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Bilateralism, Multilateralism, and the Architecture of International Law

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This paper studies the different roles, impact, and operation of bilateral treaties and multilateral treaties as structures within the architecture of international law. I observe that the preference for bilateralism or multilateralism in international lawmaking is often determined not by an informed choice but by an instinctive association of political schools or bureaucratic affiliations with different forms of international regulation. This association, however, is not always founded on a just appreciation of the workings of either form in various contexts or of the way in which the two interact with each other. I set out to offer a framework for such an appreciation and assess the workings of multilateral treaties and bilateral treaties along three dimensions: the contribution of the respective instruments to the advancement of an international rule of law; the operation of the regime in terms of its effectiveness, efficiency, and compliance; and the democratic legitimacy of the making of each regime. I demonstrate that ideologies and values that seem to be almost blindly associated with one type of regulation may be actually better served, in some cases, by using the other type. Ultimately, this paper attempts to chart a course for more theoretical and empirical forays into the questions of why states join particular types of treaties and how these different types of treaties, or a combination of them, promote or obstruct the attainment of various goals within the architecture of international law.

“Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN.”¹

I. INTRODUCTION

The war on terror, the invasion of Iraq, the genocide in Darfur, concerns about global warming, and the economic and social effects of international trade are at the heart of debates among international lawyers, political scien-

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1. José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 394 (2000).

tists, and policymakers regarding approaches to international law. A sense of heightened political stakes worldwide has widened the divide between universalists, who aspire for an interconnected “one world, one law” international order, and unilateralists, who value independence, flexibility, and freedom of action. Instinctively, this divide generally corresponds to domestic political affiliations of left and right; the left is drawn to the vision of an interlacing universe, in which concern for the other is paramount, and the right naturally tends toward unilateralism, which is considered a byword for strength and patriotism.

For universalists, true universalization of international law requires the harnessing of participants, constituencies, stakeholders, sources, and influences into modern international legal processes. In contrast, the unilateralist, or “sovereignist,” camp² maintains that the universalization of international law poses a threat to sovereignty and national interests.

The two political camps display a strong, instinctive preference for one of two forms of treaty-making that they perceive as best serving their ideologies. In essence, universalists believe that multilateral treaties (“MLTs”) and the international organizations (“IOs”) associated with them are both the cause and the effect of a transition from anachronistic notions of sovereignty and self-aggrandizement—still epitomized in bilateral, power-based pacts—to a more enlightened international society.³ This society has been described as a “community,”⁴ a “global village,”⁵ a “neighborhood,”⁶ a “family of nations,”⁷ or even—in its most exaggerated portrayal—as a precursor to an inspired vision of global “love.”⁸ MLTs and IOs promote an international rule of law and serve as the building blocks of an international constitution.

2. See Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 9.

3. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (2d ed. 1997); HERMANN MOSLER, *THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY* (Sijthoff & Noordhoff 1980) (1974). But see Stephen Toope, *Emerging Patterns of Governance and International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 91, 103 (Michael Byers ed., 2000) [hereinafter *THE ROLE OF LAW*], for a critique on this point. The first introduction of the idea of an “international society” of states is ascribed to Emerich de Vattel. See EMERICH DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (1758).

4. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 5–6 (1995); see generally HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933). But see Dino Kritsiotis, *Imagining the International Community*, 13 *Eur. J. Int'l L.* 961, 988–91 (2002) (discussing what he terms the “rhetorical and imagined [international] communities”); Herman Mosler, *International Legal Community*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 309 (Rudolf Bernhardt ed., 7th Installment 1984).

5. See generally RICHARD A. FALK, *LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE* (1998).

6. See generally SHRIDATH S. RAMPHAL & INGVAR CARLSSON, *OUR GLOBAL NEIGHBOURHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE* (1995).

7. Pope John Paul II, Address to the Fiftieth General Assembly of the United Nations Organization, ¶ 14 (Oct. 5, 1995), available at http://vatican.va/holy_father/john_paul_ii/speeches/1995/october/documents/hf_jp-ii-spe_05101995_address-to-uno_en.html.

8. PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 404 (2001).

They are best equipped to solve global problems effectively and efficiently and their processes benefit from a high degree of professionalism and democratic legitimacy. Essentially hoping to reproduce a domestic law and governance system in the international sphere, universalists believe that multilateralism is the preferred strategy for regulating international behavior and, as a matter of principle, the world needs much more of it.⁹

Unilateralists, on the other hand, are deeply suspicious of inclusive accords. Particularly within the United States, this school of thought stresses the threat multilateralism poses to national autonomy and freedom of action.¹⁰ Both descriptively and normatively, unilateralists argue, multilateralism is useful only in the context of alliances created to advance traditional military, economic, or other national interests and becomes dangerous when it imposes meaningful restraints on states' conduct or transfers any real decisionmaking power to international governance. Even when challenges are global, universalists assert that individual state sovereignty and responsibility are still the most reliable defenses.¹¹ Consequently, unilateralists prefer, if anything, treaties with limited participation, allowing their governments to pick and choose partners and obligations. The narrowest and most limited form of treaty-making is through bilateral treaties ("BLTs").

The two political camps display a strong preference for the form of international regulation that they perceive as best serving their ideologies: in the former case, a near-blanket preference for multilateralism (ideally, universalism) expressed by multilateral treaties and, in the latter case, a deep suspicion of it and a default preference for, at most, bilateral treaties.

In this Article, however, I argue that the instinctive beeline inclination for either form of regulation—MLTs or BLTs—presupposes much about their operation and about what may be gained from them. I argue that the supposed benefits of MLTs are often not as great as advertised or expected, and the effects of BLTs are not necessarily as limited as universalists fear or unilateralists hope.

My point of departure is the account favored by mainstream international legal scholarship of the advantages of multilateralism. But this is a methodological choice (which I explain below); my argument itself is non-hierarchical. I do not advocate bilateralism *over* multilateralism. Rather, I argue that a much deeper foray into the workings of both structures of regulation, as

9. See, e.g., PHILIP ALLOTT, TOWARDS THE INTERNATIONAL RULE OF LAW: ESSAYS IN INTEGRATED CONSTITUTIONAL THEORY 453–63 (2005) [hereinafter ALLOTT, TOWARDS THE INTERNATIONAL RULE OF LAW]; CHRISTOPHER WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW 37, 102 (2004); see also PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 61–62 (2002) [hereinafter ALLOTT, THE HEALTH OF NATIONS].

10. John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 213–14 (2000). Most American unilateralists also claim that ceding such autonomy would violate the U.S. Constitution. Robert J. Delahunty & John Yoo, *International Law and the State of the Constitution: The Twenty-Fifth Annual National Student Federalist Society Symposium on Law and Public Policy – 2006: Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 76–88, 113 (2006).

11. Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 876–82 (2004).

well as of the myriad ways in which the structures interact with one another, is vital if we wish to gain a well-rounded view of the best architecture for international lawmaking. The knee-jerk association of political ideologies with one vehicle of international regulation runs the risk of overlooking potential advantages of the other. In fact, I show that ideologies and values that are commonly associated with one type of regulation may, in some cases, actually be better served by using the other.

The bond between ideology and methodology is particularly crucial in the context of treaty-making because of the clear and growing trend in state practice to favor more treaty-making of all kinds.¹² The United Nations Treaty Series (“UNTS”) currently lists about 3500 universal MLTs (those that aspire to govern all states) and 50,000 BLTs.¹³ For various technical reasons that have to do with treaty registration, the number of listed MLTs is probably inflated. The number of listed BLTs, on the other hand, probably reflects only a third of the actual number of those in existence. This means that to the observer of the world of treaty-making, the conclusion and workings of BLTs remain largely under the radar, overshadowed by the proliferation of MLTs.

This state of affairs is mirrored in a gap in existing international law literature. Although both international law and international relations scholars have studied various aspects of treaty design, existing literature fails to offer a comprehensive and systematic analysis comparing the pros and cons of bilateral versus multilateral legal instruments. In particular, even though bilateral instruments govern a considerable portion of international interaction, they have been given far less attention by mainstream international law scholars than universal or even regional agreements,¹⁴ with the notable exceptions of the Cold War disarmament agreements,¹⁵ peace agree-

12. See G. John Ikenberry, *Is American Multilateralism in Decline?*, 1 PERSP. ON POLS. 533, 537 (2003).

13. Telephone interview with Bradford Roth, U.N. Office of Legal Affairs, Treaty Section (Sept. 2007). In a comparison between data on BLTs in force, provided by the ministries of foreign affairs of ten countries, with that of the UNTS, substantial discrepancies were found. A search via the UNTS Advanced Search Page resulted, in some cases, in only a fraction of the BLTs reported by the countries themselves. For example, the Canadian Ministry of Foreign Affairs and International Trade lists 2,676 bilateral treaties (both with states and IOs), see <http://www.treaty-accord.gc.ca/TreatyResult.asp> (last visited Apr. 7, 2008), while the UNTS lists only 1,471. France reports 4,773 bilateral treaties (with states and IOs), see <http://www.doc.diplomatique.gouv.fr/BASIS/pacte/webext/bilat/sf> (last visited Apr. 7, 2008), while the UNTS lists only 2,983. In other cases, such as for Australia, the UNTS registry reported a higher number of BLTs than the country itself did (999 vs. 830), as the UNTS included treaties no longer in force. See <http://www.info.dfat.gov.au/Info/Treaties/Treaties.nsf/WebView?OpenForm&Seq=12> (last visited Apr. 7, 2008).

14. See Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 470 (2006).

15. On bilateral arms-control agreements, see ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 99–100 (1995). See generally Kenneth W. Abbott, “Trust But Verify”: *The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1 (1993).

ments,¹⁶ and, more recently, bilateral investment treaties (“BITs”).¹⁷ The lack of mainstream scholarly interest in the workings of BLTs is all the more surprising given the absence of systematic empirical data comparing the effects of MLTs with those of other possible forms of international accords and analyzing how different types of international agreements operate in concert.¹⁸

It may well be that there is a good reason why MLTs have captured more scholarly attention. MLTs are instinctively, though often wrongly, associated with “higher politics”—security, human rights, environment, and trade. In addition, a single MLT applies to a larger number of international actors, is often complemented by IOs and international bureaucracies, and is likelier to include some kind of dispute-resolution mechanism.¹⁹ In short, MLTs resemble “real law.” BLTs, on the other hand, are less glamorous. For the most part, they are perceived as necessary stopgap measures in the absence of universal norms or as a means of translating existing universal rules into specific bilateral contexts. BLTs are the international parallel of domestic contracts concluded in the shadow of domestic laws.

Doctrinally, however, BLTs are every bit as much “international law” as MLTs. Both types of treaties are mere structures in a complex architecture of legal instruments that make up international law. Neglecting the role of BLTs in this complex architecture impairs our descriptive acumen—in that it leaves us with only a partial account of international lawmaking—as well as our normative agenda—in that critical tools for promoting desired goals are missing. Because the majority of literature focuses on the advantages of MLTs, I challenge the association between ideological affiliations and treaty type through a critique of existing accounts of MLTs. In so doing, I hope to revive interest in the workings of BLTs by emphasizing the strengths and weaknesses of both MLTs and BLTs.

My assessment tracks three popularly offered, broad sets of criteria:

16. See generally ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS (Stephen John Stedman, Donald Rothchild & Elizabeth M. Cousens eds., 2002); Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT’L L. 373 (2006).

17. See generally Zachary Elkins, Andrew Guzman & Beth Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT’L ORG. 811 (2006); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT’L L.J. 67 (2005).

18. In response to arguments made by international relations institutionalist scholars about multilateral cooperation in the framework of MLTs and IOs, Jack Goldsmith and Eric Posner note, “we have sympathy for this analysis, which rests on standard rational choice models, but we think that the proponents of this view have made claims on its behalf that are not always supported by the evidence.” JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 86 (2005) [hereinafter GOLDSMITH & POSNER, *LIMITS*].

19. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 319–20 (2002) [hereinafter Guzman, *The Cost of Credibility*].

- 1) Promotion of the rule of law and the constitution of an international society as measured through uniformity of law and equality before the law;
- 2) Compliance, effectiveness, and efficiency; and
- 3) Democratic legitimacy and professionalism in treaty-making.

My assessment in each category begins with existing accounts, both explicit and implicit, of how these criteria are best realized through MLTs. I then challenge such accounts not because they are necessarily false, but rather because they confuse normative aspirations with real-world performance. Next, I suggest a more nuanced view of both MLTs and BLTs under each set of considerations. When compliance, effectiveness, and efficiency are considered, I show that generic distinctions among different types of regimes—particularly, those regimes regulating coordination or cooperation activities, dealing with club goods or universal goods, and projecting externalities onto others—make a conscious and informed choice between MLTs and BLTs particularly crucial. Finally, I demonstrate how, far from an either/or choice, the two forms of regulation can complement, enrich, and reinforce one another.

Again, my assessment of the two regimes is not normative. I remain agnostic as to the choice between competing benefits or costs of each type of regulation. The words “cost” or “benefit” naturally beg the question, “for whom?,” and I remain conscious of the fact that costs and benefits are perceived and determined differently by the White House, the U.N. Secretariat, Greenpeace, or the Togolese Ministry of Foreign Affairs. My wish is to set straight prevalent claims regarding the costs and benefits of MLTs and BLTs and thereby chart a new direction for future theoretical and empirical testing of how these treaty forms operate as components of the architecture of international law.

The Article is structured as follows: Part II offers terminological clarifications and defines the scope of this work. Part III offers an assessment of BLTs and MLTs alongside considerations of rule of law and the constitution of the international society. Part IV offers an assessment of compliance, effectiveness, and efficiency of both MLTs and BLTs. Part V offers an assessment alongside considerations of professionalism and democratic legitimacy in the treaty-forming process. Part VI explores the different ways in which BLTs and MLTs interact, and could interact, as components in the architecture of international law. Part VII summarizes the key points of this study and suggests avenues for further empirical research.

II. TERMINOLOGY AND SCOPE

For the sake of methodological coherence and manageability, I limit this study to formal treaties that meet the Vienna Convention on the Law of

Treaties²⁰ (“VCLT”) definitions. A treaty, under the VCLT, is “an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation.”²¹ This standard definition of a treaty makes no distinctions among treaties on the basis of form, content, purpose, or the number of parties concluding them.²² It also makes no explicit differentiation between “law-making” treaties and, essentially, contractual treaties.²³ For purposes of the VCLT, therefore, there is no material difference between bilateral or multilateral treaties, whatever their aims may be.²⁴ Nor is there any material difference or normative hierarchy between bilateral and multilateral treaties for the purposes of adjudication before the International Court of Justice (“ICJ”). In cases of conflict under either form of treaty, the Court would apply general principles of interpretation, such as the “last in time” rule or the “more specific” rule.²⁵

Although there is no material, nor normative difference between these two types of treaties, I use BLTs and MLTs as two opposite and extreme forms of treaties. BLTs are treaties concluded between two states and are not open to the entire international community. MLTs will here be used as shorthand for multilateral treaties that invite the international community at large to join them, and thus, at least in aspiration, aim at universal participation. I consider such universal treaties as the epitome of the multilateral effort.

I accord little attention to regional or other limited multilateral treaties (“LMLTs”), which are treaties concluded among specific states and which do not aspire to become universal. In effect, LMLTs represent the middle ground between BLTs and MLTs. LMLTs interact with both BLTs and MLTs and, in relation to each one, serve as a modified version of the other.

20. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (entered into force Jan. 27, 1980).

21. *Id.* art. 2, para. 1(a).

22. In its early codification phases, the International Law Commission attempted to specifically define “general multilateral treaty” as a specific multilateral treaty that concerns general norms of international law or that deals with matters of general interest to the international community at large. SHABTAI ROSENNE, *THE PERPLEXITIES OF MODERN INTERNATIONAL LAW* 355 (2004). This effort was rendered moot by the VCLT. For more on the typology of bilateral and collective obligations, see generally Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 *EUR. J. INT’L L.* 907 (2003).

23. For the effects of bilateral and multilateral types of obligations within multilateral frameworks on state responsibility and enforcement by third parties, see generally Linos Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 *EUR. J. INT’L L.* 1127 (2002). Note that this distinction is often debatable, as in the case of international trade. See Pauwelyn, *supra* note 22, at 928–36 (arguing that although WTO obligations are essentially bilateral obligations and not collective, some may indeed be regarded as collective).

24. Where the number of parties is material to the arrangement, as in the case of reservations or exiting treaties, provisions apply *mutatis mutandis*. Regardless of the treaty form, some VCLT rules are affected by the object and purpose of the treaty. For most purposes, however, including conclusion, entry into force, compliance, and resolution of treaty conflicts, the two forms are generally on an equal par. See VCLT, *supra* note 20, arts. 20, 40, 41, 58.

25. For rules of interpretation and other methods of resolving conflicts between treaties, see Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 *GEO. WASH. INT’L L. REV.* 573, 587–647 (2005).

Although the relationship between MLTs and LMLTs has been studied to some extent (mostly in the context of regional and international trade),²⁶ less notice has been paid to the interplay between LMLTs and BLTs (mostly in the limited context of the effects of regional arrangements on bilateral agreements concluded between countries in a region). I hope additional studies of these two relationships will benefit from and be informed by the assessment of MLTs and BLTs I offer here.

In limiting this study to formal treaties, I also leave out “soft law” mechanisms. Variably defined,²⁷ these mechanisms are mostly understood to mean nonbinding instruments designed as declarations of intentions, desired goals, shared values, or general aspirations.²⁸ In the universalist camp, the urge to promulgate more universal norms has been evident in the drafting and conclusion of hundreds of multilateral soft-law instruments, including declarations, resolutions, pledges, codes of conduct, and other instruments. I similarly ignore bilateral soft-law instruments.

I occasionally address multilateral customary international law not codified in treaties. Despite being the one source of law that can actually claim to be universal in coverage (save the limited exception of persistent objectors), customary international law has been the subject of heated debate among international law scholars, who seem to disagree on almost every feature of it: how one “finds” custom, how it is created and changed over time, which states actually participate in its making, and the extent to which it should prevail over conflicting domestic law.²⁹ Mindful of these

26. See generally THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? (Joseph H. H. Weiler ed., 2000); Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. INT'L L. 917 (1992); Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483 (2004).

27. On the impact of nonbinding norms in four fields of international law—human rights, environment, trade and finance, and arms control—and their uncertain definitions, see generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL SYSTEM (Dinah Shelton ed., 2000); on the lack of a single definition, see Edith Brown Weiss, *Introduction, in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 15 (Edith Brown Weiss ed., 1997); on the different motivations behind the choice to devise multilateral arrangements in forms other than binding treaties, see Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 587 (2005) [hereinafter Raustiala, *Form and Substance*].

28. Kal Raustiala suggests the distinction between “contracts” (legally binding) and “pledges” (legally nonbinding). Raustiala, *Form and Substance*, *supra* note 27, at 581. Friedrich Kratochwil and Christine Chinkin both advance a distinction between specific obligations, which are “hard,” and those that are more abstract, which are “soft.” FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 203 (1989); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989). Others have observed that, even though not legally binding as such, soft law instruments do give rise to legitimate expectations regarding the implementation of legal relations even if they themselves do not create such relations. See, e.g., ALLOTT, THE HEALTH OF NATIONS, *supra* note 9, at 308.

29. See GOLDSMITH & POSNER, LIMITS, *supra* note 18, at 23–44 (2005). See generally MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999).

debates, I rely on mainstream doctrinal understandings of the development and operation of customary law.

Finally, I leave out a systematic analysis of less formal structures of international cooperation, such as transnational networks of judges, bureaucrats, parliamentarians, and other professionals who, as Anne-Marie Slaughter has demonstrated, create *de facto* forms of global governance.³⁰ More broadly, these less formal structures include the full spectrum of “interstitial” and implicit rules and norms that, some argue, are an inherent part of international law.³¹ Nor do I include an analysis of the workings of *ad hoc* negotiation and diplomatic efforts, either within or outside of formal structures. Indeed, one may well question the fundamental wisdom of regulating an increasing portion of international affairs through formal legal means and the consequent depletion in status and aspiration of diplomacy, *ad hoc* negotiated solutions, or other less formal mechanisms.³² It is a question I do not intend to answer here, although I allude to it at some points in my argument.

All these instruments that I leave out of the discussion are crucial components in the architecture of international law, at times even more important than the formal treaties I address here. Omitting them is done out of necessity, not oversight.

III. AN INTERNATIONAL RULE OF LAW AND THE CONSTITUTION OF THE INTERNATIONAL SOCIETY

“The expansion of the rule of law in international relations has been the foundation of much of the political, social and economic progress achieved in recent years. Undoubtedly, it will facilitate further progress in the new Millennium.”³³

Universalism is often associated with the aspiration for an “international rule of law.”³⁴ International lawyers and diplomats characterize the “rule of

30. See generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

31. See Vaughan Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, in *THE ROLE OF LAW*, *supra* note 3, at 207, 219–21.

32. Such an argument has been advanced by David Kennedy, who challenges the entire effort of promoting humanitarian goals (in which he includes human rights, humanitarian protection, environmental protection, and poverty alleviation) through legal instruments. See DAVID KENNEDY, *THE DARK SIDE OF VIRTUE* 3–36 (2004). On the impossibility of international law to resolve inherent political and normative disputes, see generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989). See also Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 *EUR. J. INT'L L.* 187, 213–14 (2006), for an argument on the diminishing of space for political engagement due to global administrative arrangements.

33. Letter from Kofi Annan, U.N. Sec'y Gen., to Heads of States (May 15, 2000), available at <http://www.un.org/millennium/law/sgletter.htm>.

34. Robert Cooper, *How Shall We Answer Robert Kagan*, 4 *INTERNATIONALE POLITIK* (Transatlantic Ed.) 19, 22 (2003) (F.R.G.) (“Multilateralism and the rule of law have an intrinsic value. We value pluralism and the rule of law domestically; it is difficult for democratic societies—including in the

law” as the single most important goal of the international system, one upon which all other goals—peace, prosperity, and effective international cooperation—depend. In its simplest iteration, “rule of law” means that international law should guide the conduct of states: it is the final arbiter of the exercise of power and states must comply with its provisions.³⁵

To assess the degree to which MLTs and BLTs actually contribute to the ideal of the rule of law, it is necessary to recall for a moment how the rule of law evolved as an ideal. Much of the multilateral effort that began in the second half of the nineteenth century was directed toward international, multinational legislation—reasonably analogous to national legislation—that would induce a shift away from interest-based, limited alliances and toward uniform regulation of the behavior of all states at the expense of their sovereignty. It was thought that the ideals of democracy and liberalism, alongside economic and technological growth, would be promoted best through a liberal and pacifying international legal system. Such interstate law would mitigate the naturally anarchic nature of the international system, binding states together and curbing the rogue tendencies of individual states. In effect, it was hoped, such a legal system would eventually replace armed force as the ordering principle of the international system.

In this spirit, the U.N. Charter, in many ways regarded as the “constitutional” document for the international legal system, states in its preamble that its members are determined “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”³⁶ In article 1, the Charter stipulates that the organization’s goals are “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”³⁷

But the envisioned international rule of law was not meant only to replace power as the arbiter of disputes. In its ideal form, international rule of law held the promise of transcending its instrumental role and standing as a value in itself. In its most extreme triumphant form, a universal rule of law not only would serve as an organizing principle of international relations that regulated the behavior of states, but also would constitute the *quintessential* international society. In Philip Allott’s vision, “[t]he time has come

U.S.—to escape from the idea that they are desirable internationally as well.”). See also José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324, 326 (2006), for an account of institutions that aspire to global participation as attempting “to subject the totality of international relations to the rule of law” and “inspire conceptions of a new form of *jus gentium*.”

35. See Hans Corell, *The Visible College of International Lawyers: “Towards the Rule of Law in International Relations,”* 95 AM. SOC’Y INT’L L. PROC. 262, 263 (2001) (Mr. Corell was at the time under-secretary-general for legal affairs and the legal counsel of the United Nations.); IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 1–17, 213–28 (1998).

36. U.N. Charter pmb1.

37. See U.N. Charter chap. VI, for further information on the pacific settlement of disputes.

to actualise an ancient potentiality—the history of the self-constituting of the society of all-humanity, the society of all human societies. It will be the beginning of universal human history.”³⁸

To achieve this goal, Andrew Hurrell explains, international law needed to transform its pluralist vision into a solidarist one.³⁹ The former, constructed within the classical European state system, was premised on the mutual recognition of sovereignty, difference, and deference. The latter, much more ambitious in scope and content, sought to abolish fragmentation. A solidarist version of international law would create and stabilize not only an international system of sovereign states, but also a true transnational society or, in the words of Immanuel Kant, an omnilateral society that embodies “the act of all the wills of a community together (*lege*).”⁴⁰

It is with this ideal in mind that MLTs must be judged. To establish a society through law, law must be multilateral in its making and application. To create an omnilateral or solidarist society through an international rule of law, the law must project a special normative pull. On both of these counts, MLTs instinctively seem a more fitting instrument than more limited partnerships.

The following sections weigh the degree to which MLTs do in fact promote the ideals embedded in an international rule of law, as their designers hope, and demonstrate how the present aggregate of rules and practices regarding treaty-making and participation render the goals impossible to attain in reality. It is in part this impossibility that should draw our attention to BLTs as alternatives.

One question that exceeds the scope of this paper is whether or not the ideal of an international rule of law, one that unifies the international system to the point of homogeneity, is in fact desirable. Martti Koskenniemi, for instance, argues that

[o]ur inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, *for reasons internal to the ideal itself*, rely on essentially contested—political—principles to justify outcomes to international disputes.⁴¹

If Koskenniemi is correct, then increased legalization of international relations is at best inconsequential and at worse harmful. Notwithstanding this

38. ALLOTT, TOWARDS THE INTERNATIONAL RULE OF LAW, *supra* note 9, at 465.

39. Andrew Hurrell, *Conclusion*, in THE ROLE OF LAW, *supra* note 3, at 327, 336.

40. IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 84 (W. Hastie trans., T. & T. Clark 1887) (1796), cited in Benedict Kingsbury, *Omnilateralism and Partial International Communities: Contributions of the Emerging Global Administrative Law*, 104 J. INT'L L. & DIPL. 98, 99 (2005).

41. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 7 (1990); see also KOSKENNIEMI, *supra* note 32.

skepticism, I proceed under the assumption that some regulation of international relations through legal instruments is still both feasible and desirable. Shared language can be more than shared rhetoric and can operate as a norm-creating tool.

My inquiry follows in two parts: First, I question whether MLTs do in fact create a shared language, in other words, whether they create common and equal commitments. Second, I question the special normative and symbolic pull ascribed to MLTs. In both parts, I consider the function of BLTs as an alternative.

A. *Uniformity and Equality*

1. *Uniformity*

At first glance it seems obvious that if international law is to constitute the shared language of all nations and states, it must be multilateral. International must be not only multilateral but also uniform, imposing equal limitations and obligations.⁴² Such equal obligations intuitively seem best realized through MLTs: while a system of tens of thousands of BLTs creates a cacophony of rules and arrangements, a regimented system of MLTs generates more uniform and more easily identifiable rules.⁴³ MLTs also reduce the possibility of states being subject to competing obligations and picking and choosing their international commitments.⁴⁴ MLTs can thus bind all states together in similar and reciprocal undertakings and tighten the knot of interdependence.

Moreover, even if not universal at first, MLTs have the capacity, at least in theory, to generate “instant custom,”⁴⁵ thus making their provisions binding upon all members of the international community over a relatively short period of time. Universalists, therefore, seek a unified system of MLTs to replace many of the existing, more limited, agreements; or, at the very least, they seek to ensure that limited agreements are concluded in the shadow of MLTs.⁴⁶

But the normative aspiration for a unified, equal, and binding universal law keeps stumbling against the reality of a system of equally sovereign

42. Stéphane Beaulac, *An Inquiry into the International Rule of Law* 14–18 (EUI Max Weber Programme Series Working Paper No. 2007/14, 2007), available at <http://ssrn.com/abstract=1074562>.

43. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 382 (2005) [hereinafter ALVAREZ, *IOS AS LAW-MAKERS*].

44. See, e.g., Spiro, *supra* note 2 (protesting against the pick-and-choose policy); see also Corell, *supra* note 35, at 262–63.

45. On the possibility of instant custom, see *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 28). For a critique of this proposition, see G.J.H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 86 (1983).

46. See, e.g., Espen Barth Eide, State Sec’y, Keynote Statement at the Vienna Convention (Jan. 13, 2006), available at <http://odin.dep.no/fd/english/news/speeches/010051-090029/dok-bn.html> (“In order to facilitate effective international cooperation, the goal should be to create a common legal foundation and greater harmonisation of states [sic] efforts in developing legal instruments.”).

states, materially different from one another, and upon whose joint consent the law depends for its enactment and observation. Thus, as things stand, neither the making nor subsequent application of international law necessarily meets the jurisprudential requirements of a domestic-like “rule of law.”⁴⁷ It is precisely in this context that the transposition of the domestic ideal onto the international sphere falters.⁴⁸

Some MLTs (such as human rights or trade instruments) do in fact enjoy widespread ratification, thus becoming truly universal. But others fail to attract a substantial number of parties. Examples of the latter category abound: the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (13 parties), the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (41 parties), the 1996 Agreement on the Establishment of the International Vaccine Institute (13 parties), and the 1971 Agreement establishing the International Pepper Community (6 parties) are just some examples.⁴⁹ In fact, of the 522 MLTs deposited with the U.N. Secretary General, less than half have been ratified by over a third of U.N. members, and only a third have been ratified by more than half of U.N. members.⁵⁰ A low number of ratifications also prevents these MLTs from burgeoning into instant custom, as hoped for by treaty designers.

Furthermore, even if the fewer treaties covering a given subject area mean more uniform application, MLTs are not necessarily at an advantage. The thousands of existing MLTs can themselves create competing regimes within the same sphere. One should consider, for example, the rules pertaining to anti-personnel landmines. Landmines have been the subject of Protocol II to the Convention on Certain Conventional Weapons⁵¹ as well as the 1997 Ottawa Convention.⁵² Under the former treaty, the use of landmines is

47. I allude here to the principles set out by H.L.A. Hart and Lon Fuller. See H.L.A. HART, *THE CONCEPT OF LAW* (1961); LON L. FULLER, *THE MORALITY OF LAW* (1964).

48. See Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305, 314–15 (2006) (“[I]t is not clear just how the commitment to the rule of law is to be cashed out in the international arena.”). For a discussion of the normative concerns that must guide the quest for the legitimacy of international law and the rule of international law, see generally Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004).

49. Advanced Search Page of the United Nations Treaty Series, <http://157.150.195.4/LibertyIMS:/anon/cmd=XMIGetWebPage;CmdFile=XMIAdvSearch.cmd> [hereinafter UNTS Advanced Search Page].

50. Out of 258 treaties in force, 138 were ratified by 64 or fewer states, 166 were ratified by 96 or fewer states, and 63 treaties have been ratified by 134 or more states. The Constitution of the World Health Organization, the 1949 Geneva Conventions, and the Convention on the Rights of the Child enjoy the widest ratification—they have been ratified by 192 states. See *id.*

51. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II, May 3, 1996, 35 I.L.M. 1206. For an updated number of parties, see <http://disarmament.un.org/TreatyStatus.nsf/CCWC%20Amended%20Protocol%20II?OpenView> (last visited Apr. 7, 2008).

52. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (156 parties). See [http://disarmament.un.org/TreatyStatus.nsf/APM%20Convention%20\(in%20alphabetical%20order\)?OpenView](http://disarmament.un.org/TreatyStatus.nsf/APM%20Convention%20(in%20alphabetical%20order)?OpenView) (last visited Apr. 7, 2008).

allowed; under the latter, the use is prohibited. The 87 countries bound by Protocol II include most of the world's major current or past landmine producers—the United States, China, India, Russia, Pakistan, and Israel—all of which have refused to join the Ottawa Convention. A similar situation arises with regard to the treatment of cultural property in times of conflict. Four different treaties are dedicated to this issue, in addition to various provisions on safeguarding cultural property that appear in other instruments,⁵³ each proscribing certain actions but allowing others.⁵⁴ Because treaties normally do not supersede one another but rather exist side by side, the result is that some actions can simultaneously be lawful for one state and unlawful for another, depending on the treaties to which these states are parties. There is thus an inherent tension between the universalization of the law and its bilateral application in each particular case.⁵⁵

Beyond the application of different treaties to different ratifying countries, reservations, understandings, and declarations (“RUDs”) added to ratifications and accessions further vary the application of specific provisions. Very few MLTs prohibit the addition of RUDs to ratification altogether.⁵⁶ Consequently, even among parties to the same treaty, different rules may apply depending on the RUDs added by a party and the acceptance of or type of objection to these RUDs by others. In other words, RUDs effectively turn MLTs into a series of BLTs. Ironically, the law concerning permissible and impermissible reservations is itself ambiguous and the subject of much debate among international law scholars.⁵⁷

The lack of uniformity of rules and the failure to achieve universal ratification of all MLTs bespeak a problem more fundamental than the self-interested reluctance of states to join the universalist enterprise or the individual treaty conflicts between parties who are bound by conflicting provisions re-

53. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 53, June 8, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court art. 8(2)(b)(ix), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

54. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 167 L.N.T.S. 279; Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, 38 I.L.M. 769.

55. ROSENNE, *supra* note 22, at 31.

56. For examples of MLTs that prohibit RUDs, see United Nations Convention on the Law of the Sea art. 309, Dec. 10, 1982, 1833 U.N.T.S. 3; Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works art. 22, Feb. 28, 1980, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3; Rome Statute, *supra* note 53, art. 120; WHO Framework Convention on Tobacco Control art. 30, June 21, 2003, 2302 U.N.T.S. 166.

57. On permissible and impermissible reservations in the context of human rights treaties, see generally Roberto Baratta, *Should Invalid Reservations to Human Rights Treaties Be Disregarded?*, 11 EUR. J. INT'L L. 413 (2000); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002). The subject of treaty reservations has recently been taken up by the International Law Commission. See, e.g., Int'l Law Comm'n, *Reservations to Treaties*, June 30, 2005, http://untreaty.un.org/ilc/summaries/1_8.htm.

lating to a similar subject matter. This problem is the doubtful assumption of value-coherence or of universal natural law; it is the question whether the international community could actually agree on a truly universal constitution espousing common norms and values. It is here where legal rhetoric hides deep moral and political disagreements.

Indeed, in the context of human rights norms, scholars have argued that “human rights and Western liberal democracy are close to a tautology,”⁵⁸ and that the “exclusivity and cultural specificity [of human rights norms] necessarily deny the concept universality.”⁵⁹ Recent attempts to devise an international treaty banning female genital circumcision (also known as female genital mutilation, or “FGM”), which have met with fierce objection on the part of some African and Middle Eastern countries, offer an example of the deep normative divisions within the international community. Freedom of religion, cultural relativism, and protection of women’s health and well-being all intertwine in the debate within and among African countries on whether FGM should be prohibited by treaty.⁶⁰ Although less common, voices calling for the international banning of male circumcision encounter a similar quagmire of arguments.

The skepticism toward the existence and scope of truly universal values is not limited to the sphere of human rights. It is equally valid in contexts as diverse as global health, environmental protection, economic development, and labor standards, to name a few. As David Kennedy recently opined, “[t]oday’s most pressing policy challenges do not lend themselves to one-size-fits-all solutions and ethical nostrums [T]hose who explore diverse ideas with different audiences will be more effective than a homogeneous, tightly-coordinated movement.”⁶¹ The attempt to devise one-size-fits-all regimes brushes over deep ideological rifts and often produces vague, minimal, and essentially less meaningful uniform rules.

Moreover, even where the international community agrees on a universally held norm, it must still wrestle with the need to balance other competing norms. This ordering problem exhibits itself through what scholars have

58. Makau Wa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in *THE ROLE OF LAW*, *supra* note 3, at 149.

59. *Id.* at 150.

60. Ass’n for African Women on Res. and Dev., *A Statement on Genital Mutilation*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 418–19 (Henry J. Steiner & Philip Alston eds., 2000) (citing *THIRD WORLD—SECOND SEX: WOMEN’S STRUGGLES AND NATIONAL LIBERATION: THIRD WORLD WOMEN SPEAK* 217 (Miranda Davies ed., 1983)); see also Makau Mutua, Op-Ed., *A Noble Cause Wrapped in Arrogance*, *BOSTON GLOBE*, Apr. 29, 2001, at D8 (arguing that the individual-centric European tradition does not fit with Asian, Islamic, or African traditions and so should not be considered universal). In 2003, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol) was adopted, including a prohibition on FGM. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol), Sept. 13, 2000, CAB/LEG/66.6 (entered into force Nov. 25, 2005), reprinted in Martin Semalulu Nsibirwa, *A Brief Analysis of the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women*, 1 *AFR. HUM. RTS. L.J.* 40, 53 (2001).

61. David Kennedy, Op-Ed., *Recasting UN’s Role*, *BOSTON GLOBE*, July 8, 2006, at A15.

termed the “fragmentation” of international legislation, meaning the existence of different and somewhat autonomous rationales underlying a variety of regimes each proclaimed to be universal.⁶² These regimes often conflict in their particular principles and institutions, their procedures and preferences, and their primary goals: trade liberalization versus environmental protection, development versus environmental protection, trade liberalization versus development, trade liberalization versus human rights, and liberal human rights versus communal human rights. Since the patchwork legislative process of treaty-making is incoherent and inconsistent, the norms enshrined by one treaty can conflict with those underlying another MLT. For example, proponents of international regulation of pornographic and obscene materials on the internet face the advocates of unregulated cyber flow of information. The efforts to devise a Multilateral Investment Agreement (“MIA”) for the protection and promotion of foreign direct investment through the September 2003 Cancun round of WTO negotiations have been foiled due to civil society’s concerns about its effect on the environment, labor rights, and development.⁶³ Developing countries that stress the rights to healthcare and education, rights recognized by the 1966 International Covenant on Education, Social, and Cultural Rights,⁶⁴ find themselves at odds with the developed world’s insistence that they protect intellectual property under the 1994 Trade-Related Aspects of Intellectual Property Rights⁶⁵ (“TRIPS”) agreement.

It is in this context that BLTs enjoy advantages. BLTs obviously cannot provide a general constitution for the international society, assuming for the moment that such a constitution is at least partly desirable or attainable. In a world in which diversity is more natural than uniformity, however, BLTs can produce arrangements that are more coherent in that they tailor their arrangements to the specific needs and circumstances of the particular dyadic relationships they purport to regulate. BLTs are better structured to meet the problems associated with fragmentation, competing values, and cultural diversity. Bilateral investment treaties find the balancing point among concerns for foreign investment, the environment, labor standards, and cultural sensitivities in a particular dyadic relationship while allowing for an altogether different balance in another dyadic relationship.

62. See generally Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, June 30, 2005, http://untreaty.un.org/ilc/summaries/1_9.htm#_ftnref1.

63. A similar attempt to devise a multilateral agreement on investment within the Organization for Economic Cooperation and Development (“OECD”) framework has failed for similar reasons. See *infra* text accompanying note 151; see also James Salzman, *Decentralized Administrative Law in the Organization for Economic Cooperation and Development*, 68 L. & CONTEMP. PROBS. 189, 197–200 (2005).

64. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

65. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

This lack of uniformity allows BLTs greater room for creativity, flexibility, and political expediency. A tailored arrangement also endows its authors and their subjects with a sense of ownership over its provisions, thereby increasing their propensity to comply. The uniformity of MLTs is thus traded for the individual fit of BLTs. When the attempt to devise an MIA through the WTO failed, countries turned instead to negotiating approximately 1800 BITs.⁶⁶ The flexibility offered by those BITs, as one commentator noted, allows “the United States [to] ensure that foreigners don’t control its defense industry; France [to] ensure that its culture remains uniquely French . . . and [lets] smaller countries have leverage when negotiating against bigger richer nations.”⁶⁷ Indeed, the United Nations Conference on Trade and Development recently emphasized “the need for a certain degree of flexibility to allow countries to pursue their development objectives in the light of their specific needs and circumstances”⁶⁸

In summary, although in theory MLTs promote uniformity in international law, in reality they achieve only limited success. The ability of states to pick and choose their obligations, even when ideals are multilaterally established, hinders the creation of a uniform body of international law. Uniformity comes at the expense of other values, such as flexibility and adaptation to the special circumstances of a particular setting, which are better promoted through BLTs.

2. *Equality*

Uniformity of obligations seems to promote equality among states because all states become subject to similar limitations, with no one state existing “above the law.” Most MLTs enunciate a set of uniform rights and obligations binding on all treaty parties, even though some anomalies of power exploitation do exist, such as the five permanent members of the U.N. Security Council and the Security Council’s right to sanction nuclear countries for violations of the Treaty on the Non-Proliferation of Nuclear Weapons (“NPT”).⁶⁹

Even if the uniform application of the rights and obligations contained in MLTs could be achieved, however, applying notionally equal provisions to different countries would not necessarily yield equal outcomes. In practical application, the uniform treaty terms have very different effects on dissimi-

66. U.N. Conf. on Trade & Dev. [UNCTAD], http://www.unctadxi.org/templates/Page____1006.aspx (last visited Apr. 7, 2008). *But see* UNCTAD, *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development*, 26, U.N. Doc. UNCTAD/WIR/2006 (Oct. 16, 2006), available at <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3968&lang=1> (claiming that the cumulative number of concluded BITs is closer to 2500).

67. Susan Ariel Aaronson, *International Investment Carousel*, 18 INT’L ECON. 56, 57 (2004).

68. UNCTAD, *Systemic Issues in International Investment Agreements (IIAs)*, at 5, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/2 (Mar. 21, 2006).

69. *See* U.N. Charter art. 23, ¶ 1; Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970).

larly situated countries.⁷⁰ Benedict Kingsbury argues that, in fact, much of the world's inequality is due to the notion of sovereign equality, which sanctifies the idea of formal equality over substantive equality.⁷¹ Although there are some MLTs that pay special attention to the difficulties of weaker states by imposing different obligations on differently situated states—a practice known as “common but differentiated responsibility” (“CDR”)⁷²—it is a rare phenomenon mostly limited to the environmental sphere and even then an anomaly.

Of course, unequal uniformity is not limited to the MLT domain. BLTs are mostly drafted in symmetrical reciprocal terms, which are often discriminatory in application. In February 2004, for example, as part of its Proliferation Security Initiative to combat the proliferation of weapons of mass destruction, the United States signed a bilateral treaty with Liberia (the world's second-largest shipping registry after Panama) that accorded each other the right to board, search, detain, and seize the cargo of any vessel that is reasonably suspected of trafficking in missiles or weapons of mass destruction (“WMDs”) on the high seas.⁷³ Liberia, it turns out, does not have a navy.⁷⁴

Whether or not MLTs are more prone to discriminatory uniformity than BLTs is an empirical question. Yet, on the whole, it would seem that any multilateral arrangement that does not contain differentiated obligations, as applied to materially differently situated states, would prove, on average, more discriminatory than a bilateral one. Package deals, adjustments, and side-payments that may compensate for discriminatory application are less complex in a bilateral than a multilateral setting.

Beyond the equal application of laws as a derivative of the uniformity of law, equality also may be promoted through the *making* of the law. MLTs seem to promote this type of equality as all states are typically invited to participate in a MLT-making conference, each having equal vote in drafting and adopting the final text of the treaty.

It is a peculiar feature of treaty-making, however, that a state can participate in a treaty negotiation, drafting, and voting, without ever adopting the treaty through ratification. Even if all countries participate in forming a particular treaty, some of them, perhaps even the most relevant or affected,

70. For a critique of specialists' efforts to establish a uniform international commercial law, see Paul B. Stephen, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 753–88 (1999).

71. Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599, 600–02 (1998).

72. See generally Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004); Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations*, 10 EUR. J. INT'L L. 549 (1999).

73. Proliferation Security Initiative Ship Boarding Agreement, U.S.-Liber., Feb. 11, 2004, available at <http://www.state.gov/t/isn/trty/32403.htm>.

74. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 530 (2004) (citing *Deal Lets U.S. Search Ships*, N.Y. TIMES, Feb. 14, 2004, at A4) [hereinafter *Policing the High Seas*].

could opt out, thereby frustrating the regime and any claim it has to equality.

Moreover, a universalist claim has been that IOs have enabled weaker states to have a greater impact on the initiation of multilateral conferences and the forming of MLTs.⁷⁵ Power differences that easily permit stronger parties to exploit weaker ones in bilateral settings are mitigated in the multilateral context by coalitions of weaker states.⁷⁶ The multilateral setting also compels every party to contract with every other party. This limits the ability of stronger powers to design discriminatory regimes that may favor some at the expense of others. The conjoining of efforts and resources also allows weaker states to participate more cost-effectively in multilateral negotiations, whereas in the bilateral setting they would have had to independently shoulder the burden of negotiating. Equal participation by all states also increases the transparency of the MLT-making process. Consequently, arrangements that are devised within a multilateral framework, as in the areas of international trade⁷⁷ or the environment,⁷⁸ are perceived as more equal and fair.⁷⁹

But even with increased participation, it is unclear that a multilateral setting would necessarily better serve the interests of weaker states. To be sure, a small island state might indeed be better off negotiating means to combat global warming through a coalition in a multilateral setting than bilaterally with the United States. A group of more than twenty poor countries successfully blocked the MIA when they united in a coalition against richer governments in Cancun.⁸⁰ Ironically, this might have been a Pyrrhic victory for the poorer countries, which were then left to negotiate, separately and individually, a series of BITs with the richer countries. The Cancun

75. ALVAREZ, IOs AS LAW-MAKERS, *supra* note 43, at 283.

76. See CHAYES & CHAYES, *supra* note 15, at 6–7 (“[A] multilateral negotiating forum provides opportunities for weaker states to form coalitions and organize blocking positions.”); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1, 18–23 (2004) (discussing bargaining coalitions in the negotiations over the TRIPs agreement).

77. World Trade Organization, GATS Training Module, Basic Purpose and Concepts: Most-Favoured-Nation Treatment, available at http://www.wto.org/English/tratop_e/serv_e/cbt_course_e/c1s6p1_e.htm (stating that the most favored nation principle “allows everybody to benefit . . . from concessions that may have been agreed between large trading partners with much negotiating leverage.”) (last visited Apr. 7, 2008); see also Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 758 (2003) (arguing that “the Most-Favoured Nation principle (‘MFN’) of the GATT/WTO regime has effectively made international trade a multiplayer game for its members.”).

78. For example, the Alliance of Small Island States, a coalition of forty-three small island and low-lying coastal countries (thirty-seven of which are U.N. members), coordinates negotiation positions among its members within the U.N. system, particularly in the areas of development and the environment. See Alliance of Small Island States, <http://www.sidsnet.org/aosis/> (last visited Apr. 7, 2008); see also International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Port Louis, Mauritius, Jan. 10–14, 2004, *Report*, U.N. Doc. A/CONF.207/11.

79. Ikenberry, *supra* note 12, at 534; see also ALVAREZ, IOs AS LAW-MAKERS, *supra* note 43, at 283.

80. See generally Amrita Narlikar & Diana Tussie, THE G20 AT THE CUNCUN MINISTERIAL: DEVELOPING COUNTRIES AND THEIR EVOLVING COALITIONS IN THE WTO, 27 WORLD ECON. 947 (2004).

experience is one that demonstrates how the multilateral negotiation setting, even if theoretically beneficial to weaker states, proves very difficult for weaker states to manage in practice.

Moreover, there could be instances in which the bilateral setting would actually prove more beneficial to weaker states even if a multilateral arrangement were possible. First, what constitutes bargaining power is context-dependent. Intensity of preferences, viable alternatives to a negotiated agreement, support (or opposition) from domestic constituencies, and even being weak are all sources of power in negotiation. Negotiation theory abounds with literature on how weak parties can reach favorable outcomes when negotiating with stronger parties, with coalition-forming being one of many strategies.⁸¹ Many other strategies do not require a multilateral setting and can operate even more effectively in a bilateral setting. Such strategies include the targeted swaying of domestic constituencies in the other country,⁸² broadening a country's own alternatives to a negotiated agreement, constraining or worsening the other country's alternatives,⁸³ hand-tying, and the posing of credible threats or promises.⁸⁴ Although these strategies are more effective in some settings than others, they suggest that the weak are not always at their strongest in a coalition.

Second, it is possible that a powerful country might allow itself to be more generous toward one weaker state, with which it enters into a bilateral agreement, than toward fifty weaker states, which are potential parties to an MLT. Bilateral free-trade agreements allow the United States to open its markets more willingly in order to trade with a particular, often weaker, partner (e.g., Morocco, Malaysia, Panama) than it would in the framework of the WTO, where obligations are assumed toward all. In fact, the General Agreement on Tariffs and Trade ("GATT") had foreseen the possibility of parties willing to commit to freer trade in a bilateral or regional context and, accordingly, determined that its provisions would not apply to such arrangements.⁸⁵ There are also instances in which powerful countries promise weaker states technical and other forms of assistance in exchange for increased cooperation over a matter of mutual interest, such as immigration. The stronger party, *A*, has a specific interest in the cooperation of a weaker country, *B*, but much less so in the cooperation of countries *C*, *D*, and *E*. A BLT between *A* and *B* would therefore promise *B* much higher payoffs than

81. See generally POWER AND NEGOTIATION (I. William Zartman & Jeffrey Z. Rubin eds., 2000); Jeswald W. Salacuse, *How Should the Lamb Negotiate with the Lion? Power in International Negotiations*, in NEGOTIATION ECLECTICS, 87, 87–99 (Deborah Kolb ed., 1999).

82. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 454–56 (1988).

83. David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation*, 1 NEGOTIATION J. 163, 171–72 (1985).

84. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 22–28, 35–46 (2d ed. 1980).

85. See General Agreement on Tariffs and Trade art. 24, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

a comparable MLT.⁸⁶ Externalities and distributional consequences may tip the scales in favor of an MLT, enabling *C*, *D*, and *E* to benefit from the regime as well, but *A* would likely impose less favorable terms on all participants, harming *B*. Although most MLTs do not exclude the option of a more favorable BLT between *A* and *B* complementing the general MLT agreement, principles like the MFN rule render additional BLTs difficult in certain contexts.

Third, we must assume that stronger parties will be able to provide more side payments of various sorts and thus push for their preferred deals even in a multilateral setting. Although this ability might be somewhat curbed by strong coalitions of weaker states, stronger powers will remain stronger in any setting. Strong states also are able to multiply their power by forming coalitions of their own. As Nico Krisch writes, “international law is *both* an instrument of power and an obstacle to its exercise.”⁸⁷ Moreover, in forming coalitions, weaker states need to compromise among themselves on their stated positions. In the context of international economic law, for instance, Edward Kwakwa argues that most developing states are still “rule-takers,” receiving rules set by the more powerful states.⁸⁸ In at least some circumstances, therefore, strong countries may become even stronger in multilateral settings.

Finally, faced with strong coalitions that reject compromise, more powerful states are apt to opt out of the regime altogether, as the United States has done with the Kyoto Protocol,⁸⁹ the Rome Statute of the International Criminal Court, and the Ottawa Convention. Opting out by powerful states might render the regime less meaningful, as with the Kyoto Protocol, and would inhibit the treaty’s provisions from becoming binding customary international law.

B. Normative and Symbolic Power

MLTs, as a general rule, enjoy a symbolic and normative power far greater than that of a random accumulation of more limited agreements. The pomp and splendor that accompanies the MLT-making process—the thousands of delegates, the expensive and prolonged conferences, the lengthy speeches and tons of documents—often give the final product a celebratory aura that

86. It is also possible that on one occasion, *B* is made better off through a BLT, while on another occasion *C* is made better off. In the aggregate, it is impossible to make a claim that any weaker country is necessarily better off in a bilateral setting. But it is similarly impossible to assume it is better off in a multilateral one.

87. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 371 (2005).

88. Edward Kwakwa, *Regulating the International Economy: What Role for the State?*, in THE ROLE OF LAW, *supra* note 3, at 227, 232–40.

89. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Mar. 16, 1998, 37 I.L.M. 1997 (entered into force Feb. 16, 2005), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

most limited treaties lack. That a visible and embodied “international community” should come together to affirm its collective revulsion against genocide and torture, commitment to the rights of women, concern about the fate of endangered species, or abhorrence of certain methods of warfare creates a powerful international narrative of what is good, right, and legitimate. It is in part this normative and symbolic power that has drawn the attention of legal scholars to MLTs.

The multilateral enterprise possesses, at least in theory, a discursive force, whereby the norms incorporated into the multilateral regime reverberate into and across national constituencies, become ingrained in public consciousnesses, and are imprinted upon states’ behavior. For some international relations scholars, especially those ascribing to the constructivist school of thought,⁹⁰ the symbolic and discursive power of these norms is also that by which they become perceived and acted upon as legally binding. Looking at human rights treaties, for instance, the power of MLTs lies to a large degree in their widespread ratification. This ratification begins what may be called an international conversation that absorbs human rights norms into its various exchanges, validating and solidifying them as part of states’ binding commitments.

Especially in the case of MLTs, which stipulate obligations *erga omnes*, a convention may be adopted as much for its symbolic value as for its contractual one. As pointed out by the International Court of Justice in its 1951 Advisory Opinion on the Question of Reservations to the Genocide Convention, the contracting parties

do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.⁹¹

Judge Alvarez (dissenting) added that conventions of this type “have a universal character; they are, in a sense, the *Constitution* of the international society, the *new constitutional law*. They are not established for the benefit of private interests but for that of the general interest.”⁹²

90. See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 185 (1998).

91. Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28, 1951).

92. *Id.* at 51.

Charting the boundaries of a normative “international society,”⁹³ MLTs also seem to distinguish the honorable members of the international society from the less honorable, the law-abiding citizens from rogue neighbors. The abundance of scholarship dedicated to “American exceptionalism” strives to explain why the United States stands alone with Somalia in failing to ratify the Convention on the Rights of the Child; why it meets Somalia once again in the much-maligned club of states who have not ratified the Ottawa Convention; and why the United States is yet again among those who have not joined the International Criminal Court (“ICC”). Underlying this effort is the belief, at least of some, that non-ratification is the exceptional behavior that must be explained and accounted for or else rejected as unjustified, unilateral conduct.⁹⁴

It is true that some MLTs strive to establish a normative constitution for a transnational society, and when these MLTs attract widespread ratification and attention they are successful in creating a shared normative language. Relatively few MLT conferences, however, are actually the subject of widespread attention or address such value-rich subjects as human rights, development, and global warming. In fact, most MLTs pertain to more technical issues, seeking to set uniform codes of conduct, standards, and reciprocal arrangements. Examples include the 1995 U.N. Convention on Independent Guarantees and Stand-By Letters of Credit (currently with 8 parties); the 1954 Customs Convention on the Temporary Importation of Private Road Vehicles (78 parties) and its 1956 counterpart on Commercial Road Vehicles (40 parties); the 1962 Agreement on Special Equipment for the Transport of Perishable Foodstuffs (4 parties); and the 1974 Convention on a Code of Conduct for Liner Conferences (80 parties).

Furthermore, even treaties motivated by moral convictions and whose negotiation captures world attention may nevertheless meet with limited success in attracting widespread ratification. For example, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families has 37 parties;⁹⁵ only 34 countries

93. Commenting on this socializing and constitutive power, Philip Allott writes: “At the beginning of the twenty-first century, at long last, two centuries late, there is reason to think that we are witnessing the first stages of a great metamorphosis of the international system, a change in the metaphysical groundwork of international law, a beginning of the end of the Vattelian worldview. We are witnessing the emergence of a universal legal system.” ALLOTT, *THE HEALTH OF NATIONS*, *supra* note 9, at 59. See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004) (writing about the socializing and acculturating force of international human rights treaties).

94. See generally the various contributions to *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005); Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, in *THE COST OF ACTING ALONE: MULTILATERALISM AND US FOREIGN POLICY* 345 (Shepard Forman & Patrick Stewart eds., 2001); Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 *AM. J. INT’L L.* 313 (2001).

95. Ratifications to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, <http://www2.ohchr.org/english/bodies/ratification/13.htm> (last visited Apr. 7, 2008).

have joined the 1961 Convention on the Reduction of Statelessness;⁹⁶ and only 79 countries have joined the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others⁹⁷—a number that does not include 9 out of the 14 countries listed by the U.S. State Department as those who contribute most to the problem of trafficking in persons.⁹⁸ Even more strikingly, one in three U.N. members have still not ratified the 1949 Convention on the Prevention and Punishment of the Crime of Genocide⁹⁹—one of the few treaties that should, theoretically, have been universally and unquestioningly accepted.¹⁰⁰ Although it may plausibly be argued that promoting norms and values of this kind would be even more difficult through bilateral instruments, the modest number of ratifications given to these MLTs indicates that the norm-setting benefits of MLTs may be overstated. These numbers are certainly not as high as universalists had hoped.

As earlier noted, RUDs added upon ratification or accession further encroach on the uniformity of rules, signaling only partial or conditioned acceptance of the allegedly universal norms that a multilateral treaty is supposed to create. When RUDs are added, the normative and symbolic pull of the agreement diminishes even more. Roughly one in four countries ratifying the 1966 International Covenant on Civil and Political Rights (“ICCPR”) insisted on at least one RUD. Interestingly, a majority of these belonged to the “Western European and Other” group of the United Nations,¹⁰¹ precisely where the greatest normative convergence around the terms of the covenant might have been expected. If conventions that purport to express universal values, even *jus cogens* norms, fail to secure near-universal ratification, such conventions run the risk of signaling the opposite. Lack of ratification might prove that the value is in fact not universal and that the norm cannot be truly conceived as *jus cogens*.

BLTs, in general, are more utilitarian, limited, interest-based exchanges that are thin on values and symbolism. They rarely enjoy the same normative and symbolic pull enjoyed by MLTs, either in their making or in their

96. There were 34 states parties to the Convention as of Nov. 1, 2007. United Nations High Commissioner for Refugees, States Parties to the 1961 Convention on the Reduction of Statelessness, available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3bbb24d54>.

97. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 (entered into force July 25, 1951).

98. Press Release, White House, Presidential Determination with Respect to Foreign Governments' Efforts Regarding Trafficking in Persons (Sept. 21, 2005), available at <http://www.state.gov/g/tip/rls/prsr/2005/53777.htm>.

99. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

100. All numbers are drawn from the UNTS Advanced Search Page, *supra* note 49.

101. See U.N. Treaty Collection, Survey of Reservations, Objections and Withdrawals – ICCPR, http://untreaty.un.org/humanrightsconvs/Chapt_IV_4/CovenantCivPo.pdf (last visited Apr. 7, 2008); Martin Scheinin, *Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice*, available at <http://www.nuigalway.ie/sites/eu-china-humanrights/seminars/ds0411.php>.

application. Except for a few high-profile exceptions, such as the 1986 Reagan-Gorbachev Reykjavik Summit that resulted in the 1987 Intermediate-Range Nuclear Forces Treaty,¹⁰² the 1999 Vajpayee-Musharraf Lahore Declaration,¹⁰³ and the 1993 Rabin-Arafat Declaration of Principles,¹⁰⁴ a bilateral agreement is likely to remain under the radar of widespread international interest. If publicity is the goal, MLTs serve the project of an international constitution far better than BLTs.

This is not to ignore the numerous instances in which BLTs have touched on core values of the international community, shaping and redefining them and eventually accumulating into general custom. For example, trade agreements that have incorporated human rights, environmental, and labor standards; bilateral disarmament accords; and agreements on immigration and the trafficking in women and children. Statistically speaking, however, of the 50,000 registered BLTs, most are unlikely to carry the same symbolic weight or normative pull as multilateral agreements, except perhaps in their aggregate.

A bilateral undertaking is more likely to carry a special normative weight when the undertaking is particularly relevant to the practices of the two states concerned. Thus, a bilateral agreement between warring parties on the laws of war may serve to reinforce the agreement's underlying norms more than the ratification of a multilateral framework by the same two parties, or, more poignantly, by parties who face no threat of war at all. I address the relationship between the bilateral undertaking and the background multilateral norms in the last section of this paper. It is also possible that incorporating norms into a series of BLTs that have more stringent monitoring and compliance mechanisms may better serve to strengthen these norms over time than an MLT, a possibility I discuss in the next section.

In short, universal MLTs can promote uniformity and formal equality, but in reality their success is often uncertain and conditional. Although BLTs impair uniformity, they fulfill other functions, such as tailoring arrangements to particular relationships and balancing competing norms, and are particularly important in balancing environment, labor rights, and development considerations.

Although MLTs do promote the equal application of international obligations, their success in this context also is limited. Moreover, formally equal application of similar provisions to differently situated countries does not yield equal outcomes, and the inclusion of differentiated commitments in MLTs is still the exception. Although BLTs are more susceptible to a pick-and-choose strategy, they do allow for differentiated arrangements in different relationships. Even though weak states enjoy coalition power in the mul-

102. Intermediate-Range Nuclear Forces Treaty, U.S.-U.S.S.R., Dec. 8, 1987.

103. Lahore Declaration, India-Pak., Feb. 21, 1999.

104. Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestine Liberation Org., Sept. 13, 1993, 32 I.L.M. 1525.

tilateral setting, under certain circumstances individual states, even if weak, benefit from bilateral contracts.

IV. COMPLIANCE, EFFECTIVENESS, AND EFFICIENCY

The lodestar guiding the movement toward universal legislation over the past 150 years or so has been the increasingly dominant assumption that global problems require global solutions: as wars have widened their scope, so must law widen its scope; trade liberalization would mean little if it were not undertaken by a sufficiently large number of states; dangers to the environment know no boundaries and require the involvement of the entire international community; terrorist finances will float freely across borders unless stopped by coordinated regulation in every state; and human rights could never be realized if they remained the pet cause of a handful of leading states. The more interdependent our world becomes, the more international cooperation is necessary to achieve collective goals and fend off global harms. Interdependence also creates a legitimate interest for states in what other states do or abstain from doing. Thus, concludes Brigitte Stern,

the only way to regulate the global economy and the global world is to improve the efficiency of international law, both in respect of its content and its institutional framework: in other words, there is no solution apart from the *creation of a truly world-wide international law system of regulation*.¹⁰⁵

The effectiveness of the multilateral response is complemented by the efficiency of the process through which equilibrium for cooperation is reached: instead of accumulating thousands of bilateral negotiations in every possible combination,¹⁰⁶ efficient bargaining is achieved through one multilateral negotiation process. For example, instead of negotiating over 18,000 BLTs on the reciprocal respect of the inviolability of foreign ambassadorial staffs and premises in each particular country, the Vienna Convention on Diplomatic Relations¹⁰⁷ established one common regime that applies to all diplomats. Similarly, Richard Posner argues that treaties on the laws of war were meant to create tort-like rights and obligations, and that negotiating them in an MLT framework was therefore more efficient than doing so through a series of BLTs.¹⁰⁸ Accordingly, multilateralism, often with its regulatory compo-

105. Brigitte Stern, *How to Regulate Globalization*, in *THE ROLE OF LAW*, *supra* note 3, at 247, 255 (Michael Byers ed., 2000) (italics in the original).

106. If every dyad of the 192 states who are members of the United Nations concluded only one bilateral agreement, the total number of agreements would already reach 18,336 (this number is calculated using the formula $n(n-1)/2$).

107. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

108. Richard A. Posner, *Some Economics of International Law: Comment on Conference Papers*, 31 J. LEGAL STUD. 321, 324 (2002).

ment, seems intuitively the most effective and efficient tool for facilitating universal cooperation and policing international behavior.¹⁰⁹

But despite the strong intuition that global problems require global solutions, not all problems are global and not all global problems in fact require global solutions. In order to assess the true function of both MLTs and, less intuitively, BLTs in enhancing cooperation and policing international behavior, it would be necessary to distinguish among various types of goods and regimes. I articulate benefits and shortcomings in terms of probable compliance with obligations, the efficiency in bargaining over them, and the effectiveness of their operation—criteria that regularly appear in the literature on treaty design. I start with a general overview of these considerations and then proceed to distinguish among types of regimes, activities, and goods. I believe that this distinction is necessary in order to get a more refined view of the workings of MLTs and BLTs in different contexts.

A. *Compliance, Efficiency, and Effectiveness—General Observations*

I begin with the caveat that the questions of compliance, efficiency, and effectiveness must ultimately rely on a combined empirical and theoretical examination. Moreover, with regard to any particular treaty, these questions can only be answered after the treaty has been concluded and entered into force, and they must be assessed against other possible alternatives, either existing or imaginary. With this caveat in mind, I turn to some general observations on how the structure of the treaty—as MLT or BLT—affects these questions.

Much has been written about the design of international regimes and their effectiveness in promoting their stated goals through compliance.¹¹⁰ In emphasizing the need to distinguish between compliance, in the sense of following treaty obligations, and the ultimate effectiveness of any treaty in attaining its goals, George Downs, David Rocke, and Peter Barsoom have introduced the term “depth of obligations” to denote the degree to which a treaty obligation requires a change in the behavior of its parties.¹¹¹ Only

109. See, e.g., CHAYES & CHAYES, *supra* note 15, at 123–24; THOMAS J. SCHOENBAUM, INTERNATIONAL RELATIONS—THE PATH NOT TAKEN: USING INTERNATIONAL LAW TO PROMOTE WORLD PEACE AND SECURITY 54 (2006); Robert O. Keohane & Joseph Nye, Jr., *Two Cheers for Multilateralism*, FOREIGN POL’Y, Fall 1985, at 148–67.

110. See generally LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY (1979); Anne-Marie Slaughter & Kal Raustiala, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); Harold Jacobson, *Afterword: Conceptual, Methodological and Substantive Issues Entwined in Studying Compliance*, 19 MICH. J. INT’L L. 569 (1998). On the managerial school of compliance, see generally CHAYES & CHAYES, *supra* note 15; on the transnational theory of compliance, see generally Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2632 (1997); for a general bibliography and ideological and methodological classification of international compliance literature, see generally William Bradford, *International Legal Compliance—Surveying the Field*, 36 GEO. J. INT’L L. 495 (2005).

111. George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT’L ORG. 379, 383 (1996).

deep obligations, so the argument goes, can produce effective outcomes. Shallow provisions, although more easily complied with, are also less meaningful in shaping behavior.¹¹²

Many scholars (although certainly not all) agree that MLTs tend to impose open-ended, standard-setting obligations, rather than clear, specific rules. This is the result of the need to accommodate the hodgepodge of values, interests, and preferences of a large number of participants, the fear of noncompliance by some participants, and the lack of immediate and direct reciprocity among all.¹¹³ At the same time, however, there is a substitution effect between the depth of the obligations imposed by an international agreement and the number of parties that will agree to accept these obligations.¹¹⁴ Universalists favor participation over depth of obligations, believing that parties will come to internalize the multilateral regime's norms and values through mere participation therein, even if the practical effects are nominal at first. Very shallow obligations could subsequently be ratcheted up through additional protocols or amendments propagated in an evolutionary manner.¹¹⁵ Universalists further argue that it is better to have shallower obligations complied with than deeper obligations ignored or, worse, renounced by parties defecting from the agreement.¹¹⁶

While this is a plausible account, it is by no means a certain one. Bruno Simma, for instance, has argued that modern MLTs deplete the legal value of treaties as a normative source of obligation because parties will concede to compromises around the lowest common denominator.¹¹⁷ If Simma is correct, then an MLT conclusion is not a cost-free exercise, and there is no reason to assume that obligations will develop from it in an evolutionary manner.

112. The assumption here of course is that the obligations are not only deep but also "right" in terms of means and ends. Also, as Goldstein and Martin argue, increasing depth is not always beneficial and may even prove counterproductive: when obligations impose too much on the parties and leave little wiggle room to respond to new developments or unforeseen challenges, parties might opt for a wholesale defection from the regime. See Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603, 620-23 (2000).

113. Raustiala, *Form and Substance*, *supra* note 27, at 611. In comparing MLTs to multilateral soft-law instruments, Raustiala also observes that MLTs often contain shallower obligations because "[s]tates need to compensate for the risk of their own noncompliance by weakening, monitoring, or watering down commitments." Soft law, on the other hand, being more of a "pledge" than a "contract," as he defines those terms, allows states to be bolder in the face of uncertainty. *Id.* at 582.

114. Oona A. Hathaway, *Between Power and Principle: A Political Theory of International Law*, 72 U. CHI. L. REV. 469, 514-19 (2005).

115. See generally CHAYES & CHAYES, *supra* note 15; Marc A. Levy et al., *The Study of International Regimes*, 1 EUR. J. INT'L REL. 267, 283-85 (1995). For a critique of this notion of treaty evolution generally and in the context of environmental regimes more specifically, see generally George W. Downs, Kyle W. Danish & Peter N. Barsboom, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465 (2000).

116. CHAYES & CHAYES, *supra* note 15, at 27; Goldstein & Martin, *supra* note 112, at 620-23.

117. Bruno Simma, *Consent: Strains in the Treaty System*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 485, 485-94 (R.St.J. Macdonald & Douglas M. Johnston eds., 1983).

In contrast, since the bargaining process of BLTs requires compromises between fewer parties, reciprocal concessions are easier to secure and monitor, and deeper and more meaningful obligations may be assumed. At times, such BLTs may propagate and diffuse to cover additional parties, thus evolving through already deeper obligations. Much of the law of war has developed in this manner. Other times, the bilateral exchange might deter additional parties from assuming similar undertakings.

The efficiency of multilateral bargaining must also be weighed against alternatives. Here we need to be careful not to confuse the efficiency of the negotiation *process* with the efficiency of its *outcome*. Negotiating one MLT may indeed be more efficient than negotiating thousands of BLTs (although the failure of recent rounds of WTO negotiations may call this assumption into question.)¹¹⁸ Even so, whether the resulting agreement is necessarily more efficient than the sequencing and accumulation of separate accords is uncertain. In fact, a multilateral negotiation is often essentially a series of bilateral negotiations evolving toward coalitions and broader consensus.¹¹⁹

Moreover, in negotiating a given agreement, the chance of a Pareto optimal outcome would seem higher when there are fewer bargaining parties, provided other parties are not directly affected by the agreement.¹²⁰ The introduction of additional parties to treaty negotiations is hardly ever cost-free. It potentially increases barriers to efficient agreements and exacerbates problems of information asymmetry, strategic barriers, psychological barriers, and institutional constraints.¹²¹ The multilateral negotiation process is therefore more efficient than a limited process only if all negotiating participants are indeed relevant and necessary to the regime.¹²² If they are not, bargains struck might be shallow—the result of having to disperse benefits across the board—or excessive—due to the participation of parties who would not ultimately share the burden of the costs of compliance. This point was nicely illustrated by John Keynes, special advisor to the British delegation, in his account of the Bretton Woods negotiations: “[T]wenty-one countries have been invited [to Bretton Woods] which clearly have nothing to contribute and will merely encumber the ground. . . . The most mon-

118. A recent *Economist* article predicts that “those keen on liberalising trade will focus on regional and bilateral agreements. These are already proliferating . . . : just about every one of the WTO’s 149 members is a party to a regional trade agreement of some sort.” *The Dying of the Light*, *ECONOMIST.COM*, Jul. 24, 2006, http://www.economist.com/agenda/displaystory.cfm?story_id=E1_SNTVVNQ.

119. On the sequencing of multilateral negotiations, see generally James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First*, in *WISE CHOICES: DECISION, GAMES, AND NEGOTIATION* 324 (Richard J. Zeckhauser et al. eds., 1996).

120. Later in the article, I address the issue of externalities and consequently the issue of efficient outcomes from the perspective of the international community at large.

121. On the organizational, psychological, and strategic barriers to favorable negotiated outcomes, see *BARRIERS TO CONFLICT RESOLUTION* (Robert H. Mnookin, Lee Ross & Kenneth J. Arrow eds., 1995).

122. I return to the question of how “relevance” or “necessity” is determined later in this paper.

strous monkey-house assembled for years.”¹²³ The real negotiation, he reported, was in fact a U.S.-U.K. bilateral negotiation, with other delegations (some not even speaking the language) simply facing a take-it-or-leave-it option with regard to the outcome text of the bilateral negotiation.¹²⁴

Another inefficient facet of multilateral negotiation arises when, as often happens, a party participates in the treaty-making process and influences its outcomes without ultimately joining the regime.¹²⁵ Any individual state has very little chance of single-handedly stopping an MLT negotiation process, since it is almost always easier to say “yes” than “no” once the invitation to the negotiation conference is out.¹²⁶ But it is easy enough to resist ratifying the treaty after it is concluded. During the Rome Statute negotiations, the United States was successful in blocking ICC jurisdiction on the basis of extradition by the capturing state, thereby watering down the treaty substance. Having thus substantially affected the ICC regime, the United States ultimately declined to join it. The ability to manipulate the design of the regime without subsequently accepting its prescriptions results in both inefficient and ineffective outcomes, thereby diminishing the real ability of MLTs to overcome collective action problems. This problem obviously does not arise when the agreement is struck between particular parties, whereby the negotiation assumes acceptance of the terms by all or by none.

It is impossible to generalize which treaty structure—the bilateral or the multilateral—secures in principle more reliable compliance. Some scholars support the universalist claim, emphasizing the importance of reputational or prestige incentives for compliance in the multilateral context,¹²⁷ especially given the increasingly common inclusion of monitoring, dispute resolution, or enforcement mechanisms in MLT regimes.¹²⁸ Others, however, argue that monitoring and detection of violations, as well as the ability to

123. STEVEN E. SANDERSON, *THE POLITICS OF TRADE IN LATIN AMERICAN DEVELOPMENT* 30 (1992) (internal quotation marks omitted), cited in RICHARD PEET, *UNHOLY TRINITY: THE IMF, THE WORLD BANK AND THE WTO* 40 (2003).

124. *Id.*

125. On the different legal implications of signing and ratifying treaties, see VCLT, *supra* note 20, arts. 9–18.

126. José E. Alvarez, *Symposium: Globalization & The Erosion of Sovereignty in Honor of Professor Lichtenstein: The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 232 (2002); Kumm, *supra* note 48, at 914.

127. See, e.g., Lisa L. Martin, *Multilateral Organizations After the U.S.-Iraq War*, in *THE IRAQ WAR AND ITS CONSEQUENCES: THOUGHTS OF NOBEL PEACE LAUREATES AND EMINENT SCHOLARS* 359, 370 (Irwin Abrams & Wang Gungwu eds., 2003); Guzman, *The Cost of Credibility*, *supra* note 19, at 319–20; Andrew T. Guzman, *Book Review: The Promise of International Law*, 92 Va. L. Rev. 533, 556–58 (2006) [hereinafter Guzman, *Book Review*]; Ikenberry, *supra* note 12, at 535, 539. For a nuanced analysis of the effects of reputational concerns in different settings, see generally George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95 (2002). And for a skeptical view of reputational concerns as inducing compliance, see generally Rachel Brewster, *Unpacking the State's Reputation* (Mar. 2008) (unpublished manuscript, on file with author).

128. Guzman contends, as a theoretical proposition, that dispute-resolution mechanisms are more likely in MLTs than BLTs. See Guzman, *The Cost of Credibility*, *supra* note 19, at 319–20; see also Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 190 (2007) (finding that half of the treaties examined contained

retaliate against violations, should operate more effectively in the bilateral setting, provided there are no clear power disparities.¹²⁹ Ultimately, as earlier noted, it is an empirical question. But to date, little systematic comparative work exists to support either position.¹³⁰

A final parameter in this context is the stability of the regime. Multilateral regimes enjoy a substantial degree of stability, a derivative of the prohibitive costs of renegotiations among treaty members plus the stabilizing feature of a bureaucracy where an IO is associated with the regime. Once the treaty is concluded, any change to or amendment of its provisions requires the consent of all of the original treaty parties in order to apply among them (otherwise, the change or amendment would apply only among the consenting states).¹³¹ This means that any change to the original text necessitates renegotiations among all parties, which is an extremely complicated and costly task, operating as a disincentive for frequent changes. Consequently, the durability of the original agreement is ensured.

This stability is at once a curse and a blessing. Almost every agreement needs to manage the tension between ensuring its long-term stability and allowing for adaptation to changing circumstances. But MLTs carry the implied expectation that they are to continue indefinitely.¹³² This means that any adaptation to reflect changing circumstances, new scientific data, or technological advances becomes exceptionally difficult. As earlier noted, the lack of flexibility and fear of noncompliance in the face of unanticipated events might drive parties to MLTs to accept only shallower obligations. In addition, the difficulty in renegotiating terms might deter countries from

dispute-resolution mechanisms and half did not, although not reporting whether such mechanisms were more likely to be found in MLTs or BLTs).

129. See generally Robert O. Keohane, *Reciprocity in International Relations*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY* 132 (Keohane ed., 1986), first published in 40 *INT'L ORG.* 1, 1–27 (1986) (showing skepticism about the power of reciprocity in general and specifically doubting reciprocity in the context of multilateral exchanges).

130. While some empirical studies have addressed the inclusion of dispute-settlement and enforcement mechanisms in treaties, these studies did not distinguish between MLTs and BLTs. Most empirical studies show that international agreements generally do not include any strong enforcement mechanisms, nor do parties generally agree to subject themselves to mandatory dispute-resolution mechanisms. Notable exceptions in the MLT context are the WTO (Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, Annex 2) and the United Nations Convention on the Law of the Sea (in Part XV). Even where applicable, most dispute-settlement clauses have never been invoked. While the number of international courts is on the rise, most international treaties establish neither courts nor any other body with sanction-imposing powers. See CHAYES & CHAYES, *supra* note 15, at 32–33; Andrew T. Guzman, *The Design of International Agreements*, 16 *EUR. J. INT'L L.* 579, 582 (2005) (arguing that sanctions generate a net loss to the parties where “one party faces a cost that is not recovered by the other,” and thus, parties may choose not to utilize dispute-settlement mechanisms in order to avoid this loss). See generally Raustiala, *supra* note 27.

131. See VCLT, *supra* note 20, arts. 40–41. But see ALVAREZ, *IOS AS LAW-MAKERS*, *supra* note 43, at 336–37 for a description of exceptions to this principle in several IO constitutions.

132. For a discussion of flexibility as a determining factor in whether or not to conclude a treaty or a “soft law” instrument, see Raustiala, *supra* note 27, at 591–93. See generally Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 *EUR. J. INT'L L.* 499 (1999).

participating in the regime in the first place or lead them to defect from it later on.

One way in which treaty-makers attempt to resolve the stability-flexibility tension is through the framework-protocol treaty design, whereby initial negotiations focus on creating broad, standard-setting framework conventions and then details and further negotiations are channeled through new protocols. This arrangement provides only a partial response and in some ways only puts a different name to a familiar problem. The negotiation of new and more specific regulations, such as protocols banning certain types of weapons under the Convention on Certain Conventional Weapons or negotiation rounds under the GATT/WTO framework, is incredibly complex and often unsuccessful.¹³³ Changes to the original agreement in any case, unless otherwise stipulated by the treaty itself, still require the consent of all of its original parties in order to bind them.¹³⁴

Bilateral frameworks, by contrast, are likely to allow for greater flexibility and offer parties more opportunities for renegotiation and adaptation to changing circumstances, thus potentially increasing the parties' willingness to initially accept deeper obligations. The danger, however, is that it is much easier for stronger parties opportunistically to impose renegotiations on weaker parties in such settings.

B. *Compliance, Efficiency, and Effectiveness—A Typology of Regimes*

To compare the workings of MLTs and BLTs in a more detailed and systematic manner, it is necessary to distinguish among several types of goods and activities that serve as the subject of international regulation. I use common distinctions and criteria,¹³⁵ including coordination versus cooperation activities, universal versus club goods, and externalities-projecting versus non-externalities-projecting regimes. Most of international regulation could be categorized within this typology, thus making it possible to offer some generic assessment of which structure of regulation would best fit in various contexts.

1. *Coordination Activities*

Coordination regimes are established where states' interests in a particular issue converge around several possible equilibria and the only function of the regime is to offer a focal point for coordination. Once the focal point is set,

133. See *The Dying of the Light*, *supra* note 118, at 1.

134. See VCLT, *supra* note 20, arts. 40–41.

135. Such distinctions have been suggested, in different framings, in the international relations literature. See generally EXPLAINING COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., 1986); Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RES. 3 (1998); John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT'L ORG. 561 (1992); Duncan Snidal, *Coordination Versus Prisoner's Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923 (1985).

no party has an incentive to defect. Coordination efforts that seek to set a focal point for a large number of states are most efficiently bargained for and realized through MLTs. MLTs and supplementing IOs are useful in setting and maintaining such focal points through iteration, dissemination of information, monitoring, and assistance toward compliance.¹³⁶ This is the case both with regard to the original treaty and to any further elaboration on the treaty's original provisions. Examples of MLTs functioning in this way include the stipulation by the International Civil Aviation Organization of international codes for aerial communication and the allocation of transmission frequencies by the International Telecommunication Union ("ITU").¹³⁷ The more activities become international in character, the bigger the role regimes have to play. Uniform measurements, standardized quality tests, and mutual recognition of licenses and certificates are becoming the global norm.

A limited coordination regime, conversely, would make sense in the following two cases: first, where the coordination effort addresses an activity or subject matter relevant only to a small number of countries—a situation that I address below; second, when the coordination effort affects a country's cultural, ethnic, or historical sensibilities, or is otherwise viewed as a country-specific determination. As an example of the latter kind of idiosyncratic coordination, the setting of national holidays could not be regulated multilaterally. Even the seemingly innocuous synchronization of daylight-saving time is done, if at all, on a federal or regional level but not on a universal one.¹³⁸ Here is how CBS News described the politicization of daylight-saving time in Israel and the Palestinian Authority:

Switching from daylight-saving time to Eastern Standard Time in Israel has become a political act. Israelis switched early to promote religious redemption. Palestinians decided to wait two weeks, citing patriotism. As a result, the region has operated on two clocks—throwing a lot of people off schedule: Businessmen were kept waiting, peace negotiators double-checked their schedules, diplomats found their parties pooped. It apparently even muddled terrorists, who killed themselves instead of their targets when their bombs detonated an hour early.¹³⁹

136. For a general discussion on how IOs promote MLT-making, see ALVAREZ, *IOs AS LAW-MAKERS*, *supra* note 43, at 338–400.

137. Convention on International Civil Aviation, Annex 10, Dec. 7, 1944, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

138. See, e.g., Council of Australian Governments Communiqué (July 14, 2006) (announcing that "New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory will consider synchronising the start and end dates for Daylight Saving Time"), available at <http://www.coag.gov.au/meetings/140706/index.htm>; Council Directive 2000/84/EC, Summer-Time Arrangements, 2001 O.J. (L 31) 21–22.

139. *My Clock is Better than Yours: Daylight Savings Time Conflict in Israel*, CBS NEWS, Sept. 17, 1999, <http://www.cbsnews.com/stories/1999/09/17/world/main62701.shtml>.

At times, even when the activity is shared by many, a coordination agreement between two (or among several) states may set a sufficiently strong focal point around which all other countries will subsequently have to converge. This is the case where these few states enjoy a special status or power in the market. In the extreme case, one country alone can force all others to follow. Lisa Martin, for instance, offers the example of how the United States forced other states to move from an allocative to a market-based regime in telecommunication, simply by committing itself to such a transition.¹⁴⁰ In such cases, a bilateral or more limited negotiation among the stronger players may be more efficient to begin with than a multilateral one.

2. Cooperation Activities

International regimes face a greater challenge in regulating mixed-motive games, such as combating global warming, tracking terrorist financing, stopping the spread of HIV/AIDS, or curbing the proliferation of weapons of mass destruction. In all of these instances, states have an interest in cooperation, but the temptation to defect is also high.¹⁴¹ In such cases, which are best framed as iterated prisoner's dilemma games, the regime strives to set equilibrium for cooperation and to stabilize it. Ideally, international agreements, buttressed by international organizations, set out rules and procedures that lengthen the shadow of the future, serve as a clearinghouse for information, enhance transparency and communication, and offer issue linkages that generate higher payoffs for the parties.

When collaboration is required among a large number of states, multilateral regimes help states to cooperate effectively by increasing incentives for compliance, reducing fears of defection by others, and generally overcoming collective action problems.¹⁴² Although most international agreements do not establish a central, coercive enforcement mechanism, they do often offer a looser form of decentralized enforcement through monitoring mechanisms, rules of reciprocity, and the interest of parties to the agreement in preserving their reputation for compliance with international obligations.¹⁴³

But while coordination games lend themselves more easily to multilateral frameworks, collaboration efforts, which require all players to move away from their dominant strategies, are not an easy fit for MLTs. Diffused reci-

140. Lisa L. Martin, *Interests, Power, and Multilateralism*, 46 INT'L ORG. 765, 777 (1992).

141. Although realist international relations scholars have debated the institutionalist school for decades, these debates do not challenge the institutionalist account per se, but only the degree to which international regimes can in fact overcome power concerns. See generally John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994-95, at 5.

142. For a discussion on the ability of regimes to promote cooperation, see generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN WORLD POLITICAL ECONOMY* 49-109 (1984).

143. Keohane, *supra* note 129, at 146-50; David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 392-94 (1990); Guzman, *The Cost of Credibility*, *supra* note 19, at 319-20; Guzman, *Book Review*, *supra* note 127, at 553-58. See generally Downs & Jones, *supra* note 127; Brewster, *supra* note 127.

procuity among parties and greater difficulty in direct retaliation for defections complicate multilateral collaboration efforts. At the same time, they may be necessary to overcome collective action problems and prevent free-riding. BLTs, conversely, are easier to negotiate, monitor, and enforce through direct retaliation. Bilateral exchanges lend themselves more easily, through iterated interactions, to stable equilibria. They run the risk, however, of being more susceptible to power exploitations and to projecting externalities onto third parties.

The next two subsections attempt to offer additional guidance on when a multilateral collaborative regime should be sought and when it would be preferable to design a more limited partnership. A more nuanced view of adapting structures to settings should take into account the distinction between universal (common) goods and more limited (club) goods. When the exchange of services is considered, material differences among states may render an MLT unfeasible and undesirable. Another distinction should be made between regimes that project externalities on non-members and those that do not.

3. *Universal Goods and Club Goods*

Universal or common goods are those that belong or are directly relevant to the entire international community.¹⁴⁴ The universal regulation of common goods such as the environment, the high seas, and outer space makes intuitive sense because it potentially affects every member of global society. Regulation of the common goods ostensibly requires wide-to-global participation to be effective, and often encounters collective action problems that MLTs might successfully overcome. Even if free-riders and hold-outs plague global regimes and diminish their effectiveness, the rationale of the MLT framework is a sound one in this context.¹⁴⁵

This is not the case when states are attempting to regulate cooperation over more limited goods, such as joint watercourses, boundaries, or oil reserves, or when they seek reciprocal exchanges of commitments, as in extradition, investment, and cultural or educational exchanges. The terms of such agreements are highly contingent upon differences between countries, and are thus better negotiated as BLTs or LMLTs than as MLTs. The failure of the 1997 International Watercourses Convention—a proposed MLT regulating the allocation of water in international watercourses—is a good example: the treaty itself contained only broad and vague guidelines on allocation

144. On the distinction between universal (also known as “common” or “public”) goods and “club” goods, see generally RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* (2d ed. 1996).

145. Of course, the line distinguishing between universal and more contained goods might not always be clear: we might, for instance, believe that the protection of diplomats should be a universal value, independent of a bilateral agreement between two particular states, or that principles for the allocation of rights in shared resources should be universally determined.

and to date, more than ten years after its conclusion, has attracted only 15 out of the 35 ratifications necessary for it to enter into force.¹⁴⁶ In contrast, hundreds of BLTs and LMLTs have been concluded to allocate rights in joint watercourses by riparians, both before and since the convention was adopted.¹⁴⁷ In commenting on the Convention, Eyal Benvenisti noted that

[s]tates taking part in multilateral negotiations over a framework agreement refuse to make concessions or even indicate future readiness to offer concessions, because the situation does not ensure reciprocal concessions. . . . [S]tates stick to non-cooperative positions in anticipation of subsequent negotiations over the fate of the transboundary resources they share.¹⁴⁸

A more limited framework in the context of a club good also ensures the non-inclusion of parties who are not directly relevant to the regime and whose participation might skew the most effective equilibrium (for instance, by using the negotiations of this regime to improve bargaining positions in other contexts).

Counterintuitively, even in the case of universal goods, there may be instances in which more limited forms of cooperation may still prove more effective than MLTs. As earlier noted, the inclusion of additional negotiation partners is not cost-free. A smaller but effective coalition may prove more successful at attaining the goals of an international regime than universal participation. In areas such as trade liberalization and environmental arrangements, the effective coalition may be relatively large, although, even then, success may largely depend on a smaller subgroup of states.

The participation of Vanuatu, for instance, in the Montreal Protocol or the GATT/WTO may serve other purposes, but it is not *necessary* for achieving these regimes' immediate goals. In other types of regimes, the effective coalition may be as small as two, but those two may be very important countries. The Cold War arms-reduction arrangements were concluded in BLTs between the United States and the Soviet Union, even though other powers (China, the United Kingdom, and France) also possessed nuclear weapons. By comparison with those of the superpowers, the other powers' arsenals were insignificant, and the strategic focus was therefore on a bilateral negotiation. By a similar logic, a future international antitrust regime would largely depend on an agreement between the United States and the European Union that others would then have to follow to at least a substantial degree.

146. Convention on the Law of the Non-Navigational Uses of International Watercourses art. 36, May 21, 1997, G.A. Res. 51/229, U.N. GAOR, 51st Sess. (1997), reprinted in 36 I.L.M. 700.

147. See Meredith A. Giordano & Aaron T. Wolf, *Sharing Waters: Post-Rio International Water Management*, 27 NAT. RESOURCES F. 163, 166–69 (2003).

148. EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE* 203 (2002).

Even the battle against global warming, largely viewed as a global enterprise, could effectively be taken on by a relatively small number of countries. The current U.S. administration has called for a post-Kyoto anti-global warming pact to be negotiated among at most the fifteen countries that are responsible for eighty-five percent of greenhouse gas emissions in the world.¹⁴⁹ If this proposal was genuinely motivated by the will to design an effective emissions-reduction regime, then such limited framework negotiations may have actually proven more efficient and more effective than a universal alternative, at least in the short run. Subsequently, in December 2007, President Bush joined dignitaries and representatives from 180 countries, NGOs, IGOs, and the media (making up about 10,000 participants) in agreeing on a roadmap for the negotiation of a successor to the Kyoto Protocol by 2009.¹⁵⁰ It remains to be seen whether such negotiation will prove fruitful in that timeframe and who the key negotiating partners will be.

Regional arrangements also demonstrate the minimum effective coalition point: in order to regulate regional goods, only the agreement of the regional states is required, since the introduction of additional, external actors into the regime is only likely to complicate and burden the negotiations and increase the operation costs of the regime once concluded. The attempt by the Organization for Economic Cooperation and Development (“OECD”) to devise the Multilateral Agreement on Investment (“MAI”) failed partly because the option was left for non-OECD countries to accede to the agreement, prompting civil society concerns about the consequences of the MAI’s arrangements for the developing world. Left only to OECD countries, an agreement would more likely have been achieved.¹⁵¹

One should note that a bilateral arrangement pertaining to a club good without the participation of other members of the club may be as harmful as a universal regime that includes too many members not belonging to the club. The 1959 bilateral treaty between Egypt and Sudan over the sharing of the Nile River waters¹⁵² took no account of the eight other Nile riparians who were obviously affected by the treaty. Moreover, earlier bilateral or trilateral agreements now hinder a broader accord among all ten riparians in the context of the Nile River Basin Initiative.¹⁵³

149. Andrew C. Revkin, *Conditional Support for U.S. Climate Change Plan; Bush Plan Seen as Step Toward Consensus*, INT’L HERALD TRIB., June 5, 2007, at 2.

150. The United Nations Climate Change Conference in Bali, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Apr. 7, 2008).

151. For a detailed account of the failure of the MAI negotiations, see generally EDWARD M. GRAMHAM, *FIGHTING THE WRONG ENEMY: ANTIGLOBAL ACTIVISTS AND MULTINATIONAL ENTERPRISES* (2000).

152. Agreement for the Full Utilization of the Nile Waters, Egypt-Sudan, Nov. 8, 1959, 6519 U.N.T.S. 63.

153. See Mohammed Abdo, *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, PERCEPTIONS: J. OF INT’L AFF., June–Aug. 2004, at 1, available at <http://www.sam.gov.tr/perceptions/Volume9/June-August2004/mohammed.pdf>; cf. Ashok Swain, *The*

There may be reasons to prefer a universal framework even if a minimum effective coalition is all that is necessary to create an effective regime. This is the case if the parties seek to promote redistributive goals or to ensure that all countries benefit proportionally from the new regime. Left to their own devices, stronger parties would show little interest in the effects of their limited arrangements on weaker parties. Some countries would end up being repeat winners, while others would keep drawing the shorter straw. The participation of landlocked countries in the United Nations Convention on the Law of the Sea ("UNCLOS") conferences protected those countries' interests (for instance, access to maritime commerce), even though they had little to contribute in terms of reciprocal exchanges of commitments, and even though one could envision a treaty signed by maritime countries only.¹⁵⁴ But this latter logic has its obvious limits too, as countries can neither practically nor normatively be required to consistently engage in redistribution efforts. This point is closely related to the consideration of externalities, which I address next.

Where differences among countries are materially relevant to the regime, multilateralism is bound to fail. This is especially true in the context of reciprocal exchanges of services. Extradition is a case in point: although dealt with in some regional agreements, many countries would object to a true MLT on extradition, not wanting to commit to extraditing their citizens to all other countries without distinction.¹⁵⁵ This would be partly due to domestic constitutional constraints prohibiting the extradition of one country's citizens to another country, and it would be partly due to a reluctance to extradite people to countries that have disreputable legal or punitive systems. For similar reasons, countries' cooperation in intelligence sharing is carried out mostly through bilateral channels (which, unlike multilateral ones, allow for secrecy). Thus, BLTs allow countries to accommodate their specific interests and strike the right balance between national and international considerations. Uniformity in such cases would be neither desirable nor efficient.

Obviously, the classification of a good as universal or common is not always an objective or merely technical question. Rather, it may well be a

Nile River Basin Initiative: Too Many Cooks, Too Little Broth, 22 SAIS REV. 293, 303–05 (2002) (suggesting that it would be more practical and appropriate to begin with a sub-basin limited framework and only then to broaden participation to include the other riparians).

154. There are forty-three landlocked countries in the world, not all of which have joined the UNCLOS. The United States opted not to join the regime, mainly due to concerns with regard to deep seabed mining. For an excellent account and analysis of the UNCLOS negotiation, see generally JAMES SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* (1984).

155. Where MLTs do provide arrangements for extradition in particular contexts, such provisions usually defer to the national laws and treaties in force of the states parties. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 99, art. 7. If not, such MLTs usually suggest extradition as an alternative to national criminal prosecutions by the capturing state. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5–7, Dec. 10, 1984, S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85.

normatively and politically motivated determination. The sphere of human rights demonstrates this point most dramatically. In some cases, human rights abuses might tangibly affect other countries, for example, by spawning refugees or signaling aggressive tendencies by the country's leadership. But even when there are no tangible repercussions outside the borders of that particular country, the present-day *erga omnes* commitment to human rights turns the abuse into a matter of international concern. It thus expresses a profound view of human rights as a universal common good, a "natural global resource."¹⁵⁶

4. *Externalities*

Agreements among states often project externalities—positive or negative—onto non-member countries. A bilateral mutual-defense pact may threaten a third country that is in conflict with one of the parties to the pact. A bilateral agreement to cooperate in the development of new types of weapons is another example. The U.S.-Soviet arms reduction agreements, on the other hand, yielded positive externalities, as would bilateral agreements on cooperation toward environmental protection. Some BLTs, such as mutual extradition arrangements, impose almost no externalities on third parties.

Externalities create stakeholders; affected parties have a legitimate interest in a regime that projects externalities. MLTs are more useful, at least normatively, in mitigating negative externalities and in redistributing the benefits of positive externalities. They are less necessary when fewer externalities are involved. It may therefore be assumed that some spheres, such as peace and war, the proliferation of weapons, or environmental cooperation are best regulated internationally, while extradition, the recognition and enforcement of foreign courts' decisions, or even investment and bilateral trade best benefit BLTs or LMLTs.¹⁵⁷

When externalities do exist, a key question becomes whether the right to participate in the regime should depend on a party's ability to make a real contribution to it or on the regime's potential effects on that party. Take, for example, Togo's participation in a treaty dealing with outer-space experiments. Togo itself has little to contribute to the treaty in a material sense in the absence of the technology or the intention to conduct such experiments. Nevertheless, it may have a legitimate interest in ensuring that countries that do possess such technology and intentions do not engage in any non-

156. On the universalism of human rights, see Louis Henkin, *The Universality of the Concept of Human Rights*, 506 ANNALS AM. ACAD. POL. & SOC. SCI. 10, 13–14 (1989).

157. This observation may reinforce scholars' view of the WTO as, in practice, an amalgamation of BLTs rather than one MLT. See, e.g., Pauwelyn, *supra* note 22. But cf. Lloyd Gruber, *Power Politics and the Institutionalization of International Relations* 1–25 (Harris Sch. Working Paper Series 03.18, 2003) (arguing that bilateral trade agreements do impose substantial externalities, forcing other countries who want to compete in the same markets to adopt the least favorable terms provided for in agreements with their competitors).

key-business in space. Of course, the same logic could make Togo a legitimate stakeholder in almost every possible regime, including the U.S.-Soviet arms reduction agreements or, closer to home, any peace agreement between two African countries. Even assuming that every country affected by an international agreement has some sort of normative claim to a voice in its negotiation, granting a role to those with nothing to contribute may become a burdensome, inefficient process and open the door for potential extortions well beyond the immediate interest of the affected country.¹⁵⁸ Once again, as in the case of the classification of goods as universal or club, determining the existence of externalities and defining stakeholders is not merely a technical or objective question; rather, it involves ethical and political choices about the nature of the international system.

To sum up, it would be impossible categorically to prefer MLTs or BLTs along the lines of the compliance, effectiveness, or efficiency of the regime. Despite the strong intuition that “global problems require global solutions,” at times, more limited solutions are actually better suited to meet certain global problems. In designing the right legal architecture, one should consider the type of regime sought (coordination or collaboration), the type of good regulated (universal or club), whether the activity imposes externalities on others, and what would be the most efficient bargaining process for both present and future purposes.

V. PROFESSIONALISM AND DEMOCRATIC LEGITIMACY

Some of the most often cited advantages of multilateral regimes have less to do with the treaties that comprise them than with the institutional features of the IOs that accompany them.¹⁵⁹ Even though IOs are not unique to the multilateral context (BLTs may also establish dedicated bodies to oversee the implementation of agreements), as distinct legal entities they are much more prevalent within it. A growing trend, corresponding to that of MLT-making, has also been evident in the establishment of multilateral intergovernmental organizations.¹⁶⁰ This trend has been touted by universalists as much as it has been feared by sovereigntists.

In this section I unpack these reported benefits into two groups: democratic legitimacy and professionalism. Although the two are closely related,

158. On the different weight of states participating in treaty-making on outer space, see Bin Cheng, *The Contribution of Air and Space Law to the Development of International Law*, 39 CURRENT LEGAL PROBS. 181, 190 (1986).

159. On the role of international organizations in multilateral regimes in general, see ALVAREZ, *IOS AS LAW-MAKERS*, *supra* note 43; KEOHANE, *supra* note 142; INTERNATIONAL ORGANIZATIONS (Jan Klabbers ed., 2005).

160. Thus, the 2006 Yearbook of International Organizations lists 1759 international governmental organizations in addition to almost 20,000 international nongovernmental organizations operating in spheres as diverse as agriculture, health, arms control, labor, scientific cooperation, transportation, and much more. 5 YEARBOOK OF INTERNATIONAL ORGANIZATIONS: GUIDE TO GLOBAL AND CIVIL SOCIETY NETWORKS 2007/2008 3, 215–30 (Union of Int'l Ass'ns ed., 44th ed. 2007).

the first focuses on the stages of the initiation, negotiation, and conclusion of the treaty, while the second focuses on the implementation and operation of the regime. As IOs are more endemic to MLT regimes, the discussion in this section centers on the pros and cons of multilateral IOs.

A. *Democratic Legitimacy*

Multilateral conferences have increased the diversity of actors involved in the process of treaty-making to include not only governments but also non-state actors such as NGOs, industry groups, international civil servants, bureaucrats, lawyers, and other experts. These nontraditional participants do not enjoy a vote on new MLTs but nevertheless influence negotiations through their advocacy, reporting, and expertise.¹⁶¹ In all these respects, modern multilateral treaty-making could be viewed as more participatory, more transparent, more democratized, and hence more legitimate than traditional bilateral diplomacy.¹⁶²

This benefit exceeds treaty-making. As part of a process of “deformalization,” bureaucrats and experts form transnational networks and alliances, transcending any particular state’s interest. This process has been perceived, in scholarship and civil-society politics, as promoting, beyond international law and regulation, a new form of international governance,¹⁶³ which is run not only by states for states but also by transnational and supranational institutions, and which is concerned not only with the welfare of states but with the well-being of individuals.¹⁶⁴ International law thus reaches out beyond high-level diplomats and affects every human being around the globe.

This transnational idea gathered steam with the end of the Cold War, as an invigorated United Nations began hosting World Conferences on the environment, human rights, women, social affairs, human settlements, sustainable development, and more. These conferences underscored the modern shift from interstate regulation of interstate relations to a transnational regulation of a global citizen’s welfare.¹⁶⁵ Today, international organizations, national governments, and alliances of NGOs compete to take the lead in promoting the conclusion of more MLTs. Canada and the International Campaign to Ban Landmines won the lead on the Ottawa anti-landmine

161. ALVAREZ, *IOs AS LAW-MAKERS*, *supra* note 43, at 357–59.

162. On the transparency of IOs’ decisionmaking processes through the involvement of NGOs, see Robert O. Keohane, *Global Governance and Democratic Accountability*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130, 144–45 (David Held & Mathias Keonig-Archibugi eds., 2003).

163. SLAUGHTER, *supra* note 30, at 36–64. On the regulatory “layer” in the “geology of international law,” see J.H.H. Weiler, *The Geology of International Law: Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 547 (2004) (F.R.G.).

164. Martti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT’L L.J. 61, 74–75 (2005). Koskenniemi further argues that the Cold War has also challenged the “constitutional” order of international legislation through three forces that he identifies as “empire,” “fragmentation,” and “deformalisation.” *Id.* at 78–88.

165. *See id.* at 73 (observing that, with regard to these U.N. conferences, “[t]his surely seemed like world government by world conferences adopting universal standards”).

process; Trinidad and Tobago revived the discussions in the United Nations over an international criminal court in 1989; the World Health Organization, supported by a transnational alliance, initiated the Framework Convention on Tobacco Control in 1999; and in 2003 Amnesty International, Oxfam, and the International Action Network on Small Arms jointly launched the global Control Arms campaign for promoting an international Arms Trade Treaty. MLTs have become a new form of international political startup.¹⁶⁶

But whether greater involvement by a larger number of actors necessarily denotes greater democratic legitimacy is questionable. This is another instance in which analogies from the domestic lawmaking sphere are problematic. Private and nongovernmental actors involved in international treaty-making belong to a very specific subset of the international community.¹⁶⁷ Men influence it more than women; the rich have a much more vocal presence than the poor; and some cultural tenets dominate it at the expense of others.¹⁶⁸ The marketplace of ideas is not equally open to all. One can imagine that during the WTO tuna-dolphin dispute, far more NGOs were happy to argue for the dolphins than for the tuna-dependent fishermen; the latter were represented only by their governments, not “civil society” at large. Distortions of this kind can have a real effect on negotiated outcomes. As Koskenniemi notes,

[p]rivate actors, stakeholder groups and experts will receive a position alongside public actors in a decision-making process geared toward rapidity and effect. The counterpart does not come from public diplomacy but from amorphous political groups, anti-globalisation lobbies and social movements with a strategy that [is] no longer geared toward a public law governed liberal federation.¹⁶⁹

Kenneth Anderson has similarly criticized developments in multilateral treaty-making, arguing that international law has been hijacked by essentially undemocratic modes of supranational lawmaking, through the influx of NGOs and international civil society, and that therefore there may be valid reasons for the United States and other countries to withhold their consent from certain suspect regimes; or at least, the United States should not be accused of being a unilateral imperialist, as it was struggling against

166. On competition among IOs in the making of treaties, see ALVAREZ, *IOs AS LAW-MAKERS*, *supra* note 43, at 285–86.

167. Mancur Olson’s observations with regard to better-organized domestic interest groups being able to exert greater pressure on governments are valid in the international sphere as well. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 22–36 (1965).

168. On feminist critiques of international lawmaking, see HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000). On racial critiques, see Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 *VILL. L. REV.* 841 (2000).

169. Koskenniemi, *International Legislation*, *supra* note 164, at 80.

the imperialism of the “international civil society.”¹⁷⁰ While serving as chair of the advisory board of the Open Society Institute’s Landmines Project, which funds activities in support of the international NGO campaign to ban landmines, Anderson was bold enough to observe,

I hope and, as an international NGO activist, strive hard to cause the United States to join the Ottawa Convention. But no matter how many non-governmental organizations across the globe adopt this position, they do not “democracy” make. They—we—are pressure groups, political lobbying groups, and they do not confer democratic legitimacy, least of all upon the profoundly undemocratic organs of the international system.¹⁷¹

These observations add to frequently raised concerns about international organizations, and particularly the “democratic deficit” caused by an exaggerated delegation of powers to such institutions without sufficient accountability: decisionmaking and rule-making powers, traditionally within the sole domain of the executive or legislature of every state, are now regularly exercised by IOs. This transfer of the locus of power is viewed by some as the disempowerment of the state as a governing unit and the distancing of decisionmaking and governance away from the people.¹⁷² Some scholars have even argued that the MLT agenda actually *exacerbates* state sovereignty at the expense of democratic participation by domestic interest groups in the international lawmaking process.¹⁷³

Naturally, these critiques have not remained unanswered. Robert Keohane, for instance, has argued that intergovernmental organizations are an easy target to pick on because they are “weak and visible” and because they lend themselves more easily to notions of reform than more powerful entities, such as multinational corporations or states.¹⁷⁴ The comparison, others argue, is not between MLTs as they exist today and ideal internationally democratic structures, but between the former and an old-fashioned, state-centric system, which leaves almost no room for voices outside it to be heard.

170. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT’L L. 91, 97–99 (2000).

171. *Id.* at 120.

172. These types of arguments have been voiced with respect to globalization in general. See, e.g., ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 289 (2004); RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE (1999). Regarding the burgeoning study of global administrative law, see generally Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1 (2006).

173. See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT’L L. 381, 392–96 (2000) (arguing that we need a discriminating view of multilateralism in which we favor it when it enhances democracy, as in the case of international trade, but truncate it when it enhances the power of the states, and consequently, the power of stronger interest groups within the state).

174. Keohane, *supra* note 162, at 146.

BLTs do not generate critiques of “democratic deficit.” Initiation of BLTs is usually the province of governments and bureaucracies, less of civil society, although the ability of non-state actors to influence the course of bilateral negotiations is well-recorded, both in theory and in practice.¹⁷⁵ Unlike the process for making MLTs, the BLT-making process attracts little attention—and consequently less involvement, for better or worse—by actors outside the immediate countries and citizens concerned. Thus, while the Doha Round negotiations of a multilateral investment agreement attracted huge attention, the 2000 separately negotiated BLTs, which in accumulation had similar (if not greater) impact, were generally overlooked by international coalitions. A similar dynamic has been apparent in bilateral free trade agreements negotiated by the United States, which often include crucial provisions in the areas of environmental protection or access to patented pharmaceuticals. This makes it harder for domestic constituencies to rely on transnational alliances and coalitions in influencing their own governments. Once the agreement enters into force, its implementation is then handled either by the existing bureaucratic apparatus or, less commonly, a dedicated new body.

It may therefore be claimed that the initiation, negotiation, and implementation of BLTs are consequently closer to the people that are affected by the treaty than the doings of a more remote international bureaucracy. In that sense, a BLT’s regime is more accountable to the citizens it affects. Naturally, where the government is not accountable to its own people, the lack of ability of citizens to influence the terms of the agreement makes the notion of being closer to the people an empty one. In addition, the flip side is the roster of issues discussed in previous sections: the dangers inherent in power-exploitation, the ignoring of negative externalities projected by the agreement, and the potential inefficiency and ineffectiveness of the regime. When domestic constituencies or weaker governments are facing a superior counterparty and in need of external support, the fact that their bilateral dealings attract less attention and interest is to their great disadvantage.

B. Professionalism

An alternative source of legitimacy for international regimes may be found in the professionalized transnational bureaucracy that is responsible for crafting, expanding, monitoring, and at times implementing multilateral agreements. The coming together of experts and professionals, who are perceived as objective as opposed to politically biased, endows the regime with a professional legitimacy. This is part of the coming of age of international law, which is no longer only a mirror of politics but objective, more

175. See Putnam, *supra* note 82, at 436.

like real law, requiring professionals to make and administer it.¹⁷⁶ IOs and their professionalized bureaucracies are performing these functions and driving the propagation of additional MLTs, investing the insights, knowledge, and practice accumulated in the making and operation of the original MLT. Accordingly, José Alvarez argues, modern MLTs “can no longer be judged the way we judged the 19th century compact—through a snapshot frozen at a single moment in time. The success of these living treaties is now best measured through a modern motion picture, which is able to record their evolutionary development across time.”¹⁷⁷ This international professionalism also reverberates onto developing countries, serving as an example and a resource for their own bureaucracies.¹⁷⁸

But the bureaucratization of the process, which ostensibly contributes to the specialization and professionalization of the regime, also makes the bureaucrats repeat winners at the expense of other interested parties.¹⁷⁹ Though generally celebrating the accomplishments of international organizations, Alvarez notes that

IO bureaucracies, like bureaucracies elsewhere, may also prove inefficient or ineffective at encouraging agreement; they may develop their own agendas at the expense of the state principals they ostensibly serve. . . . [P]ath dependencies, such as an infatuation with decisions by “consensus” however cosmetic, may lock negotiations onto the wrong historical path or result in meaningless lowest common denominator solutions. Modern international law is strewn with the wreckage of package deals that fail to secure the rates of ratification expected within a reasonable time¹⁸⁰

Alvarez finds a surprising ally in John Bolton, who argues that bilateral cooperation has proven much more efficient and effective at combating the proliferation of WMDs by *not* “relying on cumbersome treaty-based bureau-

176. Martti Koskeniemi, *International Legislation*, *supra* note 164, at 66–67 (“International treaties in their totality will be the Law-book of international law.” (quoting and translating OTFRIED NIPPOLD, *DER VÖLKERRECHTLICHE VERTRAG, SEINE STELLUNG IM RECHTS-SYSTEM UND SEINE BEDEUTUNG FÜR DAS INTERNATIONALE RECHT* 274 (Berne, Wyss 1894))).

177. Alvarez argues that these managerial regimes have deepened over time and that all offer “the prospect of a virtually continuous legislative enterprise.” Alvarez, *The New Treaty Makers*, *supra* note 126, at 221–22 (quoting Gunter Handl, *Environmental Security and Global Change: The Challenge of International Law*, in *ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW* 199 (W. Lang et al. eds., 1991)); *see also* ALVAREZ, *IOS AS LAW-MAKERS*, *supra* note 43, at 316–31 (discussing “managerial” forms of treaty-making).

178. *See generally* GILI S. DRORI ET AL., *SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION* (2003) (documenting the diffusion of science, scientific methods, and scientific discourse as a global culture, empowering and guiding the behavior of states and supporting development).

179. Koskeniemi, *International Legislation*, *supra* note 164, at 75.

180. Alvarez, *The New Treaty Makers*, *supra* note 126, at 222. For a further critique of the role of experts—predominantly, international lawyers—in treaty-making, *see generally* David Kennedy, *The Julius Stone Memorial Address 2004 at the Julius Stone Institute of Jurisprudence, University of Sydney: Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005).

cracies.”¹⁸¹ In describing the Proliferation Security Initiative (“PSI”)—a system of bilaterally negotiated safeguards between the United States and other countries to monitor and prevent the shipping of WMD materials through major seaports—Bolton comments,

[i]n developing PSI, our main goal has been a simple one: to create the basis for practical cooperation among states to help navigate this increasingly challenging arena. We often say, “PSI is an activity, not an organization.” This is not hard to understand, but is unusual. We think it is a fundamental reason for PSI’s success to date. PSI is not diverted by disputes about candidacies for Director General, agency budgets, agendas for meetings, and the like. Instead, PSI is almost entirely operational, relying primarily on the activities of intelligence, military, and law enforcement agencies.¹⁸²

Whether or not the interest in preventing WMD proliferation might have been better served through a formal multilateral regime, complemented by a dedicated organization for monitoring, consultation, and reporting, is questionable. What has been seen as an imposition of power by the United States has caused resentment to the point of self-exclusion by others. China, for instance, announced that it would not support PSI, citing legal concerns.¹⁸³ This is an example of an ideological aversion to multilateralism that is potentially counter-productive. But Bolton’s point highlights another important aspect of the efficiency debate, demonstrating that efficiency pertains not only to the negotiation process but also to the operation of the regime concluded.

To sum up, much of the attraction of MLTs lies in their perception as more inclusive democratic instruments through the professionalism associated with their making and application. These benefits may be overstated and are not risk-free. BLTs may be more democratic in being closer to the people and eliminating foreign interests from hijacking the negotiation of the agreement. In any case, as a sociological observation, the enormous growth of the global administrative community, which suggests and drafts additional multilateral instruments and helps establish treaty bodies, is undoubtedly a major force behind the expansion of universalism.

181. John R. Bolton, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: The Bush Administration’s Forward Strategy for Nonproliferation*, 5 CHI. J. INT’L L. 395, 395 (2005). It is interesting to note that Bolton himself is a devout unilateralist, who nevertheless acknowledges here the need for bilateral cooperation.

182. *Id.* at 400.

183. Edward Lanfranco, *China Won’t Sign on to PSI*, SPACE WAR, Sept. 2, 2005, <http://www.spacewar.com/news/china-05zzzzzzq.html>.

VI. BILATERAL AND MULTILATERAL INTERACTIONS

From the foregoing discussion it becomes apparent that any decisive presumption in favor of multilateralism or bilateralism would overreach, both normatively and descriptively, and would stand the chance of being self-defeating for either side of the universalist/unilateralist debate. The relative merits of multilateral and bilateral regimes come into view only upon a more nuanced examination of different kinds of international cooperation across a variety of subject matters. The environment, trade and investment, human rights, diplomatic immunities, the sea and the moon, resource sharing, transport and telecommunication, health, and education are all, in the context of treaties, different types of “goods” that necessitate different types of international cooperation, lending themselves more naturally to different types of regulatory regimes. Values such as promoting the rule of law, equality, effectiveness, and democratic legitimacy may all be advanced through MLTs but may, at times, be better realized through more limited forms of cooperation.

No less importantly, neither MLTs nor BLTs operate in a vacuum. All treaties are buildings or structures in the overall architecture of international law. Or, to use Joseph Weiler’s metaphor, bilateralism and multilateralism are but two strata in the more complex geology of international law.¹⁸⁴ Viewing each structure on its own closes off from view the myriad ways in which they interact with one another: how they complement, enrich, and strengthen one another, and also how they might inhibit or obstruct one another. Understanding the full scale of interaction makes the choice between designing BLTs or MLTs at any particular moment even more consequential. Although the previous sections have already alluded to some possible interactions, the following section is dedicated to their systematic exposition.

First, in their simplest and most elemental form, BLTs fully reproduce multilaterally designed legal rules, merely repeating the latter to reinforce them in the bilateral context. Such repetition is not redundant. Dyads of countries may wish to conclude bilateral agreements for symbolic reasons, emphasizing their intent to abide by an already multilaterally assumed commitment toward one another in particular. India and Pakistan, for instance, concluded a bilateral agreement on the treatment of their respective diplomatic and consular staff,¹⁸⁵ even though both countries were already parties to the corresponding multilateral Vienna conventions.¹⁸⁶ The fact that the

184. Weiler, *supra* note 163, at 551.

185. See Jawed Naqi, *India Accuses Pakistan of Harassing Its Diplomats*, DAWN, Nov. 10, 2001, available at <http://www.dawn.com/2001/11/10/top6.htm> (discussing the Code of Conduct for the Treatment of Diplomatic/Consular Personnel in India and Pakistan).

186. Vienna Convention on Diplomatic Relations, *supra* note 107; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

agreement was signed amidst an enduring conflict between the two countries gave the bilateral agreement a special political and normative clout, which the Vienna conventions did not have.

Another reason to reproduce a multilateral commitment in a bilateral instrument is the belief that the pledge would carry more weight in the bilateral setting, where retaliation for violations is potentially more immediate and precise. The pre-existence of the multilateral norm makes it easier to repeat in the bilateral agreement. It is also possible that the multilateral rule, with its existing body of accepted practical application and interpretation may then operate to stabilize and reinforce the bilateral agreement. Thus, in the United States-Singapore (2003),¹⁸⁷ United States-Chile (2003),¹⁸⁸ and United States-Morocco (2004)¹⁸⁹ Free Trade Agreements ("FTA"), labor obligations were included in the core text, ostensibly reinforcing neglected multilateral commitments already undertaken under the framework of the International Labour Organization ("ILO"). Presumably, the incorporation of these commitments into the bilateral instrument adds to their force and increases the likelihood of compliance. It also brings the labor obligations into the ambit of the mandatory dispute resolution mechanism operating under the FTA, a mechanism which does not exist under the ILO regime. Empirical analysis should be able to show whether labor practices have actually improved following the conclusion of such trade agreements.

Second, BLTs may translate legal arrangements, which include only vague standards in their multilateral setting, into concrete commitments in a particular case. The UNCLOS, for example, provides general guidance on the delimitation of maritime boundaries, the division of continental shelves, and the allocation of fishing rights in contiguous zones. But the application of its provisions in any particular sea requires a BLT (or LMLT) that takes into account the specific geographical conditions of the area. A similar need for individual application often causes trade disputes within the GATT/WTO frameworks to be resolved by bilateral agreement. In fact, in almost any international dispute, parties invoke general international rules, treaty-based or customary, in support of their opposite stances. The extent to which MLTs or multilateral customary norms ultimately inform and govern the negotiated resolution of international disputes is unclear and demands further empirical study.

187. United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, 117 Stat. 948, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

188. United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, Dep't State 04-35 *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf.

189. United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html.

Third, even when corresponding to existing multilateral norms and rules, BLTs can do more than simply repeat or adapt general norms to bilateral settings. Rather, given the more limited bargaining setting, they may prescribe deeper obligations and even prove more effective in inducing compliance. Some bilateral agreements on environmental cooperation entail deeper and more detailed commitments than MLTs aimed at similar goals.¹⁹⁰ Thus, bilateral agreements between the United States and Australia and the United States and India included arrangements on technology and information-sharing, which the United States had earlier refused to introduce in the multilateral environmental agreements.¹⁹¹

The practice of imposing deeper obligations through BLTs is even more common in the security sphere. In that context, it is customary to include deeper obligations even when the parties are not bound by any corresponding multilateral commitment. Even before they joined any regional or multilateral non-proliferation regime, Brazil and Argentina concluded a bilateral nuclear disarmament agreement, which included an inspection regime far more transparent and intrusive than that required by the NPT.¹⁹² This regime is still active, despite both countries' subsequent accession to both the NPT and the Mercosur regional nonproliferation framework.¹⁹³ Recently, various bilateral treaties have granted state parties the power to interdict the transport of WMDs on the high seas more explicitly than any existing MLT.¹⁹⁴

Even when *jus cogens* norms are at stake, as in the prohibitions on genocide, racial discrimination, torture, or war crimes, BLTs may still prove a useful tool against the backdrop of an existing MLT. It is feasible to imagine more robust protection of human rights through bilateral instruments when, for instance, the latter offer a package deal which conditions lucrative trade on better human rights performance. The bilateral framework allows more

190. See, e.g., Agreement on Environmental Cooperation between the Government of the United States of America and the Government of the Republic of Chile, U.S.-Chile, June 17, 2003, Dep't State 04-86, available at <http://www.state.gov/g/oes/rls/or/22185.htm> (establishing work programs to promote the joint collection and publication of information on both parties' environmental legislation, policies, practices, and enforcement activities); Agreement between the Government of the United States of America and Canada on Air Quality, U.S.-Can., Mar. 13, 1991, T.I.A.S. 11,783 (setting specific objectives for emissions limitations or reductions of air pollutants and adopting the necessary programs and other measures to implement such specific objectives), available at <http://www.epa.gov/airmarkets/programs/usca/agreement.html>.

191. See U.S.-Australia Climate Action Partnership, <http://www.state.gov/g/oes/climate/87665.htm> (last visited Apr. 7, 2008). For an example of the progress of this bilateral partnership and its activities, see <http://www.state.gov/g/oes/climate/rmks/11788.htm>.

192. See Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC), available at http://www.abacc.org/engl/abacc/abacc_structure.htm (last visited Apr. 8, 2008).

193. Treaty for the Prohibition of Nuclear Arms in Latin America, Feb. 14, 1967, 22 U.S.T. 762, 634 U.N.T.S. 281 ("Treaty of Tlatelolco").

194. See Byers, *Policing the High Seas*, *supra* note 74, at 529-30. Byers also notes that "[t]he Proliferation Security Initiative is reflective of a shift in U.S. foreign policy toward a more flexible approach to collective action that eschews both ad hoc unilateralism and institutionalized multilateralism." *Id.* at 542.

effective monitoring of practices, stronger dispute resolution procedures, and more immediate incentives for compliance. The United States-China trade agreements have tied, albeit indirectly, U.S. trade commitments to proven improvements in Chinese human rights practices. Such bilateral instruments may carry both normative and substantive power to promote values that MLTs alone have failed to secure.

The 1996 Israel-Lebanon Understanding¹⁹⁵ provides another example of a bilateral agreement surpassing *jus cogens* norms. Mediated by the United States and France in response to escalation in hostilities between Israel and Lebanese armed groups, the Understanding sought to accord civilians on both sides of the border absolute protection from all injury. This absolute protection marked a departure from the generally accepted laws of war, which acknowledge and legitimize the collateral effects of lawful warfare on civilians, toward greater protection of civilians regardless of considerations of military necessity. The regime was mildly successful in its mission.¹⁹⁶

In all these cases, BLTs build on existing MLTs to promote more effectively values that we perceive to be global—human rights, environment, disarmament, etc. In most cases, the existence of a prior MLT, which signals a broad recognition of the underlying norms and interests, makes it easier and at times even possible to conclude a complementary BLT. The latter's limited bargaining setting, in turn, allows parties to be more daring and more generous in their exchanges. The absolute immunity accorded by the Israel-Lebanon Understanding to civilians amidst ongoing hostilities could never have been negotiated universally, then or today. The parties' willingness to accept blame for actions that would have been recognized as lawful actions taken in self-defense under general laws of war was a unique feature of this agreement. The more limited framework, which was tailored to the specific characteristics of the conflict, undoubtedly allowed the parties to be bolder in their undertakings and experiment with deeper obligations than those in existence.

When we think of the practice of deepening norms via BLTs, it should not be assumed, however, that starting out with a MLT and then ratcheting up obligations through a series of BLTs is always a risk-proof strategy. There may be cases in which multilateral contracting might make it easier for states to resist deeper bilateral obligations by pointing to their already-existing multilateral commitments. Nor is it the case that the bilateral treaty is always intended for augmenting the multilateral undertaking. In fact, oftentimes a bilateral agreement is intended for exactly the opposite purpose. There is evidence that free trade agreements negotiated by the United States will tend to increase protection for intellectual property, beyond the

195. U.S. Embassy in Tel Aviv, Isr., Israel-Lebanon Ceasefire Understanding (Apr. 26, 1996), *available at* http://israel.usembassy.gov/publish/peace/documents/ceasefire_understanding.html.

196. On the experience of the Israel-Lebanon Understanding, see GABRIELLA BLUM, ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES 190–241 (2007).

stipulation of TRIPS, at the expense of access to affordable medicines in the other country.¹⁹⁷ Clear power disparities within these dyadic relationships allowed the stronger party to evade more equitable terms and bargain to its own advantage.

Fourth, bilateral treaties are often used as carrots to induce parties to join or adhere to multilateral regimes. The 1994 trilateral United States-Russia-Ukraine agreement offered the Ukraine greater security assurances and economic incentives in exchange for the transfer of its nuclear weapons to Russia,¹⁹⁸ thus ensuring that Russia is the sole successor to the Soviet Union as a nuclear power under the NPT framework. But just as bilateral instruments are sometimes used for side-payments to induce participation in a multilateral effort, they may also be used to escape them. The “article 98” bilateral agreements into which the United States has entered to ensure immunity for American personnel from ICC jurisdiction¹⁹⁹ or Australia’s withdrawal from UNCLOS jurisdiction prior to its bilateral negotiation over maritime boundaries and gas and oil reserves with East Timor²⁰⁰ provide compelling examples. The legislation of the American Service-Members’ Protection Act,²⁰¹ which ordered the U.S. president to impose sanctions on countries that participate in the ICC, is an even blunter instance of the use of a bilateral (or unilateral) route to inhibit a multilateral effort.

Moreover, a practice of striking bilateral package deals that afford special compensation for better human rights behavior (or any other global value) runs the risk of encouraging states to hold out on multilateral commitments with the attempt to extort additional compensation for such commitments bilaterally. The withdrawal of North Korea from the NPT and its demands for American commitments as condition for reentry is a case in point.²⁰²

A fifth type of interaction occurs when rules derived from a variety of multilateral instruments overlap, requiring a bilateral agreement to choose one to govern the bilateral relationship. For example, water-allocation treaties, especially before the conclusion of the 1997 Framework Agreement on International Watercourses, had to select one of four different customary

197. See Carlos María Correa, *Implications of Bilateral Free Trade Agreements on Access to Medicines*, 84 BULL. OF THE WTO, 399, 399–404 (2006).

198. The United States-Russia-Ukraine Trilateral Statement and Annex, Jan. 14, 1994, available at <http://www.atomicarchive.com/Docs/Deterrence/Trilateral.shtml>.

199. See U.S. Department of State, Article 98 Agreements and the International Criminal Court, <http://www.state.gov/t/pm/art98/> (last visited Apr. 7, 2008).

200. See Joint News Release, Att’y Gen. Williams and Minister for Foreign Affairs Downer, Changes to International Dispute Resolution (Mar. 25, 2002), available at http://www.foreignminister.gov.au/releases/2002/fa039j_02.html (declaring that Australia’s withdrawal from the compulsory jurisdiction of the ICJ was based on the principle that maritime boundary disputes were best settled through negotiation and suggesting the possibility of upcoming negotiations over Australia’s maritime border with East Timor).

201. American Service-Members’ Protection Act, 22 U.S.C. §§ 7421–31 (2004).

202. For more information on North Korea’s withdrawal, see U.S. State Dep’t, Background Note: North Korea, <http://www.state.gov/t/pa/ei/bgn/2792.htm> (last visited Apr. 7, 2008).

rules on the sharing of transboundary watercourses.²⁰³ The 1997 Agreement ultimately favored the principle of joint management but only in vague terms that still necessitate detailed and elaborate negotiations on any specific watercourse. Rather than ratifying an unhelpful multilateral treaty, riparian states have mostly chosen instead to conclude hundreds of bilateral water-sharing agreements.

The need to reconcile competing rules increases when the rules are derived from different subject-area regimes, which are driven by varying goals and values. Although, strictly in terms of numbers, having more BLTs may exacerbate the problem of fragmentation and proliferation of competing legal instruments, they are nonetheless useful when there is a need to strike a balance between conflicting principles and preferences. In particular, BLTs are expedient in that they can take into account the specific needs and requirements of each country. Because they are tailor-made, BLTs can square security and human rights, development and protection of intellectual property, free trade and labor rights. They can be more creative in the solutions they offer to similar problems arising under differing circumstances.

A sixth type of interaction occurs where a particular BLT attempts to amend, override or depart from an MLT. This is not the same as a bilateral instrument used simply to escape the multilateral undertaking, as in the earlier mentioned examples of the article 98 agreements or Australia's withdrawal from ICJ jurisdiction under the UNCLOS. In this category, a bilateral agreement departs from a multilateral norm in order to accommodate for values or interests that are recognized universally. A common example occurs in the peace-justice debate. The current trend in international criminal law is to oppose all impunity and proscribe all amnesty given to war criminals, even when the amnesty is agreed upon between the parties to the conflict. The abundance of scholarship debating the tradeoff between the ideals of peace and justice²⁰⁴ prompts consideration of bilateral arrangements that advance peace at the expense of accountability for war crimes, even though the Rome Statute of the ICC seems to accommodate such a preference only narrowly and reluctantly.²⁰⁵ In commenting on the issuance of an arrest warrant by the ICC against a Ugandan rebel group leader, the head of Uganda's parliamentary opposition said, "[t]he ICC has become an impediment to our efforts. Should we sacrifice our peacemaking process here so

203. These customary rules were absolute territorial sovereignty, absolute territorial integrity (riparian rights), equitable utilization, and community of interest (joint management). On the international and domestic law of transboundary water-sharing, see Patricia Wouters, *Editor's Foreword*, in *INTERNATIONAL WATER LAW: SELECTED WRITINGS OF PROFESSOR CHARLES B. BOURNE* x, x-xxvi (Patricia Wouters ed., 1997).

204. See, e.g., M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 *CASE W. RES. J. INT'L L.* 191 (2003); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT'L L.* 7 (2001).

205. See Rome Statute, *supra* note 53, art. 53(2)(c). It might be argued that despite the text of the Rome Statute, prosecutorial discretion is wide enough to encompass consideration of a suspect's role in promoting peace and to withhold proceedings against him or her.

they can test and develop their criminal-justice procedures there at the ICC? Punishment has to be quite secondary to the goal of resolving this conflict.”²⁰⁶ While the Ugandan case does not involve a BLT in the formal sense, involving an intrastate conflict and negotiations between the government and rebel groups, the issue of amnesties to war criminals is bound to come up in future bilateral peace accords, such as a final status agreement between Israel and Palestine, raising similar concerns.

Moreover, stringent application of international legal rules without regard for each unique historical, political, and cultural context may be counter-productive. Flexible accommodation of the particular needs of countries and the space for creative bilateral schemes should be regarded as a normative value. A case in point is that of Cyprus and the European Court of Human Rights (“ECHR”). The ECHR has twice ruled that Turkey had been violating rights in northern Cyprus, in reference to various treaties.²⁰⁷ The “Annan Plan for Peace,” advanced by the U.N. Secretary General a few years later, included various provisions that departed from the ECHR’s ruling in order to accommodate Turkish interests. When Cypriots went to the polls to vote on the Annan Plan, the majority of Greek Cypriots voted against it. To the extent that the Court’s rulings had any effect on the Greek Cypriot vote, therefore, they were clearly not an enticement for a negotiated solution, which would have required the Greeks to accept some of Turkey’s past actions and interests on the island. Referring to the ongoing peace negotiations on the island, the ECHR asserted that “inter-communal talks cannot be invoked in order to legitimate a violation of the [European] Convention [on Human Rights].”²⁰⁸

The Cypriot example calls into question the expediency of resolving deep-running political, historical, national, and ethnic conflicts through courts. But it also demonstrates a potentially much graver consequence of increased multilateral regulation, especially the labeling of additional norms as peremptory: the narrowing down of the political space that is necessary for resolving such conflicts through careful consideration of context-specific circumstances. Today, the island remains divided and the prospects for peace in the near future are doubtful.

The aggregate of possible relations I have laid out indicates the top-down influence of international multilateral law over the conclusion of BLTs. But it also implies the counter-movement, by which BLTs can operate either in the absence of any MLT, or by which they may, in time, develop into multilateral international law. In the area of international taxation, for instance,

206. Helena Cobban, Op-Ed., *Uganda: When International Justice and Internal Peace Are at Odds*, CHRISTIAN SCI. MONITOR, Aug. 24, 2006, at 9 (quoting Morris Ogenga-Latigo). Naturally, one might ask whether, absent the arrest warrant issued by the ICC, a peace process would have begun at all.

207. *Loizidou v. Turkey*, App. No. 15318/89, 23 Eur. Ct. H.R. 513, ¶ 63 (1996); *Cyprus v. Turkey*, App. No. 25781/94, 35 Eur. Ct. H.R. 967, ¶ 18 (2001).

208. *Cyprus v. Turkey*, 35 Eur. Ct. H.R. at ¶ 174.

no universal comprehensive tax treaty has been concluded, since governments insist on devising their own domestic tax structures to meet different economic needs. Instead, hundreds of bilateral treaties have established as many made-to-measure exchanges.

It is possible that allowing states to experiment with different regimes on a bilateral basis eventually creates a larger pool of arrangements to choose from, adopt, or modify as necessary, providing for a greater wealth of experience to draw upon when we come to manage the diversity of international relationships. Such a diverse fund of arrangements is represented by the 2000 negotiated BITs, which would not have come into being had the sought-after Multilateral Investment Agreement been concluded. In time, the accumulation of such BLTs could generate a customary norm or spark the negotiation of a multilateral treaty. Successful bilateral formulas could serve as useful precedents and foundations for future MLTs. As earlier noted, significant portions of modern MLTs on the laws of war are an accumulation and development of earlier practices and customs, many of which were incorporated into bilateral agreements between warring parties.²⁰⁹

But just as multilateralism may constrain the conclusion of further BLTs, it is also possible for the many varied BLTs to obstruct a multilateral norm from developing. It is thus doubtful whether the conclusion of a multilateral agreement on investment is still feasible (or desirable) today, when 2000 varied BITs are already in existence. If it turns out that the bilateral frameworks have mostly enabled stronger powers to exploit weaker ones in a significant way, then the lack of a credible alternative in the guise of a multilateral investment agreement is problematic. In a similar vein, in the sphere of international trade, bilateral and regional frameworks have been vilified by the WTO, as well as several international trade scholars, as an obstacle for more robust multilateralism.²¹⁰ In this context, too, to evaluate these concerns we need empirical evidence of the effects of limited trade structures on international trade along various dimensions.

VII. CONCLUSION

Formal treaties are but one subset of structures in the metropolis of international law. This article advances a systematic study of the diversity of form and effect within the compass of treaties: how different treaty structures operate, when they are particularly useful, and what their drawbacks might be. It also highlights the need for a better understanding of how

209. For an example of immunity for innocent fishing vessels, see *The Paquete Habana*, 175 U.S. 677 (1900).

210. See Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in *NEW DIMENSIONS IN REGIONAL INTEGRATION* 22, 22–49 (Jaime de Melo & Arvind Panagariya eds., 1993). See generally Paul Krugman, *Is Bilateralism Bad?*, in *INTERNATIONAL TRADE AND TRADE POLICY* 9 (E. Helpman & A. Razin eds., 1991).

types of treaties interact with one another, and how, in their accumulation and interrelation, they compose the architecture of international lawmaking.

Undoubtedly, ideological visions of our world must affect our preferences regarding the architecture of lawmaking. The very different world vision of universalists and unilateralists—of how common and uniform our world should be, and of how common and uniform it *can* be—drives each camp toward opposing choices with regard to broad or narrow partnerships in international lawmaking.

My working assumption has been that instinctive preferences for regulating vehicles habitually attendant on a particular ideology can be self-defeating, and that only a broad positive study, complemented by empirical testing, can give us the most useful insights on how to promote international goals using formal treaties. The Article therefore has examined in detail how different types of treaties promote different values under various conditions, showing that knee-jerk ideological preferences sometimes run the risk of causing their holders to exaggerate or underestimate the costs and benefits of different forms of regulation. At times, those who aspire for an international constitution and the embedding of universal norms in universal regimes may find bilateral treaties surprisingly effective in promoting these norms, as in the cases of labor standards, environmental protection, or nonproliferation. In the same way, for those who are concerned about sovereignty and freedom of action, multilateral regimes might still prove the most efficient and effective method of attaining security or economic power, as in the cases of multilateral regimes governing arms control or the protection of intellectual property. Oftentimes, far from an either-or choice, it is a combination of both structures that may produce the most potent architecture.

In an attempt to fill in the gap in the current mainstream of international legal thought, the paper began by tracing prevalent claims and expectations regarding MLTs: the promotion of the rule of law and related values (equality, uniformity, and normative power); compliance, effectiveness, and efficiency of regimes; and the democratic legitimacy and professionalism associated with multilateral treaty-making. I demonstrated that many of the claims about the virtues of MLTs are overstated, that expectations are frustrated by the conduct of states in practice, and that the focus on MLTs blocks our vision from the potential operation of BLTs. All of these observations call for a more nuanced view of the embedded potential of both MLTs and BLTs than is offered by current work.

I then argued that the choice between different structures of regulation must run a gamut of multifaceted considerations, including the type of activity to be regulated under a proposed international regime, the necessity of truly universal cooperation in attaining sought goals, the possible externalities of the behavior or regulation on non-members, the degree to which a regime seeks to establish universally applicable norms, and the question of

whether material differences among countries prohibit uniform arrangements. Power disparities may tip the scale either way—toward or away from multilateralism—depending on the context. Finally, I discussed how the workings of MLTs and BLTs in concert either promote or hinder the attainment of international (or domestic) goals.

Throughout the Article, I offered a typology of the workings of different types of treaties under various circumstances, at times speculating or offering anecdotal evidence of how these two types of treaties fare in particular subject areas. This typology would benefit from further empirical investigation. For example, empirical testing should either affirm or refute the claims regarding the comparative effects of BLTs and MLTs in different types of activities or concerning different types of goods, the reinforcing power of BLTs (such as in the case of labor standards or human rights more generally), the uses and abuses of power disparities in bilateral negotiations (looking, for instance, at FTAs and BITs), the extent to which MLTs inform the negotiation and conclusion of BLTs in the same sphere, or the degree to which BLTs obstruct the creation of broad-based multilateral regimes. Another empirical avenue would be to test the degree of involvement of domestic and international civil society in the negotiation and conclusion of different forms of treaties. Such empirical work would test existing claims about democratic legitimacy, transparency, and popular participation as well as my own claim that BLT-making is too often under the radar screen of international actors despite the BLT's relevance to and impact on values dear to those actors.

My assessment has remained internal to the world of bilateral and multilateral treaties. It explored the operation of two types of treaties in comparison with one another but not vis-à-vis other alternatives such as customary norms, general principles, soft-law mechanisms or individual self-regulation, or even LMLTs. One question that remains implicit in this discussion and that warrants concern is whether the metropolis of international law, with its host of formal forms of regulation, is crowding out the operation of politics, diplomacy, even power. This question becomes acute where treaties purport to prescribe *jus cogens* norms, allowing no reservations, derogations from, or conflict with their provisions. We must keep in mind that the moral and ethical tenets of the international community, inasmuch as they are cohesive, are not frozen. Norms change and specifically devised provisions may come, in time, to be regarded as degenerate. The legitimacy and lawfulness of the 1923 Treaty of Lausanne, which mandated the ethnic transfer of nearly two million people between Greece and Turkey,²¹¹ would be widely rejected today even though the architect of the scheme, Dr. Fridtjof Nansen, was awarded the Nobel Peace Prize. One may equally im-

211. British Empire, France, Italy, Japan, Greece, and Turkey, Treaty of Peace, July 24, 1923, 28 L.N.T.S. 11 (1924); Convention Concerning the Exchange of Greek and Turkish Populations (Lausanne), Jan. 30, 1923, art. 1, 32 L.N.T.S. 75.

agine that the non-recognition of an “economic refugee” status would come, in the none-too-distant future, to be viewed as a moral aberration by future generations.

It is therefore abundantly clear that international law must retain a measure of adaptability as well as variegation. For this reason, among others, the role of BLTs as a source of international law and a tool of international relations should be restored from its currently neglected place in international law scholarship. Hopefully, an increased scholarly interest in bilateral behavior might also induce international actors to pay greater attention to what governments are in fact doing bilaterally.

