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DOCTOR FRANKENSTEIN'S INTERNATIONAL ORGANIZATIONS

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Abstract

In the classic novel, *Frankenstein*, Doctor Frankenstein creates a living creature in the hope of cheating death. The monster, as the creature is called, horrifies Doctor Frankenstein, turns against him, and kills several people, causing the doctor to regret his decision to make the monster in the first place.

When states establish an international organization (IO), they create an institution with a life of its own on the international stage. Though states can, collectively, control the IO, without unanimity among them the organization can often act on its own. The danger for a state, then, is that its creation, like Frankenstein's, will become a monster and act contrary to its interests.

In contrast to Frankenstein, however, states are conscious of this risk and are able to guard against it. This Article explains that much of the existing landscape of international organizations has been formed by the state response to this "Frankenstein problem." The effort by states to avoid creating a monster explains, among other things, why there are so many IOs, why they vary so widely in scope, and the manner in which they are permitted (and not permitted) to affect international law and international relations. The Article also identifies the four types of activities that IOs are allowed to undertake and explains how states choose which activities to place within which organizations. More generally, the Article offers a better understand of why and how IOs are designed and their place within the international legal order.

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I. INTRODUCTION

In Mary Shelley’s *Frankenstein*,¹ Dr. Victor Frankenstein discovers the secret of life and sets about making a living being. When he brings his creation to life, Frankenstein is aghast at the monster he has created. Unfortunately for the doctor, the monster is beyond his control and the balance of Shelley’s story recounts the interactions between Frankenstein and his monster. The creator wants to be free from his creation, but the monster desperately wants a companion and attempts to persuade the doctor to create one. Frankenstein set out to defeat death. “Life and death appeared to me ideal bounds, which I should first break through, and pour a torrent of light into our dark world.”² What he got instead was a monster that killed innocent humans.

The key unit of analysis in the international system is the state. When states act collectively they are able to shape that system in virtually any way they wish. In the effort to achieve their objectives, however, they sometimes create a different kind of actor – a different form of “life” in the international

¹ MARY SHELLEY, *FRANKENSTEIN* 24 (1818).

² *Id.*

arena – an international organization (IO).³ Indeed, states have created so many international organizations that these institutions are familiar to every student of international law and politics and, indeed, to anyone who follows the news.

States create these organizations with the hope of enhancing international cooperation or, in some other way, allowing states to achieve their objectives more effectively than can otherwise be done. Like Frankenstein's monster (though perhaps less dramatically), IOs created by states may behave differently than expected. There is always a risk that an IO will impact the system in ways the harm, rather than help, the interests of states.⁴

States, then, face what I term the “Frankenstein problem” when they create IOs. By creating a new entity – often one with international legal personality – states hope to address some common problem. Once created, however, the new entity has a life of its own and cannot be fully controlled by individual states.⁵ They face a direct tradeoff between the need to give the IO enough authority to be effective and the desire to guard against the risk that it will become a monster.

What separates states from Doctor Frankenstein is that the former have learned from the latter's actions. Frankenstein took no precautions to guard against the risk that his creation would become a monster. States, on the other hand, understand the risks associated with creating IOs and may even be taking too many precautions to protect against IOs that misbehave.

This Article is an attempt to identify and explore the Frankenstein problem as it relates to international organizations. Along the way it not only explains the behavior we observe, it makes predictions about the kinds of IOs we should or should not expect to exist, including how the power to bind states, the scope of the organization, the ability to comment on international norms, and more interact within IOs. It also identifies the key categories of IO activity and describes why states might choose one set of these activities over another in the creation of an organization.⁶

³ I recognize that it is something of a fiction to refer to a common purpose or intent when a group of states establishes an organization. To the extent that this notion is uncomfortable, one can think of it instead as the purpose or intent of a single state that supports the organization. The IO that is created can deviate from what that state anticipates in the ways discussed in the text.

⁴ See, e.g., JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 328(2005) (“As IOs, whether prompted by the functionalist needs of their members or the desires of their bureaucrats, expand their original mandates, their normative reaches extend beyond what their creators had anticipated.”)

⁵ Collectively, of course, states continue to control the organization.

⁶ To foreshadow what is to come, IOs undertake four broad tasks: they take action in pursuit of well-defined goals in a way that does not require them to make broad policy decisions; they provide a forum for states to exchange information and negotiate; they speak as

There is already a large literature on the subject of international organizations, the international law that applies to them, and the details of their processes.⁷ This literature has a good deal to say about many of the questions addressed in this Article. It also provides a treasure trove of rich historical and institutional detail that helps us understand the functioning of individual institutions and the interactions among IOs.⁸ Of greatest relevance to this project is a corner of this literature that asks questions very similar to those that interest me here. Dunoff and Trachtman, for example, ask, “Why are these organizations created, and how should they be designed?” and “[W]hy is there not just one big one?”⁹ Abbott and Snidal ask, “What attributes account for their use, and how do these characteristics set formal organizations apart from alternative arrangements, such as decentralized cooperation, informal consultation, and treaty rules”¹⁰ This literature sheds considerable light on IOs and their role in the system and provides a starting point for my own inquiry.

There remains, however, a need for a broader understanding of the role IOs play in the international order. By this I do not mean an understanding of what individual organizations do. We have good accounts of many of the world’s IOs, whether the largest and most conspicuous, such as the United

institutions about international legal matters of concern to states, sometimes affecting international law and politics as a result; and they provide dispute resolution systems.

⁷ See JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005); NIGEL D. WHITE, *THE LAW OF INTERNATIONAL ORGANIZATIONS* (2d ed. 2005); CLIVE ARCHER, *INTERNATIONAL ORGANIZATIONS* (3d ed. 2001); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960* (2002); David Kennedy, *The Move To Institutions*, 8 *CARDOZO L. REV.* 841, (1987); David J. Bederman, *Appraising a Century of Scholarship*, 100 *AM. J. INT’L L.* 20 (2006); Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, *INT’L ORG.* 707, 707-27 (1999); MICHAEL BARNETT & MARTHA FINNEMORE, *The Power of Liberal International Organizations*, in *POWER IN GLOBAL GOVERNANCE* 161, 163-71 (2005); HAROLD K. JACOBSON, *NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM* (2d ed. 1984); Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 *J. CONFLICT RESOL.* 3 (1998); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *YALE L.J.* 1 (1999); Songying Fang, *The Informational Role of International Institutions and Domestic Politics*, 52 *AMER. J. POL. SCI.* 304 (2008); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organization Law*, 6 *INT’L ORG. L. REV.* 319 (2009); Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 *GEO. WASH. L. REV.* 87 (2008); Louis Henkin, *International Organization and the Rule of Law*, 23 *INT’L ORG.* 656 (1969).

⁸ The most significant contributor in recent years has probably been Jose Alvarez, whose writing and, in particular, whose book on the subject are essential reading. See ALVAREZ, *supra* note 7; Jose E. Alvarez, *International Organizations: Then and Now*, 100 *AM. J. INT’L L.* 324 (2006).

⁹ Dunoff & Trachtman, *supra* note 7.

¹⁰ Abbott & Snidal, *supra* note 7.

Nations or the World Trade Organization,¹¹ the quietly effective such as the Universal Postal Union, or the relatively small and specialized, such as the European Police Force.¹² Rather, I mean that we need a better sense of why IOs are structured the way they are and how they interact with and impact the international legal system. Just as there is reason to understand the features of individual mammals such as humans, whales, and koalas, and those of mammals as a class (as distinct from, say, reptiles or birds), there is reason to understand the class of IOs in addition to understanding the individual members of that class.

The Article proceeds as follows: Part II presents the Frankenstein problem: The need for each state to balance the potential benefits of an IO against that risk that the IO will behave contrary to the interests of the state. This tension and efforts by states to manage it lie at the heart of the process of IO creation and dictate the design of IOs. Part III examines how states manage the Frankenstein problem. In particular, it considers four categories of activities carried by IOs, and discusses how each of them implicates the Frankenstein problem in a different way. These four types of activities and the way in which states use them provide an improved understanding of these institutions. Part IV concludes.

II. THE DOCTOR FRANKENSTEIN PROBLEM

A. STATES AND THE FRANKENSTEIN PROBLEM

There are hundreds of IOs in the world today and they have become so embedded within the international system that it is all but impossible to imagine contemporary international life without them.¹³ To cite just one under-appreciated example, the World Health Organization’s orchestrated a smallpox campaign¹⁴ that rid the world of a disease that, over its final hundred years, killed more than three times as many people as all the world’s wars combined.¹⁵ The precise number in existence depends on how

¹¹ See PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* (2007); *THE OXFORD HANDBOOK ON THE UNITED NATIONS* (Thomas G. Weiss & Sam Daws eds., 2008); *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus, eds., 3d ed. 2011); JOHN JACKSON, *SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006); PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* (2d ed. 2008); *THE WTO AS AN INTERNATIONAL ORGANIZATION* (Anne O. Krueger ed., 1998).

¹² Steven Peers, *Human Rights Ctr., Europol: The Final Step in the Creation of an “Investigative and Operational” European Police Force* (2007), <http://www.statewatch.org/news/2007/jan/europol-analysis.pdf>.

¹³ See HENRY SCHERMERS & NIELS BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* 3 (3d ed. 1995).

¹⁴ See D.A. HENDERSON, *SMALLPOX: THE DEATH OF A DISEASE: THE INSIDE STORY OF ERADICATING A WORLDWIDE KILLER* (2009).

¹⁵ *Id.* at 12.

one defines the category – a question on which there is no consensus.¹⁶ For the purposes of this Article it is most convenient to follow the approach taken by Alvarez in his seminal book, *International Organizations as Law-Makers*. Rather than embracing any single definition (“Elaborate definitions of IOs raise more problems than they are worth.”¹⁷) he acknowledges three common elements widely viewed as relevant to the identification of an IO: (1) establishment by agreement between states; (2) existence of at least one organ capable of operating separately from member states; and (3) operation under international law.¹⁸ Alvarez points out that even this list is imperfect as rigid adherence would omit institutions that virtually everybody agrees should qualify as an IO (e.g., at its inception the General Agreement on Tariffs and Trade “GATT” did not have an organ capable of acting separately from member states).¹⁹ Following Alvarez, I adopt a pragmatic approach and take the above criteria as indicia of an IO, but do not adhere to a rigid formalism that demands that all three be present in every cited example.²⁰

Dr. Frankenstein sought to cheat life but ended up creating a killer. When states create an IO, they seek to create an international actor that will serve their interests. Because they understand, in a way that Frankenstein did not, the risk of creating a monster, they go about the act of creation more carefully than he did. This caution can manifest itself most obviously in a decision to forego the opportunity to create an IO. If they do create an organization, the manner in which they create it, and the power they give it, will be heavily shaped by their awareness of the Frankenstein problem.

It is helpful to first recognize that there is nothing inevitable about the tasks assigned to IOs, the governance structures within them, or the authority ceded to them. IOs are created by states and could, in principle, be granted virtually any power or authority.²¹ If one looks to the IOs that have actually been created, however, it is clear that states have made some consistent choices. Despite the considerable diversity among IOs, there are consistent

¹⁶ For historical accounts of the rise of the IO, see Koskenniemi, *supra* note 7; Kennedy, *supra* note 7. By one count, the number of IOs was at 37 in 1909 and rose to 378 by 1985. See Charlotte Ku, *Global Governance and the Changing Face of International Law*, ACUNS Rep. & Papers 26-34 (2001). One should not take these numbers too literally as the precise definition of an international organization affects the number that are included, and identifying every candidate for inclusion is virtually impossible.

¹⁷ See Alvarez, *supra* note 7, at 4.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 6-7.

²⁰ Many other definitions have been proposed. Abbott and Snidal have offered the following: “Two characteristics distinguish IOs from other international institutions: centralization (a concrete and stable organizational structure and an administrative apparatus managing collective activities) and independence (the authority to act with a degree of autonomy, and often with neutrality, in defined spheres).” Abbott & Snidal, *supra* note 7 at 9.

²¹ Some institutions are created by other institutions, but if one traces the ancestry further back the genesis is always a decision by states.

patterns in how states have elected to bring these institutions to life. Examining the design features of existing IOs – features chosen by states – helps us draw some conclusions about what states have sought to achieve through these institutions.

Consider, for example, the European Union and, in particular, how unique it is. No other transnational organization has been granted powers that even approach those of the EU. It has the power to bind its member states on a wide range of matters, for instance. The EU demonstrates that states are able to delegate tremendous power to an IO over a broad array of issues. The fact that it is so radically different from any other IO, however, shows just how reluctant states are to surrender this sort of authority. The exceptional nature of the EU and, to a lesser extent, the Security Council, raises the question of why states have so rarely granting this kind of power to IOs. More generally, what drives state decisions with respect to IO design?

We begin with the somewhat obvious point that states create IOs to serve their collective and individual interests.²² Every state that supports the creation of an IO must believe itself better off with the institution than without it.²³ This leads us to ask what it is that states get from IOs. If one reviews the activities carried out by IOs (discussed in detail below²⁴) it is clear that states can, and do, perform all of the functions performed by IOs. They engage in direct action both individually and collectively; they are able to engage in discussions and negotiations without resorting to formal international organizations; they can engage in speech of whatever type they wish, and ad hoc groups of states can even do so collectively; and states can resolve disputes through any process they wish, including with the help of neutral third parties. In other words, IOs do not exist because they do what states are unable to do for themselves. Rather, they exist because they can do these things *better or more easily* than states can.

On the other side of the balance – tempering state enthusiasm for IOs – is a reluctance to surrender authority. States are the dominant players in the international system, each state has tremendous power to govern within its territory, and states as a group can collectively shape the international environment in which they exist. Neither the states themselves nor the

²² There are, of course, methodological debates within international law that implicate the question of what it means to say that a state pursues its interests and the extent to which those interests are stable or in constant flux. It is not necessary to resolve this debate in this Article, and so I leave it to one side. It is enough for present purposes to observe that the creation of an IO requires the consent of participating states.

²³ When speaking of the interests of a state, I use that term, as is typical, to refer to the interests as reflected through the domestic political process of the state. For this reason the interests pursued may diverge from what is perceived to be in the broad interests of the population.

²⁴ See Part III for discussion.

individuals in positions of power within them are eager to surrender this power. The problem is that the goal of retaining autonomy may be in tension with the goal of finding the most effective ways to cooperate.²⁵

To create an IO, states must surrender some of their power to the institution. If the institution is to have more influence, states must surrender more power. Any such surrender of power creates the risk that the IO will fail to serve the interests of the state or states. The IO will only be created if that risk is outweighed by the expected benefits.²⁶ This must be true for states as a group, but it must also be true for each individual state that joins the IO.²⁷ This is, of course, just another way of stating the Frankenstein problem. States create IOs when the promise of improved cooperation outweighs the risk that they are creating a monster.²⁸

B. BUILD A BETTER MONSTER

Every aspect of the IO's structure and authority represents an opportunity for states to design the institution in a way that generates the greatest possible benefit in terms of facilitating cooperation with the smallest

²⁵ In fact, a good deal of what we study under the heading of international law is the product of states' efforts to balance these priorities. Sometimes, for example, a state uses a treaty to enter into legally binding promises in exchange for similarly binding promises from its counter-party. In entering into such a treaty, each state surrenders some degree of sovereignty in exchange for cooperation. A whole array of strategies (exit clauses, reservations, sunset provisions, escape clauses, etc.) are used to modulate cooperation while preserving autonomy. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* (2008).

²⁶ Abbott & Snidal, *supra* note 7 at 16.

²⁷ One can add some additional nuance to the cost-benefit analysis connected to the creation of IOs. When the WTO was created, for example, it was understood that the old GATT system would be folded into the WTO – meaning that states did not have the option of refusing to join the WTO in favor of retaining the GATT system. States still have a cost-benefit decision to make, but the decision was between the WTO and exclusion from the trading regime rather than between the WTO and the status quo. See Andrew T. Guzman, *The Consent Problem in International Law*, in BERKELEY PROGRAM IN LAW AND ECONOMICS WORKING PAPER SERIES (2010).

²⁸ Using the terminology of economics, one can make the same point by describing IOs as bodies that reduce transaction costs. Ronald Coase developed the Theory of the Firm to explain why business firms exist as legal entities distinct from the individual humans involved. The basic (yet profound) insight is that production is organized within a firm when the transaction costs of this approach are lower than transactions costs associated with relying on a set of market interactions. Firms are useful when their handling of some set of exchanges is more efficient than the market's. Just as individuals can interact through a series of market transactions, states can work together through a set of discrete ad hoc interactions. In some instances, however, it is more efficient for individuals to organize themselves into a firm and, in a similar way, it is sometimes more efficient for states to work together through an international organization. See Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1973), reprinted in RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 33 (1988); Dunoff & Trachtman, *supra* note 7.

possible loss of sovereignty.²⁹ With the modest assumption that states seek to maximize their own interests, we can use the ways in which they create IOs as evidence of what they value, and what they are willing or unwilling to surrender in exchange for more efficient cooperation.³⁰

After an IO is born, states retain formal control over the organization, of course, but exercising that control may require a super-majority or perhaps unanimity of member states. This gives the organization room to pursue its own goals – which may not be identical to the goals intended by the founding states. The best opportunity for states to manage this principal-agent problem presents itself at the moment of the organization's founding. The design of the institution, typically done through a Charter or other founding document, lays the ground rules for the relationship between the organization and its member states.³¹ The terms of the charter, then, represent key mechanism through which states control the IO.

The ability to draft the charter in any way they wish, is not enough to fully protect states against the risk that an IO might behave contrary to their interests. No matter what they do with the charter, the IO may become a monster. The IO, after all, must have the ability to act or speak or in some way impact the international system. The authority necessary to do so cannot be fully separated from the ability to misbehave. For example, the most obvious way to prevent an IO from acting contrary to the interests of its members is to grant every state a veto over IO actions. Indeed, this strategy is followed in some IOs. The problem is that a decision-making rule that relies on consensus is likely to substantially reduce (and perhaps eliminate) the benefits of creating the organization.

Recognizing that states can make choices over many aspects of the IOs governance casts the Frankenstein problem in a slightly different light. It is

²⁹ Notice that Doctor Frankenstein failed to take advantage of this fact. He could have created a monster that was too weak, physically, to kill; or one that could not walk; or in some other way reduce or avoid the harm caused by his monster. Because he did not consider the risk that he would create a monster, he took no precautions.

³⁰ What has been discussed up to this point applies to IOs, but also applies to other forms of agreement such as treaties. The analysis here is similar in spirit to prior writing I have done about treaties and international agreements. See Guzman, *supra* note 25 at 121-122. Both are the product of state consent and are only created if they make states better off. IOs differ from treaties, however, because the former are intended to have an existence beyond the founding agreement among states. An IO is not simply a set of words on a page. It is an organization with (potentially) the capacity to think, act, and speak on its own and with international legal personality. IOs are alive in an international law sense.

³¹ The power of an IO comes, at least initially, from its founding documents. These can go by various names, including Charter (e.g., The United Nations Charter), Agreement (e.g., The Agreement Establishing the World Trade Organization), Constitution (e.g., The Constitution of the International Labor Organization), Convention (e.g., The Convention on International Civil Aviation), and more. For convenience, I will refer to these founding documents as charters.

not simply a question of whether states should create an IO or not. Rather, it is a question of how to create an IO that best balances the objectives of states against the risk of creating a monster. Instead of being a binary (create or do not create) decision it is a choice from a large array of possible structures, including of course, not creating an IO at all.

By way of illustration, consider just one element of IO design. An IO may be given the power to create international law rules that bind the state or to judge the legality of a state's conduct. This would represent a direct and significant compromise of sovereignty. Alternatively, states may grant the IO much less power and authorize it to do no more than announce non-binding "best practice" principles. Or the IO could be given power that lies between these two extremes. Whatever choice is made, it is important to note that success for a state does not mean protecting its sovereignty at all costs. No state has ever made that its guiding objective, and no state does so when considering its posture toward IOs. Success lies instead in finding the best possible compromise between retaining autonomy and generating desirable international cooperation.

Chayes and Chayes famously argued that sovereignty should be measured by membership and participation in IOs.³² Raustiala, in turn, has argued that IOs are sovereignty-enhancing if one takes sovereignty to be a measure of the level of effective governance.³³ Whatever terminology one uses the point is the same – IOs provide states with a mechanism to advance their interests and states are willing to surrender some power in exchange. That said, they prefer to surrender less, rather than more power, and so they must balance the desire to advance their interests through IOs while simultaneously limiting the power given to those organizations.

C. WHAT THE MONSTER LOOKS LIKE

Frankenstein set out to defeat death, but ended up making a killer. If the experiment had simply failed, one might conclude that the effort had been a waste of time and energy, but beyond the opportunity cost of the endeavor there would have been few negative consequences (and not much of a book for Shelley). When an IO is created there is always a risk that it will simply be ineffective and its creation will prove to have been a waste of time and money. This Article, however, is more interested in IOs that are harmful in the way that Frankenstein's monster was harmful – IOs that not only fail to generate the benefits sought by their creators, but that actually cause harm to one or more of the founding states. When does an IO become a monster?

³² ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

³³ Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 860 (2003).

Much of the IO landscape represents an attempt by states to manage these two risks. Indeed, at least two related features of IOs can be explained as a response to these threats: (i) there are a lot of them; and (ii) the scope of their influence varies considerably.

Consider first the scope of authority given to an IO. All else equal, creating an IO with narrow scope reduces the risk of creating a monster. The task of a more focused organization can be specified with greater precision in its founding documents and it is easier to observe if it strays from its original mission. Furthermore, an IO with a more limited mission can do less damage when it strays – a rogue IO is less damaging if it starts with a narrower scope. By creating many IOs, each with a narrow jurisdiction, rather than fewer institutions with broader authority, states can more effectively prescribe the issues that each organization can and cannot address.

If the above is correct, then states believe that small is beautiful when it comes to IOs. If nothing else were going on, every IO would be tiny in scope. In fact, many IOs have a relatively broad scope, so states must face some other, competing concerns. There are at least three reasons why states may, at the margin, enlarge rather than shrink the scope of an IO, all of which can be illustrated with the example of the WTO. I will refer to these as: effectiveness, linkage, and efficiency.

First, the IO must be given sufficient scope to be effective. Some problems can only be addressed successfully if the IO is able to work on a range of issues simultaneously. Liberalizing trade, for example, requires that the WTO do more than simply limit tariffs. Because a state can achieve the same level of protection with an import quota as it can with a tariff, both issues must be included within the WTO's mandate. In fact, all nontariff barriers must be subject to regulation through the WTO system if the goal of liberalized trade is to be pursued successfully. Subsidies must also be subject to discipline because they, too, can operate as a substitute for tariffs. Even "non-trade" issues that impact on trade, such as health and safety, or environmental regulation, must be part of an effective trade agreement to the extent they affect access to markets. Sure enough, when the General Agreement on Tariffs and Trade (GATT) was created in 1947, each of these issues was included (though admittedly, sometimes in an incomplete way).

Second, because negotiation takes place within IOs, it is sometimes necessary to expand the scope of the institution's mandate to facilitate bargaining. Specifically, it may be necessary to bring two or more disparate issues within a single IO so there is enough bargaining space to get the consent of all

parties.³⁴ For years, efforts to reach an international agreement that would provide increased protection of intellectual property rights had failed to make any progress because developing countries had no reason to greater protection of intellectual property. It was only when intellectual property was brought within the WTO system and intellectual property issue could be linked to trade issues that an agreement was reached in the form of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).³⁵

Third, expanding the scope of an IO may yield efficiencies in the running of the organization. Creating two distinct institutions might require a duplication of activities and costs that does not make sense, or that would create jurisdictional conflicts. Rather than including an agreement on trade in services (GATS) within the WTO, for example, states could have created a distinct organization devoted to that topic. To do so, however, would require duplication of many of the features of the WTO, including a distinct dispute settlement process, secretariat, governance rules, and so on. This would have not only been wasteful, it would also have made the system less effective. With respect to dispute resolution, for example, trade disputes in services do not come neatly labeled and distinct from trade in goods issues, so there would be inevitable jurisdictional battles, conflicting rulings, confusing precedents, and so on. By having the GATS agreement within the WTO, the trading system was made simpler and almost certainly better.³⁶

All of this leads to a prediction about IO size. We should expect any given IO to be as the narrowest possible scope subject to the benefits that greater scope can have for effectiveness, negotiation, and efficiency. Because these forces are not present with the same intensity in all areas, we should expect IOs scope to vary from one institution to another. When applied, as above, to the WTO, these basic forces offer an explanation for the broad outlines of that organization and the scope of its activities. By way of contrast, consider the International Competition Network, which seeks to promote cooperation and convergence in national competition policies.³⁷ Increasing that

³⁴ See Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATING* (1982).

³⁵The description in the text is one of two possible interpretations of events leading up to the TRIPs Agreement. The other, less optimistic interpretation, is that by bringing the IP issues into the trade negotiations, developed countries were able to combine their preferred IP rules (reflected in the TRIPs Agreement) and membership in the new WTO. This prevented developing countries from joining the WTO while refusing to accept TRIPs. More pointedly, developing countries were forced to choose between capitulation on the IP issues and exclusion from the international trading system.

³⁶ To the extent larger organizations risk become overly bureaucratic or inflexible states would have an additional reason to prefer more small organizations rather than a single large one.

³⁷ The difference in scope between the International Competition Network and the WTO is illustrated by the fact that, like the ICN, the WTO considers competition policy, but that

organization's scope would do little to increase effectiveness, improve negotiation, or increase efficiency and so it remains focused on the relatively narrow topic of improving communication among competition policy regulatory bodies.

The same reasoning suggests as an IO's scope grows, other controls on its behavior should increase in importance. When a narrow scope is impractical, states will look for other ways to manage the Frankenstein problem. The most obvious strategy is to impose more demanding voting requirements, prohibiting the IO from making decisions over the objections of member states. This pattern seems at least roughly consistent with what we observe at, for example, the WTO. The WTO does not have a limitless scope, but it is nevertheless far-reaching and includes (to one degree or another) trade in goods, trade in services, intellectual property, health, agriculture, and more. Because decisions require unanimity at the WTO, however, states retain considerable control over the organization's activities.³⁸ An alternative strategy is to allow an organization with broad scope to make decisions over the objection of some members, but to undermine the impact of those decisions. This is a reasonable description of the UN General Assembly, for example. It is authorized to speak on virtually any matter, and can do so over the objection of some members, but the resulting resolutions have no binding force or formal impact on the international legal system.

The same negative correlation between scope and IO authority should exist at the other end of the spectrum – where IOs have the greatest decision-making power and the greatest ability to affect the international legal system, we should observe the narrowest and most clearly-defined scope. Examples here include the Codex Alimentarius and the Chemical Weapons Convention, bodies with the power to impact the formal legal obligations of states, but limited to narrow technical areas.³⁹

D. DR. FRANKENSTEIN'S SECURITY COUNCIL

Efforts by states to minimize the Frankenstein problem generate a flexibility that allows states to create and benefit from IOs much more often. That said, one should not lose sight of the fact that as long as states create IOs there is

subject merits no more than an obscure committee within the WTO that rarely attracts much attention.

³⁸ Two qualifications are necessary. First, the formal rules of the WTO establish voting rules that do not always require unanimity. See WTO Agreement, arts. IX, X. The practice of the organization, however, has always been based on unanimity. Second, the unanimity rule does not apply (obviously) to the dispute settlement system at the WTO. That system can and does do things over the objection of states – most obviously the losing state in a dispute. This article discusses dispute resolution, including the WTO system, in more detail. See Part III.D. for discussion.

³⁹ See *infra* TAN 103 - 116.

no way to completely eliminate the risk of creating a monster. The institution’s promise and its risks both stem from its ability (however constrained) to make decisions and take actions even if not all members agree.

The Security Council offers one of many possible illustrations of the tension between sovereignty and cooperation that exists anytime an IO is created. With the creation of the United Nations, states gave the Security Council the power to authorize the use of force.⁴⁰ In so doing, each state (with the exception of the five permanent members) accepted the risk that it could become the target of such an authorization. Nothing could be more important to states or more central to modern notions of sovereignty, yet states agreed to this grant of power with the hope that in exchange they would benefit from increased international peace and security. Every time the Security Council takes an action (especially under Chapter VII, which authorizes the Council to bind member states) contrary to the interests of a state, the Council has become a monster in the eyes of that state. So, for example, even if the decision to authorize all necessary measures to protect civilians in Libya in March of 2011 was normatively desirable from a humanitarian or international perspective, it was obviously contrary to the interests of Muammar Gaddafi’s government. From the perspective of that government, the Security Council acted contrary to its interests and may even have been a “but for” cause of the regime’s collapse.

An example that stretched over a longer time-frame and that more clearly illustrates how an organization can turn on a state – as the monster turned on Doctor Frankenstein – is provided by South Africa. Before laying out the example, I wish to be clear that South Africa’s apartheid regime was deeply repressive and abhorrent. Whatever contribution the Security Council made to its demise was a good thing. I make this somewhat obvious point to emphasize that the example is intended to show how an IO can take actions contrary to the interests of one or more member states. From the perspective of a state creating or joining the organization, this is the fundamental risk. Whether the actions of the organization are desirable in some global sense may be part of the reason to consider creating the IO, but the state nevertheless remains focused on the consequences for itself. To understand IOs we need to consider the perspective of individual states, even if those states are despotic authoritarian regimes.

South Africa was one of the fifty-one founding members of the United Nations. Like every member other than the P5, it surrendered authority to the Security Council when it joined the UN. It could be labeled a violator of international law and could face legally binding sanctions or even an authorization by the Security Council for the use of force against South Africa

⁴⁰ U.N. Charter, art. 42.

citizens. At the time, however, South Africa had at least two very good reasons to think that it would never face such hostility from the Council with respect to its domestic racial policies.⁴¹

First, the scope of the Security Council's authority was carefully limited. The Council has the authority to issue binding resolutions under Chapter VII of the UN Charter only after it determines "the existence of any threat to the peace, breach of the peace, or act of aggression."⁴² Furthermore, the Charter provides explicitly that the UN will not interfere in domestic matters.⁴³ In 1945 there was little doubt that these limits on the power of the UN and the Council left South Africa's racial policies beyond the reach of the Security Council.

South Africa had additional reasons to expect the Security Council would avoid taking any view on domestic racial policies. Despite the emergence of legal agreements condemning it, institutionalized racial discrimination remained widespread. In particular, the United States, a permanent member of the Security Council, had its own institutionalized discrimination issues, so South Africa seemingly had little reason to think that its own racial policies would become an international priority.

So South Africa seemed well-protected and in 1947 the risk that the Council would turn on it seemed extremely remote. As events actually unfolded, of course, the limits on the Council's authority to adopt legally binding resolutions were not enough to protect South Africa's apartheid regime from censure and, by the late 1980s, the global politics of racial discrimination had shifted in such a way that neither the United States nor others were prepared to protect South Africa from the Council.

⁴¹ South Africa did not institute a formal policy of apartheid until 1948. Even in 1945, however, racial discrimination was widespread and sanctioned by the government. In nearly every part of life, health, education, housing, etc., the South African government took steps to control's black South African's lives to reinforce their role as temporary settlers who were welcome in "white" South Africa for the sole purpose of serving employment needs. See South African History – Apartheid, GOVERNMENT OF SOUTH AFRICA, <http://www.info.gov.za/aboutsa/history.htm#Apartheid>.

⁴² U.N. Charter, art. 39.

⁴³ U.N. Charter, art. 2.7. To be sure, Article 2.7 also states that this principle does not prejudice the application of enforcement measures under Chapter VII. In other words, the Security Council can intervene in what might be considered domestic matters if it concludes that there has been a breach of the peace. The important point here is simply that at the time of its formation internal matters related to race relations were not considered to fall within the Council's area of responsibility. "Only since the end of the Cold War has the Council established that it – and the world at large – has any say in the human rights situation inside sovereign countries." Joanna Weschler, *Human Rights, in THE UN SECURITY COUNCIL* (David M. Malone ed., 2004).

By joining the UN, South Africa surrendered some autonomy and formally subjected itself to the influence of the Security Council. In doing so, it had not way to predict how that authority would be used three decades later. This same loss of sovereign power will be present, to one degree or another, anytime an international institution is established with the authority to act in a consequential way.

E. EXIT AND VOICE IN AN IO

Up to this point I have discussed how state manage the Frankenstein problem at the time of an IOs creation. Once the IO is established individual states retain the classic forms of influence identified by Hirschman: exit and voice. Hirschman explained that individuals can respond to dissatisfaction with an organization or firm either by leaving the organization (“exiting”) or by seeking to fix the organization (“voicing” their discontent).⁴⁴ As applied to state participation within an IO, neither of these solutions is perfect, but each offers a way to temper the Frankenstein problem.

First, states can try to influence the IO though their voting rights, the appointment of staff, withdrawal of financial contributions, and normal politicking.⁴⁵ Most obviously, if action requires unanimity, the state has considerable protection. If, on the other hand, the IO can act based on a majority vote or even without a vote of member states, the state is less able to exercise control.

At a certain point, after realizing what he has created, Doctor Frankenstein enters into a dialogue with his monster. The monster explains that it is lonely, and promises to vanish into the wilderness if the doctor will only create a mate for him. Frankenstein initially agrees – essentially offering to give the monster what it wants to prevent further harm or destruction. This is an effort by Frankenstein to use “voice” to influence the monster. For a state within an IO, the use of voice may involve voting or it may involve a similar kind of negotiation and compromise. Because IOs remain responsive to states to some degree, individual states or groups of states can sometimes alter the conduct of the organization.

After Frankenstein’s monster has killed the doctor’s younger brother and an innocent girl adopted by his parents has been falsely convicted and executed

⁴⁴ ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

⁴⁵ The specific rights states have within the organization are determined (by states) when the IO is established, of course. One can think of this as a two-stage problem. When the IO is created, states must collectively design a set of rules to govern internal decision-making. Once the organization is operating each states can, individually, use whatever influence it has to shape decisions.

for the crime, Doctor Frankenstein flees to the mountains to ease his sorrow. He hopes, perhaps, to escape (“exit”) the horror of what he has created, but the effort fails. It is at this moment in the story that the monster finds him and begs him to create a mate.

When a state concludes that an IO has become a monster and is doing more harm than good, the state can exit. Frankenstein’s attempt to flee does not end the monster’s existence, or even fully protect the doctor from the monster’s actions. The same is true of states that attempt to separate themselves from an IO. For the vast majority of IOs, exit allows the state to escape the formal obligations imposed on members. Nevertheless, exit may not be practical and it may not achieve the goal of protecting the state from the organization’s actions. First, the act of exiting signals an unwillingness to work within the institution and may carry with it reputational consequences every bit as large as remaining. Second, exit may not fail to protect a state from actions by the IO. To the extent the IO’s influence comes through soft law of one form or another or if the IOs policies affect non-members in important ways, exit may not eliminate the IO’s ability to affect the state’s interests. Exit from the UN, for example, would not have insulated South Africa from economic sanctions.⁴⁶ A state may also hesitate to exit because doing so would deny it the ability to shape future conduct by the IO. Finally, exit deprives the state of whatever other benefits accrue to members of the IO. Thus, for example, exit from the WTO would be exceptionally costly for any state because it would lose all the market access protections provided by the organization.

Despite these drawbacks, states sometime choose to exercise their right to exit. In 2005, for example, the United States withdrew its consent to ICJ jurisdiction under the Vienna Convention on Consular Relations (VCCR). This action was taken in response to unfavorable rulings from the ICJ in several VCCR cases, most notably the *Avena Case*.⁴⁷ Withdrawal protected the US from ICJ jurisdiction in future cases, and so eliminated the risk that the ICJ would act in ways that the US felt were contrary to its interests with respect to this particular treaty. Exit did not protect the US from the *Avena Case* itself – the ICJ retained jurisdiction – so exit obviously did not offer complete protection.⁴⁸ The threat of exit, even if only implicit, can have a profound impact on IO behavior. If too many states exit, the organization may lose its ability to carry out its mission. Equally important, the IO itself,

⁴⁶ In the South African case there was discussion of expelling South Africa from the United Nations, though no expulsion ever took place. See generally <http://www.nationsencyclopedia.com/United-Nations/Membership-SUSPENSION-AND-EXPULSION.html> (providing background information on the discussion to expel South Africa).

⁴⁷ Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 1 (Mar. 31).

⁴⁸ The decision to withdraw jurisdiction was also a way to communicate to the ICJ that the United States would not tolerate decisions that ran too strongly counter to its interests.

and the people who make decisions on its behalf, will typically wish to retain a larger, rather than smaller, membership. In making decisions, then, the potential for exit disciplines IO behavior.

If the organization strays too far from what states intend, the latter can collectively remake or even disband the organization. This, too, corresponds to the use of voice in Hirschman's model. The effectiveness of this oversight depends on how hard it is for states to change the organization. If doing so is possible only with the unanimous support of all states, for example, this is a relatively weak mechanism of control.

III. HOW STATES PLAY DOCTOR FRANKENSTEIN

We now turn to look a little more specifically at the tasks and responsibilities states choose to assign to IOs, always keeping in mind that the decisions made by states as they create IOs reflect their reaction to the underlying Frankenstein problem.

Though IOs feature tremendous diversity with respect to their day-to-day activities, it is possible to identify four categories of activities that they undertake.⁴⁹ First, they engage in action intended to achieve some specific objective such as the elimination of disease. Second, they provide a forum for negotiation among states and a platform from which states themselves can speak (as distinct from the organization speaking). Third, IOs themselves sometime speak in ways intended to influence international law and international relations. This category of speech includes the creation of binding rules of international law by the organization itself as well as many other forms of speech that do not create binding rules. Finally, IOs sometimes provide a formal dispute resolution system.⁵⁰

Each of these activities offers different benefits to states, and each poses different risks. The first two categories, in which IOs are empowered to take specific, well-defined actions and to provide a forum for states, are low-risk and allow states to greatly reduce the danger posed by the Frankenstein

⁴⁹ One could group the activities of IOs in other ways, of course. "Research on international institutions and their potential influence on national choice has identified three principal functions performed by international institutions: enhancing the contractual environment within which state choices are made (including voting rules, suffrage provisions, numbers of parties, frequency of meetings, etc.), building state concern and building national capacity." PETER M. HAAS, ROBERT O. KEOHANE, & MARC A. LEVY, *INSTITUTIONS FOR THE EARTH* 53 (1993); "IOs "are established for limited purposes – primarily, to facilitate the making of some treaties, to focus debate and make recommendations to governments, and to serve as venues for settling disputes on closely circumscribed topics." Alvarez, *supra* note 7, at 15.

⁵⁰ The categories are not mutually exclusive, of course, and many institutions have activities that fall into more than one category. Further, the borders of the categories themselves are imprecise and some activities may be difficult to categorize.

problem. The problem for states is that many of the world’s most serious problems cannot be addressed effectively unless the IO has broader powers.

A. IO ACTION

The function of IOs that is perhaps easiest to understand, and that attracts the least attention from commentators, is the performance of some specific task (rather than the attempt to influence international legal norms). Just as a private company planning an event might establish a committee or working group to carry out the day-to-day work of ensuring that it goes well, states sometimes use IOs to do a job. An international organization can sometimes provide collective goods and take advantage of a variety of economies of scale, specialization, and pooling of resources more effectively than states can do on their own. The WHO, for example, orchestrated a campaign to rid the world of smallpox,⁵¹ a disease that, over its final hundred years, killed more than three times as many people as all the world’s wars combined.⁵²

The World Bank provides another, somewhat more controversial, example. The Bank was created toward the end of the Second World War and its mission is to improve the lives of the world’s poor. This is, admittedly, a broad mandate that leaves considerable discretion in the hands of the organization but it nevertheless fits within the category of IOs created to work on a specific task. The Bank’s central functions do not include the promulgation of hard or soft law rules or the resolution of disputes, for example. It is not, at root, designed to be a player in the arena of international law. It does, of course, have tremendous influence over many states, and even plays a role in global economic issues, so I certainly do not claim that the institution lacks influence. Its most basic functions, however, are economic rather than legal. It is in the business of making loans to sovereign states in support of government projects or reform efforts.

Though one can debate the extent of the Bank’s success in combating global poverty, there is no doubt that it has taken action in pursuit of that mission.⁵³ In a recent year, for example, the Bank provided \$47 billion in support for over three hundred projects in developing countries. It also provides financial and technical expertise to countries. Projects range from the provision of microcredit to AIDS prevention, to education, to post-disaster rebuilding.⁵⁴

⁵¹ Henderson, *supra* note 14.

⁵² *Id.* at 12.

⁵³ The most cynical might argue that the Bank has not, in fact, pursued the alleviation of poverty but, instead, has served to promote the interests of the United States, developed countries as a whole, or perhaps corporate interests. I take no position on this debate in this Article. My point is simply that the Bank has actually acted in important ways. I leave normative assessment of those actions to others.

⁵⁴ See generally Projects & Operations, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20103853~>

The existence of the World Bank is explained by the fact that providing financing to developing countries is a form of collective good that is best accomplished collectively rather than bilaterally. It makes sense to centralize the process of evaluating requests for financial support and providing that support from a single common fund. The pooling of financial resources, expertise, and administrative effort provides obvious economies of scale that help achieve the goal of providing assistance to developing countries.⁵⁵ For lenders, the World Bank allows them to participate in lending to a portfolio of borrowers, which serves to reduce the risk they would face if they made bilateral loans to just a few.

Though IOs of this type can have an important impact on human welfare, they are the least interesting for present purposes. They are the easiest IOs to understand, and impose only very modest sovereignty costs (though the World Bank shows that even these organizations can impose some sovereignty costs). Though even the most directed program must involve some judgment by the organization and some delegation of authority from states, the scope for the organization to behave in ways that are contrary to the interests of its founding states is limited. These IOs are not typically engaged in a process of changing or directly influencing international legal norms. They are, instead, attempting to generate specific results. For this reason, they are not heavily affected by the Frankenstein problem than the three categories of activity discussed below.

Before moving on, two important caveats must be added. There are at least two ways in which even IOs focused primarily (or exclusively) on performing some task may simultaneously affect the legal obligations of states and fit, to some extent, in one of the other categories identified in this Article.

First, there is no bright line between IOs pursuing specific outcomes through concrete action and those seeking to influence the legal obligations of states. UNICEF, for example, can fairly be described as primarily focused on action. It undertakes projects aimed at health and immunization, education, nutrition, safe water supplies, and so on. Following the 2010 earthquake in Haiti, for example, UNICEF provided assistance to children and others in that country. On the other hand, UNICEF does not limit itself to the actual delivery of assistance. It is also an advocate for assistance to the poor and especially to children. It is more than willing to promote international legal

[menuPK:1697035~pagePK:51123644~piPK:329829~theSitePK:29708,00.html](#) (profiling how the World Bank’s projects operate).

⁵⁵ Critics of the World Bank might point out that the institution also represents a remarkable concentration of power that can affect states, sometimes contrary to the interests of those states. Here, again, we see the balance that states must seek to strike between giving an IO enough power to be effective while minimizing its ability to act contrary to the interests of states.

norms (both hard and soft) that it judges to be consistent with its mission. For example, the organization states that it “subjects national and international policies to scrutiny against the norms and standards set out in the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women.”⁵⁶ In short, an IO focused on action may also be engaged in any or all of the other types of activities discussed in this Article.⁵⁷

From the perspective of states creating an IO, the Frankenstein problem can be almost totally avoided if the actions of the IO can be specified such that the organization has no policy engagement. Returning to the example of the World Bank, to the extent that it is criticized as acting contrary to the interests of debtor states, that critique is based on the view that the Bank makes poor policy decisions related to the terms of its loans. A better example is the International Bureau of Weights and Measures (BIPM) which seeks to “ensure the world-wide uniformity of measurements and their traceability to the International System of Units.”⁵⁸ This is largely a task-oriented mandate without major risk of harm to the interests of states. Unfortunately for states, this will be possible only in rare instances. In many instances the goal of increased cooperation will not be served by this sort of IO, and so one or more of the other categories of activity will have to be permitted.

Second, every IO has a governance structure, and that structure provides an example, or model, of how states can or perhaps should work together to address common problems. Over time and across IOs, certain principles of collective governance have emerged and have come to be seen as desirable or, perhaps, required. The governance of IOs is addressed in a large and growing literature most commonly described as “Global Administrative Law” (GAL).⁵⁹ GAL focuses on “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the

⁵⁶ Policy Advocacy and Partnerships for Children’s Rights, UNICEF, <http://www.unicef.org/policyanalysis/index.html>.

⁵⁷ In the same way, IOs that emphasize legal obligation or state-to-state cooperation may also be engaged in specific project-oriented or on-the-ground efforts.

⁵⁸ BIPM homepage, INTERNATIONAL BUREAU OF WEIGHTS AND MEASURES, <http://www.bipm.org/en/home/>.

⁵⁹ See Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, THE EMERGENCE OF GLOBAL ADMINISTRATIVE LAW, 68 L. & CONTEMP. PROBS. 15 (2005); Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan Weiner, *Foreword: Global Governance as Administration - National and Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1 (2005); Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC’Y OF INT’L L. PROC. 143 (2005); Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1 (2006); Richard B. Stewart, *US Administrative Law: A Model for Global Administrative Law?*, 68 L. & CONTEMP. PROBS. 63 (2005); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 Yale L.J. 490 (2006).

accountability of global administrative bodies.”⁶⁰ Like administrative law in the United States, GAL is interested in how various decision making entities go about their business and, in particular, the extent to which they meet standards of transparency, participation, rationality, and legality.⁶¹ Though my focus in this Article is on how IOs affect the behavior of states and GAL tends to have more emphasis on the legitimacy and accountability of IOs (among others), there is a good deal of overlap between the two. One of the constraints facing an IO, for example, is the need to retain some degree of legitimacy in its actions. This is especially true for the many IOs that influence international relations through soft law, the impact of which depends heavily on whether the IO is perceived to be acting within its authority and with proper process. Satisfying key normative criteria of GAL, then, can often help an IO to affect state behavior.

B. PROVIDING A FORUM

1. An International Law Catalyst

IOs are often critical catalysts to the creation of international law because they provide states with a forum in which to learn about one another’s concern, exchange views on policy and, ultimately, negotiate agreements. Examples of IOs playing this role are so easy to find that I will simply list a few. The WTO and its predecessor, the GATT, have presided over eight successful rounds of negotiation, each of them leading to a formal, binding agreement. The ILO has been instrumental in the creation of many legally binding treaties, including the Forced Labour Convention,⁶² the Worst Forms of Child Labour Convention,⁶³ and the Freedom of Association and Protection of the Right to Organise Convention.⁶⁴ The United Nations (or more precisely, UNCITRAL) facilitated the Convention on the International Sale of Goods.⁶⁵

This role of IOs here is often described as reducing the transaction costs associated with negotiation.⁶⁶ The basic idea, however, was familiar long before international lawyers began using the term “transaction costs” at all. Writing in 1969, Louis Henkin observed that “[IOs] promote, facilitate, expedite, and improve the making of law by bringing nations together and emphasizing their common interests; by identifying problems that might

⁶⁰ Kingsbury, *supra* note 59, at 143.

⁶¹ *See id.*; Kingsbury, Krisch, Stewart & Weiner, *supra* note 59 at 15.

⁶² Convention Concerning Forced or Compulsory Labour (entry into force, May 1, 1932).

⁶³ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (entry into force, Nov. 19, 2000).

⁶⁴ Convention concerning the Freedom of Association and Protection of the Right to Organise (entry into force, April 7, 1950).

⁶⁵ United Nation Convention on Contracts for the International Sale of Goods (entry into force, Jan. 1, 1988).

⁶⁶ *See* Abbott & Snidal, *supra* note 7; William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT’L L. & POL’Y 227, 242-56 (1997).

lend themselves to law and developing possible legal 'solutions' for them; by providing personnel, machinery, and processes for the various stages of international legislation from conception to enactment."⁶⁷

This kind of use of an institutional structure is familiar in our everyday lives. Homeowners form associations rather than relying on ad hoc efforts to achieve common goals such as a neighborhood watch or lobbying the city to add stop signs or speed bumps to the streets. People form professional groups (doctors, lawyers, teachers, etc.) to pursue their objectives. The governors of American states have created the National Governors Association to help them cooperate and to enhance their voice in Washington. It would be surprising if countries were somehow unable or unwilling to create institutions for the same purpose of reducing the costs of collective action.

Housing discussions within an institution provides several benefits that are either absent or attenuated if meetings are arranged in an ad hoc fashion. Most obviously IOs encourage more frequent and more detailed discussions. Increased interaction, in turn, promotes the sharing of information and enhances reputational effects.⁶⁸ IOs can also provide a set of default procedures to structure negotiations or other interactions. There is no need to rehash the rules of procedure, voting, agenda-setting and so on each time states come together. Among other benefits, this arrangement allows an organization to respond quickly to developing events. On the day after Al Qaeda's September 11, 2001 attacks on the United States, for example, the Security Council issued a resolution of condemnation. There would have been no way to generate such a rapid collective response from the international community without an established organization. An IO can also facilitate issue linkage, which can be a critical step in reaching agreement.⁶⁹ The best example here is the already-mentioned TRIPs Agreement on intellectual property.⁷⁰

The presence of secretariats also assists cooperation.⁷¹ Secretariats produce information with less bias (or for the cynical, with a different bias) than that produced by states and reduce the need for duplication of efforts by states to gather information. Secretariats also perform the mundane yet important function of recording ratifications and reservations as well as collecting and distributing information regarding monitoring.⁷²

⁶⁷ Henkin, *supra* note 7, at 657.

⁶⁸ See Abbott & Snidal, *supra* note 7, at 10.

⁶⁹ Recall that linkage is one of the reasons why states may broaden the scope of an IO. See *supra* Part II.C.

⁷⁰ See *supra* note 35.

⁷¹ See Alvarez, *supra* note 7, at 346.

⁷² Secretariats sometimes also have some enforcement role such as providing comments on the compliance efforts of states or engaging in a form of informal dispute resolution.

A standing IO also helps address one of the persistent problems facing cooperation – the free rider problem. When cooperation is aimed at producing a public good – protecting fish stocks, combating terrorism, preventing disease, etc – it can be challenging to get all relevant states to participate. Those that contribute to the solution must bear the associated costs, while the benefits go to every nation, including those that do not contribute. An international institution can mitigate the challenge in two distinct ways. First, if all relevant states are members of the organization they will all be present for any negotiation – overcoming one hurdle to cooperation. Second, and more importantly, an organization makes it easier for states to make a collective decision. One of the ways to overcome a collective action problem is to make cooperation contingent on participation by all relevant parties. This creates a form of aggressive reciprocity -- if any state withholds its cooperation, the effort fails. IOs are well suited to this strategy because decisions often require unanimous consent.

The importance of IOs in facilitating agreement is demonstrated by the care states take in selecting the IO at which they wish to raise an issue. Where an issue falls within the mandate of more than one IO, bringing it to the “wrong” one can doom efforts at reaching a solution. Bringing it to the “right” one, on the other hand, can lead to agreement. Furthermore, the content of an agreement may depend on the IO at which it was discussed. Discussing bribery and corruption at the OECD, for example, leads to a different political dynamic than doing so at the UNGA or the WTO.⁷³

2. Compliance with International Law

The primary focus in this Article is on how IOs help states resolve common problems and, in particular, help states find ways to cooperate. One should not forget, however, that IOs also play an important role in promoting compliance with international law. They do so by increasing communication among states which enhances reputational effects and promotes information sharing.⁷⁴

Better communication, including the creation of default procedures for interaction, generation of unbiased information, and so on, IOs increase the frequency and quality of interaction. A larger number of interactions (both formal and informal) reduces the stakes involved in each exchange and increases the importance of future exchanges to current decisions. In other words, the relationship is more iterative, which makes reputational effects

⁷³ See Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT’L ECON. L. 275 (2001); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004).

⁷⁴ On compliance more generally, see Guzman, *supra* note 25.

more important.⁷⁵ This makes it more costly for states to violate their international law commitments and, so, increases the likelihood of compliance.

Second, by increasing communication among states, IOs improve the effectiveness of diplomacy's oldest tool: "jawboning."⁷⁶ Chayes and Chayes observe that many violations (or perceived violations) of international law are the product of a lack of communication and transparency.⁷⁷ The "managerial approach" recommended by Chayes and Chayes is focused on improving transparency through the collection of data on behavior (through self-reporting, monitoring, NGO reporting, and so on), mediation and conciliation, capacity building, and general efforts at conversation and persuasion. At root, managerialism involves the exchange of information and continuing communication. By reducing ambiguities and misunderstandings and by giving states the opportunity to persuade one another of what they believe to be the best course of action, managerialism increases the likelihood of compliance. To the extent managerialism is pursued in the international arena, much of it is done within IOs.⁷⁸

Notice that when IOs provide a forum for state the Frankenstein problem is quite minor. Any agreement still requires the consent of all participating states, so state authority is preserved. An effective forum may increase the likelihood of agreement and it may expose a state to greater political pressure than it would otherwise feel, so there is perhaps some minor risk in the creation of an IO that serves this role. Realizing this danger, states sometimes resist the creation of a "talking shop" or refuse to attend meetings.

C. IO SPEECH

Perhaps the most contentious activity undertaken by IOs is speech. When I refer to IO speech, I include virtually any expression or rule created by the organization without the consent of all members and outside of formal dispute settlement procedures. Needless to say, the category encompasses a wide variety of statements. Whatever form the speech takes, it interests us anytime it affects (or tries to affect) the international system. This means

⁷⁵ See Guzman, *supra* note 25.

⁷⁶ See Chayes & Chayes, *supra* note 32, at 22-28, 118-123.

⁷⁷ See Chayes & Chayes, *supra* note 32, at 10.

⁷⁸ Dinah Shelton, *Law, Non-Law and the Problem of "Soft Law,"* in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 1, 2 (Dinah Shelton ed., 2000) ("The existence of international bureaucracies created and driven by treaty regimes they supervise makes compliance possible and likely, helping resolve ambiguity and indeterminacy of norms, assisting regulatory targets to overcome deficits in capacity to comply through technical assistance, and otherwise inducing conforming behavior.")

that we have to account for the many different forms of IO speech that seeks to influence the system.

It is possible to separate IO speech into two categories. The first category includes all speech that imposes binding legal obligations on at least one state that did not consent to the rule.⁷⁹ The most striking feature of this category of rules is that it is so small. It is extremely rare for an IO to be given and to exercise the authority to create this type of “hard” international law.

The second category of speech is a residual category, including all non-binding rules, statements, proclamations, and other speech by IOs. This is a very large and diverse category of speech and it represents a large share of what IOs do. Yet it sits awkwardly within the classical international law firmament, as I discuss in more detail below.⁸⁰ This form IO speech needs a name. Some authors have proposed labels such as declarative international law or universal international law while others have dismissed these rules as not “law” at all.⁸¹ Ultimately the terminology is not used consistently, which sometimes creates confusion. In this Article I will refer to rules, norms, and guidelines created by IOs as “soft law” if they lack binding legal force under international law and as “hard law” if they have binding force. This uses the term soft law in a formalist fashion that is useful for clarity and purposes of discussion and that is consistent with the dominant use of the term in American legal scholarship.⁸² A minority of writers use the term differently, usually with reference to agreements that create imprecise obligations, whether legally binding or not.⁸³ For the sake of clarity, one definition must be chosen, and in this Article the terms soft law and hard law will refer to the legal status of a rule.⁸⁴

⁷⁹ There can be a semantic question of whether the IO itself has created a binding rule if that rule was established through a consent-based process. I am not at all interested in this semantic distinction. I wish to distinguish rules that bind only those that consented from those that bind states that refused to consent. For convenience I describe the second group as being created by the IO itself, and the first as being created by the states.

⁸⁰ See Part III.C.2 for discussion.

⁸¹ See Hiram E. Chodesh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 23 TEX. INT’L L. J. 87 (1991); Jonathan Charney, *Universal International Law*, 87 AM. J. INT’L L. 529 (1993); Prosper Weil, *Toward Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 414-15 n.7 (1983).

⁸² See Shelton *supra* note 78; Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEG. ANALYSIS 171, 172 (2010).

⁸³ See Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 422 (2000); Johnstone, *supra* note 7, at 89.

⁸⁴ The forms of soft law discussed in this Article do not represent an exhaustive list. The term includes other forms of non-binding rules as well, including non-binding agreements among states such as the Helsinki Final Act or the Universal Declaration of Human Rights.

1. Containing the Hard Law Monster

Many commentators, including myself, have argued that hard and soft law are less different than is often suggested in international law scholarship.⁸⁵ Though only hard law is said to be legally binding, the processes by which these two forms of rulemaking affect state behavior are fundamentally the same, and there is good reason to study the two forms together. Nevertheless, it is convenient for present purposes to separate hard and soft law into two categories. First, it is a distinction that states often take very seriously. Because we are interested in state behavior and state decision making, this is reason enough to distinguish the two forms of rule making. The hard law-soft law dichotomy is also convenient because the distinction is easy to draw. With only occasional exceptions, it is possible to determine whether a particular rule meets the standard required to be a binding rule (i.e., hard law) or is instead non-binding soft law.

At this point we must distinguish between the grant of legislative authority to an IO and the consent-based creation of international law within such an organization.⁸⁶ Sovereign states can create rules of international law through treaty at any time, of course, including while working within an IO. Rules are created in this way bind only those that consent to them and I do not consider this to be rule making *by* the institution. Such rules, after all, are the product the consent of affected states and so there is no meaningful sense in which the authority to make the rules has been delegated to the IO. So, for example, the OECD Convention grants that organization the power to adopt decisions that are binding on members, but such decisions require the consent (or abstention) of each member.⁸⁷ The role of the organization in this context is not to actually create legal rules – that is still being done by the member states. To the extent the organization is doing anything, it is making it easier to reach agreement, a subject discussed above in Part III.B.

When, in contrast, an IO can bind members that object to a rule, the institution can fairly be said to be making law. IOs provide a few of the very rare instances in which binding rules can emerge without the consent of all affected states. One can immediately see the Frankenstein problem at work in these exceptional situations. Exposing oneself to binding international rules created without one's consent, and perhaps even over one's objection, is a large risk for a state. The state is taking a chance that the IO will become

⁸⁵ See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEG. ANALYSIS 171 (2010); Raustiala, *supra* note 30; Alvarez, *supra* note 7, at 118-22.

⁸⁶ True legislative power would allow the organization to bind all states, even if those that are not member of the organization. This extreme authority does not exist within any IO. See Alvarez, *supra* note 7, at 118 (pointing out that "IOs are never given explicit power to adopt resolutions and decisions regarding the behavior of *all* states (and not just members)").

⁸⁷ Convention of the Organization for Economic Cooperation and Development, 888 UNTS 179, arts. 5-6.

a monster. To justify acceptance of such an IO requires the promise of exceptional gains available only by overcoming the rigidity imposed by the need for consent.

States are so fearful of the monster that such an IO might become, they have granted the power to make hard law in only three situations:⁸⁸ the EU, the UN Security Council, and several standard setting bodies given the power to promulgate binding international rules over certain well-defined and technical areas.⁸⁹ In two of these three cases (the Security Council and standard setting bodies), the Frankenstein problem is managed by imposing other constraints on the IO.

The Security Council

As one would expect, the Security Council’s authority comes from the UN Charter. The Council is charged with “primary responsibility for the maintenance of international peace and security.”⁹⁰ To carry out this mission it is granted the authority to impose legally binding measures on all UN members. This authority is found in Chapter VII of the UN Charter. More specifically, Article 48 provides that:

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.⁹¹

To act under its Article VII power, the Council requires that nine of its fifteen members vote in favor and that none of the five permanent members exercise their veto.⁹² If these requirements are met, all UN members are legally bound by the resolution. No other international body has anything approaching the Council’s power to impose binding international law on the entire world. In this sense, it is not only the high water mark of delegation to IOs, and it is fundamentally different from every other instance of delegation,

⁸⁸ I put aside for the purposes of this article a category of rule-making that deals with the internal rules of an organization. Alvarez points out reasonably that these “internal” rules sometimes can have powerful effects, a point I do not wish to dispute. The effect of those rules, however, are ultimately not felt as binding rules of international law so much as norms created as a result of their use within institutions.

⁸⁹ See Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CALIF. L. REV. 1693 (2008); Alvarez, *supra* note 7, at 10 (“few IOs are accorded explicit law-making powers, except in narrowly defined areas of the law, and relatively few IO organs combine explicitly delegated law-making power with the power to take such action without the specific concurrence of all members.”); PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 297-335 (2001).

⁹⁰ U.N. Charter, art. 24.

⁹¹ U.N. Charter, art. 48.1.

⁹² U.N. Charter, arts. 27, 39.

with the exception of the EU.⁹³ The Council is given real authority to make and implement policy decisions through binding, non-consensual, international law rules that affect every UN member.⁹⁴ No other IO can do anything similar.⁹⁵

In light of the Frankenstein problem, why would states give the Council this remarkable power?

To the extent the Security Council presents a puzzle, it is partially explained by the context of its creation. It came about in the aftermath of the Second World War, when the victorious powers had a tremendous ability to dictate the terms of international interactions and were highly motivated to develop an institution that would prevent future wars. It is only a modest overstatement to say that those who would become the permanent members of the Security Council designed the institution to serve their interests and that other states were powerless to object. Viewing the institution from this perspective makes it much easier to understand.

The P5, after all, are not exposed to the risk of non-consensual law-making. For these powerful states, then, the Security Council looks very much like many other IOs – it participates in and affects international relations, and its mere existence can sometimes affect behavior, but that influence does not have the imprimatur of hard law unless the state consents. To be sure even the P5 may sometimes not get what they want from the Council or it may impede their efforts to pursue their national objectives. Prior to the American invasion of Iraq in 2003, for example, the United States sought a Security Council resolution authorizing the use of force. The existence of the Security Council created pressure on the US to seek its approval, and the failure to get the desired resolution weakened the American political position. This style of influence – creating international political pressure of one sort or another – is what IOs typically do. The P5 are exposed to this sort of effect from the Council, but they are similarly exposed in many other IOs.

⁹³ The EU and the Security Council are different in countless ways, of course. Here I only mean that both have the power to impose binding rules over the objection of states, and both have the power to do so over more than simply technical issues.

⁹⁴ There remain significant compliance issues related to these decisions, to be sure, but the power to bind states in this way remains remarkable.

⁹⁵ Alvarez, *supra* note 7, at 62 (“Putting aside the rarely exercised powers of the Security Council to enforce the peace and the unique supranational authorities conferred on the European Community’s Commission, real IO lawmaking . . . is limited to the technocratic law of certain circumscribed UN specialized agencies, such the WHO’s ability to issue health regulations or the ICAO Council’s ability to adopt binding aviation rules over the high seas.”). The Charters of a few IOs provide for a system of voting that would, in theory, allow for the creation of binding law over the objections of a minority. The WTO, for example, allows a two-thirds majority to amend certain provisions of the WTO Agreement. WTO Agreement, art. X:3. Even in these cases, however, the new rules only apply to states that have agreed to them. *Id.*

On the question of why the Council was given the power to bind states, an important part of the answer is that it was never given this power with respect to the P5. The question, then, is why the other 46 original members were willing to expose themselves to the non-consensual authority of the Security Council.⁹⁶ The answer is that they had little choice – they were given a take-it-or-leave-it offer to join this international organization and had to join if they wanted to be full members in the international community. A few of the original members (India, the Philippines, Belarus, Ukraine) were not even independent states at the time.

Even under these favorable conditions, the grant of authority to the Council was measured. Before it can take any action, the Council is to determine the existence of “any threat to the peace, breach of the peace, or act of aggression.”⁹⁷ Though the limits of this authority are difficult to pin down with any precision, there is little doubt that this language restricts the reach of the Council. It would strain credibility, for example, if the Council adopted a resolution purporting to govern international banking services, climate change, global poverty, disease control, or anything else that does not implicate global peace and security in a reasonably direct way.

The potential for non-consensual rules is also dramatically reduced by the Council’s voting rules. As mentioned, a Security Council resolution requires a super-majority of members (9 of 15) and must not be vetoed by any member of the P5.⁹⁸ For countries allied with one of the P5, there is the additional protection that they may be protected by that country’s veto.⁹⁹ Even countries without a protector on the Council may be shielded because controversial actions will often provoke a veto. The American invasion of Iraq in 2003 is, again, a good example. The Council’s refusal to approve the use of force against Iraq was not motivated by a close alliance with that country, but the failure of the United States to get enough support nevertheless shielded Iraq from a use of force resolution. The paralysis built into the voting structure was, of course, even more powerful during the Cold War, when the institution and the rules were created. In October, 2011, China and Russia vetoed a response to the violence in Syria.¹⁰⁰

⁹⁶ One additional member, Poland, signed the Charter a few months later and could also be included in the count of “original” members.

⁹⁷ U.N. Charter, art. 39.

⁹⁸ Though the text of Article 27.3 of the Charter seems to require that all permanent members cast a positive vote, the practice of the Council, supported by a decision of the ICJ in the *Namibia* case, ICJ Reports (1971), 6, at ¶¶ 20-2; 49 ILR 2, has been that it is enough that a permanent member not object.

⁹⁹ For example, in the late 1990s western states wanted to intervene in Kosovo and Serbia. They neither sought nor received authorization to use force from the Security Council because it was recognized that Russia would veto such a resolution.

¹⁰⁰ *Russia and China Veto UN Resolution Against Syrian Regime*, THE GUARDIAN, Oct. 4, 2011.

Though authorizations to use force are the most dramatic Security Council actions, the ability to impose binding, non-consensual rules normally does not involve force. It is more typically used to condemn some action and to call for a change in a state’s behavior. It is meaningful that such resolutions are legally binding rather than simply hortatory, but one should not exaggerate their impact. To illustrate, consider the Security Council resolutions adopted in 1998 in response to the crisis in Kosovo. Resolution 1160, adopted in March of 1998, demanded that Serbia withdraw its “special police units and cease[] action by the security forces affecting the civilian population.” Resolution 1199, adopted in September of 1998, demanded that Belgrade cease hostilities and negotiate a political settlement. Both of these resolutions were Chapter VII resolutions, meaning that they were legally binding. They were also fruitless. They neither resolved the dispute nor prevented the atrocities of 1999.¹⁰¹ My point is not that such resolutions are irrelevant, but rather that their influence is finite. Joining the UN and submitting to the authority of the Security Council does impose a sovereignty cost on states, but that cost is limited by the fact that even legally binding resolutions can usually be ignored. Ignoring a resolution may generate some reputational or other consequences, but a state may prefer to live with those consequences rather than to comply with a Security Council mandate. In sum, there is no real coercive enforcement power (with the rare exception of authorizations to use force).

The question remains, however: why has the power to create binding law been given to this institution and not to others? Why have states not created a body capable of generating binding rules to govern international trade, for example? Or global environmental issues? Or human rights?

At least two answers suggest themselves, though I am not convinced that either represents the entire story. First, giving an institution the ability to generate binding international law rules is a dramatic grant of authority and we would expect it to take place only when the benefits from cooperation are very high. This is clearly true with respect to international peace and security. The difficulty here is that the sovereignty costs are also very high in this area. It is not obvious that international trade would be a less attractive area for this kind of cooperation. The stakes involved are lower, to be sure, but this means that both the sovereignty costs of giving authority to an institution and the resulting benefits are lower – the net benefits from

¹⁰¹ From March – June 1999 the Serbian and Yugoslav forces conducted a three month campaign of “ethnic cleansing” by terrorizing the ethnic Albanian population of a town called Glogovac and surrounding villages in Kosovo. Human rights organizations reported widespread looting, destruction of hospitals and school, detentions, and the massacres of families. See Kosovo Atrocities Recounted in Detail, HUMAN RIGHTS WATCH, <http://www.hrw.org/news/1999/07/26/kosovo-atrocities-recounted-detail>.

such an arrangement might even be greater with respect to trade area than security.

Second, the Security Council was created at a unique moment in history. It is easy to understand that in the aftermath of the Second World War states and their leaders had a powerful interest to find ways to avoid future conflicts, and the Security Council represented an effort to do so. That same period, however, also featured a strong desire for cooperation in other areas, including economic cooperation and human rights. In human rights the desire to avoid future atrocities led to (among other things) the Universal Declaration of Human Rights. The same motivation led the drafters of the UN Charter to list promoting and encouraging respect for human rights as one of the purposes of the United Nations. Yet states stopped short of creating a body, analogous to the Security Council, capable of either promulgating human rights rules or issuing legally binding resolutions aimed at violative conduct by states.¹⁰²

Whatever the reason, the Security Council represents a *sui generis* example of an institution with the power to issue binding international law over more than simply technical issues. If other institutions are to be granted the same sort of binding authority, it is likely to happen in the face of some similarly unusual set of circumstances.

Standard-Setting Bodies

If one looks beyond the Security Council and the EU, examples of binding international law created by IOs are difficult to find.¹⁰³ Virtually all such examples can be described as standard setting, by which I mean relatively technical bodies establishing rules over narrow, well-defined areas of law.¹⁰⁴ These bodies create binding law, but the scope of their authority and discretion is extremely narrow. As mentioned above, when states have much to gain by granting an institution the power to create binding rules, they also have an incentive to grant that institution only the absolute minimum scope of authority.¹⁰⁵

Perhaps the most prominent example of a standard setting body with the power to bind states is the Chemical Weapons Convention (CWC). The CWC

¹⁰² One might object that the most powerful states at the time, the United States and the USSR, were both engaged in human rights violations. This is true, but the creation of a human rights body similar to the Security Council would not have threatened the interests of these two powers because they could have retained a veto within that body, just as they did at the Security Council.

¹⁰³ See Guzman, *supra* note 25.

¹⁰⁴ See Ken Abbott & Duncan Snidal, *International Standards and International Governance*, 8 J. EUR. PUB. POL'Y 345 (2001); Tim Buthe & Walter Mattli, *International Standards and Standard-Setting Bodies*, in OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT (David Coen, Grant Wyn, Graham Wilson eds., 2010).

¹⁰⁵ See *supra* II.C. for discussion.

went into force in 1997 and was the culmination of a decades-long effort to curtail the rise of chemical weapon stockpiles. Since going into effect, 188 state members have signed on to the treaty. The CWC itself is administered by the Organization for the Prohibition of Chemical Weapons (OPCW), an independent IO that has a working relationship with the UN. Pursuant to the mandate described in the CWC, the OPCW has direct responsibility for and power over verification of chemical weapon stockpile destruction, chemical weapon production, and national inspection procedures.

For purposes of this article, the most relevant part of the CWC is the Annex on Chemicals. In the Annex, chemicals are categorized into three schedules by the chemicals' potential for legitimate use outside of weaponry. The Annex can be amended by the OPCW as needed.¹⁰⁶ States submit proposed changes to the Director General who then distributes the proposal to all state parties along with a recommendation to adopt or reject the change. If no state party objects to the recommendation within ninety days, the Director General's recommendation is adopted. If any state objects, the matter goes to the Conference of State Parties, where a two-thirds vote is required to pass the proposed changes.¹⁰⁷

The CWC forbids reservations or opt-outs that are contrary to the purpose of the convention. Because the purpose of the CWC is defined as the total ban on the development, acquisition, stockpile, and use of chemical weapons listed in the Annex, it would be facially counterproductive if states were free to reject the CWC classification of chemical weapons.¹⁰⁸ It follows that if a new chemical were ever to be added to the Annex through the OPCW's amendment mechanism, state parties would be bound to follow their CWC obligations in regards to that chemical. The only sure way for a state to escape the binding power of an amendment is to exit the convention altogether. Needless to say this is an extraordinary step as it requires stepping away from not only the amendment but from the entire agreement.¹⁰⁹

Another well-known standard setting body that is sometimes described as creating binding rules is the Codex Alimentarius. The Codex Commission is an intergovernmental body charged with creating food standards and guidelines. It was conceived as a soft law organization without any formal

¹⁰⁶ Chemical Weapons Convention art. 15 §(4), (5).

¹⁰⁷ Chemical Weapons Convention art. 8 §(B)(18). Consensus is preferred. But failing that, a two-thirds vote is required.

¹⁰⁸ Chemical Weapons Convention art. I §(1).

¹⁰⁹ In fact, the CWC includes explicitly language signaling that the parties view exit as a drastic response. "Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that *extraordinary events*, related to the subject matter of this Convention, have jeopardized the *supreme interests* of its country." Chemical Weapons Convention art. XVI §2.

legal authority to bind states. In 1995, however, the creation of the WTO incorporated the Codex in a way that gave it binding force. Under the WTO's SPS Agreement, domestic measures which conform to standards, guidelines, and recommendations established by the Codex are presumed to be consistent with the requirements of the SPS Agreement.¹¹⁰ WTO Member states are not able to opt out of the relevant provisions, so a Codex standard, though non-binding on its own, can become a form of mandatory rule through incorporation into the WTO system.¹¹¹ Despite the change brought about by the WTO's embrace of Codex standards, the fact that the standards themselves are reached through consensus means that states do not risk being subject, over their objection, to binding rules.

It should be noted that most standard setting bodies are not granted the power to create binding rules, so the power to make hard law is exceptional even within this category of institutions. The most important single source for standard setting, for example, the International Standards Organization (ISO), has issued many thousands of standards. These standards do not have any binding force and each country is free to adopt or ignore them.¹¹²

Even when the case for a binding rule is fairly strong and the risk of misbehavior is small, states prefer to leave themselves an escape hatch. The Convention on Facilitation of International Maritime Traffic is intended to facilitate maritime traffic by harmonizing documentary and other similar requirements for ships traveling internationally.¹¹³ One can easily see the gains to be had by reducing the bureaucratic burden on such activity, and one can similarly see the sense in delegating the specifics to a group of experts with the authority to promulgate mandatory rules. This is a relatively simple coordination problem and the risk to states seems very small. Even here, however, states were apparently unwilling to delegate fully. The relevant standards can be amended by a majority of the parties to the Agreement,¹¹⁴

¹¹⁰ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures, art. 3.2, Annex A.1.

¹¹¹ Decisions at Codex are made by the Codex Alimentarius Commission, which consists of representatives of the member states. The Codex statute states that final decisions at the Commission is preferably made by consensus, a simple majority vote will suffice in the case of lack of consensus. Rules of Procedure of the Codex Alimentarius Commission, Rule XII(2), Rule VI (2), in Codex Alimentarius Commission: Procedure Manual, 20th Edition.

¹¹² Within this category of non-binding standards mention should be made of those that are formally binding on states unless they opt-out. Such standards are sometimes referred to as binding, but it is incorrect to think that the standard setting bodies have the power to impose hard law on states

¹¹³ Convention on Facilitation of International Maritime Traffic, adopted 1965, <http://www.admiraltylawguide.com/conven/facilitation1965.html>.

¹¹⁴ The amendment process depends on whether or not a Conference of the Contracting Governments is requested by one-third of the governments. If not, a bare majority is sufficient for the amendment to become binding. If a conference is convened, an amendment requires two-thirds of those present and voting to be adopted. Convention on Facilitation of International Maritime Traffic, arts. VII.2, VII.3.

but any objecting state can opt out of standard, preventing this from being an example of non-consensual law-making.¹¹⁵

One common feature of all the above standard-setting practices, especially those that impose binding rules, is that the subject matter is limited and technocratic. States appear willing to give certain highly specialized IOs the power and onus to come up with standards as long as the scope of the standards are limited and significant harmonization is required. Because the gains from harmonization are extremely high, the ability to achieve harmonization through negotiation is limited (perhaps due to distributional conflicts), and it is possible to delegate the task of harmonization to experts while keeping their influence in check, states will consider establishing standard-setting bodies or even, in rare circumstances, granting such bodies the power to bind states.¹¹⁶ In doing so, however, they are careful to establish severe constraints on the scope of the IO's jurisdiction so as to minimize the risk that it will act contrary to the interests of states.

2. Releasing the Soft Law Monster

Though the ability of IOs to create formally binding international law is heavily constrained, these institutions are often given broad scope to speak in a non-binding way.¹¹⁷

Not every IO has the authority to “speak” in a way that creates soft law, but many do. The UNGA and Security Council are obvious examples. A few other bodies with this authority are: the International Atomic Energy Agency (IAEA), the World Health Organization (WHO), the International Labor Organization (ILO), the International Telecommunication Union (ITU), the Universal Postal Union (UPU), and the World Meteorological Organization (WMO).

When IOs speak, they can create rules that, despite their non-binding nature, affect state behavior. For example, the Nuclear Suppliers Group (NSG) Guidelines set out export control guidelines governing the transfer of nuclear materials between states.¹¹⁸ These guidelines are not themselves legally binding on states, but they provide content for the vague but legally binding export control obligations included in the Nuclear Nonproliferation

¹¹⁵ Convention on Facilitation of International Maritime Traffic, art. VIII.1.

¹¹⁶ Before moving on it should be noted that there are many examples of IOs promulgating standards that are not formally binding but that nevertheless affect state behavior. I do not discuss them here because they represent a form of soft law, which is discussed below.

¹¹⁷ See, e.g., THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (1969)(arguing that the International Civil Aviation Organization obtains a higher level of participation and better regulation of aviation through the use of non-binding “Standards and Recommended Practices” than it could achieve through binding approaches).

¹¹⁸ Nuclear Suppliers Group Guidelines, available online at <http://www.nuclearsuppliersgroup.org/Leng/02-guide.htm>.

Treaty.¹¹⁹ Another example is provided by Resolutions from the United Nations General Assembly (UNGA). Such resolutions are certainly not binding on states, but they are produced with the objective of nudging the international system in one direction or another. Thus, for example, in the 1960s and 70s the UNGA issued a series of resolutions relating to sovereignty over natural resources.¹²⁰ These resolutions were aimed at least in part at legitimating the nationalization of foreign-owned property within developing countries and resisting the notion that such nationalizations must be accompanied by full compensation of affected foreign investors. The resolutions certainly did not settle the issue, but they did become part of the conversation and they contributed importantly to the political back and forth on the issue. They were not binding international law, but they adopted a legal tone and contributed to international understanding of the customary international law rules on expropriation. Though not hard law, it is a mistake to simply dismiss them as irrelevant.

There are at least two different forms of soft law made by IOs. The first provides a kind of support for hard law rules. It fills in gaps, clarifies meaning, and nudges the content of hard law rules. International treaties (not to mention CIL), like all written legal texts, are incomplete and open to interpretation. IOs are among the mechanisms to clarify the meaning of these agreements. In Part III.D I discuss the role that tribunals play in this regard. In this section I am interested in how IOs that do not act as tribunals affect existing legal rules. Among the most obvious places where this happens are the Security Council and the General Assembly. Debates and resolutions from these bodies affects how international law is perceived and, therefore, its meaning.

By way of illustration, consider the rules surrounding the use of force. These have been deeply influenced by both the Security Council and the General Assembly, even though these bodies have no formal authority to interpret the law.¹²¹ It may seem self-evident to international lawyers that the Security Council is able to influence the *de facto* content of international law with respect to the use of force, but someone unfamiliar with international law would surely find it strange that anyone would pay attention to this body. The Council, after all, consists of just a few countries, each of which is acting in its own interests as distinct from representing groups of countries or people. The Council’s reactions are political, rather than legal, and are highly selective. In short, there is no reason to think that the Council is likely

¹¹⁹ See Timothy Meyer, *Soft Law as Delegation*, 32 FORDHAM INTL L.J. 888 (2009).

¹²⁰ See UN G.A. Res. 1803(XVII); UN G.A. Res. 3171(XXVIII); UN G.A. Res. 3281(XXIX).

¹²¹ Resolution on the Definition of Aggression, G.A. RES. 3314 (XXIX) (1974); Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States, G.A. RES. 2625 (XXV) (1970); Alvarez, *supra* note 7. I return to the ICJ’s impact on our understanding of use of force in Part III.D.

to act in a neutral or principled way to clarify the meaning of international law.

Nor is the Council charged with interpreting, clarifying, or creating international law. It is responsible for “international peace and security” and, in that function, presumably has to come to some conclusion about when threats to peace and security exist. But it is never required to act, so inaction cannot logically be taken to signal the absence of such a threat, and action in one case is a poor predictor of action in similar future cases. Furthermore, the Council is not required to make law in order to carry out its functions. It is able to act in response to a threat to the peace without stating whether or not there has been a violation of international law.¹²²

A newcomer to the field might well wonder why states pay attention to the Security Council when it speaks in non-binding ways and why states would give it this role in the first place?

The answer is that this, too, is a balance struck by states in response to the Frankenstein problem. Having the Security Council speak on the subject is of value to states because there would otherwise be no mechanism to promote a common understanding of the rules governing use of force that goes beyond the words in the Charter.¹²³ There is no other body able to play this role, and no true international court to resolve these issues. The ICJ obviously plays a role, but its jurisdictional limits and the fact that it can only respond to disputes constrains its ability to clarify the Charter’s meaning. Each state had to weight these significant gains against the risks that the Council would act contrary to its interests. Given the importance of the topic, the danger of the Council becoming a monster was surely of great concern.

As already discussed in the context of the Security Council’s ability to bind states, the architects of the United Nations constrained the Security Council to protect against it becoming a monster.¹²⁴

The Security Council’s soft law statements relating to the use of force operate in support of the UN Charter. The second way in which IOs can generate soft law is more autonomous. It does not interpret or clarify existing treaty law but, rather, creates a soft law rule based on perceptions of CIL or, depending on one’s views, from whole cloth. Such pronouncements often assert that they are merely restating or codifying CIL, but to the extent they provide any independent influence on our understanding of the law, they can fairly be

¹²² ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 204 (1963).

¹²³ Rulings by the ICJ also serve to clarify the meaning of the Charter, of course, but can only respond to specific disputes and its establishment is similarly affected by the Frankenstein problem.

¹²⁴ See TAN 90 - 102.

called soft law. When they announce rules of law that do not meet the threshold of CIL (something that is often in the eye of the beholder), then they are creating or reinforcing soft law norms that operate separately from hard law.

A conspicuous and well-known example of this sort of soft law is the Draft Articles of State Responsibility produced by the International Law Commission (ILC) in 2001.¹²⁵ These Draft Articles do not themselves embrace the label of soft law. Instead they claim to “formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.”¹²⁶ But any fair reading of the Draft Articles must come to the conclusion that they are more than a list of widely accepted hard law rules. The phrase “by way of . . . progressive development” in the above quote makes clear that the Draft Articles seek to nudge the law along. Reading through the Draft Articles themselves confirms that this is more than simply a restatement of CIL and treaty rules.¹²⁷ Though some of the rules in the Draft Articles are widely accepted rules of international law, many do not fit this description.¹²⁸ Most importantly, the Draft Articles themselves are routinely cited as evidence that a particular norm is, indeed, a rule of CIL.¹²⁹ The moment the Draft Articles themselves become evidence of binding law, they have gone beyond a simple restatement of the rules and become a source of the rules. They become a form of non-binding speech that seeks to influence our understanding of international legal rules. They become soft law.

It is fair to ask why states would allow an IO to speak in a way that could influence the legal obligations contained in a treaty. States, after all, place great emphasis on the consent requirement in international law. They (mostly) do not accept legal obligations to which they have not consented. Why, then, would they create a structure in which their existing legal obligations can be influenced by an organization outside their direct control?

¹²⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UNITED NATIONS, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹²⁶ *Id.* at 31.

¹²⁷ It is worth noting that the Draft Articles also illustrate the importance of other soft law sources including international tribunals, the Security Council, the General Assembly, and more. Such sources are often cited in the Commentary to the Draft Articles in support of the stated norm.

¹²⁸ For example, Article 3 states the universally accepted claim that international law (as opposed to domestic law) governs the characterization of an act as internationally wrongful. Draft Articles, *supra* note 125, at 36.

¹²⁹ David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT’L L. 857, 867-68 (2002).

One could also reasonably ask the opposite question: If states are willing to create institutions with the power to influence legal obligations, why don't they give these institutions the power to change or create hard law? If delegation makes sense, why do states do it in such a timid fashion?

There is little doubt that the surrender of control to an international institution comes with costs. States will allow it only when there are offsetting benefits. In other words, states will create an IO with the authority to create soft law only if the gains from doing so exceed the sovereignty costs.¹³⁰ Neither existing background rules or international law nor an individual treaty represents a fully contingent, comprehensive set of rules. States, therefore, must choose between having an IO capable of filling in the gaps of existing law or simply living with the associated uncertainty or incompleteness.¹³¹ When states conclude that it is preferable to provide for some gap-filling, an IO capable of generating soft law is one possible strategy. Though the statements made by the IO are non-binding, they can create focal points around which states can coordinate and can even nudge a state toward a more, rather than less, cooperative interpretation of the rules.

So allowing IOs to speak can add value to an agreement. Allowing the IO to speak too loudly or too freely, however, erodes the power of the founding states too much. States do not want an IO to deviate from the state's own understanding of the agreement (at least not too much) and does not want the IO creating new obligations that it must follow. Depending on how states balance the desire to grant enough flexibility to adapt to future events against the desire to retain control, they can give the IO more or less ability to speak in an influential way.

The decision to grant IOs the power to generate soft law, then, represents an intermediate position. It is a compromise forced upon states by the Frankenstein problem. When states make this choice they are signaling that the cooperative benefits of the institution exceed the costs, but only up to a point. Delegating the power to generate hard law is too costly in the vast majority of situations, so states only grant the IOs they create the power to create soft law. The IO is not rendered impotent, but it is less powerful than it would be if it could undertake binding interpretations.

The fact that states so frequently create IOs with the power to speak through soft law, but so rarely allow those same institutions to create hard law, tells us something about the importance states place on this formal distinction. It indicates that while states retain a powerful preference for control over their hard law obligations, they are quite willing to surrender control over soft law pronouncements. This may not be surprising to most students of

¹³⁰ And only if a soft law approach offers greater gains than a hard law approach.

¹³¹ The creation of a tribunal is a further option, which I discuss in Part III.D.

international law, but it flies in the face of claims that the formal status of international legal rules is unimportant. If international law skeptics are to be believed, they will have to explain why states so thoroughly limit their exposure to non-consensual, binding international law but readily accept non-consensual soft law.

D. DISPUTE RESOLUTION

The fourth and final function performed by IOs is dispute resolution. The International Court of Justice is the most obvious example. A similar function is carried out by tribunals nested within larger IOs, such as the WTO’s dispute settlement system or the Inter-American Court of Human Rights, which exists within the Organization of American States.

The international system can at times seem to be overrun with international tribunals.¹³² The list of such quasi-courts includes ICJ, the WTO Appellate Body, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, the International Criminal Court, the African Court on Human and People’s Rights, the International Center for Settlement of Investment Disputes and its ad hoc tribunals, and on and on.¹³³ These institutions have become an important part of the legal landscape, and represent one of the important and conspicuous functions performed by IOs.¹³⁴

For present purposes, we restrict our attention to inter-state dispute resolution by IOs, which allows us to put aside at least a few tribunals that do not deal primarily with state-to-state disputes. Cases involving a private party as one of the litigants are sufficiently different from state-to-state tribunals that I leave a discussion of their impact to another time. When I refer to “international tribunals,” then, I mean to include only tribunals that deal with state-to-state disputes. I recognize that the term is typically used more broadly, but I use it in this narrower way for convenience.

¹³² The precise number of international tribunals is sensitive to how one defines these institutions. One count puts the number at 21, though its definition is more expansive than the one used in this Article. See Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 L. & CONTEMP. PROBS. 37, 57-60 (2008).

¹³³ One could, of course, add the European Court of Justice and the European Court of Human Rights. Though international tribunals appear to be increasing in number and importance, and though they are clearly worth investigating and understanding, we should not lose sight of the fact that it remains the case that most international obligations exist without any mandatory system of adjudication to support them. Consider, for example, that virtually all obligations in the fields of environmental law, arms control, use of force, humanitarian law (at least with respect to the behavior of states), diplomatic law, and more lie outside the mandatory jurisdiction of any tribunal.

¹³⁴ The IO in question may be the tribunal or tribunal system itself, or it may be one part of a larger IO, as is the case with the WTO’s system of dispute resolution.

Because a tribunal addresses disputes between states, and because a ruling is likely to disappoint one, and perhaps both parties, there is a sense in which a tribunal will necessarily act contrary to the interests of some states. There is, in addition, a broader risk that the tribunal will adopt interpretations of laws that are out of step with the will of the relevant states. Like other IOs, in other words, there is a risk that a tribunal will turn on its creators.

When states decide to create a tribunal they accept these risks in exchange for the benefits that a tribunal offers. These benefits, which have been catalogue in other places, include neutral resolution of a dispute, clarification of relevant legal rules, and an opportunity for states to resolve disagreements without violence and (relatively) insulated from political pressures.

International tribunals are intriguing institutions because, despite sometimes being named “courts,” and frequently being thought of as a species of court, they bear only a superficial resemblance to domestic courts. Among the features of international tribunals, at least two represent a response to the Frankenstein problem.

Jurisdiction

Consider first the jurisdiction of international tribunals. Like virtually every other feature of international tribunals (or IOs, for that matter) states are able to choose the jurisdictional rules and the number of tribunals. Someone unfamiliar with the current system might be surprised to learn that states have chosen not to construct a tribunal with general jurisdiction over disputes among states. In reality, of course, the jurisdiction of international tribunals is so heavily constrained that for the large majority of international disputes no international tribunal has mandatory jurisdiction.

The ICJ, for example, could have been created with jurisdiction over all disputes between UN members regarding international law. In fact, the ICJ arguably sought to do something along these lines through its opt-in system of jurisdiction. Any state party to the ICJ Statute can accept the jurisdiction of the court in all legal disputes concerning international law.¹³⁵ As it turns out, however, states have been reluctant to submit themselves to the court's general jurisdiction. At present, sixty-six states have submitted declarations accepting the Court's jurisdiction.¹³⁶ Of the permanent members of the Security Council, only the UK has done so.¹³⁷ Furthermore, the number of declaration overstates the reach of the court because many of those

¹³⁵ International Court of Justice Statute art. 36.2.

¹³⁶ Declarations Recognizing the Jurisdiction of the Court as Compulsory, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

¹³⁷ *Id.*

declarations include significant exceptions to the country’s acceptance of jurisdiction.

Despite these limits, it must be said that the ICJ does, indeed, receive cases on the basis of these declarations of jurisdiction. Exposing oneself to the jurisdiction of the tribunal over any dispute involving international law is a unilateral act and a state gains little by accepting this burden, especially if a majority of other states have chosen not to do so. The explanation for why states nevertheless accept the court’s jurisdiction likely lies in the reciprocity condition included in so many declarations. Most states condition their acceptance on a similar acceptance by other states. In other words, they only accept the mandatory jurisdiction of the Court when the complaining state has submitted a similar declaration.¹³⁸ The ability to demand reciprocity in this way means that a state only accepts jurisdiction, in practice, in disputes with other states subject to ICJ general jurisdiction (possibly subject to exceptions). States are willing to expose themselves to the jurisdiction of the court, which they would otherwise prefer to avoid, because in exchange they gain access to the court when they have a grievance against other states.

The ICJ can also acquire jurisdiction through treaty. The parties to a treaty can refer disputes to the ICJ, and can choose to grant the court mandatory jurisdiction over the disputes that arise from the treaty. The parties consent to jurisdiction through the treaty, but do so before a dispute arises. Other tribunals acquire jurisdiction through treaty in much the same way. WTO tribunals rely on the WTO Agreement and the WTO’s Dispute Settlement Understanding. The Law of the Sea Tribunal is empowered by the United Nations Convention on the Law of the Sea, and so on.

The way in which states expose themselves to the jurisdiction of tribunals sometimes but not others accords with how one would expect them to respond to the Frankenstein problem. States submit to a tribunal’s jurisdiction because doing so gets the state the ability to bring cases against other states and, in doing so, improve the likelihood of compliance with relevant international law rules. They also, however, expose themselves to the tribunal and have to worry that the tribunal will act in ways that are contrary to the state’s interests. Rather than accepting the jurisdiction of a single tribunal over all issues, states can manage the Frankenstein problem more effectively by making many smaller separate jurisdictional decisions. In areas where the benefits from a tribunal outweigh the risks, jurisdiction can be accepted. In areas where the opposite is true, jurisdiction can be denied. The most obvious way to manage jurisdiction in the way is by embedding jurisdictional decisions within treaties. States can then accept or reject the jurisdiction of a tribunal (perhaps the ICJ, perhaps some tribunal created for this purpose) for the specific obligations in the treaty and nothing

¹³⁸ This is permitted under International Court of Justice Statute art. 36.3.

else. Indeed, they can even provide for the acceptance of jurisdiction for some, but not all, obligations within the treaty. In short, tribunals can be a powerful tool to advance cooperation and compliance, but they are also difficult to control once they are established. Careful management of the extent to which a state is exposed the mandatory jurisdiction of a tribunal represents a predictable response to this dilemma.

The desire to manage jurisdictional questions on an issue-by-issue basis could still be consistent with a single tribunal – perhaps the ICJ. There would be obvious benefits in terms of efficiency, consistency, and legitimacy to having a single tribunal rather than many separate ones. Yet states have chosen to create many unrelated tribunals: the ICJ, the WTO tribunal system, ITLOS, various human rights tribunals, and so on.

I argue above that states have an interest in creating IOs with narrow scope, in part to reduce the harm if the IO pursues objectives different from those of the founding states.¹³⁹ The same reasoning explains why states prefer to avoid a single global tribunal. By limiting the subject matter jurisdiction of tribunals states reduce the risk that they will become monsters – that they will act in ways contrary to interests of states. The subject matter jurisdiction of the WTO's Appellate Body (AB), for example, is carefully constrained in the Dispute Settlement Understanding. The WTO's dispute settlement system serves to “preserve the rights and obligations of Members under the covered agreements in accordance, and to clarify the existing provisions of those agreements.”¹⁴⁰ Notice that the inquiry is focuses squarely on the WTO agreements rather than on international law more broadly. That these provisions matter is demonstrated by the fact that their limits are a matter of contentious debate. There is, for example, disagreement on the impact of separate, non-trade, commitments made by WTO member states and the extent to which the AB should take these legal obligations into account.¹⁴¹ If trade disputes were resolved at the ICJ this debate would almost certainly not exist. The ICJ would consider all relevant international law, would grapple with the hierarchy of different sources of law, and would ultimately come to some conclusion about each states legal commitments and the legality of its behavior. By creating a separate tribunal within the WTO, states avoided this holistic approach to dispute resolution. They succeeded, to at least some extent, in limiting the scope of the tribunal's inquiry, to WTO law rather than to all international law.

¹³⁹ See *supra* TAN II.C.

¹⁴⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3(2).

¹⁴¹ See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L. J. 333, 342-43 (1999); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

Establishing different tribunals for different purposes also allows states to tailor other features of each tribunal to suit the needs of the particular situation. They can for example, provide for greater or lesser independence of judges or panelists. More independence, of course, increases the credibility of the tribunal but also increases the risk that it will generate rulings the run counter to the state’s interests. This is a the Frankenstein problem all over again, and building many tribunals allows states to make this and other decisions about the design of the tribunal in a nuanced fashion, suitable to their needs within each issue area.¹⁴²

Stare Decisis

The second feature of tribunals that I wish to discuss is the absence of *stare decisis*. When an international tribunal issues a ruling, it is typically understood to bind the parties to the dispute with respect to their specific dispute – meaning that the losing party is expected to comply with the tribunal – but it does not have any formal binding force beyond the particular case. This is a view of court or tribunal decisions that is familiar within civil law systems, of course, but it runs contrary to the norm on common law systems. One might ask why states opted for the former rather than the latter as the norm under international law.

The status quo is easy to understand when viewed in terms of the Frankenstein problem and when compared to the power given to other IOs to create international legal rules. Notice that the Frankenstein problem applies in two distinct ways. First, states determine how the tribunal ruling impacts the particular dispute before the tribunal. Second, decide what consequence the ruling has for future cases and for international law more broadly.

With respect to the specific dispute before the tribunal the ruling of the tribunal is normally considered binding. Interestingly, even this seemingly obviously rule is not universal. There are various instances in which IOs opine on the merits of a case in a way that is not binding on the parties. One must take care with semantics here as these bodies are not always referred to as “tribunals” in the literature, but they are engaged in the fundamentally the same function.

A good example is the UN Human Rights Committee (“the Committee”). The Committee was established under the authority of the ICCPR to monitor compliance with that agreement.¹⁴³ It consists of eighteen members who,

¹⁴² See Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. (2008), 171-235; Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107.2 YALE L.J., 273-391 (1997).

¹⁴³ International Covenant on Civil and Political Rights and Optional Protocol, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (1967) (entered into force Mar. 23, 1976).

although nominated by their home states, are elected and serve in their personal capacities.¹⁴⁴ The Committee monitors compliance with the ICCPR in three ways. First, the ICCPR requires parties to report to the Committee on the steps they have taken to implement the obligations created by the ICCPR.¹⁴⁵ The Committee is authorized to “comment” on the reports and submit those comments to the states for their consideration.¹⁴⁶ Second, the ICCPR permits states to declare their willingness to have their compliance with the Convention challenged by other member states.¹⁴⁷ If an amicable solution is not reached between the parties, the Convention authorizes the Committee to request information from the parties and requires it to issue a report on the dispute.¹⁴⁸ Third, the Optional Protocol to the ICCPR allows states to permit individuals to lodge complaints about their human rights practices with the Committee.¹⁴⁹ When a complaint is properly made, the Committee is authorized to receive information about the dispute from both the individual and the state concerned, and to formulate and express its “views” on the matter.¹⁵⁰

The “views” or “comments” issued by the Committee bear some resemblance to the decisions of international tribunals, at least to the extent that the former interpret the relevant legal obligations and, in light of those obligations, opine on state conduct. The Committee’s writings, however, have no independent legal effect and do not even bind the state party involved in the case.¹⁵¹ Though the Committee is not thought of as a tribunal, it affects our general understanding of the law in much the same way as a tribunal. Like the rulings of a tribunal, the Committee’s decisions add a nonbinding gloss on the legal obligations contained in the relevant legal text (the ICCPR in the case of the Committee). In both cases these bodies have an impact through soft law statements.

Even when addressing the merits in a particular case, then, states balance the benefits and the risks of exposing themselves to legally binding pronouncements.

Turning to the impact of decisions on international law more broadly and on future cases, the universal rule is that tribunals lack the power to create binding international legal rules. They do not create a body of binding precedent. They do, however, have enormous influence on our understanding of the law. One of many possible examples is the famous

¹⁴⁴ International Covenant on Civil and Political Rights art. 28(3).

¹⁴⁵ International Covenant on Civil and Political Rights art. 40.

¹⁴⁶ International Covenant on Civil and Political Rights art. 40(4).

¹⁴⁷ International Covenant on Civil and Political Rights art. 41.

¹⁴⁸ International Covenant on Civil and Political Rights art. 41(1)(h).

¹⁴⁹ International Covenant on Civil and Political Rights Optional Protocol, *supra* note 143.

¹⁵⁰ *Id.* at art. 5.

¹⁵¹ Helfer & Slaughter, *supra* note 142.

Nicaragua case, in which the ICJ laid out its interpretation of the UN Charter's use of force rules. Though the ICJ ruling is not itself binding law, one could not claim to understand use of force without knowing that case and the ICJ's position.

I have intentionally used the same example (use of force) as I use in Part III.C to show that the decisions of tribunals operate in much the same way as the soft law created by other IOs. In both cases the relevant rules affect our understanding of international law but are not binding. In another words, soft law is being generated in both cases.¹⁵²

Once we recognize the relationship between tribunal-generate soft law and soft law generated by IOs in other ways, it seems obvious that tribunal decisions must be non-binding. Recall how reluctant states are to give IOs the power to create binding international law. It would be shocking indeed for states to refuse any grant of formal lawmaking authority to most IOs only to turn around and grant it to tribunals. What one would expect instead is what one actually observes. Tribunals are normally not granted the power to bind states (beyond the states involved in the case with respect to the specifics of the case) but (like other IOs) they are given the power to generate soft law.¹⁵³

IV. CONCLUSION

What should we make of the current use of IOs by states? This Article has tried to explain how the Frankenstein problem accounts for a great deal of the decisions states have made with respect to IOs, including when IOs are created, what powers they are given, and how the various design elements in IOs are traded off against one another.

Because IOs acquire of life of their own once they are launched, we can learn a good deal about state concerns by examining the Charter of these organizations. We can see, for example, that states almost never view the cooperative gains from IOs as large enough to give these institutions the power to create binding international law. Furthermore, when IOs do get this power, states are careful to make sure that the scope of the organization is extremely narrow. The only exceptions to this practice – the Security Council and the EU – are properly thought of as special cases. In contrast, states are more than willing to give IOs the power to speak to matter of international law and policy in a wide variety of contexts, even when the

¹⁵² See Alvarez, *supra* note 7, at 329. (“[P]erhaps the largest body of emerging “soft law” today is the ever-increasing numbers of judgments issued by various permanent international courts and tribunals.”)

¹⁵³ Notice that even this soft law role is not necessary. Tribunals could be charge with resolving a dispute without issuing a reasoned decision (or without publishing that decision) and without opining on the law.

statements by the organization may have a significant impact on the general understanding of relevant legal rules and norms. The most obvious example of this can be found in tribunals, which are created to interpret international legal rules, albeit in a non-binding way. Other examples could be pulled from the Article, but the common theme is that states seek a balance between the need to give IOs sufficient power to achieve their goals and the desire to avoid having those same IOs act contrary to their interests.

All of this leads to a normative question that I have largely avoided in this Article: Have states struck the balance correctly? In other words, do IOs have too much power, not enough power, or just the right amount?¹⁵⁴ The answer to this question is, of course, subjective, and reasonable people may disagree. I have avoided this question so that the analytical approach and conclusions in the Article are not conflated with the normative question raised in this paragraph. Before closing, however, I want to at least indicate my own perspective, even as I acknowledge that there is insufficient space for a full explanation.

My own view is that the net impact of IO activity is quite clearly positive, notwithstanding the dangers inherent in the Frankenstein problem.¹⁵⁵ It seems to me that states have approached this problem with too much conservatism. Though the problem is real, I believe that there are significant gains to be had by giving IOs more rather than less ability to influence the international system. There would, no doubt, be more instances of individual states regretting the power given to IOs, but these costs would be outweighed by more cooperative outcomes when addressing the world's largest problems. I have made a similar point in other writing where I argue that the international system places too much emphasis on consent.¹⁵⁶

These normative thoughts, however, are secondary to the main purpose of this Article, which is to offer an explanation for the decisions states have made about IOs in the past, and some tools with which to think about how similar decisions are likely to be made in the future.

¹⁵⁴ A Goldilocks analogy suggests itself here, but I will resist as Frankenstein is already on the scene.

¹⁵⁵ There are also significant issues of legitimacy and agency that are well-addressed elsewhere and that I have not emphasized. See Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 127-29 (2000); See Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 386 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

¹⁵⁶ See Guzman, *supra* note 25.