

## **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, 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 paper suggests a contrary position: institutional thickness paradoxically weakens global governance structures. 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 rules, laws and institutional forms in world politics. The 2008 financial crisis and subsequent Great Recession have spurred additional calls for new regimes – and new responsibilities for older regimes.<sup>1</sup> 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.<sup>2</sup> Some 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.<sup>3</sup> Just as clearly, however, multiple actors in international relations have demonstrated a willingness to engage in forum-shopping in order to advance their interests on the global stage.<sup>4</sup> 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?

This paper argues that the growth of global governance can have a paradoxical effect on world order. Institutional thickening eventually erodes the causal mechanisms

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<sup>1</sup> Mattoo and Subramanian 2008; Group of Twenty 2009; Group of Thirty 2009.

<sup>2</sup> Goldstein et al 2001; Raustiala and Victor 2004; Aggarwal 2005; Alter and Meunier 2006.

<sup>3</sup> Alter and Meunier 2009.

<sup>4</sup> Gruber 2000; Drezner 2007; Benvenisti and Downs 2007; Busch 2007.

that – according to the institutionalist paradigm – foster cooperation in an anarchic world. As global governance structures morph from international regimes to regime complexes, legal and organizational proliferation can shift world politics from rule-based outcomes to power-based outcomes. Proliferation enhances the ability of powerful states to engage in forum-shopping relative to other actors. Weaker actors, as well as the great powers, can and will avail themselves of forum-shopping. There are a variety of reasons, however, why international regime complexity stacks the deck in favor of the strong over the weak to a greater degree than the status quo ante. In the process, institutional proliferation erodes the causal mechanisms through which regimes ostensibly strengthen international cooperation.

If powerful actors are constrained from forum-shopping, then the erosion of global governance structures would be ameliorated. 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, raising the costs of forum-shifting. It is worth contemplating whether some regime complexes possess 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.<sup>5</sup> To assess these possible constraints, this paper looks at two regime complexes that would be considered to possess high degrees of viscosity – the

public health amendment to the TRIPS accord, 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 seven 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 great power response to the Doha Declaration on TRIPS and public health to determine how great powers worked around a hard law constraint on pharmaceutical patents. 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 why institutional proliferation can erode global governance, it is worth recalling why international institutions are considered to be significant in the first

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<sup>5</sup> Koremenos, Lipson and Snidal 2003.

place. In the debate between realists and institutionalists from a generation ago, the latter group of theorists articulated clear causal mechanisms through which international regimes and institutions affected world politics.<sup>6</sup> Although this scholarly debate ran its course some time ago, the institutionalist logic permanently shifted the terms of debate.

Neoliberal institutionalism posited that cooperation was possible in an anarchic world populated by states with unequal amounts of power.<sup>7</sup> According to this paradigm, international institutions are a key mechanism through which cooperation becomes possible. One way institutions facilitate cooperation is by constructing “focal points” for agreement between states in the international system.<sup>8</sup> This logic borrowed 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 parallel argument about international regimes in world politics.<sup>9</sup> By creating a common set of rules or norms for all participants, institutions foster the convergent expectations that define cooperative behavior and define the conditions under which when states are labeled as defectors from the agreed-upon rules.

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 famous definition for international regimes: “implicit or explicit principles, norms, rules and decision-making procedures around which actors’

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<sup>6</sup> See Baldwin 1993 for a summary of this debate.

<sup>7</sup> 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.

<sup>8</sup> Schelling 1960.

<sup>9</sup> On structure-induced equilibrium, see Shepsle 1979. See Milner 1997, and Martin and Simmons 1998, for conscious translations of this concept to world politics.

expectations converge in a given area of international relations.”<sup>10</sup> 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.”<sup>11</sup>

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 norms or principles. The result is a Hobbesian order commonly associated with the realist paradigm.<sup>12</sup> 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.<sup>13</sup>

Institutionalist fully acknowledge that power plays a role in determining rule-based outcomes as well.<sup>14</sup> 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 states’ power (and interest) without reference to the institutions that connect them.”<sup>15</sup> Institutions act as binding mechanisms that permit displays of credible

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<sup>10</sup> Krasner 1983, p. 2. See also North 1991, p. 97

<sup>11</sup> Keohane and Martin 1995, p. 45.

<sup>12</sup> Waltz 1979; Mearsheimer 1994/95, 2001; Wendt 1999, chapter six.

<sup>13</sup> Carr 1939 [1964]; Drezner 2003.

<sup>14</sup> Indeed, Oran Young made this point in an early article about international regimes. See Young 1980, p. 338.

<sup>15</sup> Snidal 1996, p. 127.

commitment, for great powers and small states alike.<sup>16</sup> In pledging to abide by clearly-defined rules, great powers make it easier for others to detect their own noncooperative behavior. They 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.<sup>17</sup> In the case of the World Trade Organization, for example, the spread of hard law has made it increasingly difficult for governments to waive obligations by invoking escape clauses or safeguards.<sup>18</sup> Even if the strong write the rules, institutionalists argue, those rules provide certainty and protection for the weak as compared to a lawless world. For smaller and weaker actors, institutions provide an imperfect shield against the vicissitudes of a purely Hobbesian order.<sup>19</sup>

Most variety of realists allow that, at least at the margins, international institutions enable rule-based outcomes. Mainstream realist scholars acknowledged that international regimes persist despite changes in the underlying distribution of power.<sup>20</sup> Even offensive realists acknowledge that international institutions ameliorate the cheating problem that anarchy poses.<sup>21</sup> Other realists have acknowledged the contributions made by neoliberal institutionalists.<sup>22</sup> For any given issue area, moving from an anarchical world structure to one with coherent international regimes shift world politics from Hobbesian to Lockean outcomes.

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<sup>16</sup> Ikenberry 2000.

<sup>17</sup> Snidal and Abbott 2000; Goldstein and Martin 2000.

<sup>18</sup> Goldstein and Martin 2000, p. 619.

<sup>19</sup> Ikenberry 2000; Reus-Smit 2004; Kelley 2007.

<sup>20</sup> Krasner 1983, pp. 357-361. See also Hasenclever, Mayer and Rittberger 1996, p. 187.

<sup>21</sup> 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.

<sup>22</sup> Schweller and Priess 1997, p. 10.

## The tangled web of global governance

For the first generation of institutionalist literature, the animating 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.<sup>23</sup> The proliferation of international law and international organizations reduces the importance of this question, however.<sup>24</sup> Table 1 demonstrates the proliferation of global governance structures in recent years. There has clearly been a steady increase in the number of conventional international governmental organizations (IGOs), autonomous conferences, and multilateral treaties.

The causes for institutional proliferation are variegated, ranging from functional to opportunistic to mimetic causes.<sup>25</sup> An increase in “issue density” undoubtedly stimulates the demand for new rules, laws and institutions.<sup>26</sup> In other instances, the “capture” of international institutional institutions by a powerful state or interest group could spur the creation of countervailing organizational forms.<sup>27</sup> The creation of new regimes is a stratagem for rational state actors to cope with situations of uncertainty and complexity.<sup>28</sup> 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 necessarily planned in advance.<sup>29</sup> The world society school posits that actors create new rules and institutions as

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<sup>23</sup> For a review, see Lipson 2004, pp. 1-4.

<sup>24</sup> For one empirical account of this growth see Shanks, Jacobson, and Kaplan 1996.

<sup>25</sup> 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. See, for example, Raustiala and Victor 2004, p. 298.

<sup>26</sup> Keohane 1982.

<sup>27</sup> On this possibility, see Mansfield 1995.

<sup>28</sup> Rosendorff and Milner 2001; Koremenos 2005; Benvenisti and Downs 2007.

<sup>29</sup> Jupille and Snidal 2005; Snidal and Viola 2006.

a mimetic exercise to adopt the forms of powerful institutions – which can explain the expansion of world associations and the proliferation of regional groupings.<sup>30</sup> For the concerns of this paper, the relevant fact is that the sources of institutional proliferation are neither strictly endogenous nor strictly opportunistic.<sup>31</sup>

In a world thick with institutions, cooperation under anarchy is no longer the central problem for institutionalists. The puzzle now shifts to selecting among a welter of possible governance arrangements.<sup>32</sup> As Duncan Snidal and Joseph Jupille point out: “Institutional choice is now more than just a starting point for analysts and becomes the dependent variable to be explained in the context of alternative options.”<sup>33</sup> The current generation of institutionalist work recognizes the existence of multiple and overlapping institutional orders.<sup>34</sup> 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.”<sup>35</sup>

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

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<sup>30</sup> Meyer et al 1997.

<sup>31</sup> Benvenisti and Downs 2007, p. 609.

<sup>32</sup> Krasner 1991.

<sup>33</sup> Jupille and Snidal 2005, p. 2.

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

<sup>35</sup> Raustiala and Victor, 2004, p. 279.

such an institutional environment.<sup>36</sup> 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 that behavior that was previously regulated is now more deeply regulated.”<sup>37</sup>

International lawyers by and large concur with this assessment.<sup>38</sup> Relying on a different causal logic, public choice scholars affirm that the growth in the number of regimes will stimulate competition – and therefore more efficient governance.<sup>39</sup>

Policymakers and policy analysts issue calls for ever-increasing institutional thickness.<sup>40</sup> 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.<sup>41</sup>

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

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<sup>36</sup> See the citations in fn. 2.

<sup>37</sup> Goldstein et al 2001, p. 3.

<sup>38</sup> Koskeniemi and Leino 2002; Burke-White 2004; Prost and Clark 2006.

<sup>39</sup> See, for example, Frey 2008.

<sup>40</sup> For recent examples, see the citations in fn. 1, as well as Slaughter 2004; Martin 2005; Daalder and Lindsey 2007.

<sup>41</sup> Ikenberry and Slaughter 2006, p. 27. See also Slaughter 1997, 2004.

proliferation dilutes the power of previously constructed focal points. The existence of overlapping rules raises the costs of monitoring opportunistic defections from existing regimes. The creation of conflicting legal mandates weakens actors' overall sense of legal obligation, softening hard law arrangements in the process. Finally, the increased complexity of global governance structures raises the costs of national compliance with international mandates 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.

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.<sup>42</sup> Even if the original intent is to reinforce existing regimes, institutional mutations will take place that can be exploited via forum-shopping as domestic interests and institutions change over time.

The problem, of course, is that by definition focal points should be rare, otherwise it becomes more problematic 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.<sup>43</sup> If the number of constructed focal points increases, then actors in world politics face a larger menu of possible rule sets to

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<sup>42</sup> For empirical examples, see Raustiala 1997a; Hafner-Burton 2009

<sup>43</sup> Schelling 1960, p. 58.

negotiate. Logically, actors will seek out the forum where they would expect the most favorable outcome.<sup>44</sup>

Second, the proliferation of international rules, laws, and regimes makes it more difficult to determine and detect 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 they are consciously defecting from other regimes. This undercuts the costs to reputation that ostensibly binds states to keep their international commitments.<sup>45</sup>

Consider, for example, the persistent trade dispute between the United States and European Union over genetically modified organisms in food.<sup>46</sup> 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 counters 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. Neither actor suffers significant reputational costs 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

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<sup>44</sup> Raustiala and Victor 1994, p. 280; Drezner 2007, chapter three; Busch 2007.

<sup>45</sup> Benvenisti and Downs 2007.

general norms and procedures of the international legal system, impose important obligations upon states.<sup>47</sup> 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 in good faith to prior legal mandates. International legal scholars have been aware of this problem, labeling it the “fragmentation” of international law.<sup>48</sup>

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.”<sup>49</sup> This statement reflects the consensus of international legal scholars, despite recent efforts to articulate hierarchical norms. The principle of equivalence means that 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 political preferences 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 and state agencies with overlapping mandates will often conflict at the joints of a complex policy problem. This leads to legal or bureaucratic

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<sup>46</sup> Drezner 2007, chapter six.

<sup>47</sup> Snidal and Abbott 2000; Goldstein et al 2001, p. 24-28; Norman and Trachtman 2005; Kelley 2007.

<sup>48</sup> Hafner 2000; United Nations International Law Commission 2006; Krish 2007; Benvenisti and Downs 2007.

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. When the courts issue their rulings, they are reasonably confident that their judgments will be executed. No concomitant body of widely-recognized law exists at the international level.<sup>50</sup>

Furthermore, courts like the WTO Appellate Body and the International Court of Justice will be wary of issuing rulings that clarify about the hierarchy of law, particularly if the dispute involves great powers. Courts wish to preserve their authority, which means that they will be wary of issuing rulings that will lead to noncompliance. Since international courts possess no enforcement power, they will be loathe to make judgments about the hierarchy of law that they know will be ignored by countries with the capability to resist. In the case of the GMO dispute, for example, the WTO panel declined to say anything about the relationship between trade and environmental law.

The effect of overlapping legal mandates and reluctant international courts is a softening of hard law. Obligation, precision and delegation are the three criteria by which international relations scholars judge law to be hard or soft. If the question of which laws apply when becomes an open question that courts are unwilling to answer, then one can see hard law begin to weaken on both the obligation and precision dimensions.

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

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<sup>49</sup> 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.

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. Indeed, developing countries have persistently tried to use United Nations economic institutions to thwart or override the Bretton Woods institutions.<sup>51</sup> However, there are strong reasons to believe that regime complexity enhances the bargaining advantages of great powers more than would be the case 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.<sup>52</sup> For example, Emilie Hafner-Burton looks at the relative performance of overlapping regimes concerning human rights and trade.<sup>53</sup> 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. Power, in and of itself, is one way to generate new focal points.

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<sup>50</sup> Krisch 2006.

<sup>51</sup> Krasner 1985.

<sup>52</sup> Krasner 1991; Voeten 2001.

<sup>53</sup> Hafner-Burton 2005, 2009.

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,<sup>54</sup> 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 difficulties in trying to implement policies that lie at the joints of regime complexes.<sup>55</sup> Politically, however, this gap in legal clarity 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.”<sup>56</sup> Legal scholars further acknowledge that a few powerful actors are fully capable of shifting international customary law on a given subject.<sup>57</sup> Finally, when states bring conflicting legal precedents to a negotiation, the actor with greater enforcement

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<sup>54</sup> On this point, see Raustiala 1997b.

<sup>55</sup> Aggarwal 2005; Alter and Meunier 2006.

<sup>56</sup> Benvenisti and Downs 2007, p. 627.

<sup>57</sup> Norman and Trachtman 2005; Goldsmith and Posner 2005.

capabilities will have the bargaining advantage. One 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 the sanctioning power of smaller countries is more limited.

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.<sup>58</sup> Specialized human capital is a relatively scarce resource in much of the developing world.<sup>59</sup> 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.<sup>60</sup>

Figure 1 displays the relationship posited here between institutional thickness and the prevalence of rule-based outcomes. The institutionalist paradigm would predict a positive and linear relationship between the legalization and rule adherence. The argument presented here suggests a more parabolic relationship. In moving from a purely Hobbesian order to one with a coherent, 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

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<sup>58</sup> Jordan and Majnoni 2002; Reinhardt 2003; Drezner 2007, chapter five.

<sup>59</sup> 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.

certain point the proliferation of nested and overlapping regimes and the legalization of world politics actually abets more *realpolitik* 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 hegemon like the United States has the luxury of selecting the forum 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.<sup>61</sup> 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.

U.S. policymakers are quite aware of the ability to exploit institutional proliferation to advance American interests.<sup>62</sup> The March 2006 National Security Strategy explicitly stated: “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.”<sup>63</sup> This attitude towards institutional proliferation was hardly limited to officials in the Bush administration. Clinton administration officials also prided themselves on their ability to forum-shop in order to advance American interests.<sup>64</sup> Buried in a critique of Bush-era

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<sup>60</sup> Woll and Artigas 2007, p. 129.

<sup>61</sup> Drezner 2007, chapter five.

<sup>62</sup> Brooks and Wohlforth 2005, p. 515.

<sup>63</sup> 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.

<sup>64</sup> See, for example, Wechsler 2001.

policies, Francis Fukuyama supports a similar forum-shopping strategy:<sup>65</sup> “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.... 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.” The Obama administration explicitly switched fora from the G-7 to the G-20 in 2009.<sup>66</sup>

### **Candidate constraints to forum-shopping**

The hypothesis presented here on the ways in which institutional proliferation can undercut the institutionalist logic rest on a key assumption: forum-shopping is a relatively cost-free strategy for international actors. Is this true? Recent work on international organizations – including the Rational Design project and legalization efforts in the pages of *International Organization* – suggest a welter of possible variables that would present costs to forum-shifting: membership, scope, centralization, legalization, and legitimacy, among others.<sup>67</sup>

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

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<sup>65</sup> Fukuyama 2006, p. 158, 168.

<sup>66</sup> Group of Twenty 2009.

<sup>67</sup> Goldstein et al 2001; Koremenos, Lipson and Snidal 2001.

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.<sup>68</sup> 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).”<sup>69</sup>

This selection effect implies that some factors affecting the origins of international cooperation are not as relevant for explaining the viscosity 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.<sup>70</sup> 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 monitor it.<sup>71</sup> It would be hard to believe that information provision would provide a barrier to forum-shopping.

Consider the example of membership, which has been 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

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

<sup>69</sup> Fearon 1998, p. 279.

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

<sup>71</sup> Downs, Rocke and Barsoom 1996.

accept them.<sup>72</sup> The greater the number of actors that accept a rule or regulation, the greater the social pressure on recalcitrant actors to change their position.<sup>73</sup> 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.<sup>74</sup> Aspiring forum-shoppers must factor in the costs of lost legitimacy if they try to shift governance responsibilities away from legitimate institutions.

This logic is compelling but incomplete, in 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.<sup>75</sup> In some cases, the democratic character of the member states in question affects legitimacy.<sup>76</sup> For example, the United States 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.<sup>77</sup> 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

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<sup>72</sup> 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.

<sup>73</sup> Johnston 2001.

<sup>74</sup> 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.

<sup>75</sup> Voeten 2005.

<sup>76</sup> Pevehouse 2002.

United Nations, despite the latter IGO's advantage in membership. Second, Serbia's specific reputation as a transgressive actor during the Balkan Wars endowed NATO with a greater moral legitimacy.<sup>78</sup>

At first glance, theoretical factors that affect the design and effectiveness of regime complexes do not appear to alter 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.<sup>79</sup>

### **The aftermath of the TRIPS amendment on public health<sup>80</sup>**

The intellectual property rights (IPR) regime complex for pharmaceuticals represents a tough test for the arguments made in previous sections of 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

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<sup>77</sup> Prantl 2006.

<sup>78</sup> 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).

<sup>79</sup> Benvenisti and Downs 2007; Drezner 2007.

extremely difficult for even powerful states to evade their normative power.<sup>81</sup> 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.”<sup>82</sup> In August 2003, an additional WTO agreement was reached to clarify remaining ambiguities from the Doha declaration.<sup>83</sup> In December 2005 these agreements were codified through a permanent amendment to the TRIPS accord.<sup>84</sup> 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.<sup>85</sup>

If the story ended with the formal amendment to the TRIPS regime, then it could be argued that viscosity in global governance represents an effective brake against the

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<sup>80</sup> This section draws from Drezner 2007.

<sup>81</sup> Keck and Sikkink 1998; Sell 2003; Prakash and Sell 2004.

<sup>82</sup> “Declaration on the TRIPS Agreement and Public Health,” [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm).

<sup>83</sup> “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](http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm), 11 August 2005.

<sup>84</sup> “Amendment of the TRIPS Agreement,” 6 December 2005. Accessed at [http://www.wto.org/english/news\\_e/news05\\_e/trips\\_decision\\_e.doc](http://www.wto.org/english/news_e/news05_e/trips_decision_e.doc), December 2005.

dynamics discussed here about the problems of institutional proliferation and fragmentation. However, the story does not end. After the Doha ministerial, however, a parallel story emerged, enabling the regulation of IPR to shift 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.<sup>86</sup>

Even prior to the Doha Declaration, some 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.<sup>87</sup> After Doha, however, the developed economies – 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 into their free trade agreements with developing countries.<sup>88</sup> 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

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<sup>85</sup> Epstein and Chen 2002; Sell 2003; Prakash and Sell 2004;

<sup>86</sup> These FTAs were used to push other standards as well. See Hafner-Burton 2009.

<sup>87</sup> Drahos 2001.

<sup>88</sup> *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](http://www.evb.ch/cm_data/Deprive_Doha.pdf) (accessed 12 August 2005).

include TRIPS-plus agreements.<sup>89</sup> Over time, the viscosity of global governance on intellectual property rights has lessened.

These FTAs have increased the legal complexity of the intellectual property regime for the signatory parties. 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."<sup>90</sup> The Doha Declaration is also explicitly mentioned in the understanding. Frederick Abbott argues, however, that these side agreements "are drafted in a substantially more restrictive way" than the Doha Declaration itself.<sup>91</sup> In interviews, USTR officials confirmed that the legal complexity was an intentional strategy of the second-best. Since eliminating the TRIPS flexibilities on public health was a non-starter, the idea was to create a sufficient tangle of law that FTA partners would be paralyzed into inaction and abstain from using the flexibilities. 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.

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<sup>89</sup> Drahos 2001, p. 6.

<sup>90</sup> 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](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file697_3975.pdf), 9 August 2005.

<sup>91</sup> Abbott 2005, p. 352.

As Table 2 demonstrates, the most prominent of the TRIPS-plus provisions is the protection of test data.<sup>92</sup> 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.<sup>93</sup> Even this implicit threat of economic coercion was sufficient to force dependent allies into altering their regulations on these issues.<sup>94</sup> 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 in favor of the U.S. position. Many of the same global civil society scholars and activists who claimed a victory at Doha acknowledge that the proliferation of “TRIPS-plus” provisions in free trade agreements undercuts the public health norm established at Doha.<sup>95</sup> 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

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<sup>92</sup> Correa 2006.

<sup>93</sup> Office of the USTR, “Special 301 Report,” April 2005. Quotation from p. 6.

<sup>94</sup> Drezner 2003.

<sup>95</sup> Sell 2003, chapter six; Abbott 2005.

increased their negotiating effectiveness in Geneva but have yet to come to grips with the U.S. forum-shifting strategy.”<sup>96</sup> 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.”<sup>97</sup> 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.”<sup>98</sup>

It should be stressed that these developments represent a second-best outcome for the developed countries.<sup>99</sup> 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 preferred outcome of the great powers; one in which flexibility is only invoked in times of crisis epidemics. At the same time, this proliferation has increased the degree of legal uncertainty developing countries must face when they contemplate this issue. While the final outcome does not precisely fit with great power preferences, a strategy of

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<sup>96</sup> Abbott, “The WTO Medicines Decision,” p. 317.

<sup>97</sup> “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.

<sup>98</sup> Oxfam International 2006, p. 14.

<sup>99</sup> I am grateful to Larry Helfer for making this point.

institutional proliferation has allowed these states to get far more than legal observers predicted 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.”<sup>100</sup> Despite this affirmative statement, a reluctant United States complied with the Yemeni request.

The official reason proffered 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 from North Korea to Yemen. And therefore, the merchant vessel is being released.”<sup>101</sup> Undersecretary of State for arms control John Bolton complained that “fear from the lawyers had caused panic,” preventing a seizure of the weapons.<sup>102</sup>

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<sup>100</sup> The White House, “National Strategy to Combat Weapons of Mass Destruction,” December 2003, p. 2.

<sup>101</sup> Press briefing by Ari Fleischer, December 11, 2002: accessed at <http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html#2>, January 2008.

<sup>102</sup> 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.

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.”<sup>103</sup> This principle is codified in article six of the 1958 High Seas Convention and article 92 of the United Nations Convention of the Law of the Sea (UNCLOS). Despite its failure to ratify the Law of the Sea treaty, the United States embraced this norm when the Reagan administration pledged in 1983 to abide by almost all of its provisions.<sup>104</sup> The motivation for U.S. adherence derives from the substantial benefits that come from the unimpeded movement of commercial and military shipping.<sup>105</sup> In the aftermath of the September 11<sup>th</sup> 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 forcible interdiction of WMD materials. To do this, the United States launched a new regime complex to ratcheted up 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

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<sup>103</sup> 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.

<sup>104</sup> Taft 2004. .

concern.”<sup>106</sup> 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.<sup>107</sup>

By September 2003, PSI members had agreed on a Statement of Interdiction Principles to serve as the basis for further cooperation and activity.<sup>108</sup> 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.<sup>109</sup> 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.”<sup>110</sup>

PSI activities were not publicly advertised, but the initiative achieved some policy successes. The PSI was credited with halting the shipment of centrifuges to Libya in 2003. The interdiction was a contributing factor in that country’s decision to renounce its WMD ambitions in December 2003.<sup>111</sup> U.S. officials stated that between September

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<sup>105</sup> Byers 2004, p. 527.

<sup>106</sup> State Department, “Proliferation Security Initiative: Frequently Asked Questions.” Accessed at <http://www.state.gov/t/isn/rls/fs/23764.htm>, January 2008.

<sup>107</sup> Bolton 2007, pp. 122-126.

<sup>108</sup> They can be accessed at <http://www.state.gov/t/isn/rls/fs/23764.htm>.

<sup>109</sup> Ibid. See also Bolton 2007, p. 125.

<sup>110</sup> Squassoni 2006, p. 4.

<sup>111</sup> Jentleson and Whytock 2005/6, p. 74.

2004 and May 2005, the PSI acted on eleven separate occasions; between April 2005 and April 2006, the PSI was activated two dozen times.<sup>112</sup>

Legal scholars have been dubious about whether U.S. ambitions for PSI would be consistent with the Law of the Sea Treaty.<sup>113</sup> Beyond the PSI, therefore, the United States 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.”<sup>114</sup> The State Department has stated publicly that it views 1540 as sufficient legal 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.<sup>115</sup> Between 2004 and 2009, the U.S. signed nine of these treaties, including four with the largest flag of convenience states: Cyprus, Liberia, Malta and Panama.<sup>116</sup> Combined with the PSI Core Group members, by

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<sup>112</sup> Holmes and Winner, p. 284, 294.

<sup>113</sup> Byers 2004; Cotton 2005.

<sup>114</sup> <http://daccess-ods.un.org/TMP/1582099.html>.

<sup>115</sup> Two hours for Liberia and Panama; four hours for the Marshall Islands. Ahlström 2005, p. 756.

<sup>116</sup> The full list is available at <http://www.state.gov/t/isn/c27733.htm> (accessed January 2009).

the end of 2007 the United States possessed the expedited ability to interdict more than half of world shipping.<sup>117</sup>

Third, in October 2005 the International Maritime Organization agreed upon a new Suppression of Unlawful Acts (SUA) protocol.<sup>118</sup> 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.”<sup>119</sup> Legal and security scholars concur with this assessment.<sup>120</sup>

The combined effect of these measures on the legal state of play remains subject to debate. China and India 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.

Despite this resistance, however, the new counterproliferation norm attracted an increasing number of adherents. More than 65 countries attended the June 2006 meeting

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<sup>117</sup> Holmes and Winner 2007, p. 284.

<sup>118</sup> [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=259&doc\\_id=686](http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686), accessed January 2008.

<sup>119</sup> Quoted in Guilfoyle 2007, p. 28.

<sup>120</sup> Doolin 2006; Holmes and Winner 2007.

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."<sup>121</sup> 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."<sup>122</sup>

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."<sup>123</sup> As more countries embrace the PSI, legal commentary on the regime has acknowledged the creation of an emergent 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 effects."<sup>124</sup> Some security scholars go even further, arguing that these

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<sup>121</sup> 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.

<sup>122</sup> Arms Control Association, "The Proliferation Security Initiative (PSI) At a Glance," October 2007.

<sup>123</sup> Friedman 2003, p. 5.

<sup>124</sup> Doolin 2006, 31; Guilfoyle 2007, p. 35.

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.<sup>125</sup>

As with the intellectual property case, 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**

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 creates 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.

The results in this paper are preliminary. 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

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<sup>125</sup> Dombrowski and Payne 2006; Shulman 2006; Holmes and Winner 2007.

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.<sup>126</sup>

In the long term, the theory presented here suggests that institutional proliferation can erode the coherence of global governance structures. To be sure, in a unipolar world, the short-term effects of this strategy are not necessarily threatening to world order. The hegemon can use an forum-shopping 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.<sup>127</sup> States with attractive forum-shopping options create an incentive for pre-existing organizations – and member states in those organizations – to skew their policies towards appeasing those states.<sup>128</sup>

Forum-shopping and evasion are not costless over time, however. The problems emerge when more than one state has the power to effectively pursue this strategy.

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<sup>126</sup> On the ICC, see Weller 2002, Scheffer 2005 and Kelley 2007.

<sup>127</sup> Krisch 2005; Benvenisti and Downs 2007; Drezner 2007.

<sup>128</sup> Gruber 2000; Johns 2007. This goes alone power is why the public choice argument that competition will improve global governance structures is unlikely to be true. Competition will merely encourage all

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. The European Commission is looking to promote its own policy preferences by “promoting European standards internationally through international organization and bilateral treaties.”<sup>129</sup>

The most active region in institution-building, however, has been the Pacific Rim. Over the past decade China created new institutional structures outside of America’s reach, including the Shanghai Cooperation Organization, the Forum on China-Africa Cooperation and the BRIC summits. The Asian financial crisis clearly spurred the creation of a number of regional arrangements, including a network of bilateral preferential trade agreements with ASEAN and other regional actors, the East Asia Summit, Chiang Mai Initiative, Asian Bond Markets Initiative, and ASEAN Plus Three meetings. What’s noteworthy about these regional arrangements is the absence of the United States from all of them.<sup>130</sup> The trend was significant enough for former Singaporean prime minister Lee Kuan Yew to warn American policymakers that, “you guys are giving China a free run in Asia.... The vacuum in US policy is enabling the Chinese to make the running.”<sup>131</sup>

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

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structures facing a threat of hegemonic exit to cater to great power preferences even more than they otherwise would.

<sup>129</sup> Quoted in “EU wants rest of world to adopt its rules,” *Financial Times*, February 18, 2007.

<sup>130</sup> Barma, Ratner and Weber 2007.

<sup>131</sup> Quoted in Edward Luce, “Obama Urged to Fix Trade Policy Vacuum,” *Financial Times*, November 9, 2009.

complex can develop reputations for “organized hypocrisy.”<sup>132</sup> A hypocritical IGO generates policies that either decoupled from stated norms or so inchoate that they cannot be implemented or enforced. While some United Nations agencies have already been accused of functioning as organized hypocrisies,<sup>133</sup> proliferation will begin to affect the Bretton Woods institutions as well. Jagdish Bhagwati has complained about the “spaghetti bowl” of overlapping trade agreements weakening the coherence of the World Trade Organization.<sup>134</sup> Even if these challenges are currently at nascent levels, over time the forum-shopping phenomenon erodes the stability of significant international regimes.

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. Paradoxically, the proliferation of transnational rules can lead to a tragedy of the global institutional commons.

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<sup>132</sup> Krasner 1999.

<sup>133</sup> Lipson 2007

<sup>134</sup> Bhagwati 2008.

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**TABLE 1**  
**GROWTH IN GLOBAL GOVERNANCE STRUCTURES**

<b>Type of international regime</b>	<b>1981</b>	<b>1993</b>	<b>2003</b>
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
<b>TOTAL</b>	<b>2906</b>	<b>3948</b>	<b>4916</b>

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**

