaping the patterns of global governance.¹ A few policymakers, a fair number of international relations scholars, and many international lawyers posit that these trends will lead to more rule-based outcomes in world politics. This increased attention has not necessarily improved our theoretical understanding of the phenomenon, however. The increasing thickness of the global institutional environment clearly suggests a change in the fabric of world politics.² Just as clearly, however, great powers have demonstrated a willingness to substitute different decision-making fora in order to advance their interests in world politics.³ This leads to an important question. Does the proliferation of rules, laws, norms and organizational forms lead to an increase in rule-based outcomes, or merely an increase in forum-shopping?

IR theorists have tried to move beyond demonstrating the mere existence of institutional choice and forum-shopping to explaining when it is likely to occur. What are the necessary and sufficient conditions that would lead a great power to substitute governance structure within a regime complex? To get at this question, this paper makes two arguments about the effect of institutional thickening on global governance

¹ Goldstein et al 2001; Raustiala and Victor 2004; Aggarwal 2005; Alter and Meunier 2006.

² Alter and Meunier 2009.

outcomes. First, the proliferation of rules, laws and institutional forms can have a paradoxical effect on global governance. As global governance structures morph from international regimes to regime complexes, legal and organizational proliferation eventually shifts world politics from rule-based outcomes to power-based outcomes – because proliferation enhances the ability of powerful states to engage in forum-shopping. Small states as well as the great powers can avail themselves of this strategy. There are a variety of reasons, however, why this tactic favors the strong over the weak to a greater degree than if forum-shopping was not an option. In the process, institutional proliferation erodes the causal mechanisms through which regimes ostensibly strengthen international cooperation.

One can conceive of conditions when great power governments might be constrained from forum-shopping. We can label this property the degree of *viscosity* within global governance structures. In fluid mechanics, viscosity is the resistance a material has to change in its form. High levels of viscosity imply a material that changes slowly. In global governance, high levels of viscosity would imply substantial amounts of internal friction within a single regime complex, making it costly to shift fora. It is worth contemplating whether some regime complexes suffer from higher rates of viscosity than others – and also whether some regime complexes grow more or less viscous over time.

Recent literature on international organizations, including the Rational Design school, propose a number of factors that could explain the relative viscosity of global governance structures.⁴ These include membership, scope, centralization, legalization,

³ Gruber 2000; Drezner 2007; Benvenisti and Downs 2007.

⁴ Koremnos, Lipson and Snidal 2003.

legitimacy, and reputation. To assess these constraints, this paper looks at two cases that would be considered “tough tests” – the 2001 Doha Declaration on intellectual property rights and public health, and the Law of the Sea constraint against the interdiction of ships on the open seas. In both cases, the pre-existing regime would be considered “strong” in terms of legalization, norm coherence, and rule adherence. Nevertheless, the cases suggest that these factors do not pose either a consistent or persistent constraint to forum-shopping. Even over short periods of time, there is little viscosity within global governance structures.

The rest of this paper is divided into six sections. The next section revisits the realist-institutionalist debate to understand why institutions initially contribute to rule-based outcomes. The third section discusses why the proliferation and legalization of global governance structures can undercut rather than reinforce institutionalist theories of world politics. The following section draws on recent literature to evaluate the collection of factors that could increase the viscosity of global governance. The fifth section examines the Doha Declaration to determine what factors prevented short-term forum-shopping on intellectual property rights. The sixth section examines recent efforts to carve out a WMD exception to international legal constraints against interdiction on the high seas. The final section summarizes and concludes.

Why institutions matter

To understand how increasing institutional proliferation can affect global governance outcomes, it is worth reflecting why international institutions are considered to be significant in the first place. In the debate that took place between realists and institutionalists a generation ago, the latter group of theorists articulated in great detail how international regimes and institutions mattered in world politics. Although this scholarly debate ran its course some time ago, the institutionalist logic permanently shifted the terms of debate.

The primary goal of neoliberal institutionalism was to demonstrate that cooperation was still possible even in an anarchic world populated by states with unequal amounts of power.⁵ According to this approach, international institutions are a key mechanism through which cooperation becomes possible. A key causal process through which institutions facilitate cooperation is by developing arrangements that act as “focal points” for states in the international system.⁶ The logic borrows from the new institutionalist literature in American politics, which focuses on the role that domestic institutions played in facilitating a “structure induced equilibrium.” Neoliberal institutionalists made a similar argument about international regimes and world politics.⁷ By creating a common set of rules or norms for all participants, institutions help to foster the convergent expectations that define cooperative behavior, while highlighting instances when states defect from the agreed-upon rules.

⁵ Keohane 1984; Axelrod 1984; Axelrod and Keohane 1985; Oye 1986; Baldwin 1993; Keohane and Martin 1995; Hasenclever, Mayer and Rittberger 1996; Martin and Simmons 1998. Though often conflated, the institutionalist paradigm is distinct from liberal theories of international politics. On this distinction, see Moravcsik 1997.

⁶ Schelling 1960.

⁷ On structure-induced equilibrium, see Shepsle 1979. See Milner 1997, and Martin and Simmons 1998, for conscious translations of this concept to world politics.

The importance of institutions as focal points for actors in world politics is a recurring theme within the institutionalist literature. Indeed, this concept is intrinsic to Stephen Krasner's commonly accepted definition for international regimes: "implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations."⁸ More than a decade later, Robert Keohane and Lisa Martin reaffirmed that, "in complex situations involving many states, international institutions can step in to provide 'constructed focal points' that make particular cooperative outcomes prominent."⁹

By creating focal points and reducing the transaction costs of rule creation, institutions can shift arenas of international relations from *power-based outcomes* to *rule-based outcomes*. In the former, disputes are resolved without any articulated or agreed-upon set of decision-making criteria. The result is a Hobbesian order commonly associated with the realist paradigm.¹⁰ While such a system does not automatically imply that force or coercion will be used by stronger states to secure their interests, the shadow of such coercion is ever-present in the calculations of weaker actors.¹¹

No institutionalist disputes that power also plays a role in determining rule-based outcomes as well.¹² However, they would also posit that the creation of a well-defined international regime imposes constraints on the behavior of actors that are not present in a strictly Hobbesian system. As Duncan Snidal puts it, "institutions drive a wedge between power and outcomes. That is, outcomes cannot be predicted simply by understanding

⁸ Krasner 1983, p. 2. See also North 1991, p. 97

⁹ Keohane and Martin 1995, p. 45.

¹⁰ Waltz 1979; Mearsheimer 1994/95, 2001; Wendt 1999, chapter six.

¹¹ Carr 1939 [1964]; Drezner 2003.

¹² Indeed, Oran Young made this point in an early article about international regimes. See Young 1980, p. 338.

states' power (and interest) without reference to the institutions that connect them."¹³ Institutions act as binding mechanisms that permit displays of credible commitment.¹⁴ In pledging to abide by clearly-defined rules, great powers make it easier for others to detect noncooperative behavior. These states will incur reputation costs if they choose to defect. If the regime is codified, then they impose additional legal obligations to comply that augment the reputation costs of defection.¹⁵ In the case of the World Trade Organization, for example, Judith Goldstein and Lisa Martin point out, "the use of legal rule interpretation [in the WTO] has made it increasingly difficult for governments to get around obligations by invoking escape clauses and safeguards."¹⁶

Institutionalists and some realists further argue that once international regimes are created, they will persist even after the original distributions of power and interest have shifted.¹⁷ Because the initial creation of institutions can be costly, Hasenclever *et al* point out, "the expected utility of maintaining the present, suboptimal (albeit still beneficial) regime is greater than the utility of letting it die, returning to unfettered self-help behavior, and then trying to build a more satisfactory regime."¹⁸ Some realist scholars have acknowledged that international regimes will persist despite changes in the underlying distribution of power.¹⁹ For smaller and weaker actors, institutions provide an imperfect shield against the vicissitudes of a purely Hobbesian order.²⁰

¹³ Snidal 1996, p. 127.

¹⁴ Ikenberry 2000.

¹⁵ Snidal and Abbott 2000; Goldstein and Martin 2000.

¹⁶ Goldstein and Martin 2000, p. 619.

¹⁷ Ikenberry 2000.

¹⁸ Hasenclever, Mayer and Rittberger 1996, p. 187.

¹⁹ Krasner 1983, pp. 357-361.

²⁰ Reus-Smit 2004; Kelley 2007.

By the late nineties, most variety of realists allowed that, at least at the margins, international institutions could contribute to rule-based outcomes.²¹ Even offensive realists acknowledge that international institutions ameliorate the cheating problem that anarchy poses.²² Other realists have acknowledged the contributions made by neoliberal institutionalists. As Randall Schweller and Davis Priess observed, “institutions matter because even the most rudimentary actions among states requires agreement on, and some shared understanding of, the basic rules of the game.”²³ In moving from an anarchical world structure to one with coherent international regimes, institutions could contribute to a shift away from Hobbesian outcomes in world politics.

The tangled web of global governance

For the first generation of institutionalist literature, the key problem was how to surmount the transaction costs necessary to agree upon the rules of the game in a world where there were no institutional focal points.²⁴ The proliferation of international law and international organizations reduces the importance of this question, however.²⁵ Table 1 demonstrates the proliferation of global governance structures in recent years. There has clearly been a steady increase in the number of conventional IGOs, autonomous conferences, and multilateral treaties.

²¹ The obvious exception here are structural neorealists and offensive realists. See Waltz 1979 and Mearsheimer 1994/95.

²² Mearsheimer 1994/95. Offensive realists nevertheless dispute the explanatory power of institutionalists, because the latter paradigm cannot account for the effect of relative gains concern.

²³ Schweller and Priess 1997, p. 10.

²⁴ For a review, see Lipson 2004, pp. 1-4.

²⁵ For one empirical account of this growth see Shanks, Jacobson, and Kaplan 1996.

The causes for this increase are clearly varied, ranging from rational to mimetic causes. Robert Keohane argues that increased “issue density” stimulates the demand for new rules, laws and institutions.²⁶ In other instances, the “capture” of international institutional institutions by a powerful state or interest group could spur the creation of countervailing organizational forms.²⁷ The creation of new regimes is a stratagem for rational state actors to cope with situations of uncertainty and complexity.²⁸ Some scholars go further, suggesting that the bounded rationality of international actors explains the existence of such structures. Organizational overlap is created when institutions are created in an evolutionary manner, suggesting that such instances are not planned in advance.²⁹ The world society school posits that actors create new rules and institutions as a mimetic exercise to adopt the forms of powerful institutions – which can explain the expansion of world associations and the proliferation of regional groupings.³⁰ For the concerns of this paper, the relevant fact is that the sources of institutional proliferation are neither strictly endogenous nor strictly opportunistic.³¹

In a world thick with institutions, surmounting the transaction costs of policy coordination is no longer the central problem for institutionalists. The problem now shifts to selecting among a welter of possible governance arrangements.³² As Duncan Snidal and Joseph Jupille point out: “Institutional choice is now more than just a starting

²⁶ Keohane 1982.

²⁷ On this possibility, see Mansfield 1995.

²⁸ Rosendorff and Milner 2001; Koremenos 2005; Benvenisti and Downs 2007.

²⁹ Jupille and Snidal 2005; Snidal and Viola 2006.

³⁰ Meyer et al 1997.

³¹ Benvenisti and Downs 2007, p. 609.

³² Krasner 1991.

point for analysts and becomes the dependent variable to be explained in the context of alternative options.”³³

The current generation of institutionalist work recognizes the existence of multiple and overlapping institutional orders.³⁴ For many issues and/or regions, more than one international organization can claim competency. Kal Raustiala and David Victor label this phenomenon as regime complexes: “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area. Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors.”³⁵ Even researchers who stress the non-rational aspects of global governance agree that some actors engage in explicit efforts to foster strategic inconsistencies within a single regime complex.³⁶

Many scholars, lawyers and practitioners have welcomed the proliferation of international institutions. The literature on regime complexes and the progressive legalization of world politics examines the extent to which these legal overlaps constitute a new source of specific politics and what strategies governments pursue to maneuver in such an institutional environment.³⁷ The editors of *Legalization and World Politics* observe approvingly that: “In general, greater institutionalization implies that institutional rules govern more of the behavior of important actors—more in the sense that behavior previously outside the scope of particular rules is now within that scope or

³³ Jupille and Snidal 2005, p. 2.

³⁴ Aggarwal 1998, 2005; Helfer 1999, 2004; Raustiala and Victor 2004; Jupille and Snidal 2005; Alter and Meunier 2006.

³⁵ Raustiala and Victor, 2004, p. 279.

³⁶ *Ibid.*, p. 298.

³⁷ See the citations in fn. 1.

that behavior that was previously regulated is now more deeply regulated.”³⁸

International lawyers by and large concur with this assessment.³⁹

Policymakers issue calls for ever-increasing institutional thickness.⁴⁰ In the final report of the Princeton Project on National Security, John Ikenberry and Anne-Marie Slaughter concluded:

[H]arnessing cooperation in the 21st century will require many new kinds of institutions, many of them network-based, to provide speed, flexibility, and context-based decision making tailored to specific problems. This combination of institutions, and the habits and practices of cooperation that they would generate – even amid ample day-to-day tensions and diplomatic conflict – would represent the infrastructure of an overall international order that provides the stability and governance capacity necessary to address global problems.⁴¹

The proliferation of international rules, laws, and institutional forms *might* lead to the outcomes predicted by Ikenberry, Slaughter *et al.* As regimes grow into regime complexes, however, there are at least four reasons to believe that the institutionalist logic for how regimes generate rule-based orders will fade in their effect. Institutional proliferation can dilute the power of previously constructed focal points. The existence of nested and overlapping governance arrangements makes it more difficult to detect opportunistic defections from existing regimes. The creation of legal mandates that conflict over time can weaken all actors’ sense of legal obligation. Finally, the increased complexity of global governance structures places a disproportionate strain on countries with more severe resource constraints. All of these reasons create dynamics that favor the great powers more than would be expected under the institutionalist paradigm.

³⁸ Goldstein et al 2001, p. 3.

³⁹ Koskeniemi and Leino 2002; Burke-White 2004; Prost and Clark 2006.

⁴⁰ For recent examples, see Slaughter 2004; Martin 2005; Daalder and Lindsey 2007.

⁴¹ Ikenberry and Slaughter 2006, p. 27. See also Slaughter 1997, 2004.

The proliferation of regime complexes and decision-making fora leads to an inevitable increase in the number of possible focal points around which rules and expectations can converge. This is true even if newer institutions are created to buttress norms emanating from existing regimes. Actors that create new rules, laws and organizations will consciously or unconsciously adapt these regimes to their political, legal, and cultural particularities.⁴² Even if the original intent is to reinforce existing regimes, institutional mutations will take place that can be exploited via forum-shopping as domestic regimes and interests change over time.

The problem, of course, is that by definition focal points should be rare, otherwise it becomes more difficult to develop common conjectures. Indeed, in his original articulation of the idea, Thomas Schelling stressed that uniqueness was essential for focal points to have any coordinating power.⁴³ If the number of constructed focal points increases, then actors in world politics face a larger menu of possible rule sets to negotiate. Logically, actors will seek out the fora where they would expect the most favorable outcome.⁴⁴

Second, the proliferation of international rules, laws, and regimes makes it more difficult to determine when an actor has intentionally defected from a pre-existing regime. Within a single international regime, the focal point should be clear enough for participating actors to recognize when a state is deviating from the agreed-upon rules. If there are multiple, conflicting regimes that govern a particular issue area, then actors can argue that they are complying with the regime that favors their interests the most, even if

⁴² For empirical examples, see Raustiala 1997a; Hafner-Burton 2009

⁴³ “Equally essential is some kind of uniqueness; the man and wife cannot meet at the ‘lost and found’ if the store has several.” Schelling 1960, p. 58.

⁴⁴ Raustiala and Victor 1994, p. 280; Drezner 2007, chapter three; Busch 2007.

they are consciously defecting from other regimes. This undercuts the costs to reputation that ostensibly binds states to keep their international commitments.⁴⁵

Consider, for example, the ongoing trade dispute between the United States and European Union over genetically modified organisms in food.⁴⁶ The US insists that the issue falls under the WTO's purview – because the WTO has embraced rules that require the EU to demonstrate scientific proof that GMOs are unsafe. The EU insists that the issue falls under the 2001 Cartagena Protocol on Biosafety – because that protocol embraces the precautionary principle of regulation. The result is a legal deadlock, with the biosafety protocol's precautionary principle infringing upon the trade regime's norm of scientific proof of harm. It will be difficult to reconcile the legal norms contained within the WTO and Cartagena regimes.⁴⁷ Neither actor suffers any reputational cost from non-compliance with the other actor's favored regime.

Third, the legalization of world politics can paradoxically reduce the sense of legal obligation that improves actor compliance with international regimes. Scholars of international law argue that the principle of *pacta sunt servanda*, buttressed by the general norms and procedures of the international legal system, impose important obligations upon states.⁴⁸ The proliferation of international law, however, can lead to overlapping or even conflicting legal obligations. If one posits an evolutionary model of institutional growth, such an occurrence can take place even if actors are trying to adhere

⁴⁵ Benvenisti and Downs 2007.

⁴⁶ Drezner 2007, chapter six.

⁴⁷ Ibid.

⁴⁸ Snidal and Abbott 2000; Goldstein et al 2001, p. 24-28; Norman and Trachtman 2005; Kelley 2007.

in good faith to prior legal mandates. Legal scholars are increasingly aware of this problem, labeling it the “fragmentation” of international law.⁴⁹

Once conflicting obligations emerge, so does the problem of reconciling such a conflict. As Raustiala and Victor point out, “the international legal system has no formal hierarchy of treaty rules. Nor does it possess well-established mechanisms or principles for resolving the most difficult conflicts across the various elemental regimes.”⁵⁰ This statement reflects the consensus of international legal scholars, despite recent efforts to articulate hierarchical norms. Because of legal equivalence, national governments can legally evade international laws and treaties that conflict with their current interests by seeking out regimes that espouse contradictory norms. Even if governments did not initially intend to act opportunistically when creating overlapping law, shifts in either the international environment or domestic politics can create political incentives for exploiting their existence –and, in the process, erode or shift the *opinio juris* necessary for international law to function properly.

This problem is hardly unique to international law. In American politics, for example, different federal agencies with different mandates will often conflict at the joints of a complex policy problem. This leads to obvious legal or bureaucratic battles. There is at least one important difference between the domestic and international realm, however. In American politics, administrative law and administrative courts function as a means for adjudicating overlapping mandates. No concomitant body of widely-recognized law exists at the international level.⁵¹

⁴⁹ United Nations International Law Commission 2006; Benvenisti and Downs 2007.

⁵⁰ Raustiala and Victor 2004, p. 300. The Vienna Convention on the Law of Treaties provides a limited set of vague norms regarding the hierarchy of law, but there is little observed adherence to these norms.

⁵¹ Krisch 2006.

Finally, and related to the last point, institutional proliferation increases the complexity of legal and technical rules. Negotiating the myriad global governance structures and treaties requires considerable amounts of legal training and technical expertise related to the issue area at hand. This is particularly true when dealing with regime complexes that contain potentially inconsistent elements. Navigating these competing or overlapping global governance structures requires a great deal of investment in specialized human capital – raising the costs of compliance.

Institutional proliferation will encourage all actors to exploit the complex environment to advance their own interests. However, there are strong reasons to believe that international regime complexity endows the great powers with bargaining advantages greater than they would have possessed in a world of coherent international regimes. Consider, for example, the proliferation of focal point institutions. Because powerful states possess greater capabilities for institutional creation and rule promulgation, regime complexity endows them with additional agenda-setting powers relative to a single regime.⁵² For example, Emilie Hafner-Burton looks at the relative performance of overlapping regimes concerning human rights and trade.⁵³ She finds statistical evidence that human rights provisions contained within American and European preferential trade agreements have a more significant effect on human rights performance than the effect of United Nations human rights treaties. In this situation, the ability of the United States and European Union to shift fora away from the United Nations and into trade deals allowed these governments to push for their preferred human rights standards. Even though their overall intent was similar, the specific rights pushed by the US and EU

⁵² Krasner 1991; Voeten 2001.

⁵³ Hafner-Burton 2005.

differed for domestic reasons.⁵⁴ Power, in and of itself, is one way to generate new focal points.

Similarly, international regime complexity also allows great powers to exploit the higher costs of monitoring and enforcement. In theory, institutionalists ascribe monitoring and enforcement activities to international regimes. In practice, most global governance structures rely on the states themselves to report on compliance by themselves and others. Because the great powers possess greater monitoring and enforcement capabilities, they will be more willing to detect outright defections by weaker actors. Power asymmetries, however, will prevent smaller actors from being able to contest similar defections by the great powers. Although non-governmental organizations can potentially ally with weaker actors to provide additional monitoring capabilities,⁵⁵ their capabilities simply do not match those of the great powers.

Competing legal claims also advantage the great powers. States, international governmental organizations, and courts will face complexity in trying to implement policies that lie at the joints of regime complexes.⁵⁶ Politically, however, this situation privileges more powerful actors at the expense of weaker ones. As Eyal Benvenisti and George Downs observe, “A fragmented legal order provides powerful states with much needed flexibility.... the existence of multiple contesting institutions removes the need for them to commit themselves irrevocably to any given one. This helps them to manage risk, and it increases their already substantial bargaining power.”⁵⁷ Legal scholars further acknowledge that a few powerful actors are fully capable of shifting international

⁵⁴ Hafner-Burton 2009.

⁵⁵ On this point, see Raustiala 1997b.

⁵⁶ Aggarwal 2005; Alter and Meunier 2006.

⁵⁷ Benvenisti and Downs 2007, p. 627.

customary law.⁵⁸ Finally, when states bring conflicting legal precedents to a negotiation, the actor with greater enforcement capabilities will have the bargaining advantage. The reason the US and EU benefit so much from the World Trade Organization is not just that they can sanction countries that violate WTO rules – but that other countries have limited sanctioning power in dealing with the legal infractions of either economic superpower.

Finally, the rising costs of legal and technical interpretation also advantage the great powers. Although these transaction costs of interpreting and promulgating rules in a world of regime complexity might seem trivial to great powers with large bureaucracies, they can be imposing for smaller states.⁵⁹ Specialized human capital is a relatively scarce resource in much of the developing world.⁶⁰ It is less problematic for states that command significant resources. This asymmetry in resources allows great power governments to interpret and implement rules in ways that favor their interests. Even relatively large emerging states, like Brazil, have found themselves outmanned in negotiating new institutional arrangements with both the United States and European Union.⁶¹

Figure 1 displays the relationship posited here between institutional thickness and the prevalence of rule-based outcomes. In moving from a purely Hobbesian order to one with a single, well-defined international regime, there is a marked shift away from power-based outcomes to rule-based outcomes. However, as institutional thickness increases, the prevalence of power-based outcomes increases. Contrary to the expectations of global governance scholars and practitioners, after a certain point the

⁵⁸ Norman and Trachtman 2005; Goldsmith and Posner 2005.

⁵⁹ Jordan and Majnoni 2002; Reinhardt 2003; Drezner 2007, chapter five.

proliferation of nested and overlapping regimes and the legalization of world politics actually abets more power-based outcomes.

A world of institutional proliferation turns the realist-institutionalist debate on its head. If it is possible for the major powers to shift policy from one fora to another, an institutionally thick world begins to resemble the neorealist depiction of anarchy. A military hegemon like the United States has the luxury of selecting the fora that maximizes decision-making legitimacy while ensuring the preferred outcome. For example, in the wake of the financial crises of the nineties, the G-7 countries shifted decision-making from the friendly confines of the IMF to the even friendlier confines of the Financial Stability Forum.⁶² If there are only minimal costs to forum-shopping, and if different IGOs promulgate legally equivalent outputs, then institutional thickness, combined with low levels of viscosity, actually increases the likelihood of neorealist policy outcomes.

Policymakers and policy analysts in the United States have become increasingly aware of the ability to exploit institutional proliferation to advance American interests.⁶³ Richard Haass, Director of Policy Planning in the State Department from 2001 to 2003, articulated the Bush administration's approach to global governance as "a la carte multilateralism." According to this doctrine, the United States would choose to adhere to some but not all international agreements, to ensuring that favored multilateral

⁶⁰ Chayes and Chayes 1995. Some governments outsource their legal needs to western law firms well-versed in international law. This mitigates the human capital problem, but replaces it with a budgetary problem.

⁶¹ Woll and Artigas 2007, p. 129.

⁶² Drezner 2007, chapter five.

⁶³ See also Brooks and Wohlforth 2005, p. 515.

arrangements would expanded rather than constrain U.S. options.⁶⁴ The March 2006 National Security Strategy endorses this strategy: The March 2006 National Security Strategy echoes this sentiment, “Where existing institutions can be reformed to meet new challenges, we, along with our partners, must reform them. Where appropriate institutions do not exist, we, along with our partners, must create them.”⁶⁵ Francis Fukuyama explicitly endorses a forum-shopping strategy in promoting the idea of “multilateralism”:⁶⁶

An appropriate agenda for American foreign policy will be to promote a world populated by a large number of overlapping and sometimes competitive international institutions, what can be labeled multi-multilateralism. In this world the United Nations will not disappear, but it would become one of several organizations that fostered legitimate and effective international action.

.... a multiplicity of geographically and functionally overlapping institutions will permit the United States and other powers to “forum shop” for an appropriate instrument to facilitate international cooperation.”

Candidate constraints to forum-shopping

Recent work on international organizations – including the Rational Design project and legalization efforts in the pages of *International Organization* – suggest a welter of possible independent variables to explain the variation in coordination

⁶⁴ Thom Shanker, “White House Says the U.S. Is Not a Loner, Just Choosy,” *New York Times*, July 31, 2001, p. A1; Richard Haass, “Multilateralism for a Global Era,” remarks to Carnegie Endowment for International Peace/Center on International Cooperation Conference, Washington, DC, November 14. Available at <http://www.state.gov/s/p/rem/6134.htm> (accessed October 19, 2006).

⁶⁵ Executive Office of the President, *The National Security Strategy of the United States of America*, March 2006, p. 36. Accessed at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>, January 2008.

⁶⁶ Fukuyama 2006, p. 158, 168.

solutions: membership, scope, centralization, legalization, and legitimacy, among others.⁶⁷

While these variables undeniably affect the origins of international regimes, the shift in focus from forum-creation to forum-shifting renders many of these factors less important. The variables of concern in the study of regime creation seem less salient in looking at institutional choice. Any examination of the cohesion of international choice must recognize that at some point in the past, the relevant actors were able to agree on a set of strategies such that cooperation was the equilibrium outcome.⁶⁸ This means that the costs of monitoring and enforcement could not have been too great. As James Fearon observes: “[T]here is a potentially important *selection effect* behind cases of international negotiations aimed at cooperation. We should observe serious attempts at international cooperation in cases where the monitoring and enforcement dilemmas are probably resolvable (author’s italics).”⁶⁹

This selection effect implies that some factors affecting the origins of international cooperation are not as relevant for explaining the persistence of international regimes. For example, cooperation theorists place a great deal of emphasis on the ability of international regimes to centralize the provision of information to ensure effective monitoring of norm adherence.⁷⁰ While it cannot be questioned that imperfect information about actions can lead to the breakdown of cooperation, it would be odd to claim that states invest in negotiations to reach an agreement without considering how to

⁶⁷ Goldstein et al 2001; Koremenos, Lipson and Snidal 2001.

⁶⁸ See Keohane 1984 for a verbal description of cooperation, and Bendor and Swistak 1997, pp. 297-298 for a more technical description.

⁶⁹ Fearon 1998, p. 279.

⁷⁰ Axelrod and Keohane 1985; Koremenos, Lipson and Snidal 2001; Mitchell 1998; Dai 2002.

monitor it.⁷¹ It would be hard to believe that information provision would provide a barrier to forum-shopping.

Legal complexity and ambiguity could potentially explain why governments are blocked from forum-shopping, regardless of the issue area. Karen Alter and Sophie Meunier argue, for example, that the relationship between EU law and WTO law was ambiguous. Because of the hard legalization of both regimes, resolution of the banana dispute was more difficult than in a world of costless forum-shopping.⁷²

The problem with this argument is that the constraint of legal complexity is often overestimated. For example, both Vinod Aggarwal and Alter & Meunier posit that because international law remains non-hierarchical, it is difficult for one legal agreement to “trump” another. This fact, however, gives great powers an incentive to create new institutions as a way to hedge against unfavorable outcomes in pre-existing institutions. Even when there are differences between hard law and soft law institutions, great powers can manipulate fora on either the rule creation or rule enforcement dimension.⁷³ Through forum-shopping, great powers can dilute or evade even the hardest legal strictures, with non-legal factors playing the pivotal role in determining governance outcomes.

For example, the anti-money laundering regime consists of multiple governance bodies with different degrees of legal standing. The primary international standard – the Financial Action Task Force forty recommendations on money laundering – has achieved widespread compliance. FATF itself is not a treaty-based organization, however, nor is it

⁷¹ Downs, Rocke and Barsoom 1996.

⁷² Alter and Meunier, 2006, p. 377.

⁷³ Manipulating fora during the adjudication phase (if there is one) is a more difficult, though not impossible, task. On this point, see Busch 2007. I am grateful to Joel Trachtman for this observation.

an emanation of one.⁷⁴ Neither is the Financial Stability Forum, the body that recommended the promulgation of the FATF standard. The low level of legalization of both the FSF and FATF was not a hindrance to forum-shifting away from the international financial institutions – indeed, if anything, their membership structure and relative informality were an attractor for the United States and the European Union. In the end, the great powers were able to have the FSF’s recommendations implemented and monitored by the IMF. John Eatwell characterized the outcome accurately: “the IMF is using a treaty-sanctioned surveillance function to examine adherence to codes and principles that are not themselves developed by accountable treaty bodies.”⁷⁵ Despite the high degree of legalization within the IMF, the G-7 countries were able to shift law creation to less formal international bodies.

The hard law/soft law distinction might be useful in discerning between which parts of a functional regime complex are used for rule creation and which parts are used for monitoring and enforcement. However, legalization in and of itself is not a barrier for shifting rule creation to another forum – indeed, hard legalization might promote the proliferation of rule creation in order to dilute the impact of some hard law regimes.⁷⁶

Membership can also be posited as a barrier to forum-shopping through its effects on collective legitimacy. An IGO has high legitimacy if it can enhance the normative desire to comply with the promulgated rules and regulations. Norms derive their power in part from the number of actors that formally accept them.⁷⁷ The greater the number of actors that accept a rule or regulation, the greater the social pressure on recalcitrant actors to

⁷⁴ FATF originated from the 1989 G-7 summit.

⁷⁵ Eatwell 2000, p. 10.

⁷⁶ Goldstein and Martin 2000; Benvenisti and Downs 2007.

change their position.⁷⁸ As an IGO's membership increases, its perceived "democratic" mandate concomitantly increases – thereby enhancing its legitimating power. On this dimension, the more powerful compliance-inducing IGOs are those with the widest membership – such as the United Nations organizations.⁷⁹ Aspiring forum-shoppers must factor in the costs of lost legitimacy if they try to shift governance responsibilities away from legitimate institutions.

The problem with this logic is that it ignores the existence of alternative sources of collective legitimacy. Membership affects process legitimacy, under the assumption that an IGO with more participants confers greater authority. Beyond membership, however, IGOs can derive process legitimacy from other factors, such as technical expertise, a track record of prior success, or simply the aggregate power of member governments.⁸⁰ In some cases, the democratic character of the member states in question affects legitimacy.⁸¹ For example, the U.S. opted to launch its 1999 bombing campaign against Serbia with the backing of NATO rather than the United Nations Security Council. This action generated minimal costs in terms of legitimacy; indeed, UN Secretary General Kofi Annan retroactively gave his blessing to the operation.⁸² One could argue that was for two reasons. First, in terms of military power, expertise, and prior success at peace enforcement, NATO had greater legitimacy than the United Nations, despite the latter IGO's advantage in membership. Second, Serbia's specific

⁷⁷ Finnemore and Sikkink 1998. As will be seen, this is not to imply that membership size is the *only* source of legitimacy in world politics.

⁷⁸ Johnston 2003.

⁷⁹ Steffek 2003. It is certainly debatable whether the one-country, one vote principle used in most IGOs is truly democratic – however, the question here is whether the *perception* of democracy is present.

⁸⁰ Voeten 2005.

⁸¹ Pevehouse 2002.

⁸² Prantl 2006.

reputation as a transgressive actor during the Balkan Wars endowed NATO with a greater moral legitimacy.⁸³

Theoretical factors that affect the design and effectiveness of regime complexes do not significantly affect their viscosity. Indeed, in looking at a range of empirical cases from the global political economy, there appear to be few barriers to forum-shifting when the great powers want to change the content or enforcement of the rules.⁸⁴ The next two sections look in greater detail at one example of high viscosity to see what lessons, if any, can be generalized from it.

The aftermath of the Doha Declaration⁸⁵

The intellectual property rights (IPR) regime complex for pharmaceuticals represents a tough test for the arguments made in this paper. The World Trade Organization is the center of gravity for the IPR regime complex, and has the reputation of being a high-functioning organization. Its Dispute Settlement Understanding (DSU) represents the gold standard of international judicial power. The humanitarian norms invoked on the issue of pharmaceutical patents are singularly powerful. Once enshrined, global civil society scholars posited that it would be extremely difficult for even powerful

⁸³ NATO's success in halting Serbian actions in Kosovo highlights another point – regardless of process legitimacy, there is also the legitimacy of outcomes. If great powers deviate from established international regimes, but succeed in achieving their stated goals, that success can *ex post* legitimate their actions. For example, despite the UN Security Council's refusal to authorize Operation Iraqi Freedom, Security Council Resolution 1483, passed in May 2003, conferred legitimacy by recognizing Great Britain and the United States as the "Authority" in Iraq. See <http://www.casi.org.uk/info/undocs/scres/2003/res1483.pdf> (accessed November 2006).

⁸⁴ Benvenisti and Downs 2007; Drezner 2007.

⁸⁵ This section draws from Drezner 2007.

states to evade their normative power.⁸⁶ If any regime should have displayed persistently high levels of viscosity, it should have been this one.

In November 2001, at the Doha Ministerial meeting of the World Trade Organization (WTO), member governments responded to concerns that the trade-related intellectual property rights regime (TRIPS) was too stringent in the protection of patented pharmaceuticals. Members signed off on the “Declaration on the TRIPS Agreement and Public Health” or Doha declaration. This declaration stated that: “[T]he TRIPS Agreement does not and should not prevent members from taking measures to protect public health... the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all.”⁸⁷ In August 2003, an additional WTO agreement was reached to clarify remaining ambiguities from the Doha declaration.⁸⁸ In December 2005 these agreements were codified through a permanent amendment to the TRIPS accord.⁸⁹ These events were the culmination of a sustained campaign by global civil society designed to scale back intellectual property restrictions on the production and distribution of generic drugs to the developing world.⁹⁰

Neither the United States nor the European Union wanted the Doha Declaration. The American negotiating position was that the original TRIPS accord *already* contained

⁸⁶ Keck and Sikkink 1998; Sell 2003; Prakash and Sell 2004.

⁸⁷ “Declaration on the TRIPS Agreement and Public Health,” http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

⁸⁸ “Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health”. 30 August 2003. Accessed at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm, 11 August 2005.

⁸⁹ “Amendment of the TRIPS Agreement,” 6 December 2005. Accessed at http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc, December 2005.

⁹⁰ Epstein and Chen 2002; Sell 2003; Prakash and Sell 2004;

public health exceptions for epidemics and the like.⁹¹ Furthermore, the U.S. wanted any exception to be limited to poor countries with weak state institutions that suffer from epidemics – but that the carve-out should not go any further. Whereas the final declaration actually said that the TRIPS accord, “does not and should not prevent members from taking measures to protect public health,” the U.S. preferred narrower language, asserting a right “to take measures necessary to address these public health crises, in particular to secure affordable access to medicines.”⁹² The European Commission’s position on the TRIPS accord was similar.⁹³

If the story ended at Doha in November 2001, then it could be argued that viscosity in global governance represents an effective brake against the dynamics discussed here about the problems of institutional proliferation and fragmentation. However, the story does not end. After the Doha ministerial, however, the regulation of IPR has shifted back towards the great powers’ preferred set of outcomes. This has happened largely because of the proliferation of new institutional forms – namely, bilateral free trade agreements.⁹⁴

Prior to the Doha Declaration, developed countries had pushed for the inclusion of stronger IPR protections than TRIPS – referred colloquially as “TRIPS-plus” – in trade agreements outside of the WTO framework.⁹⁵ After Doha, the developed countries – led by the United States – began pursuing this tactic with greater fervor. The European Commission and the European Free Trade Area both inserted TRIPS-plus IPR provisions

⁹¹ Office of the USTR, “TRIPs and Health Emergencies,” 10 November 2001. Accessed at http://www.ustr.gov/Document_Library/Press_Releases/2001/November/TRIPs_Health_Emergencies.html, 10 August 2005. See, in particular, articles 7, 8, 30, and 31 of the original TRIPS agreement.

⁹² Elizabeth Olson, “Drug Issue Casts a Shadow on Trade Talks,” *New York Times*, 2 November 2001.

⁹³ European Commission, “Agreement on Intellectual Property Rights Relating to Trade and Pharmaceutical Patents,” accessed at <http://europa.eu.int/scadplus/leg/en/lvb/l21168.htm>, 11 August 2005.

⁹⁴ It should be noted that these FTAs were used to push other standards as well. See Hafner-Burton n.d.

into their free trade agreements with developing countries.⁹⁶ EU agreements with Tunisia and Morocco, for example, included provisions requiring IPR protection and enforcement “in line with the highest international standards.”

The United States was equally persistent in this practice. Table 2 demonstrates the TRIPS-plus IPR provisions in U.S. trade agreements that have been negotiated since 2000. In all of these cases, TRIPS-plus provisions were inserted into the text of the agreement. Beyond the use of FTAs, the U.S. has also used the carrot of bilateral investment treaties in order to secure bilateral intellectual property agreements that can include TRIPS-plus agreements.⁹⁷ Over time, the viscosity of global governance on intellectual property rights has lessened.

The TRIPS-plus provisions contained in FTAs would appear to conflict with the norms embedded within the Doha Declaration. Indeed, most of these FTAs contained side-letters specifically mentioning that nothing in the FTA should infringe on the Doha Declaration. For example, the side letter to CAFTA states that the treaty’s intellectual property provisions “do not affect a Party’s ability to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS.”⁹⁸ The Doha Declaration is also explicitly mentioned in the understanding. Frederick Abbott argues, however, that these side agreements “are

⁹⁵ Drahos 2001.

⁹⁶ Ibid., p. 13; see also European Commission, “EU Strategy to Enforce Intellectual Property Rights in Third Countries,” MEMO/04/255, 10 November 2004. For information on EFTA trade pacts, see Julien Bernhard, “Deprive Doha of All Substance,” August 2004, at http://www.evb.ch/cm_data/Deprive_Doha.pdf (accessed 12 August 2005).

⁹⁷ Drahos 2001, p. 6.

⁹⁸ Office of the USTR, “Understanding Regarding Certain Public Health Measures,” 5 August 2004. Accessed at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file697_3975.pdf, 9 August 2005.

drafted in a substantially more restrictive way” than the Doha Declaration itself.⁹⁹ At a minimum, the combination of legal texts introduces legal uncertainty, constraining the flexibility of the TRIPS accord desired by developing countries and global civil society.

As Table 2 demonstrates, the most prominent of the TRIPS-plus provisions is the protection of test data.¹⁰⁰ To satisfy government regulations, drug manufacturers are required to undergo significant amounts of testing to demonstrate safety and effectiveness, imposing additional costs on first-mover manufacturers. Data protection prevents other drug manufacturers from relying on that data to obtain approval for drugs that are chemically identical to the original patent-holder. The United States ensures data protection for five years; EU member states offer between six to ten years. In 2005, the USTR stated in its Special 301 Report to Congress that data protection would be “one of the key implementation priorities” for the executive branch. The report went on to identify deficiencies in data protection for pharmaceuticals testing in more than twenty countries, including China, India, Russia, Mexico, and Thailand.¹⁰¹ In the past, even this implicit threat of economic coercion has been sufficient to force dependent allies into altering their regulations on these issues.¹⁰² By ensuring the protection of test data in these FTAs, developed countries have successfully extended the scope of patent protections.

Both proponents and opponents of patent protection on pharmaceuticals agree that the ground has shifted since Doha. Many of the same global civil society scholars and activists who claimed a victory at Doha acknowledge that the proliferation of “TRIPS-

⁹⁹ Abbott 2005, p. 352.

¹⁰⁰ Correa 2006.

¹⁰¹ Office of the USTR, “Special 301 Report,” April 2005. Quotation from p. 6.

¹⁰² Drezner 2003.

plus” provisions in free trade agreements undercuts the public health norm established at Doha.¹⁰³ Frederick Abbott, who under the auspices of the Quaker United Nations Office provided legal assistance to developing countries in TRIPS negotiations, concludes that the developing world and NGOs have, “substantially increased their negotiating effectiveness in Geneva but have yet to come to grips with the U.S. forum-shifting strategy.”¹⁰⁴ In a May 2004 letter to U.S. Trade Representative Robert Zoellick, approximately 90 NGOs protested the inclusion of these TRIPS-plus provisions in FTAs, stating, “Intellectual property provisions in US free trade agreements already completed or currently being negotiated will severely delay and restrict generic competition.... through complex provisions related to market authorization and registration of medicines.”¹⁰⁵ In a November 2006 report, Oxfam International declared that, “every FTA signed or currently under negotiation has disregarded the fundamental obligations of the Declaration by maintaining or imposing higher levels of intellectual property protection.”¹⁰⁶

It should be stressed that these developments represent only a second-best outcome for the developed countries.¹⁰⁷ Given their preference orderings, their ideal outcome would have been for the Doha Declaration to never have been signed in the first place. Since Doha, however, the United States and European countries have successfully pursued a forum-shopping strategy to achieve their desired ends. The proliferation of laws and institutions since the Doha Declaration has shifted the status quo closer to the U.S.-preferred outcome; one in which flexibility is only invoked in times of crisis

¹⁰³ Sell 2003, chapter six; Abbott 2005.

¹⁰⁴ Abbott, “The WTO Medicines Decision,” p. 317.

¹⁰⁵ “Letter from 90 NGOs to U.S. Trade Representative Robert Zoellick,” 27 May 2004. Accessed at <http://www.cptech.org/ip/health/trade/ngos05272004.html>, 11 August 2005.

epidemics. At the same time, this proliferation has increased the degree of legal uncertainty developing countries must face when they contemplate this issue. The final outcome does not precisely fit with great power preferences; however, a strategy of institutional proliferation has allowed these states to get far more than impartial observers would have expected in 2001.

Interdiction on the high seas

In December 2002, acting on intelligence from the United States, a Spanish frigate boarded the freighter *So San* and discovered fifteen Scud-type missiles bound for Yemen from North Korea. Yemeni officials demanded that the missiles be delivered. That same month, the Bush administration had emphasized in its National Strategy to Combat Weapons of Mass Destruction (WMD) that, “effective interdiction is a critical part of the U.S. strategy to combat WMD and their delivery means.”¹⁰⁸ Despite this affirmative statement, a reluctant United States complied with the Yemeni request.

An important reason for this decision was the desire not to violate international norms regarding the interdiction of cargo on the high seas. In explaining the decision, White House spokesman Ari Fleischer stated that, “There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea... in this instance there is no clear authority to seize the shipment of Scud missiles

¹⁰⁶ Oxfam International 2006, p. 14.

¹⁰⁷ I am grateful to Larry Helfer for making this point.

¹⁰⁸ The White House, “National Strategy to Combat Weapons of Mass Destruction,” December 2003, p. 2.

from North Korea to Yemen. And therefore, the merchant vessel is being released.”¹⁰⁹ In his memoir, undersecretary of State John Bolton complained that “fear from the lawyers had caused panic,” preventing a seizure of the weapons.¹¹⁰

Prior to 2002, the rules regarding interdiction on the high seas were relatively clear and straightforward. As Douglas Guilfoyle writes, “With only a few limited exceptions... it is clear that a warship or law-enforcement vessel may not board a foreign vessel in international waters without flag state consent.”¹¹¹ This principle is codified in article six of the 1958 High Seas Convention and article 92 of the Law of the Sea Treaty (LOST). Despite its failure to ratify LOST, the United States embraced this norm when the Reagan administration pledged in 1983 to abide by most provisions of LOST.¹¹² The motivation for U.S. adherence derives from the substantial benefits that come from the unimpeded movement of commercial and military shipping.¹¹³ In the aftermath of the September 11th terrorist attacks and North Korea’s decision to pursue uranium enrichment, however, the United States became concerned about the shipment of WMD materials to terrorist groups. The inability to seize the *So San*’s cargo highlighted the U.S. dissatisfaction with the status quo.

The incident triggered a sustained effort, spearheaded by the United States, to carve out another exception to the law of the sea that permitted the interdiction of WMD materials. To do this, the United States created a new regime that ratcheted up

¹⁰⁹ Press briefing by Ari Fleischer, December 11, 2002: accessed at <http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html#2>, January 2008.

¹¹⁰ Bolton 2007, p. 121. The legal constraint was not the only factor in U.S. decision-making; Yemen’s status as an ally in the war on terror played a part, as did the Bush administration’s desire to remain focused on building a coalition of the willing to act against Saddam Hussein.

¹¹¹ Guilfoyle 2007, p. 4-5. The exceptions deal with combating the slave trade, piracy, and narcotics trafficking. Legal scholars agree that there is significantly greater latitude if a ship is within a state’s coastal waters or exclusive economic zone.

¹¹² Taft 2004.

interdiction capabilities. In June 2003, President Bush announced the creation of the Proliferation Security Initiative (PSI) to “aims to enhance and expand our efforts to prevent the flow of WMD, their delivery systems, and related materials on the ground, in the air, and at sea, to and from states and non-state actors of proliferation concern.”¹¹⁴ Two weeks later, the “core group” of the PSI met in Madrid two weeks later to hammer out the details of the initiative. The U.S. initially kept the Core Group limited to eleven countries, all of them treaty allies of the United States. The idea was to craft a strong set of interdiction norms before expanding the regime.¹¹⁵

By September 2003, PSI members had agreed on a Statement of Interdiction Principles to serve as the basis for further cooperation and activity.¹¹⁶ The principles – based largely on U.S. Defense Department guidance – encouraged members to “strengthen their relevant national legal authorities” and “strengthen when necessary relevant international law and frameworks” to support interdiction efforts.¹¹⁷ On the high seas, the principles urged members to “seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.” As one research report observed: “the PSI relies on the ‘broken tail-light scenario:’ officials look for all available options to stop suspected transport of WMD or WMD-related items.”¹¹⁸ PSI activities have not been advertised, but the initiative was credited with halting the shipment of centrifuges to Libya in 2003.

¹¹³ Byers 2004, p. 527.

¹¹⁴ State Department, “Proliferation Security Initiative: Frequently Asked Questions.” Accessed at <http://www.state.gov/t/isn/rls/fs/23764.htm>, January 2008.

¹¹⁵ Bolton 2007, pp. 122-126.

¹¹⁶ They can be accessed at <http://www.state.gov/t/isn/rls/fs/23764.htm>.

¹¹⁷ Ibid. See also Bolton 2007, p. 125.

¹¹⁸ Squassoni 2006, p. 4.

U.S. officials have stated that between September 2004 and May 2005, the PSI acted on eleven separate occasions; between April 2005 and April 2006, the PSI was activated two dozen times.¹¹⁹

Legal scholars were dubious about whether U.S. ambitions for PSI would be consistent with the Law of the Sea Treaty.¹²⁰ Beyond the PSI, therefore, the United States has also shifted the international legal status quo on the issue through three other mechanisms. First, the United States was able to secure unanimous passage of UN Security Council Resolution 1540. The resolution called upon all UN members to, “take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.”¹²¹ The State Department has stated publicly that it views 1540 as sufficient authority for a country to cooperate with PSI activities. Beyond 1540, the Security Council has passed three additional resolutions – 1718, 1737 and 1747 – that authorized specific interdiction efforts against North Korea and Iran.

Second, the United States signed a series of bilateral treaties with “flag of convenience” states in order to facilitate interdiction on the high seas. Most of these agreements require the United States to request permission from the flag state of its intent to board and search a suspect vessel. If the country assents, *or does not reply within a few hours*, permission is assumed to be granted.¹²² Between 2004 and 2007, the U.S. signed eight of these treaties, including four with the largest flag of convenience states:

¹¹⁹ Holmes and Winner, p. 284, 294.

¹²⁰ Byers 2004; Cotton 2005.

¹²¹ <http://daccess-ods.un.org/TMP/1582099.html>.

¹²² Two hours for Liberia and Panama; four hours for the Marshall Islands. Ahlström 2005, p. 756.

Cyprus, Liberia, Malta and Panama.¹²³ Combined with the PSI Core Group members, by the end of 2007 the United States possessed the expedited ability to interdict more than half of world shipping.¹²⁴

Third, in October 2005 the International Maritime Organization agreed upon a new Suppression of Unlawful Acts (SUA) protocol.¹²⁵ The new SUA protocol amends the pre-existing SUA to outlaw the shipment of WMDs and WMD materiel. This includes “dual-use” materials that “significantly contributes to the design, manufacture, or delivery” of weapons of mass destruction. The protocol will enter into force once the requisite number of states ratifies it. The United States declared that the SUA protocol would, “provide an international legal basis to impede and prosecute the trafficking of WMDs, their delivery systems and related materials on the high seas.”¹²⁶ Legal and security scholars concur with this assessment.¹²⁷

The combined effect of these measures on the legal state of play is a subject of debate. China and India have pushed back against U.S. efforts to create an international norm permitting WMD interdiction on the high seas, particularly via the PSI. China refused to approve 1540 until the United States removed any explicit mention of the Proliferation Security Initiative. Beijing also rejected PSI participation, expressing concerns about its legality. Because of its nuclear history, India has been wary of embracing the PSI, for fear that the new regime will be targeted against its nuclear program.

¹²³ The full list is available at <http://www.state.gov/t/isn/c12386.htm> (accessed January 2008).

¹²⁴ Holmes and Winner 2007, p. 284.

¹²⁵ http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686, accessed January 2008.

¹²⁶ Quoted in Guilfoyle 2007, p. 28.

¹²⁷ Doolin 2006; Holmes and Winner 2007.

Despite this resistance, however, the new counterproliferation norm has attracted an increasing number of adherents. More than 65 countries attended the June 2006 meeting in Warsaw commemorating PSI's third anniversary. By the end of 2007, more than eighty countries, including Russia, had publicly committed to the initiative. The United Nations adopted a cautiously optimistic attitude towards the PSI. The High-Level Panel on Threats, Challenges and Change requested all member governments to support the PSI. Secretary-General Kofi Annan stated that the PSI would "fill a gap in our defenses."¹²⁸ There have also been concrete effects on state behavior. In 2005, Denmark's ambassador to the United States, asserted that "the shipment of missiles has fallen significantly in the lifetime of PSI."¹²⁹

Several legal scholars argue that the proliferation of new rules, initiatives and practices will alter customary international law. As early as 2003, a critical legal analysis of the new regime conceded that, "a customary international law norm against trafficking in nuclear materials may have formed."¹³⁰ As more countries embrace the PSI, legal commentary on the regime has been more accepting of an interdiction norm. Joel Doolin argues that, "over time, PSI will make seizure of weapons of mass destruction at sea an international norm." In evaluating PSI and other efforts, Douglas Guilfoyle concludes, "The PSI may not be an organization, but it is certainly a means of organization: it is a continually evolving strategy for the coordination of existing jurisdictional bases for interdiction and the creation of new ones. This mere 'activity' has already had legal

¹²⁸ State Department Bureau of Nonproliferation, "Proliferation Security Initiative Frequently Asked Questions," May 2005. Accessed at <http://www.state.gov/t/isn/rls/fs/46839.htm>, January 2008. Arms Control Association, "The Proliferation Security Initiative (PSI) At a Glance," October 2007. Accessed at <http://www.armscontrol.org/factsheets/PSI.asp>, January 2008.

¹²⁹ Arms Control Association, "The Proliferation Security Initiative (PSI) At a Glance," October 2007.

¹³⁰ Friedman 2003, p. 5.

effects.”¹³¹ Some security scholars go even further, arguing that these efforts to create a new interdiction regime have created a new norm that permits the preventive use of force short of war as a means to forestall proliferation.¹³²

To be sure, the current situation remains a second-best outcome for the United States. The first-best option would be an explicit amendment of the Law of the Sea Treaty categorizing WMD proliferation with piracy and slavery as a clear exception to the right of free navigation. Given continued U.S. failure to ratify the treaty, this outcome is highly unlikely. Nevertheless, compared with the regime complex on this issue in 2002, the United States has managed to shift the status quo towards its ideal point.

Conclusion

This paper argues that the proliferation of international rules, laws, and organizational forms does not necessarily lead to an increase in rule-based outcomes. Institutional thickening weakens the power of pre-existing focal points, raises the costs and complexity of monitoring and compliance, and can create conflicting legal obligations at the global level. This situation endows great powers with fewer constraints and greater capabilities to affect outcomes. Paradoxically, after a certain point the proliferation of global governance structures shifts the international system towards a more Hobbesian environment.

¹³¹ Doolin 2006, 31; Guilfoyle 2007, p. 35.

¹³² Dombrowski and Payne 2006; Shulman 2006; Holmes and Winner 2007.

The results in this paper are preliminary, and clearly further empirical research is warranted to investigate the aggregate effects of institutional proliferation. The cases presented in this paper are suggestive, however, of the effects delineated above. The post-Doha regime for intellectual property rights demonstrates that even the presence of strong pre-existing regimes do not constrain great powers in an institutionally complex world. The development of a counterproliferation norm to permit WMD interdiction on the high seas demonstrates that, even in regimes with high degrees of legalization, viscosity remains low. To be sure, in both cases pre-existing institutions imposed residual constraints on great power action. Those constraints, however, are considerably more lax than institutionalists would have predicted *ex ante*. Even in regimes where international institutions have compulsory jurisdiction – such as the International Criminal Court – powerful actors have developed new institutions and new techniques to shift status quo policies.¹³³

In a unipolar world, the long-term effects of this strategy are not necessarily threatening to world order. The hegemon can use an institutional proliferation strategy as a means of adjusting shifting regime complexes closer to their preferred policy positions. In numerous issue areas, the United States has switched fora from what it perceived to be an ineffective or weak regime to a club regime inhabited by like-minded states.¹³⁴ Lloyd Gruber and Leslie Johns have observed that states with attractive forum-shopping options create an incentive for pre-existing organizations – and member states in those organizations – to skew their policies towards those states.¹³⁵

¹³³ On the ICC, see Weller 2002, Scheffer 2005 and Kelley 2007.

¹³⁴ Krisch 2005; Benvenisti and Downs 2007; Drezner 2007.

¹³⁵ Gruber 2000; Johns 2007.

Forum-shopping and evasion are not costless, however. The problems emerge when more than one state has the power to pursue this strategy. Over time, successful forum-shopping creates an incentive for all great powers to build up their forum-shifting options. Movement towards a multipolar distribution of power will encourage other states to act in a manner similar to the United States.¹³⁶ The European Commission is looking to promote its own policy preferences by “promoting European standards internationally through international organization and bilateral treaties.”¹³⁷ During the current financial crisis, it was the Europeans who suggested convening the G-20 rather than the G-7 to craft a policy response, bolstering one grouping at the expense of the other.¹³⁸ China has begun to create new institutional structures outside of America’s reach. The Shanghai Cooperation Organization, for example, consists of China, Russia, and the six Central Asian republics, and has facilitated military and energy cooperation among the member states.¹³⁹ At their June 2006 Beijing summit, Iranian President Mahmoud Ahmadinejad proposed that the SCO act to, “ward off the threats of domineering powers to use their force against and interfere in the affairs of other states.”¹⁴⁰ Beijing is fostering other international bodies, including the Forum on China-Africa Cooperation and the East Asia Summit.

In a multipolar era, institutional proliferation can shift global governance structures from a Lockean world of binding rules to a Hobbesian world of plastic rules. As global governance structures become more fragmented, components of each regime

¹³⁶ See Wilson and Purushothaman 2003.

¹³⁷ Quoted in “EU wants rest of world to adopt its rules,” *Financial Times*, February 18, 2007.

¹³⁸ Bruce Stokes, “G-20 Summit Just a Down Payment,” *National Journal*, November 15, 2008, pp. 61-63.

¹³⁹ Barma, Ratner and Weber 2007.

¹⁴⁰ Oliver August, “Iran in Talks to Join Alliance Against West,” *London Times*, June 6, 2006. Accessed at http://www.timesonline.co.uk/tol/news/world/middle_east/article675372.ece, October 2007.

complex can develop reputations for “organized hypocrisy.”¹⁴¹ A hypocritical IGO generates policies that are at odds with great power interests, decoupled from stated norms, or so inchoate that they cannot be implemented or enforced. Even if these challenges are currently at nascent levels, over time the forum-shopping phenomenon can contribute to a tragedy of the global institutional commons. To paraphrase Montesquieu, hypocritical regimes weaken necessary regimes. As more and more institutions are created, each of them will find their legitimacy devalued when forum-shopping occurs. With each state willing to walk away from global governance structures that fail to advance their interests, all of these structures will experience a decline in both legitimacy and effectiveness. In the long run, it appears that an institutionally thick world bears more than a passing resemblance to the neorealist conception of anarchy. Proliferation can lead to a tragedy of the global institutional commons.

¹⁴¹ On this concept, see Krasner 1999; Lipson 2007.

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TABLE 1
GROWTH IN GLOBAL GOVERNANCE STRUCTURES

Type of international regime	1981	1993	2003
International bodies	863	945	993
Subsidiaries or emanations of international bodies	590	1100	1467
Autonomous international conferences	34	91	133
Multilateral treaties	1419	1812	2323
TOTAL	2906	3948	4916

Source: Union of International Organizations, data accessed at <http://www.uia.org/statistics/organizations/ytb299.php>.

TABLE 2
IPR PROVISIONS IN AMERICAN FTAs, 2000-2006

FTA	Mandatory patent extensions	Protection of test data	Marketing restrictions	Limits on parallel imports or compulsory licensing
Jordan		X		X
Singapore	X	X	X	X
Chile	X	X	X	
Australia		X	X	X
Morocco	X	X	X	X
CAFTA	X	X	X	
Bahrain	X	X	X	
Peru	X	X	X	
Oman*		X		
Colombia*	X	X	X	
Thailand*		X		X

*FTA negotiated but not ratified

Sources: Committee on Government Reform minority staff, U.S. House of Representatives, *Trade Agreements and Access to Medications Under the Bush Administration*, Washington, DC, June 2005; Oxfam, *Patents versus Patients: Five Years after the Doha Declaration*, Oxfam Briefing Paper #95, November 2006; Consumer Project on Technology, "Health Care, Regional Trade Agreements, and Intellectual Property," accessed at <http://www.cptech.org/ip/health/trade/>, 11 January 2007.

FIGURE 1
INSTITUTIONAL PROLIFERATION AND WORLD ORDER

