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The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective

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Abstract

Consent as the cornerstone of international law has been under pressure in recent years. Non-consensual forms of cooperation exist across many issue areas. The pattern and persistence of this trend, however, do not evolve at the same pace, prompting discussions on the driving factors behind this development. This research seeks to further illuminate both the scope and the underlying drivers for this development. To that end, three major formats of non-consensualism are identified, deviating from the classical perception of international law as a contractual and multilateral construct, namely unilateralism, bi- or plurilateralism and informality. This research then applies both classical rational choice theory and behavioural economics in order to explore the explanatory power of the economic approaches to these formats of non-consensualism. This study seeks to refine our understanding of international law and highlight both the potential and limitation of economic concepts as well as their relation to power-oriented and institutional approaches.

1 Introduction

International lawyers have long perceived multilateralism and contractual law as constituting the modern trend in governing the international community.[1] This perception goes along with the narrative of the continuous expansion of international law along with growing global interdependence, leading states to accept treaty

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1 Helfer, 'Nonconsensual International Lawmaking', 2008 *University of Illinois Law Review* (2008) 71, at 72; Hollis, 'Why Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law', 23 *British Journal of International Law* (2005) 137.

making as the foundation of international law.[2] However, the consensual structure of international law has been contested in recent years – both from an analytically descriptive perspective[3] and from a normative angle.[4] The main characteristics of the overall phenomenon, including the informality of international law,[5] unilateralism[6] or the trend towards regionalism,[7] have been discussed as deviations from consensualism. Previous analyses, however, rarely undertake a comprehensive theory-based approach, particularly in determining how these singular developments reflect a broader trend towards non-consensualism in international law, nor do they offer an explanatory framework of why this trend occurs.[8]

A distinct, seemingly disconnected, recent literature strand is the application of behavioural law and economics to the study of international law. This approach broadens the traditional law and economics insights[9] and incorporates the contributions by psychologists and behavioural economists,[10] which highlight the importance of systematic heuristics and biases running against the main assumption of classical rational choice theory (that is, rationality assumption). Rational choice (RC) has been frequently applied to the study of international law,[11] while behavioural economics (BE) and psychological insights have been mainly applied to the study of international relations under the broader category of 'political psychology'.[12] The current article

2 Denemark and Hoffmann, 'Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making', 43 *Cooperation and Conflict* (2008) 186.

3 Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods', 108 *American Journal of International Law* (*AJIL*) (2014) 1; Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *European Journal of International Law* (*EJIL*) (2000) 391.

4 Guzman, 'Against Consent', 52 *Virginia Journal of International Law* (*VJIL*) (2012) 747.

5 Voigt, 'The Economics of Informal International Law: An Empirical Assessment', in T. Eger, S. Oeter and S. Voigt (eds), *Economic Analysis of International Law* (2014) 33; Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 13.

6 See, e.g., Scott and Rajamani, 'EU Climate Change Unilateralism', 23 *EJIL* (2012) 469; Shaffer and Bodansky, 'Transnationalism, Unilateralism, and International Law', 1 *Transnational Environmental Law* (2012) 31, at 38.

7 See, e.g., Voon and Mitchell, 'PTAs and Public International Law', in S. Lester and B. Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (2009) 114.

8 The most recent and comprehensive exception in this regard is Krisch, *supra* note 3.

9 See R.A. Posner, *Economic Analysis of Law* (8th edn, 2011); R. Cooter and T. Ulen, *Law and Economics* (6th edn, 2011); G. Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (1970); S. Shavell, *Foundations of Economic Analysis of Law* (2004).

10 Rabin, 'Psychology and Economics', 36 *Journal of Economic Literature* (1998) 11; Simon, 'A Behavioral Model of Rational Choice', 69 *Quarterly Journal of Economics* (1955) 99.

11 See, e.g., Dunoff and Trachtman, 'Economic Analysis of International Law', 24 *Yale Journal of International Law* (*YJIL*) (1999) 1; J.S. Bhandari and A.O. Sykes (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (1997); Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *YJIL* (1989) 335, at 348–354; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005); A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008); E.A. Posner and A.O. Sykes, *Economic Foundations of International Law* (2013); T. Eger, S. Oeter and S. Voigt (eds), *Economic Analysis of International Law* (2014).

12 See Hafner-Burton, Hughes and Victor, 'The Cognitive Revolution and the Political Psychology of Elite Decision Making', 11 *Perspectives on Politics* (2013) 368.

aims to connect the recent trends, namely the rather descriptive analysis of the ongoing patterns of non-consensualism and the more explanatory RC and BE approaches, focusing on the reasons that motivate the trend towards non-consensualism.

By definition, non-consensualism – in line with previous work[13] – broadly refers to deviations from the modes of traditional international law-making, particularly through unilateral actions, non-multilateral arrangements and informal structures. In this vein, non-consensualism does not necessarily challenge the consensual approach in international law since it evolves at the periphery of the international legal order, especially through informal channels. It is acknowledged that, according to a more narrow approach, non-consensualism could be interpreted as norms binding, or complied with by, an actor even though the actor did not consent to the norm. Non-multilateralism and informalism would then not be deviations from consent rule within a property rule approach, as these parties remain bound only to forms of contractual relations to which they have agreed.

While this narrow understanding would also offer substance for an economic analysis from an external effects perspective, I am instead interested in exploring accordance and differences in explanatory power offered by RC and BE logic in regard to a broad concept of non-consensualism. Certain forms of non-consensualism may be rationally chosen for reasons associated with effective problem solving or because there are fewer costs than formal and multilateral institutions, and this article intends to illuminate BE reasons contradicting or modifying the RC explanation. Thus, I identify specific issue areas of international law and ask whether the observed patterns of non-consensualism can be explained by applying insights from both RC and BE. Do these concepts offer plausible explanations regarding the choice of states in relation to the (non-)consensual formats of cooperation? This work is organized into five sections. Following the introduction, the second part presents the theoretical economic framework and develops the insight offered by RC and BE in relation to consent as a format of decision making under international law. The third part separately examines the three modes of non-consensualism with reference to substantial issues. In assessing each mode, the pattern of non-consensualism is factually traced from an economic perspective. The fourth part concludes.

2 Theoretical Framework: (Behavioural) International Law and Economics

A *RC and International Law*

Economic approaches to analysing international law are a well-established discipline.[14] The structure of international legal rules or institutions has been explained using RC analysis[15] that rests on the assumption of states as rational, self-interested

[13] Krisch, *supra* note 3, at 10.

[14] See references in note 11 in this article.

[15] See Norman and Trachtman, 'The Customary International Law Game', 99 *AJIL* (2005) 541; for an experimental law and economics analysis of customary law, see Engel and Kurschilgen, 'The Coevolution of Behavior and Normative Expectations: An Experiment', 15 *American Law and Economics Review* (2013) 578.

actors, who are able to identify and pursue their interests.[16] Their interests are a function of exogenous and fixed state preferences. They do not care about other states and maximize their own payoff by excluding other approaches to states' choices that account for legitimacy, security concerns or institutionalist approaches, viewing states as disaggregated actors. Within the 'tool-box' of RC-based economics, three standard economic approaches have served as analytical tools in relation to international cooperation – game theory, cost-benefit analysis and public good theory. Under the game theory, the classical prisoner's dilemma (PD) model stipulates that states have a similar interest in attaining a cooperative outcome, one that is primarily impeded by the fear that other states may deviate from the agreements.[17]

Another suitable tool in determining a state's choice is offered by the Coasean concept of transaction costs – that is, the costs incurred in finding interaction partners, negotiating contract details, monitoring compliance and enforcing sanctions.[18] This concept allows for cost-benefit analysis to evaluate the behaviour of states in the context of international cooperation and may capture the stance of a country towards consensual law.[19] When considering a choice of (non)-consensual law, different cost dimensions become relevant, and all of these vary depending on whether they are considered in the context of the number of participating countries, the degree of formality or the institutional environment of the agreement.[20] At the most basic level, sovereignty costs increase whenever states cannot choose their national prerogatives and surrender competencies.[21] Meanwhile, negotiation costs may increase not only with the number of participating states or the degree of heterogeneity of preferences but also according to the nature and complexity of the substance.[22] Implementation and enforcement costs may similarly depend on the complexity of the technicality of the substance. However, they may differ depending on the power and resources that must be enforced by countries (also on an extraterritorial basis). Monitoring costs increase when compliance with the agreement must be observed or when international organizations are established to administer an agreement. The number of participating countries may influence monitoring costs as well as the different monitoring needs of formal and informal formats of cooperation. Modification costs are highly relevant with regard to adapting current agreements to new (factual, legal or political) circumstances, and they may vary depending on the binding nature of the agreement (formal versus informal law). In sum, applying the Coasean concept of transactions to

16 See only Guzman, *supra* note 11, at 17; Goldsmith and Posner, *supra* note 11.

17 According to prisoner's dilemma (PD) approaches, international cooperation is particularly less likely to occur if the group is large. In an n-person PD, the conditions for cooperation would be close to heroic. Goldsmith and Posner, 'A Theory of Customary International Law', 66 *University of Chicago Law Review* (1999) 1113; for the criticism of this approach, see only Norman and Trachtman, *supra* note 15.

18 Coase, 'The Nature of the Firm', 4 *Economica* (1937) 386.

19 See, e.g., Abbott and Snidal, 'Pathways to Cooperation', in E. Benvenisti and M. Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (2004) 50; Lipson, 'Why Are Some International Agreements Informal?', 45 *International Organization* (1991) 495.

20 For an overview of relevant costs, see Voigt, *supra* note 5, at 38.

21 See also Epstein and O'Halloran, 'Sovereignty and Delegation in International Organizations', 71 *Law and Contemporary Problems* (2008) 77, at 89.

22 Abbott, *supra* note 11, at 398.

international legal cooperation gives rise to a context-specific cost-benefit situation as a stimulus for states' choice on whether and how to pursue international cooperation, and this offers us a toolbox to analyse non-consensualism.

Another fruitful concept in the arena of rational choice is the phenomenon of a public good. Technically, a public good is a good the consumption of which by one person has no effect on the ability of other people to consume it. International legal cooperation governing national defence, clean air or the absence of armed threat typically allows all citizens to enjoy benefits. The creation of public goods through international law gives rise to collective action problems. Unilateral actions under international law (for example, in the protection of the environment) may then reflect the free-riding of other states on the other country's activity. This article will analyse occasions where free-riding may have explanatory power regarding non-multilateral cooperation.

B *BE and International Law*

Psychologists and behavioural economists have questioned the rationality axiom from as early as the 1970s.[23] Since then, psychologists and economists have constantly investigated the systematic heuristics and biases contradicting the rationality assumption in order to establish a more realistic model of human behaviour.[24] Several key insights from BE are deemed relevant in our analysis of non-consensualism. Under the standard 'expected utility' concept of RC models, in particular, preferences are stable, irrespective of the context in which decisions are realized. In this event, the presentation and design of alternative options do not influence the decision itself, and the actors are predicted by RC theory to be responsible for always opting for the same alternative. Nonetheless, numerous experiments have proven that prospect theory renders the above proposition invalid.[25] Individuals experience loss aversion when their attitude towards gains and losses is asymmetric.

Hence, the utility of these individuals increases less by gains than by averted losses. The utility from a US $100 gain is less than an averted loss of US $100.[26] The individual's perception of what a gain or a loss is can be analysed by reference to the 'framing effect' or the 'wording effect' – these phenomena question the principle of independence, according to which preferences remain stable irrespective of the description or choice of words. Further, obvious features or events are emphasized when probabilities are estimated ('availability bias'). Consequently, people tend to overlook the base rate probability because they can clearly remember a specific event. This may lead people to systemically overestimate, for example, the probability of an environmental disaster after they have been greatly exposed to a similar event through the media.

[23] Rabin, 'Psychology and Economics', 36 *Journal of Economic Literature* (1998) 11.

[24] See, in particular, Kahneman and Tversky, 'Prospect Theory: An Analysis of Decisions under Risk', 47 *Econometrica* (1979) 263; Gigerenzer and Goldstein, 'Reasoning the Fast and Frugal Way: Models of Bounded Rationality', 103 *Psychology Review* (1996) 650.

[25] See only Tversky and Kahneman, 'The Framing of Decisions and the Psychology of Choice', 211 *Science* (1981) 453.

[26] For this example, see van Aaken, 'Behavioral International Law and Economics', 55 *Harvard Journal of International Law* (*HJIL*) (2014) 427.

International law has yet to be systematically analysed via BE.[27] Given the present focus on the emerging patterns of non-consensualism in international law, this analysis applies core insights from BE to analyse the various modes in which this trend occurs. The main aim is to identify the motivation of states to choose non-consensual formats and to illuminate the possible shortcomings of a classical economic analysis of international law.

C *Economics and Consent*

Under what circumstances does an economic rationale exist for a consensus-based international agreement? Fundamental tenets claim that international agreements may offer states various benefits as cooperation gains, which may exceed the costs incurred by the consensus-finding exercise.[28] In principle, consent in an economic perspective should always be attainable if an agreement produces net welfare gains for all participating states. A direct example of this condition is the oldest international organization in the world – that is, the Universal Postal Union (UPU). By eliminating the need to affix stamps in the addressees' country, the UPU simplified international mail, leading to an agreement that only stamps from the originating country would be required. Even though the benefits of the UPU are not equally distributed – that is, some countries send or receive more mail than others – the benefits of allowing cross-border communication for all citizens outweigh the possible costs implied for all parties involved. This paved the way for a universal agreement.[29]

More often, however, benefits do not accrue to all countries: some have greater benefits, some have less and some do not benefit at all. This reality has implications both from the perspective of an individual country's bargaining strategy and an overall welfare perspective. RC suggests that each country cares about what it gains from a potential agreement. In terms of its optimal bargaining strategy, an individual country would not enter into an agreement that produces net global gains but yields a net loss for itself. In this event, the distributional outcome would cause the consent problem.[30] From a welfare perspective and given that a heterogonous set of preferences implies different cost and benefit structures, Pareto improvements can rarely be realized. A Pareto improvement signifies a change to different allocations, leading at least one individual to be better off without making any other individuals worse off. If only one country is worse off, a Pareto improvement cannot be realized.[31] When net gains are available for some countries and not for others, a conflict naturally arises between consent and Pareto efficiency – yet the former could compensate the latter. Such a case is called the Kaldor–Hicks efficiency, which requires that the total gains of the winners

[27] Van Aaken, *supra* note 26, at 423; Shaffer and Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *AJIL* (2012) 1.

[28] Posner and Sykes, *supra* note 11, at 63–67.

[29] Guzman, *supra* note 4, at 756.

[30] *Ibid.*; Pollack and Shaffer, 'Their Interaction of Formal and Informal International Lawmaking', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 247, at 247, 250.

[31] Dunoff and Trachtman, *supra* note 11, at 46.

must exceed the losses of the losers, given that the winner can compensate the loser and still gain more benefits.[32]

Under optimal conditions, a Kaldor–Hicks improvement can be realized through a negotiation solution. This condition is particularly relevant for agreements that imply distributional effects. As part of the World Trade Organization's (WTO) Uruguay Round, the TRIPS Agreement is an example of an agreement entailing distributional effects.[33] In general, large countries gain disproportionate benefits from stringent intellectual property laws, whereas developing countries gain profits from their easy access to intellectual property rights.[34] Under such a scenario, and based on the fact that the Pareto improvements are not attainable due to developing countries being worse off, more stringent laws, which are assumed to form a net overall benefit, cannot be achieved. Moreover, in this case, Kaldor–Hicks efficiency is achieved only if the compensation of developing countries materializes. However, in practice, Kaldor–Hicks improvements are less likely to be achieved because they imply a greater deal of uncertainty surrounding the nature and magnitude of benefits and losses. Every country can determine its position as either a winner or loser, yet it can hardly calculate the actual size of its profits and losses, let alone their quantity and monetary value. In such cases, the transaction costs (in terms of political bargaining costs) are remarkably high, thereby preventing the achievement of a Kaldor–Hicks solution. This uncertainty may lead to political bargaining and asymmetric information, thus impeding compensation solutions. Given the greater simplicity and recognizability of the Pareto setting, efficient solutions can hardly be generated via compensation in line with Kaldor–Hicks.[35]

From a BE perspective, the finding mentioned above may be exacerbated given the relevance of loss aversion, suggesting that governments may weigh losses over-proportionately in comparison to gains. If a bias towards losses materializes, a compensation solution is even less likely to be achieved because the exchange that underlies compensation is flawed. The gains of a country do not quantitatively correspond to the losses of another. This occurrence may eventually lead to situations where compensation appears theoretically feasible but fails because of mistaken valuations due to loss aversion.

3 Modes of Non-Consensualism

Based on the analytical framework explained above, this article extends previous classifications of non-consensualism pertinent to the character of public goods[36] and

[32] For the foundations, see Hicks, 'The Foundations of Welfare Analysis', 49 *Economics Journal* (1939) 696; Kaldor, 'Welfare Propositions in Economics', 49 *Economics Journal* (1939) 549; see also Posner and Sykes, *supra* note 11, at 13.

[33] Guzman, *supra* note 4, at 757. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) 1994, 1869 UNTS 299.

[34] Guzman, *supra* note 4, at 758.

[35] In this vein, it can be explained why integrating the TRIPs Agreement issues into the World Trade Organization (WTO) negotiations ultimately broke the impasse between developed and developing countries, as market access on issues other than intellectual property could be used. See Guzman, *supra* note 4, at 758; Posner and Sykes, *supra* note 11, at 281.

[36] Krisch, *supra* note 3, at 3–5.

employs a distinction among the unilateralism, plurilateralism (as opposed to multilateralism) and informal formats of cooperation. Differentiation allows the isolation of both the analytical-descriptive and the explanatory purpose of this research. The distinction also allows for the disentangling of a 'lead-and-follow' pattern that seems to be a common feature of non-consensualism. In other words, cooperation is often initiated on a uni- or plurilateral basis and is subsequently (through different forms of compliance pull mechanisms) extended towards multilateralism. While the BE perspective sees the heuristics described above at work here, RC theory focuses on game theoretic and cost-benefit considerations as the main driver of multilateralization.

A *Unilateralism*

Unilateralism has been a widely discussed (and often lamented) phenomenon in international politics.[37] For the purpose of this analysis, unilateralism is construed as an alternative to multilateralism and should therefore be more accurately defined as a conduct 'to opt out of a multilateral framework (whether existing or proposed) or to act alone in addressing a particular global or regional challenge rather than choosing to participate in collective action'.[38] This definition goes beyond the question of the lawfulness of unilateral action and explores the underlying motives because 'the issue … is not whether abstention from emerging forms of multilateralism is lawful, but why it occurs'.[39]

1 Antitrust Issues

Antitrust is an issue area in which unilateralism has been a well-established tradition.[40] Since the 1920s, there have been many attempts to multilateralize competition laws and policies, as in the case of the Havana Charter in the 1940s, which ultimately failed in the US Senate.[41] Antitrust provisions were also unsuccessfully incorporated into the GATT.[42] Later, the USA intercepted the drafting of an agreement in the UN Economic and Social Council. With insufficient support from less developed countries, the antitrust rules were not incorporated into the framework of the UN Conference on Trade and Development.[43] Finally, an attempt was made to establish a multilateral agreement on competition policies in the WTO context in the 1990s; however, this

[37] Forman, 'Foreword', in D.M. Malone and Y.F. Khong (eds), *Unilateralism and US Foreign Policy: International Perspectives* (2003), at ix; Lehman, 'Unilateralism in International Law: A United States – European Symposium', 11 *EJIL* (2000) 1.

[38] Malone and Khong, 'Unilateralism and US Foreign Policy: International Perspectives', in D.M. Malone and Y.F. Khong (eds), *Unilateralism and US Foreign Policy: International Perspectives* (2003) 3; similarly Hakimi, 'Unfriendly Unilateralism', 55 *HJIL* (2014) 105, at 111.

[39] Hathaway, 'America, Defender of Democratic Legitimacy?', 11 *EJIL* (2000) 121, at 123.

[40] See, e.g., Griffin, 'Extraterritoriality in US and EU Antitrust Enforcement', 67 *Antitrust Law Journal* (1999) 159.

[41] See also Wood, 'The Impossible Dream: Real International Antitrust', 1992 *University of Chicago Legal Forum* (1992) 277.

[42] General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

[43] Brusick, 'UNCTAD's Role in Promoting Multilateral Co-operation on Competition Law and Policy', 24 *World Competition* (2001) 23. Havana Charter, 24 March 1948 (did not enter into force)

attempt also failed due to the opposition on the part of the USA and certain developing countries.[44]

Antitrust governance remained decentralized, largely due to national approaches towards antitrust enforcement. How can the persistent dominance of unilateral antitrust rules be explained? The extraterritorial actions of the economic powers have been interpreted as the hegemonic mode of economic governance in line with hegemonic stability theory.[45] Other approaches refer to antitrust matters as public goods production, according to which market regulation and enforcement are common goods in a globalized economy where some countries can free-ride.[46] Several issues related to jurisdictional and sovereignty claims may comprise a fundamental reason not to surrender national competences. Moreover, the uncertainty surrounding the design of a universal standard of antitrust governance and the scope of discretionary practice of national authorities form another barrier. All of these factors translate into significant sovereignty and monitoring costs, thus rendering consensualism (via cooperation) an unattractive option.[47]

However, no one can clearly predict whether cooperation on antitrust matters would fail. From a welfare perspective, a uniform standard of antitrust governance that ensures a worldwide level playing field is generally perceived to be desirable since monopoly rents and competitive biases are to be avoided. Without transnational regimes, information costs are incurred because fact-finding processes abroad are more difficult to achieve without the formal involvement of respective countries. Costs may also be incurred because of the insufficiency of a holistic approach. By contrast, common and uniform regimes and standards reduce costs, essentially avoiding a 'rag rug' of different national rules and transaction costs from gaps or overlaps of a wide range of policies and jurisdictions. A scope for clashes of national policies evidently exists (for example, competition policies with industrial policies abroad).[48] Accordingly, realizing Kaldor–Hicks improvements is deemed possible through a negotiation solution.

Why then has cooperation on common standards of prosecution, investigation and conditions of anti-competitive conduct failed and been limited to comity in enforcement and exchange of information? A RC answer would be that cooperation gains, at least for some parties, would not be sufficiently high. This may be the case because benefits from a level playing field through uniform rules do not exceed the potential disadvantages (for example, legal uncertainty, less domestic policy discretion). However, even if RC analysis would generally suggest that cooperation gains exist for all countries, failure of cooperation may be explained using the BE perspective and

[44] Griffin, 'The WTO Study of the Interaction Between Trade and Competition Policy: Timely and Controversial', 145 *Corporate Counsel's International Advisor* (1997) 10.

[45] Kindleberger, 'Dominance and Leadership in the International Economy: Exploitation, Public Goods, and Free Rides', 25 *International Studies Quarterly* (1981) 242.

[46] Krisch, *supra* note 3, at 12–13.

[47] Svetiev, 'The Limits of Informal International Law: Enforcement, Norm-Generation, and Learning in the ICN', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 291.

[48] Krisch, *supra* note 3, at 14.

the concept of loss aversion mentioned above. The actors involved in bargaining situations perceive their own concessions as losses, and those they receive from others as gains, thus leading to 'concession aversion'.[49]

Overestimating the values of the concessions of these actors and undervaluing those of their adversaries may form an impasse in negotiations, thereby frustrating compensation solutions in line with Kaldor–Hicks. In such cases, parties accept the adverse effects of possible termination to minimize their respective concessions. Furthermore, bargaining over the allocation of losses is less likely to lead to an agreement than bargaining over gains, which suggests that much depends on the framing of the situation. Accordingly, a gain or loss relies on the so-called 'framing effect', such that decisions made can actually vary based on how circumstances are presented (that is, as either positive or negative).[50] Concession aversion may be particularly applicable where countries, as in antitrust matters, would 'lose' their well-established legal regime or practice. In these settings, the present rules and practice governing anti-competitive conduct and enforcement are perceived as being costly achievements, a loss of which would be very painful in the return of a new legal regime.

While sovereignty issues are at stake in other areas as well (for example, in financial law), the particular sensitivity may be rooted in the imminent economic impact of antitrust measures on business. This may explain why only procedural and informal modes of cooperation have been agreed upon in antitrust matters offering several procedural advantages: the enhanced flow of information, the provision of technical assistance and the establishment of the obligations of positive comity. To this end, the Organisation for Economic Co-operation and Development and the International Competition Network have developed the best practices and platforms upon which member countries can exchange knowledge.[51] These 'procedural mitigations' fit in the rational choice framework because they are 'low-hanging fruits' intended to facilitate the conduct of antitrust proceedings without giving up sovereignty.

In this vein, the USA has rejected deeper multilateral antitrust cooperation based on the fear that a multilateral agreement would entail compromise on the potential encroachment on sovereignty. In turn, developing countries have discarded the initiative so that the more dominant foreign companies could gain access to their markets.[52] In this case, sovereignty losses have been the overarching threat associated with a uniform competition law regime. The fact that the USA and the European Union (EU) have relied on the well-established jurisprudence on the extraterritorial stretch of their jurisdictions has significantly reduced the incentives and prospective benefits of a change towards multilateral governance.[53] Again, this may be explained by the concept of loss aversion. Sunk costs – those that are not recoverable and should have

[49] Kahneman *et al.*, 'Experimental Tests of the Endowment Effect and the Coase Theorem', 98 *Journal of Political Economics* (1990) 1325, at 1345.

[50] Van Aaken, *supra* note 26, at 427, 468.

[51] Svetiev, *supra* note 47, at 271.

[52] Krisch, *supra* note 3, at 14.

[53] Putnam, 'Courts without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere', 63 *International Organization* (2009) 459, at 460, 483.

no bearing on the decision-making process – are considered losses that may prolong the implementation of current policies despite the existence of better alternatives. This is exemplified by how wars are carried out despite the uncertainties of their outcomes. Sunk costs may also be associated with any policy that has been pursued in the past, the establishment of which has required resources and practice. Even though a reformed regime (in antitrust, a more harmonized global system) is more likely to be beneficial than past practice, the sunk cost bias suggests that countries will stick to their well-established regimes.[54] This may even be in light of the expanding practice of effect-based approaches to national antitrust laws. Since national practice has been established through a 'costly' jurisprudence and antitrust enforcement practice in the past, these sunk costs create barriers to replace this practice by new international standards.

From a BE perspective, we can say further that 'ambiguity aversion' can be used to explain why multilateralism fails, especially where a RC analysis would suggest that an equilibrium in multilateral cooperation should be reached due to cooperation gains. This is because actors are ambiguity averse when probabilities cannot be easily predicted – hence, actors prefer known outcomes over unknown ones. As mentioned, the degree of uncertainty in antitrust coordination is high, and the foreseeability on the harmonized regime seems limited – over decades, states have established national antitrust rules. While heterogeneity across legal orders persists, any substantial change (going beyond comity practice) would create uncertainty about the applicable legal standard that could potentially lead to legal uncertainty affecting the entire business sector. Hence, the effect of loss aversion would be exacerbated. In sum, the use of BE perspective in studying antitrust matters involves three insights: concession aversion, framing effect and ambiguity aversion. These insights collectively prevent states from neutrally perceiving and assessing the benefits of the international level playing field by following the same set of rules.

Thus, it is plausible that the cumulative effect of the BE insight (concession aversion, sunk costs and framing) would lead to biases in the individual country's cost-benefit analysis that would overstress the cost parameters of cooperation. There are obviously limitations to this finding. First, one can hardly 'prove' that an unbiased RC logic should suggest cooperation in antitrust matters. In addition, there are many other issues at play that would indicate that risk aversion or sunk costs may influence bargaining but that do not explain fully why no bargain at all has been struck. Second, the contextual forum in which antitrust cooperation takes place matters. The choice of forum may influence a country's willingness to engage or not. For example, many least developed countries (LDCs) are cooperative on these issues within the UN Conference on Trade and Development (UNCTAD) but do not want to talk about them in the WTO. If one assumes that the potential output of cooperation would be alike and irrespective of the negotiation forum, the 'framing effect' could offer an explanation for the different engagement by LDCs since they are generally more reluctant *vis-à-vis* the WTO forum and more positively oriented towards UNCTAD.

[54] Van Aaken, *supra* note 26, at 437–438.

B *Trend toward Bilateralism and Plurilateralism*

The relationship between multilateralism and its alternatives has been comparatively well explored (especially related to international trade).[55] It has also largely been debated from a normative perspective, thus accentuating the controversies between universalists and sovereigntists.[56] From an economic perspective, multilateral approaches may generate negative or positive externalities for non-member countries. For example, a bilateral mutual-defence pact may pose a threat to a third-party country that is in conflict with one of the parties. In turn, an agreement leading to concerted environmental protection efforts may lead to positive externalities. Hence, multilateral treaties are more useful, at least in a normative sense, in mitigating negative externalities and in reallocating the benefits of positive externalities. Moreover, these treaties become less relevant when fewer externalities are involved. Based on this condition, the proliferation of weapons, environmental cooperation and some other areas (for example, peace and war) are best regulated at an international level, whereas the enforcement of decisions by foreign courts or in regard to bilateral trade are better captured by non-multilateral treaties.[57]

1 *Reduction of Complexity through De-Multilateralization*

Reducing complexity is a rationale for non-multilateralism proposed by commentators both in the international relations[58] and international law[59] literature. From an economic perspective, the act of abandoning multilateralism in favour of bi- or plurilateralism responds to the state's individual benefits and costs involved in the bargaining process. The complexity of negotiations to realize various goals (for example, political, technical or economic) is one driver for costs. Complexity can generally be reduced by decreasing the number of bargaining parties or by reducing the substantial complexity of the matter at stake.

(a) Reducing the number of participating parties

Based on the RC and BE perspectives, the number of negotiating parties is a relevant factor.[60] From a welfare point of view, international agreements should be sought to increase overall welfare. A Kaldor–Hicks improvement requires parties to negotiate on how to compensate for losses by balancing out the gains and losses incurred by different parties. With the increasing number of participating states, the transaction costs on determining a compensation solution increase, impeding the achievement

[55] Generally, see J.H.H. Weiler (ed.), *The EU, the WTO, and NAFTA: Towards a Common Law of International Trade?* (2000).

[56] Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law', 49 *HJIL* (2008) 323, at 323, 369.

[57] *Ibid.*, at 361.

[58] Caporaso, 'International Relations Theory and Multilateralism: The Search for Foundations', 46 *International Organization* (1992) 599, at 611.

[59] Guzman, *supra* note 4, at 751, 760; Guzman and Simmons, 'To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO', 31 *Journal of Legal Studies* (2002) 205.

[60] Posner and Sykes, *supra* note 11, at 23; Blum, *supra* note 56, at 361.

of Kaldor–Hicks improvements. The dilemma associated with the negotiations that occur among multiple parties is akin to Coasean bargaining, in which parties negotiate towards an equilibrium in which cooperation gains are maximized.[61] The greatest barriers that hamper the achievement of a negotiation solution are induced from the difficulties implied during bargaining, monitoring and enforcement.

Hence, compensation can be bartered more easily in non-multilateral settings. An example of this premise is the case of regional agreements among states, in which possibly similar policy preferences are shared. Agreements can be established when states' interests in a particular issue involve possible equilibria that are easier to attain than in a diversified multilateral setting. The international trade system provides an example of the most pronounced decline of multilateralism, illuminating the at times unsurmountable negotiation hurdles preventing the achievement of a Kaldor–Hicks solution in which – after compensation – all countries are better off. The GATT was initially agreed upon by just 23 states after World War II. The establishment of the WTO, the outcome of a seven-year process, already included 128 members. The ample coverage of the agreements enabled cross-sector bargains.[62]

In the meantime, a total of 161 countries had been negotiating the Doha Round, which was formed to address the imbalances of previous rounds and offer developing countries the prospect of trade talks, which they could see were to their benefit, despite the fact that the role of the WTO is not about the redistribution of wealth. However, the negotiations on the Doha agreement are seen to have been frustrated by unsurmountable controversies regarding the nature and size of trade concessions, thus reflecting the divergent set of national policy priorities. In this case, the failure to identify a conclusion can be interpreted as a failure to identify and offer sufficient compensation to persuade certain countries to conclude the agreement. Therefore, while the impasse on trade negotiations may comparatively be associated with the resistance of a few countries to agree on trade concessions, the sheer number of negotiating countries has exacerbated the bargaining process, despite some grouping of like-minded states facilitating negotiations. Clearly, impasses in cooperation processes are not only due to the number of participating states. The Doha failures are also about foot-dragging as a result of disagreement between a handful of states (USA, China and India). Thus, the role of (economic and political) power in multilateral relations also plays out as an important factor.

Conventional rational choice theory and behavioural law and economics both agree on the positive correlation of bargaining costs and the number of participants. However, the elements impeding the development and availability of negotiation solutions may also be exacerbated because of internal policy phenomena, which may be realized because of group pressure. Survey evidence demonstrates that mass public opinion interferes with the movements that seek to achieve Pareto-efficient solutions in international trade.[63] Nonetheless, the RC and BE perspectives provide different

[61] Coase, 'The Problem of Social Cost', 3 *Journal of Law and Economics* (1960) 1, at 2–8.

[62] Since the TRIPs Agreement was part of a larger set of WTO agreements ('single undertaking'), bargains can be established between the various agreements.

[63] S. Kull, *Americans on Globalization: A Study of U.S. Public Attitudes, Washington, DC: Program on International Policy Attitudes* (2000).

explanations. In particular, the RC expounds that lobby groups are strongly interested in pursuing protectionism (since it typically happens in the agricultural sector), which may influence public opinion or gain support from certain political groups.[64] This perspective is in line with Robert Putnam's two-level game in international cooperation, according to which the politics of many international negotiations can usefully be conceived as a two-level game. 'At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments'.[65] Thus, the negotiators need to address the concerns of domestic interest groups and, at the same time, reach an agreement that is acceptable for the parties to the international treaty.

BE adopts a different perspective according to which the 'framing' of the policy decision is important. This means that individuals may exist in a frame as employees but not as consumers (as suggested by economists to capture consumer rents), during which loss aversion may play a role, given that some groups lose from free trade, while the gain is in the aggregate. Hence, a great deal of information depends on the 'framing' of perception. Policy makers are inclined to be more reluctant when states perceive an agreement as a loss (for example, domestic farmers 'losing' market shares). Meanwhile, policy makers might be more agreeable when perception is dominated by profits (for example, when the increase of consumer welfare is obvious). Drawing on BE insight, trade agreements are more likely to be achieved if benefits for consumers and exporters are the dominant narrative in public perception influencing the government's choice architecture. In turn, governments whose focus is the protection of the working class (rather than the business sector) may be inclined to underscore the impact for workers in the importing or protected industries (for example, agriculture).

Further, a status quo bias might also be prevalent under such conditions. For individual states, consent avoids welfare losses; yet, the treaties that should be established to attain global welfare may ultimately not be concluded because of a status quo bias.[66] The status quo bias may be particularly relevant where potential benefits are uncertain, giving rise to ambiguity aversion. This situation, for example, may offer sector-specific explanations. While traditional fields of trade liberalization (for example, tariffs, quantitative restrictions and subsidies) allow *ex-ante* quantification of costs and benefits, other areas are far less certain in their future effect (for example, technical barriers to trade, safeguard mechanisms and intellectual property).

(b) Simplifying the bargaining subject

The rationale for reducing bargaining costs by simplifying the subject of the bargain is ambivalent. In principle, multiple issue areas increase the complexity for bargaining

[64] Van Aaken, *supra* note 26, at 447–448.

[65] Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 42 *International Organization* (1988) 434.

[66] Van Aaken, *supra* note 26, at 457.

processes,[67] as exemplified by the WTO Doha Round. Complexity and transaction costs in bargaining remain high in a setting where 'nothing is agreed until everything is agreed'.[68] Interest diversity adds to the costs of negotiation irrespective of the complexity of the substance. Club initiatives are often based on the common understanding of agenda setting and rules. In contrast, complex and diverse agreements have been proven capable of allowing cross-sector bargaining, thereby authorizing compensation in the sense of Kaldor–Hicks improvement, as found under the Uruguay Round WTO agreements (by allowing cross-sector bargains between the TRIPS Agreement and other issue areas). The concessions in one issue area may then be compensated by gains in another issue area, thereby providing the negotiating parties with more flexibility and other trading options.[69]

The insight gained from the BE perspective is added to such ambiguity because of 'loss aversion'. Often, the actors overestimate the value of their own concessions and underestimate the value of commitment of their adversary during a negotiation.[70] This situation makes bargaining more difficult and can lead to an impasse. For example, India's overvaluation of its concession in agricultural safeguard instruments may have made bargaining more difficult and more likely to lead to an impasse. This certain condition, from the BE perspective, suggests a refusal to accept losses on any level of linked agreements.[71] Less agreement is incurred by bargaining over the allocation of losses than by bargaining over gains. For this very reason, various agreements should not be linked.[72]

2 Climate Change Regulation

The trend beyond the bounds of multilateralism has been realized in the field of climate change. As for all public goods, the universal regulation of common goods makes intuitive sense because it has the potential to impact on every member of the global society. Extensive participation must be achieved with the regulation of common goods; however, this often bears collective action problems, and free-riding can diminish the effectiveness of global regimes, even though the rationale of the multilateral framework is reasonable in theory.[73]

For a long time, climate change has been regulated with emphasis on the classical multilateral process. There has been long-standing support by many developed countries for a global legally binding agreement. In particular, these countries first favoured such an agreement under the 'universal' multilateral Vienna Convention and the Montreal Protocol on ozone depletion[74] and then through the Rio Conventions

[67] Posner and Sykes, *supra* note 11, at 22.

[68] By contrast, negotiations preceding the accession of new member states to the European Union are conducted based on substantial areas. In this event, the so-called 'chapters' are sequentially concluded, during which cross-section negotiations are impossible to be realized.

[69] Posner and Sykes, *supra* note 11, at 22.

[70] Van Aaken, *supra* note 26, at 468.

[71] Levy, 'Prospect Theory and International Relations: Theoretical Applications and Analytical Problems', 13 *Political Psychology* (1992) 283, at 290.

[72] Van Aaken, *supra* note 26, at 468.

[73] Blum, *supra* note 56, at 357.

[74] Vienna Convention for the Protection of the Ozone Layer 1985, 1513 UNTS 323; Montreal Protocol on Substances That Deplete the Ozone Layer 1987, 1522 UNTS 3.

on climate change, biological diversity and desertification.[75] This particular trend on protocol establishments was followed by the 1997 Kyoto Protocol, despite the heavy criticism it has received from various perspectives since its adoption. Moreover, the negotiations on a post-Kyoto framework were overshadowed by disagreement, thus highlighting the ponderous nature of multilateral treaty negotiations.[76]

A general trend on the reluctance of some countries to enter into binding multilateral environmental protection can be observed. However, we also see movements pushing for more (non-multilateral) environmental protection. The institutional platform for law-making in the field of climate change is the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC) and the COP serving as the Meeting of the Parties to the Kyoto Protocol (CMP).[77] In the past, the decision-making process in these fora was exacerbated by the size of the conference, including the state representatives and the civil society groups.[78] The consensus mode of decision making has recently been relaxed in the COP. Consensus is generally understood as the absence of express opposition to the practice and codified rules of other multilateral processes.[79] In lieu of the express objection from a state (for example, Bolivia), the Cancun Agreements were adopted in the above instance.[80] Meanwhile, the Doha Amendments to the Kyoto Protocol (2012) were achieved only once Russia had been overruled.[81] These examples of non-consensualism have not led to binding obligations for the parties but, rather, are viewed as actions towards a kind of 'quasi-consensus' or 'general agreement'.[82]

[75] United Nations Framework Convention on Climate Change (UNFCCC) 1992, 1771 UNTS 107; Convention on Biological Diversity 1992, 1760 UNTS 79. United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994, 1954 UNTS 3.

[76] French and Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere', 25 *Journal of Environmental Law* (2013) 444; Streck, 'Innovativeness and Paralysis in International Climate Policy', 1 *Transnational Environmental Law* (2012) 137, 139; for a historical overview of climate change regulation, see Bodansky, 'The Copenhagen Climate Change Conference: A Postmortem', 104 *AJIL* (2010) 230.

[77] UNFCCC, *supra* note 75.

[78] Krisch, *supra* note 3, at 17.

[79] UN Convention on the Law of the Sea 1982, 1833 UNTS 397, Art. 161(8)(e).

[80] Decision 1/CP.16, Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, 15 March 2011; Decision 1/CMP.6, Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Fifteenth Session, FCCC/KP/CMP/2010/12/Add.1, 15 March 2011. Rajamani, 'The Cancún Climate Agreements: Reading the Text, Subtext, and Tea Leaves', 60 *International Comparative Law Quarterly* (*ICLQ*) (2011) 499.

[81] Decision 1/CMP.8, Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (the Doha Amendment), FCCC/KP/CMP/2012/13/Add.1, 28 February 2013. For a comprehensive analysis, see French and Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere', 25 *Journal of Environmental Law* (2013) 449. The most recent Paris Agreement concluded at COP-21 would, at first sight, give an indication of consensualism since it was adopted as binding agreement with consent of 196 countries. However, there is significant flexibility within the text given that national climate action targets are not included in the Paris Agreement and due to frequent references to terms such as 'should', which gives leeway to states in the implementation of the agreement.

[82] Krisch, *supra* note 3, at 17.

Apart from these exceptions to multilateralism within the existing frameworks, the burdensome negotiation process on environmental issues has also led to the culmination of non-multilateral fora outside the established negotiation framework. One relevant forum is the Major Economies Forum (MEF), which encompasses 17 countries and trading blocs pursuing a mutual understanding on climate change by establishing club structures and developing a complex system of informal interaction in an overall non-binding fashion.[83] Climate change action has also gained an even more non-multilateral pattern (outside the UNFCCC format) through the extension of competences of the UN Security Council (UNSC), which has incorporated climate change in its agenda and established a club-like plurilateralism.[84]

Against the background of this development, what explanations do the RC and BE perspectives provide? To this end, the following pattern must be explained: (1) the reluctance of countries to enter into agreements and (2) the commitment of pioneers to push ahead for environmental protection outside the multilateral framework. The sluggish process of multilateralization and commitment to enter into a binding agreement can be associated essentially with an environment that represents a usual common good situation.[85] The overuse of the common good via individually rational actions – the equivalent of free-riding – is primarily signified by the 'tragedy of the commons'.[86] Unilateral counter-action lacks effectiveness in addressing environmental problems because of the multiple origins of emissions from a wide range of actors.[87] In the absence of a central institution bridging the gap between marginal and social costs (for example, through taxation), each country has the incentive to avoid costly measures for reducing emissions, thereby placing a country in an economically disadvantageous position *vis-à-vis* other countries. In this setting, rational choice would determine the commitments of countries as a function depending on possible rewards or sanctions.[88] Binding obligations to reduce carbon dioxide clearly impose costs on countries.

Moreover, the BE perspective provides a rationale that is not related to costs given that countries refuse to consensually agree on multilateral agreements and may be guided by another, possibly non-monetary sanction. This case rests on the BE assumption that the influence of law on state preferences is in line with the compliance theory, which claims that states are convinced to comply due to the dynamics inherent in treaty regimes to which they belong, regardless of monetary implications.[89] The reluctance of states to enter or expand environmental treaty obligations may then also be realized to avoid future compliance pressure due to the non-monetary 'compliance pull' of international law. This may be interpreted as an 'anticipated loss aversion'

[83] *Ibid.*, at 18; K.W. Abbott, *The Transnational Regime Complex for Climate Change* (2011).

[84] Talmon, 'The Security Council as World Legislature', 99 *AJIL* (2005) 175, at 175.

[85] Hardin, 'The Tragedy of the Commons', 162 *Science* (1968) 1243.

[86] B. Russett and H. Starr, *World Politics: The Menu for Choice* (2nd edn, 1985), at 514.

[87] Krisch, *supra* note 3, at 16.

[88] See Posner and Sykes, *supra* note 11, at 232.

[89] A. Chayer and A. Handler Chayer, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

because the state, once it has committed to the treaty, may be more concerned with preventing a loss of reputation or credibility than with increasing it.[90]

The BE perspective also offers an additional explanation related to 'loss aversion'. Carbon dioxide reductions often demonstrate the salience of (economic) losses rather than of gains. Public opinion is typically dominated by concerns about economic disadvantages or fears about the effects for employment, whereas opportunities (for example, industrial innovation) are less salient. This connotes a 'loss feeling' in countries with respect to environmental protection, which can lead to reluctance. However, this effect may generally be an antithesis. When salient support is granted in public opinion to protect the environment, the decision of the negotiator (state representative) is influenced.[91] In particular, the negotiating behaviour and decisions of treaty negotiators depend on public opinion (in line with insights from availability heuristics and political economy), suggesting that state behaviour is linked to observable individual behavioural patterns. This effect is further exacerbated by 'ambiguity aversion', in which individuals are particularly risk averse when probabilities are not clearly defined. This case evidently applies to environmental issues. Given that the nature, the severity and even the existence of global warming and the related costs are disputed, the ambiguity of prospective losses and costs is significant.[92] These observations explain the sluggish consensual progress and commitment from the BE perspective.

If both the RC and BE perspectives offer rationales for sluggish multilateralism in climate protection, how can we explain that some countries have moved ahead with climate protection outside the multilateral framework through the MEF and the UNSC? Conventional RC game theory does not provide plausible solutions because it designs public goods (for example, climate change) as a kind of PD game in which only a single equilibrium occurs (defection or non-contribution).[93] This theory suggests the instability of (non-multilateral) concluded agreements, in which compliance suffers, and is contradicted by the BE insight. Various experiments have documented that people evaluate action on the basis of intention and motivation and not just by its consequences. Under such conditions, trust or reputation on the intention can be crucial.[94] The RC approaches focus on external restrictions, rather than on preferences, as reasons for the realization of compliance.[95] This consequentialist view is contested by the BE insight, which demonstrates that actors often follow standards determined

[90] This might explain the relative scarcity of treaty exits. See Helfer, 'Exiting Treaties', 91 *Virginia Law Review* (2005) 1579; van Aaken, *supra* note 26, at 477.

[91] Korobkin and Guthrie determined that some common heuristics are likely to influence the decision-making processes of negotiators in bargaining (assuming reciprocal treaties such as trade negotiations); see Korobkin and Guthrie, 'Heuristics and Biases at the Bargaining Table', 87 *Marquette Law Review* (2004) 795.

[92] Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 421, at 442.

[93] Olson, *The Logic of Collective Action* (1971); however, according to the Folk theorem, in a repeated game there may be cooperative equilibria. For the experiments challenging this pessimistic view, see Ledyard, 'Public Goods: A Survey of Experimental Research', in J.H. Kagel and A.E. Roth (eds), *The Handbook of Experimental Economics* (1995) 111.

[94] Falk *et al.*, 'Testing Theories of Fairness-Intentions Matter', 62 *Games and Economic Behaviour* (2008) 287.

[95] On the difference between compliance and effectiveness of international law, see van Aaken, 'To Do Away with International Law? Some Limits to "The Limits of International Law"', 17 *EJIL* (2006) 289.

by morals and ideology that defy consequential reasoning. Considerations pertaining to legitimacy and fairness can also be driving forces in complying with international law. The relevance of fairness and reputation may explain why countries enter into multilateral climate change agreements that are not binding and do not provide a sanction mechanism.[96] Accordingly, such an observation contradicts the classical law of self-interested behaviour, which comprises an incentive scheme along with reward and punishment as factors causing (non)-compliance.[97]

The classical view can generally explain the difficulties involved in concluding multilateral environmental regulation (free-riding is more attractive) and reveals the unlikelihood of its effectiveness (no sanctionability). By contrast, the BE perspective demonstrates why countries still agree to subject themselves to climate change regulation (even if only on a non-multilateral basis) when other countries also behave cooperatively (but not unilaterally). Compliance with environmental regulation may then be accepted even if it may imply higher costs or if it is not binding.[98] This does not mean that hybrid forms of explanations may more accurately capture the phenomenon. Bargaining between larger countries in the MEF or in the UNSC may be facilitated by reciprocal concessions between the main powerful actors, a shared set of policy preferences or, simply, the logic of a smaller group of countries implying lower bargaining costs – countries with salient environmental concerns (for example, the EU) as the promoting forces for climate protection, while countries with salient economic concerns (for example, developing countries) are the reluctant forces.

C *Informality as Non-Consensual Decision-Making*

A third trend of non-consensualism is action via informal agreements or institutions. Often, recourse to informalism and particularly to club negotiations is a response to the limited progress within classical formal and multilateral formats, as in, for example, the area of climate change or antitrusts. The emergence and characteristics of informal institutions and law-making in global governance, as well as the pressure they exert on the traditional modes of cooperation, have long been analysed.[99] The definition of informal law, however, has yet to be clarified, given that informality has changed over time.[100] Despite the lack of a uniform definition, informal mechanisms are mostly understood as non-binding instruments in the guise of goals, values, intentions or declarations.[101]

From an economic perspective, we are interested in identifying the conditions under which governments prefer informal international laws to the formal ones and vice

[96] Fehr and Fischbacher, 'The Nature of Human Altruism', 425 *Nature* (2003) 785.

[97] Posner and Sykes, *supra* note 11, at 232.

[98] Toope, 'Formality and Informality', in D. Bodansky, J. Brunnee and E. Hey (eds), *Oxford Handbook of International Environmental Law* (2007) 108.

[99] See, e.g., Abbott and Snidal, *supra* note 92; Pollack and Shaffer, *supra* note 30.

[100] Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 125.

[101] Blum, *supra* note 56, at 330; Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850, at 851.

versa.[102] Under RC theory, a great amount of work has emphasized the functionality of informality, notably the flexibility it offers to parties, which implies lower sovereignty costs, as well as its ability to integrate a broader range of actors and stakeholders than would be possible under formal approaches.[103] By adopting an economic perspective, we can apply the economic tools identified above, particularly the cost dimensions that may be relevant when informal agreements – instead of formal ones – are considered and those areas that are most relevant.

1 Informality and Cost Analysis

Informal law often emerges in areas where sovereignty costs are high and informal law serves to avoid the (even higher) costs that are implied in formal and binding cooperation in these issue areas. In addition, while informality and soft law are conceptually different, they often coincide. For example, in the areas of antitrust, climate change regulation and international security, regulatory action has been channelled through informal processes, eventually leading to 'soft' norms.[104] This article will highlight such coincidence in international financial law. By contrast, hard law is more restrictive since it generates reliance and exerts a much greater compliance pull.[105] Hence, under formal law policy, space is significantly constrained, while informal conduct allows for a broader range of conduct and cooperation mechanisms.[106] On the one hand, sovereignty costs are higher when hard law entails the countries' acceptance of an external authority over political decisions.[107] On the other hand, informal law incurs comparatively fewer negotiation costs since it offers flexibility and speed both in the conclusion and the implementation of an agreement.[108]

Accordingly, flexibility due to the changing nature of substances may be a valid concern implying the desire for low modification costs.[109] Therefore, if states prefer greater adaptability within an agreement, they make take recourse to informal terms in order to modify rights and obligations under an agreement and make it more flexible. For example, this undertaking was precisely implemented by the quota agreements of the Organization of Petroleum Exporting Countries, which were critical to

[102] See, e.g., Voigt, *supra* note 5, at 33.

[103] Lipson, *supra* note 19, at 495; Pollack and Shaffer, *supra* note 30, at 179; some governments perceive the main difference between formal and informal international lawmaking as the consequence of obligations: formal lawmaking generates legal obligations, whereas informal lawmaking results only in 'moral or political commitments' (Canada Treaty Information (2011); US Department of State (2011) referred to in Voigt, *supra* note 5, at 35).

[104] Krisch, *supra* note 3, at 39.

[105] Shelton, 'Introduction', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) 8.

[106] Brummer, 'Why Soft Law Dominates International Finance—and Not Trade', 13 *Journal of International Economic Law* (2010) 623, at 632.

[107] Dorf, 'Dynamic Incorporation of Foreign Law', 157 *University of Pennsylvania Law Review* (2008) 103, at 133.

[108] Gersen and Posner, 'Soft Law: Lessons from Congressional Practice', 61 *Stanford Law Review* (2008) 573, at 589.

[109] Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments', 30 *YJIL* (2005) 125, at 179.

the economic performance of the participants but were informally framed to allow adaptations to the evolving market conditions.[110] This kind of adaptability is most practical where the parties to an agreement are faced with significant uncertainty over factual future developments and where, in economic terms, the cost-benefit balance of the agreement remains unpredictable to some extent. For example, if the distributional effects under an agreement depend heavily on the macro-economic situation or on exchange rates, it will have a great impact on national interests.[111] The parties to the agreements can identify the influences of the rules in practice by avoiding formal legality for assessing their benefits in an improved manner.[112] In this event, soft law offers strategies for learning processes in which the parties can eventually resolve their problems.[113]

2 *Financial Regulation*

The trend towards informality is perhaps the most-discussed topic in the field of financial regulation, especially in relation to the governance of financial markets and the provision of international security to counter the financing of terrorism.[114] In principle, financial stability can be regarded economically as a public good exhibiting the character of non-rivalry and non-excludability. Domestic regulation incurs costs on the domestic level, but it creates global benefits as it contributes to prevent international financial crises.[115] In this sense, the costs required for providing this public good impose impediments to effective action, thereby placing those who bear the costs in a disadvantageous position *vis-à-vis* those who refuse to contribute. The concept of negative externality also becomes relevant in this context. By attracting and strengthening strong, competitive financial players, the states are arguably expected to gain the benefits of lax banking and finance regulation. Yet it could also lead to the potential risks of instability being externalized to other states.[116] A laissez-faire regime induces competition between states to maximize their (national) benefits and externalize the (international) costs prior to the financial crisis. In such a scenario, countries can free-ride on the commitment of other countries to regulate the banking sector.

Regarding the financing of terrorism, legislation in this field has been advanced through informal channels and oscillates between soft and hard law. An example is the Egmont Group, a transnational network of financial intelligence units that has grown from 20 to 100 member countries. Another example is the Financial Action Task Force, which implements a compliance scheme of blacklisting jurisdictions

[110] Lipson, *supra* note 19, at 519.

[111] *Ibid.*, at 518.

[112] Abbott and Snidal, *supra* note 92, at 442.

[113] Brummer, *supra* note 106, at 633.

[114] *Ibid.*, at 623.

[115] Guzman, *supra* note 4, at 767.

[116] In this vein, the practice of bilateral, rather than multilateral, investment treaties has been interpreted in light of the incentives an individual country has to negotiate with and offer concessions to potential investors to gain a comparative advantage *vis-à-vis* other countries. See Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *VJIL* (1998) 639.

deemed to be non-cooperative. This naming and shaming is a common tool of enforcing non-binding and informal instruments.[117]

Similarly, international financial law is highly informal and is regulated by soft law.[118] Intergovernmental institutions set agendas and standards not provided for in existing treaties and operating via non-binding bylaws.[119] In particular, the Group of 20 (G20) is the most prominent forum, which provides a plurilateral and informal rule setting. The G20 sets the agenda for international standardization, and the Financial Stability Board (FSB) is in charge of handling systemic risks. In the task of setting international standards, for banking, for regulating securities and for supervising insurance, the FSB is assisted by international bodies. Generally, the standards produced by these bodies are classified as 'soft laws' because of their non-binding nature. In other instances, the data collected by these bodies are used by national regulators as bases for national policies. Therefore, reports can help establish a basis for policy making and can help improve the appropriateness of national regulatory practices. Based on these conditions, the indirect, non-binding, but still indirectly authoritative, force influences the outcome and relevance of these intergovernmental bodies beyond the sphere of binding international law.[120]

How can the dominance of informal law in the context of financial regulation be explained from an economic perspective? The cost-analysis framework described above may highlight the dominance of informality and non-binding intergovernmentalism in the area of laws related to financial issues. First, sovereignty costs are lower than they were if pursued through formal and hard law.[121] In fact, coordination challenges in international finance are typically tied to significant distributive effects, implying considerable sovereignty costs. One country may benefit economically from the same rule that is less beneficial for another country. For example, the implementation of generous disclosure requirements has been an instrument to increase a country's attractiveness for business or financial transactions. And the application of a particular standard may turn out to imply higher economic or political costs than what the authorities had initially expected when entering into an agreement. Several other examples can be provided including money-laundering rules that reduce the attractiveness of a country as a destination for capital and corporate governance reforms that provoke other countries to establish or apply more dramatic reforms of firm organization than others.[122] In addition, negotiation costs in informal settings are

[117] The same logic applies in the EU in relation to, e.g., the European semester governing the economic policy measures of EU member states. See A. Steinbach, *Economic Policy Coordination in the Euro Area* (2014), at 124.

[118] Legally relevant norms can be soft along three dimensions, namely in content, authority or effect. See Abbott and Snidal, *supra* note 92, at 421; Reisman, 'The Concept and Functions of Soft Law in International Politics', in E.G. Bello and B.A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (1992) 135, at 136.

[119] Zaring, 'Informal Procedure, Hard and Soft, in International Administration', 5 *Chicago Journal of International Law* (2005) 547; Brummer, *supra* note 106, at 627–628.

[120] Brummer, *supra* note 106, at 630.

[121] Pollack and Shaffer, *supra* note 30, at 179.

[122] Brummer, *supra* note 106, at 635.

ambivalent. They tend to be lower since regulators do not need to ratify the agreement and can avoid strict unanimity in the end. Yet, depending on the technical character of the substance negotiations, the cost can be considerable and require many negotiation rounds.

This particular proposition conforms to other views in which distributive conflict is deemed to be high and where multiple, overlapping and competing formal and informal law-making processes are designed to enhance specific substantive interests.[123] A state may therefore have a strong incentive to select formal or informal law-making processes as a function of its substantive preferences. In the context of sensitive distributive issues, informal law provides a mechanism of avoiding formal and possibly irreversible decisions. Power is not delegated to independent supranational authorities with the existence of informal organizations. Moreover, financial regulators have the option of refusing the implementation of certain parts of the international legislation because the agreements are not legally binding. This certainly applies to policy suggestions found in the reports by intergovernmental institutions and to financial rules that have been identified and promulgated as best practices.

Finally, soft law also helps foster agreements because it reduces the risk of uncertainty that commonly taints policy issue areas. The innovative character of financial law that is characterized through technological innovations and the adaptability of trading strategies in an overall changing regulatory environment is responsible for the evolving nature of this issue area. Consequently, there exists considerable uncertainty when a party enters into long-standing agreements with others. As such, the regulation and supervision of financial markets must be continuously adapted to changing market evolutions.[124]

However, while the RC theory would suggest a better compliance record of hard and binding formal law over informal law, the compliance record of informal financial law has been remarkable. For instance, even though the Basel Club of Banking Regulators does not provide any formal enforcement scheme, a simple rule on the capital adequacy requirements was widely adopted.[125] How can this excellent compliance record of informal, non-sanction-based rules be explained? Classical game theory approaches do not offer plausible solutions because they predict that cooperation is remarkably less likely to occur if the group is large. In a *n*-person PD approach, there is little chance for cooperation.[126] Multilateral agreements become more unstable in this scenario, and compliance is reduced to the minimal level. The BE perspective contradicts this finding and provides an explanation for the stability of, and compliance with, informal law by underlining the relevance of normative expectations. In a laboratory experiment, Christoph Engel and Michael Kurschilgen compared the effect of

[123] Pollack and Shaffer, *supra* note 30, at 252; for the complementary nature of informal and formal law, see Shelton, *supra* note 105, at 10.

[124] Brummer, *supra* note 106, at 637.

[125] Zaring observed that the Basel Accord 'has enjoyed widespread compliance despite being putatively non-binding'. See Zaring, *supra* note 119, at 595.

[126] Goldsmith and Posner, *supra* note 11; for a criticism of this position, see Norman and Trachtman, *supra* note 15.

normative expectations and legal framing on cooperation and found that the existence of a binding and enforceable law is not necessary, as long as many participants believe in the continuation of a norm, because normative expectations matter and improve cooperation.[127]

This finding is compatible with that found in the literature on incomplete contracts and offers an explanation for self-enforcing agreements in the absence of an external mechanism to resolve conflicts or impose sanctions in the case of non-compliance.[128] In particular, informal enforcement is based on the incentives of parties to observe continued cooperation, which stems from the prospect of having future dealings with these other parties. In fact, a party will maintain cooperation and comply with the rules despite the lack of an enforcement scheme, mainly because the party fears that another party to the agreement could seek punishment by terminating the current agreement or avoiding future cooperation. If all of the parties to the agreement are sufficiently concerned about their future benefits from the cooperation, the threat of potential punishment can incentivize parties to act consistently with the norms.[129] Despite the game theory claim of instability of such equilibrium, future gains can be incorporated into RC models. If construed as a repeated game, reputation will matter for self-interest reasons, accounting for the gains from the broader system, which has played out in a similar fashion on the WTO level and in the reform measures of the Basel Committee on Banking Supervision.

4 Conclusion and Outlook

Contractual models of international law have not been prevalent for some time,[130] which raises concerns about whether, and to what extent, the trend towards non-consensualism poses challenges to the traditional legal structure. There is reason to argue that non-consensualism can be described as an increasingly frequent phenomenon, even though multilateral treaty making remains a resilient mode of international cooperation. This article has shown that non-consensualism is multifaceted and not a uniform phenomenon. By considering previous research, it has shown evidence of the emerging pattern by disentangling three modes of non-consensualism.

Both the RC and BE theories explain the deviations from the classical consensual pattern of cooperation, although there is some ambiguity underlining the limitations of a purely economic logic applied to (non)-consensualism. In some areas, public good theory may explain non-consensualism. Moreover, multifaceted cost considerations may illuminate the preference of countries for addressing certain issues unilaterally or informally

[127] Engel and Kurschilgen, *supra* note 15, at 578–609. The analysis of these researchers focused on customary law; yet their results can also be extended to informal law.

[128] Baker, Gibbons and Murphy, 'Relational Contracts and the Theory of the Firm', 117 *Quarterly Journal of Economics* (2002) 39.

[129] Svetiev, *supra* note 47, at 276; on the reputational damage resulting from cheating and affecting future cooperation, see Gilson, Sabel and Scott, 'Brading: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine', 110 *Columbia Law Review* (2010) 1377, at 1392–1393.

[130] Charney, 'Universal International Law', 87 *AJIL* (1993) 529, at 529; Guzman, *supra* note 4.

or for abandoning multilateral approaches in favour of club-like formats of cooperation. While each area of cooperation in international law exhibits different settings of policy preferences and cost-benefit constellations, this analysis has sought to highlight both complementary and contradictory explanations offered by RC and BE, respectively. The BE perspective contributes well-established insights on heuristics to analyse (non)-consensualism. The ample applications of, *inter alia*, loss aversion, availability heuristic, framing effect or ambiguity aversion to cooperation formats highlight the complementary explanatory power that can be provided by the BE perspective to the traditional economic analysis of international law. These tools were used to show that a RC cost-benefit analysis may be biased towards losses and ambiguities, an explanation that could be used, for example, for antitrust issues to question the RC explanation for benefits of substantial antitrust cooperation. In addition, in the area of climate change regulation, the rationale of non-multilateral approaches that push for the provision of public good (rather than free-riding) can hardly be explained by the classical game theory, but they are well founded on BE insight. Finally, the positive compliance record of informal and soft law does not have a straightforward RC foundation but can be based on the BE logic of compliance.

By contrast, in other areas, both RC and BE agree that a certain conduct makes sense, albeit they offer a different logic to induce such conduct – for example, a 'plurilateral lead' and a 'multilateral follow-up' to explain the 'leader-follower' phenomenon identifiable in climate regulation and international security. In international security, the channels of law-making and decision making on countering terrorism financing have become increasingly club-like because both the UNSC and the Financial Action Task Force (FATF) are bodies with limited membership and dominated by a few players. A strong plurilaterally driven development – that is, a development driven laterally only by a few – can be observed, although it can be quickly extended to multilateralism. The pattern with which powerful countries agree on certain standards and subsequently use institutional forces to make the regime more universal is frequently observed.[131] This 'plurilateral lead' with a 'multilateral follow-up' may range from measures of a rather unbinding character (the best practices of the Counter-Terrorism Committee, for instance) to the mandatory extension of substantive rules (the UNSC on the implementation of a financing convention) and up to a quasi-coercive means (the FATF blacklisting practice). When the 'not-yet-in-compliance' standard set by the plurilateral leaders can be sanctioned through various channels of disadvantages, the compliance pull follows a RC logic, particularly when quasi-coercive costs are imposed onto non-compliant countries.[132] In line with game theory, one may reinterpret this

[131] From the perspective of leading powerful countries, the non-multilateral move may first be explained by standard cost-benefit considerations. E.g., international security is characterized by a heterogeneous preference structure. Some countries are threatened significantly more than others and therefore benefit more than others from the security provided. Hence, benefits from international security vary considerably. This particular condition economically implies a diverse pattern of willingness of respective countries to pay or contribute to the provision or achievement of security. The countries exposed to higher threats benefit more and are therefore more willing to pay. At the same time, the countries that gain smaller benefits from international security are rather likely to count on the effort of high-benefit countries, inviting free-riding.

[132] In international security, a RC logic may exist for compliance corresponding to an ordinary sanction-based compliance mechanism when the non-compliance with the UN standards or FATF recommendations incurs unfavourable treatment under IMF and World Bank programs.

phenomenon as a first mover advantage, inducing other states to follow even though the followers would have preferred a different equilibrium in the first place.[133] In areas where the plurilateral lead takes place in informal settings, the classical RC approach is less convincing than the BE perspective. The BE insight on reference points, applied to international law-making, has an incentivizing effect on other countries, which eventually promotes multilateral follow up. Non-multilateral initiatives become frames that subsequently become the points of orientation of lawful conduct among party states. This observation sheds light on the relevance of club organizations in developing international norms that eventually become the compliance standard.

In this analytical framework, power continues to play an important role because the choice-of-cooperation format largely depends on the relative power position. Powerful countries are likely to pursue less expensive options with their ability to generate new modes of cooperation and regulate access to them.[134] 'Format shopping' allows powerful states to establish and use the institutional framework, which grants them the highest benefits and, conversely, allows them to oppose institutional settings that lead to compromises and costlier means to achieve their goals. On many occasions, the USA and EU may be the initial entrepreneurs behind international regulatory initiatives, which begin either in club-like institutions (UNSC) or informal networks (MEF) that are eventually adopted in an extensive manner. Powerful countries can also transform club-like bodies into quasi-legislative authorities to refuse multilateral approaches where unilateralism is more desirable (antitrust issues) and to create informal laws that require a high degree of reversibility of cooperation (financial law).

The findings in this article introduce some insights into the further trajectory of international law. The functional needs for institutional arrangements are essential drivers for the modes of cooperation sought by state actors and the design of international law.[135] These requirements follow the logic of rational (and sometimes non-rational) state actors determined by power relations and those of the institutional environment. The non-multilateral forms of coordination gain attractiveness depending on the degree of heterogeneity of preferences among states, which should be the case as one moves from bilateral, through regional, to multilateral negotiations.[136] With the existence of both the complementary, and (sometimes) substituting, relationship between consensualism and non-consensualism, these formats are discussed in terms of whether they are part of a more complex geology of international law.[137]

[133] From a game theory perspective, one may view states playing a "battle of the sexes" game where one state has a first mover advantage. This first mover advantage can be the result of power asymmetries. The equilibrium of such a game would be the decision of the first player, as the second player would "follow" him even though he would have preferred a different decision in the first place.

[134] Krisch, *supra* note 3, at 38.

[135] Pollack and Shaffer, *supra* note 30, at 244.

[136] Abbott and Snidal, *supra* note 92, at 445.

[137] Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2004) 547, at 551.