Pure Public Goods and Beyond:

How Legitimate International Courts Can Help Secure Global Public Goods Worth Having

Approximately as appears in *Community Interests in International Law*, ed. G. Zyberi.
Cambridge, Intersentia, 2021, 59-98.
https://intersentia.com/en/protecting-community-interests-through-international-law.html

Andreas Føllesdal*

1. Introduction

Debates about the legitimacy of international law and international courts (ICs)[1] revolve around whether, in various ways, they enable their subjects to act better.[2] One such debate concerns whether international law and ICs are effective in providing so-called global public goods (GPG). A central GPG is effective resolution of the climate crisis, and it is one for which international law and ICs are often found wanting.[3] This has often led scholars to focus on a particular diagnosis: the central legitimacy challenge is that *international law and ICs are too weak to prevent 'free riders' among states*[4]:

> Just as the state is needed to provide public goods at optimal levels nationally, international governance is needed to provide the optimal level of global public goods. For international organizations, global public goods thus provide a response to the growing questions that emerged in the 1990s about their legitimacy.[5]

> The major challenge for the production of many (but not all) global public goods, as well as those public goods that are transnational (but not global) in scope, […] is

* Research for this article was partly supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274 – PluriCourts – on the Legitimacy of the International Judiciary. I am grateful for the opportunities to present earlier versions of these arguments at PluriCourts, Stockholm University, the University of Graz, and the Nordic Network on Political Theory, and for the many constructive suggestions received there. Particular thanks to Mark Pollack, Geir Ulfstein, Christina Voigt and anonymous readers for detailed comments and improvements.

[1] See, among others, Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal, and Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press 2018).

[2] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 369-429; Andreas Follesdal, 'Survey Article: The Legitimacy of International Courts' (2020) 28(4) Journal of Political Philosophy 476.

[3] cf Fabrizio Cafaggi and David D Caron, 'Global Public Goods Amidst a Plurality of Legal Orders: A Symposium' (2012) 23(3) European Journal of International Law 643 – several specific contributions are referenced below; Shirley V Scott, 'Climate Change and Peak Oil as Threats to International Peace and Security: Is it Time for the Security Council to Legislate?' (2008) 9(2) Melbourne Journal of International Law 495, 500; Ruth Gordon, 'The Triumph and Failure of International Law' (2011) 34(1) North Carolina Central Law Review 63; Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) The American Journal of International Law 1; see also Tomer Broude, 'Warming to Crisis: The Climate Change Law of Unintended Opportunity' (2012) 44 Netherlands Yearbook of International Law 111.

[4] These and other scholars often report such views without necessarily endorsing them; cf Clifford J Carrubba and Matthew J Gabel, 'Courts, Compliance, and the Quest for Legitimacy in International Law' (2013) 14(2) Theoretical Inquiries in Law 505.

[5] Daniel Bodansky, 'What's in a Concept? Global Public Goods, International Law, and Legitimacy' (2012) 23(3) EJIL 651, 655.

collective action and free riding.[6]

> [T]he raison d'être and defining feature of public goods, in legal terms, lie in the need to provide for enforcement that cannot otherwise be provided. [7]

Concerns about free riding may be more salient for ICs than for international law in general, since states can easily avoid international adjudication by not ratifying the relevant treaty protocols.

I argue that this description, diagnosis, and prescription for how international law and ICs can and should enable GPG is unfortunate. The assumptions are too narrow, and distract our attention from other valuable contributions made by ICs—in terms of GPGs and beyond—and from other important challenges that ICs face. The shallow focus stifles our assessment of when international law and ICs may be legitimate authorities in general, and in relation to GPGs in particular. In fact, ICs' legitimacy does not depend on their ability to trigger sanctions against states; they serve several valuable functions for many objectives other than GPGs, including monitoring and providing information about other states' actions and preferences.

Even if we use the term 'global public goods' in a broader sense, heeding the efforts and publications of the UN Development Programme (UNDP), the tunnel vision remains unfortunate.[8] Broader lists include *inter alia* peace, world trade, eradication of infectious diseases, international solidarity, environmental protection, human rights, global justice, antitrust measures, food security, democracy, knowledge, the resolution of international disputes by ICs, and sovereignty itself.[9] Some scholars have questioned the conceptual value of labelling this broad range of goods 'public goods.'[10] Long lists of GPGs have fostered attempts to provide all-encompassing categories,[11] but these appear disconnected to any overarching theory. The broader concept encompasses many outcomes considered by some to be good for individuals at large, for the international community in part or in whole,[12] or among parties that transcend national boundaries.

If the expansion of GPGs comes at the cost of accurate diagnoses and prescriptions—and of sound assessments of the legitimacy of ICs—what can be done? The need for sparse and stringent theories might prompt us to return to the narrower definition of 'public goods' present in 20th-century economic theory, as the quotes above apparently do. This chapter advises against that response. To be sure, the valuable and carefully justified insights of the by now standard 'public goods theory of authority' have had profound impact; it appears to be the origin of the recent popularity of the term 'global public goods.' More profoundly, the standard theory's focus on the problem of actors who free ride on others' collaborative efforts has achieved a central place in discussions, generating many analyses of the scope of challenges to

---

[6] Gregory Schaffer, 'International Law and Global Public Goods in a Legal Pluralist World' (2012) 23(3) European Journal of International Law 669, 674.

[7] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23(3) EJIL 769, 785-786

[8] Inge Kaul, Isabelle Grunberg and Marc A Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press 1999). Other related concepts include 'common interest' cf Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014).

[9] cf lists in Kaul, Grunberg and Stern (n 8) and Joel P Trachtman, *The Future of International Law: Global Government* (Cambridge University Press 2013); More specific discussions include Christian J Tams, 'World Courts as Guardians of Peace?' (2016) 15 Global Cooperation Research Papers 5, Petros C Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23(3) EJIL 731, Peter Burnell, 'International Democracy Promotion: A Role for Public Goods Theory?' (2008) 14(1) Contemporary Politics 37, 41.

[10] Nollkaemper (n 7) 776.

[11] Kaul, Grunberg and Stern (n 8).

[12] Sometimes discussed as '*erga omnes* norms', cf Nollkaemper (n 7).

collective action among states, and how the lack of legitimate authority over these sovereigns prevents easy solutions.

While the standard theory may be correct on its own terms, we should not dismiss a broader conception of GPGs as too analytically fuzzy. The standard theory is too incomplete to justify standards that help assess legitimate authority in general, including that of international law and ICs, and that of ICs regarding GPGs in particular.

One shared feature of GPGs may be that they are 'public' in the sense that they can benefit individuals or entities in more than one state, and require concerted action by multiple actors of different kinds for their provision.[13] The standard theory's limited scope leaves out large parts of game-theoretic modelling and important tasks for the legitimate authorities intending to secure such GPGs. The following argument seeks to justify these claims, largely by drawing together the many substantive findings of other scholars. Attention to broader game-theoretic insights helps understand and address the many challenges to collective action wrought by GPGs, and how ICs contribute and might contribute, as well as identifying tasks for which authoritative ICs may be neither feasible nor suitable. The challenges of climate change and the possible contributions of the Paris Agreement illustrate this

A further reason to downplay the significance of the standard public goods theory is to reduce its unfortunate framing effects. It leads scholars to regard other collective benefits, including GPGs, as 'impure' public goods, and to focus attention on problems that are similar to those that arise with GPGs.[14] But GPGs also raise quite different concerns, arguably at least as important as those around free riding, such as whether all states, or their citizens, have reason to secure an alleged GPG, and how to allocate the work of its provision and the resultant benefits and burdens. The standard theory also reenforces inaccurate accounts that may hinder our understanding and our strategies: it maintains that authorities' central and legitimating task with regard to GPGs is to employ sanctions, in order to shift the strategies of actors assumed to be motivated only by myopic, unconstrained, and immutable self-interest. We find traces of this narrow focus in seminal contributions to the study of international law. The framing of the standard theory hampers a broader, more justified appreciation of the complex and dynamic preferences and interests of states and other actors, and impedes a better sense of the many legitimate tasks of authorities and of ICs in particular.

Section 1 provides a sketch of the standard public goods theory. Its scope conditions help explain one discernable trend in the academic literature: justifying authority as necessary to prevent the free riding that undermines public goods. Its limited focus excludes several important issues, such as who decides what is of universal interest and who identifies matters of distributive justice. Section 2 gives a brief account of the several tasks of ICs, and considers various features and functions of ICs that distinguish them from other authorities. To illustrate their differences, it considers three GPGs which pose quite different collective action problems, and where ICs and other bodies may take on distinct tasks: human rights protection, world trade, and the 'differentiated commitments' of the Paris Agreement to help states alleviate the climate crises. Section 3 seeks to incorporate game-theoretic contributions by various authors that the standard theory leaves untouched, underscoring how its exclusive focus on possible free riders shifts attention from crucial issues. The 'free rider' problem itself merits more analysis and interpretation, and many urgent global challenges for states' pursuit of the GPGs they have reason to secure are better analyzed as mixes of other types of collective action problems, such as assurance games and 'battles of the sexes', as shown by several scholars' contributions.

Section 4 discusses some implications of lifting the constraints of the standard theory for how ICs may contribute to addressing challenges posed by GPGs. It starts by challenging concern about the weak enforcement powers of ICs. Many valuable contributions by ICs occur

[13] Kaul, Grunberg and Stern (n 8) 7.
[14] ibid 4-5.

outside the scope conditions of the standard theory. The upshot is that the standard account ignores other functions of legitimate authorities, such as ICs, including allocating benefits and burdens, facilitating reasoned 'balancing' of conflicting objectives and norms, and addressing battles of the sexes and the need for assurance.

The discussions yield both good and bad news for the legitimate authority of ICs. Broader perspectives complicate our assessment of whether existing and new ICs can contribute to securing a broader range of GPGs, where distributive conflicts and complex balancing of values occur among actors with opaque and changing preferences. On the one hand, their weak direct enforcement powers against free riders do not render ICs ineffective and hence illegitimate, and they serve other important tasks. But neither international law in general nor ICs in particular are a universal panacea for the challenges of international cooperation: international bodies without adjudicatory authority may often be better placed to act. To summarize and clarify the limited scope of tasks for which ICs may be helpful, section 5 considers the contributions of a quite different, non-adversarial, and less powerful body: the Compliance and Implementation Committee of the Paris Agreement. It illustrates important steps for furthering the GPG of combatting climate change that the standard theory ignores, and that might not need the authority of ICs.

2. Global public goods and the standard public goods theory of authority

The link between authority, public goods, and free riders seems to have originated with economists' insights about a particular failure of voluntary market exchanges.[15]

The central point of the standard public goods theory is that even though certain benefits are desired by all, they cannot be provided by consensual market exchange. The reason for this consists of two features of what are often called 'pure' public goods.[16] Their consumption is *inexhaustible*—in the 'polar extreme case,'[17] use of the good by some does not reduce opportunities for use by others—and this cornucopian feature makes the production of such goods highly attractive.[18] But they are also *non-exclusive*: it is impossible or difficult to prevent their consumption by others.[19] Note that this standard conception of pure public goods is markedly different than the much broader concept of 'global public goods' presented above.

These two features leave rational actors without incentives to contribute to their production, but rather to free ride on others' efforts, with the result that the goods may not be produced. Voluntary, decentralized market exchanges cannot therefore yield an 'optimal' distribution of such public goods. Coercion may correct this market failure. This 'public goods theory of the state' maintains that authorities' main task is to deter free riders by means of sanctions. Thus the justification for a legitimate authority with coercive power over autonomous actors is to help them attain such public goods that each prefers.[20]

---

[15] The influential UNDP-based report that popularized 'GPGs' makes explicit reference to nonrivalry in consumption and nonexcludability, ibid Prior and less formalized discussions include Plato, *The Republic and Other Works* (Benjamin Howlett tr, Anchor 1973), David Hume, *A Treatise of Human Nature* (Clarendon Press 1960); John Stuart Mill, *The Principles of Political Economy, With Some of their Applications to Social Philosophy* (Longmans, Greens and Co 1909); Vilfredo Pareto, *The Mind and Society* (Arthur Livingston ed, volume 3, Harcourt, Brace and Co 1935), 946–947, and – cf, for these and further discussions, Russell Hardin and Garrett Cullity, 'The Free Rider Problem' *Stanford Encyclopedia of Philosophy* (2020) <https://plato.stanford.edu/archives/win2020/entries/free-rider/> accessed 15 January 2021.

[16] Originally called 'polar' public goods, see Paul A Samuelson, 'Diagrammatic Exposition of Public Expenditure' (1955) 37(4) The Review of Economics and Statistics 350.

[17] ibid.

[18] ibid; Paul A Samuelson, 'The Pure Theory of Public Expenditure' (1954) 36(4) The Review of Economics and Statistics 387.

[19] Richard A Musgrave, *The Theory of Public Finance: A Study in Political Economy* (McGraw-Hill 1959) 8.

[20] William J Baumol, *Welfare Economics and the Theory of the State* (Harvard University Press 1952) 57. Samuelson (n 16) analyzed 'the vital external interdependencies that no theory of government can do without' .

This justification of legitimate authority has stimulated, framed, and constrained much research and debate, about international law and ICs in particular. The legal scholars cited above appear to refer to a similar 'standard' global public goods theory of international law, but they do not necessarily accept either it or its diagnosis that the main problem of international law is its lack of sanctions against free-riding sovereign states.

I submit that the broader discussions of GPGs and institutional tasks may have suffered from the frame imposed by the economists' standard theory, which hides or hinders valuable insights. The challenge of securing public goods by preventing free riders is neither the sole or main justification for legitimate authority—for states, for international law, or for ICs. This focus may have detracted from other important tasks. We can observe this if we start with the standard theory and lift some of its restrictions, to understand better when international law and ICs may be beneficial and legitimate, and when they may not be justified. At least four *scope conditions* of the standard public goods theory do not extend easily to our broader concerns.

Firstly, the definition of 'public goods' as inexhaustible and non-exclusive is *ambiguous regarding normative commitments*. On the one hand it is *agnostic* about the normative value of the goods, and simply accepts actors' preferences regarding them. Those preferences may relate to one's own well-being, other-regarding sympathy, or complex mixes. States' concern for human rights violations by other states illustrate the latter: such violations may both be cause for humanitarian concern and challenge other states' benefits from economic trade and political cooperation. The definition simply helps explain why voluntary market exchanges cannot secure their supply or their restriction. On the other hand, central contributors to the theory express and acknowledge a range of normative positions. Thus Samuelson agrees that 'much public expenditure on education, hospitals, and so on, can be justified.'[21] The theory itself rests on several normative premises, including respect for consumer sovereignty and an allegedly weak normative claim about ethical distribution, discussed below. Notably, the theory does not address who should decide which such normative premises to accept.

Secondly, this account leaves aside issues of *preference formation* and modification. The parties' fundamental values, interests, and objectives are assumed to be stable. The acknowledged role of institutions and other actors is not to change these, but is rather limited to change the payoffs of some outcomes so that actors reorder their preferences among them.[22]

Thirdly, this account brackets conflicts among values or interests *within* each actor. The preferences of each agent over the alternatives are supposed to already have accommodated any internal conflicts among the agent's values or objectives

Fourthly, the standards for *optimal* distribution of goods in this account are quite limited. The answer to 'the ethically preferred final configuration'[23] of goods is simply any allocation where 'you can make one person better off only by making some other person worse off', that is, along the Pareto 'maximum utility frontier'.[24] The account does not address any inter-

---

He also acknowledged that he overstated the case in his first publication, as governments and taxation may have other legitimate tasks, 355-356.

[21] Samuelson (n 16) 356.

[22] This bracketing of preference formation and change is not typical of economics as a whole. This public goods account and some other parts of economics regard preferences as exogenous. See Lionel Robbins, *An Essay in the Nature and Significance of Economic Science* (Macmillan 1932). But other economists do address such issues head on, cf Amartya K Sen, 'Equality of What?' in Amartya K Sen (ed), *Choice, Welfare and Measurement* (The MIT Press 1980).

[23] Samuelson (n 16) 351.

[24] Samuelson (18).

personal conflicts other than this concern. Any *further* issues relating to distribution of goods among actors are explicitly excluded from considerations about 'the best state of the world' as beyond the '"scientific" task of the economist'.[25]

A more comprehensive account of legitimate authority, particularly that of ICs, often addresses these four topics; the origin of 'public good' analysis is therefore drastically incomplete. The following sections refer to various works of scholarship that have extended and challenged the constrained public goods account of legitimate authority, including for ICs. Authorities have other tasks, and there are reasons for ICs' authority over states other than to sanction free riders, even within the game-theoretic modelling of the standard theory.[26]

3. Tasks of international courts

How may ICs enable states and individuals with regard to GPGs? Their core task is to adjudicate disputes through interpreting and applying international law by legal methods. This may be relevant to GPGs, insofar as the IC considers state violations that hinder objectives such as free trade or human rights. But the standard public goods theory creates low expectations about the impact of any such judgment for GPGs. First, international law generally and ICs in particular will not have jurisdiction over some non-cooperating states because they have not accepted the IC's jurisdiction to begin with, or have exited from it.[27] Second, relevant actors may not have 'standing' before the IC in the relevant case. Third, any judgment will only be binding for the parties to the case. Fourth, states can refuse to comply with the IC's judgment with little risk of sanctions from the IC.[28] Its legitimate authority stands to suffer, since it fails to enable states to meet objectives they have reason to pursue, such as protecting and promoting human rights, international trade, or the environment at home and abroad.

Such general pessimism on behalf of ICs is premature. Section 3 addresses their roles regarding sanctions, although ICs carry out several other tasks that may facilitate some GPGs.[29] To illustrate, I consider two types of ICs and an international body that does not adjudicate, but can still contribute. The WTO Dispute Settlement system and its Appellate Body (AB) may be closest to the standard theory's concern with free riders. The WTO AB determines whether states have violated trade rules. In contrast, the regional ICs that adjudicate human rights treaties make contributions and challenges that seldom concern free riders. The third contrasting case considers the potential contributions of the Compliance and Implementation Mechanism of the Paris Agreement (the 'Compliance Mechanism'), which despite ostensibly being even weaker than ICs, since it is not designed to adjudicate cases,[30] may facilitate cooperation and coordination among states—or so I shall argue.

The core task of ICs is adjudication. By adjudicating, ICs also contribute to reviewing and helping others monitor compliance. This is often necessary to facilitate cooperation among parties who are 'repeat players' and interact often—especially among those not seeking to free ride, as I return to below. Further important indirect effects of adjudication concern its impact on states' reputations. A state's express choice to allow cases to be brought against it may enhance its own credibility in the eyes of others, as it thus submits to future monitoring and

[25] ibid.
[26] I leave aside how ICs may serve other legitimating tasks beyond facilitating cooperation and coordination among states, cf Follesdal 2020.
[27] Laurence Helfer, 'Exiting Treaties' (2005) 91 Virginia Law Review 1579.
[28] Schaffer (n 6) 675.
[29] For in depth and illuminating treatment of these issues cf Joshua Paine, 'International Adjudication as a Global Public Good?' (2019) 29(4) EJIL 1223.
[30] Christina Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (2016) 25(2) Review of European, Comparative and International Environmental Law 161.

scrutiny by an independent body.[31] Fear of future litigation may also help deter free riders. The IC can provide more such assurance and deterrence if the state expands the potential pool of litigants to not only include states but also private parties, as in the case of human rights ICs.

Note that bodies other than ICs may perform similar tasks, such as international or domestic monitoring bodies, or competence-building agencies. The Compliance Mechanism is a case in point.[32] In comparison to some such bodies, ICs have limits: They adjudicate on the basis of agreed treaties, leaving many urgent issues out of reach. They are also mainly 'reactive' in that they consider cases brought before them by an actor. And they only address disputes between two parties who have accepted their jurisdiction, often without legally binding effect on others. Beneficial or disadvantageous effects on third parties may arise, but compete with the core task of settling the dispute among the parties. This process may therefore be less suited to alleviating collective problems wrought by multiple states. On the other hand, the risk of being found in violation of a treaty may nudge other states to defend their policies and legislation publicly, in light of possibly conflicting obligations. Thus the European Court of Human Rights appears to defer to states' assessments of violations in some cases, but only if they have performed a good faith 'proportionality test'.[33]

A second important task of ICs is that they must often *interpret*, develop, and specify international law in order to adjudicate. States agree to these treaties as 'incomplete contracts' either because of lack of time, or the impossibility to foresee all factual situations, or because they were unable to agree on details. They entrust some of these specific treaty details to IC judges.[34] Some even argue that ICs provide a GPG by completing these treaties.[35] The impact of such interpretations may be significant, yet states sometimes explicitly leave it to the IC 'to clarify the existing provisions',[36] expecting that 'decisions through the convention's mechanism will create a significant new body of international law'.[37] When ICs 'fill in the gaps' in treaties they stabilize expectations about other actors' future conduct. They thereby help identify cases where free riding takes place, and where it does not. Through their interpretations, ICs also authoritatively set standards for how to allocate benefits and burdens, and they order and give priority to conflicting objectives and values. Their interpretations reframe and prioritize various

---

[31] Laurence Helfer, 'Why States Create International Tribunals: A Theory of Constrained Independence' in Stefan Voigt, Max Albert and Dieter Schmidtchen (eds), *International Conflict Resolution* (Mohr Siebeck 2006).

[32] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1991); Elinor Ostrom, James Walker and Roy Gardner, 'Covenants with and Without a Sword: Self-Governance is Possible' (1992) 86(2) American Political Science Review 404; Oona Hathaway and Scott J Shapiro, *The internationalists: And their Plan to Outlaw War* (Allen Lane 2017); David G Victor, Kal Raustiala and Eugene B Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (The MIT Press 1998).

[33] Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466; Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry' in Andreas Follesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013); Andreas Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018), 269-294 <http://ssrn.com/abstract=2957070> accessed 15 January 2021.

[34] Gregory Shaffer and Joel Trachtman, 'Interpretation and Institutional Choice at the WTO' (2011) 52 Virginia Journal of International Law 103; Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) ; Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes' (2013) 1(1) Journal of Law and Courts 61.

[35] Mavroidis (n 9).

[36] World Trade Organization, 'Dispute Settlement Understanding' (1994) 1869 UNTS 40, Annex 2 (DSU) art 3.2; see also Shaffer and Trachtman (n 34) 128, footnote 72.

[37] Taylor St John attributes this to James Meeker, cf Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018) 177, footnote 145.

issues, interpreting some cases of rape as acts of genocide,[38] for example, or specifying 'complementarity' vis-à-vis states[39] and 'constitutionalizing' a legal order. A prime example of the latter is how the Court of Justice of the European Union 'constitutionalized' EU law, going beyond the EU treaty texts to grant them direct effect and primacy over domestic legislation – and acknowledged human rights norms.[40] Note that this task of interpretation is not an obvious normative good, as parties may understandably disagree about the correctness and benefits of an IC's interpretation.

What, if any, comparative advantages do ICs have over other bodies in terms of interpreting and developing treaties? I start to address part of this question below, but several alternatives exist. Such (quasi-)legislative tasks may be carried out by states in the form of amendments to a treaty, or by other actors such as inter-state parliamentary committees or committees of the state parties, by coordination among domestic constitutional courts—or in dialogues with expert committees with fewer formal powers than ICs, as discussed below.

I now turn to how these IC tasks fit with the public goods theory of legitimate authority.

4. Aspects of game theory: Free riding and beyond

The public goods theory of legitimate authority is exclusively concerned with free riders, and how sanctions may shift their preferences in order to secure the public goods. To understand the tasks of authorities in general, and of ICs in particular, I delve into the range of reactions ICs may trigger, other sorts of benefits from cooperation, and other parts of game theory. Many goods fall short of the 'pure case' Samuelson discusses, for many outcomes are not preferred by all parties and many goods are partly exhaustible or partly exclusive. I then note the existence of variations in the number of necessary contributors for various GPGs. Finally, because actors often have other preferences over outcomes than free riding, I consider other forms of 'games'. These distinctions are relevant when discerning ICs' possible contributions and limitations.

4.1 Whose public goods?

Economists' interest in the standard account stemmed from the particular challenge of public goods. Many challenges facing international law today concern other objectives than these inexhaustible and non-excludable outcomes.

Firstly, many objectives are claimed by some actors to be of universal benefit, even though this is an open question. Some actors have the power to label certain objectives or outcomes GPGs and make other actors acquiesce to such labels, with important consequences. This power carries several risks. The idea that dominant powers easily conflate their interests with those of others is not new in international law: de Vitoria argued in 1539 for the Spaniards' right of freedom of movement and trade in 'the New World' based on everyone's interest in

[38] *Prosecutor v Anto Furundzija* (Judgment) ICTY-95-17/1-T (10 December 1998) paras 164-186; *Prosecutor v Dragoljub Kunarac and others* (Judgment) ICTY IT-96-23-T and IT-96-23/1-T (22 February 2001) paras 436-464, 515-543; cf Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (Office of the United Nations High Commissioner for Human Rights) <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 15 January 2021.

[39] Carsten Stahn and Mohamed M El Zeydi (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (CUP 2011); Ignaz Stegmiller, 'Positive Complementarity and Legitimacy - is the International Criminal Court Shifting from Judicial Restraint Towards Intervention?' in Nobuo Hayashi and Cecilia M Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (CUP 2017); Geir Ulfstein, 'Institutions and Competence' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009).

[40] J H H Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999).

non-harmful travel and a corresponding universal duty of hospitality.[41] Arguably, he provided a justification for regulated imperialism in the name of GPGs regardless of the actual, informed preferences of the original inhabitants.

A second risk concerns framing. By calling certain outcomes '(global) public goods,' the standard account ascribes particular preferences to protesters, namely that they are unduly self-interested free riders. Such claims may well be false: the objectors may correctly deny any of the three scope conditions of the standard account: the outcome may harm them; or they may disagree that this particular shared objective—such as more liberalized trade or freedom of speech—should have priority other important values; or they may protest the distribution of burdens and benefits created by this particular way to produce and distribute the GPG. States may correctly hold that there are more equitable ways to allocate the costs and benefits of free trade, or of combatting climate change.

4.2 Quasi-public goods

A second set of issues that merits our attention concern objectives that share some features with 'pure' public goods.[42] Some refer to these as 'impure' public goods, which unfortunately perpetrates a focus on the 'pure' cases.[43] Many benefits are exhaustible but non-excludable, and many GPGs of concern today are of this kind. Such *common-pool resources* include the world's fish stocks, and a clean environment. To prevent depletion, coordination may be required.[44] Other benefits are inexhaustible but excludable. For instance, they may be available only within a geographical region, or only for 'club' members[45] – such as access to markets on specific terms among EU or WTO member states. I submit that ICs may have important roles in securing these GPGs.

4.3 When partial compliance is enough

A third important departure from the standard theory's 'pure' case of public goods is that in many cases full compliance by all parties may not be required for the benefits to accrue.[46] The problem of 'free riders' can therefore vary. Consider common-pool resources. Some hold that all 'aggregate-effort' goods require compliance by every actor involved, be it climate change or sustainable fishing of tuna.[47] However, there is often a threshold or tipping point: as long as most parties restrain themselves, some actors may fish or harm the environment within limits. So the objective of, for example, environmental control or sustainable levels of fishing, is secured as long as the 'aggregate effort' of the parties is within a certain range. Satisfactory solutions may therefore only require compliance by a certain number of actors, often several 'big players', whose aggregate steps suffice. Indeed, efforts below or above a threshold may be unnecessary or unwarranted. This creates complex coordination problems, raises issues of fairness, and may challenge the legitimacy of international law and ICs that require general

[41] Francisco de Vitoria, 'On the American Indians' in Anthony Pagden and Jeremy Lawrance (eds), *Vitoria: Political Writings* (CUP 1992). Grotius developed such accounts further: Hugo Grotius, *On the Freedom of the Seas - Mare Liberum* (Brill 2009) 25; cf Vincent Chetail, 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel' (2016) 27(4) EJIL 901; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

[42] For thorough and insightful discussions, cf Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (OUP 2007); Paine (n 29).

[43] Kaul, Grunberg and Stern (n 8) 4-5.

[44] Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press 2005).

[45] Todd Sandler, 'Regional Public Goods and International Organizations' (2006) 1 Review of International Organizations 5.

[46] For further discussion, cf. Barrett, referenced in Bodansky (n 5), p. 652.

[47] Nollkaemper (n 7) 778

compliance. Compliance by a club of 'like-minded' actors might suffice, especially if they can provide club goods or side payments to members. A related issue arises for human rights: an IC that adjudicates human rights violations may still enable states to fulfil their human rights obligations even if certain states routinely fail to comply. However, an IC cannot help a state credibly pre-commit to human rights compliance if many states fail to defer. The IC is no longer better placed than the state to provide assurance, and its legitimacy may be at stake.

In other cases, in which any benefit depends on the 'weakest link', noncompliance by only one state may wreak havoc. Examples include preventing endemic diseases, nuclear weapons, or tax havens. Indeed, in some such cases the incentives for a few to free ride increases with increased compliance by others.[48] ICs may help prevent such weakest links, serving a 'fire-alarm function' in allowing parties to trigger individual cases of suspected violations.[49] From this point of view, ICs should have a low threshold for considering cases. This may mean giving non-state actors a stake in the cases. Private parties may be awarded rights, as is the case with human rights, or they may benefit from treaties, such as trade agreements. Private parties may demand that their government brings cases or implements rulings.[50] They may also bring cases—and indeed this appears to be a trend among 'new style' ICs.[51]

A further variation on the number of required compliers is 'single-best-effort' public goods, which include efforts by a powerful player, possibly a hegemon, to establish or maintain regimes that are also beneficial to others or could be.[52] One example is when one actor can afford to bring a costly case to court to settle a controversial issue by means of an interpretation or judgment, with consequences for a broader community.[53] Note that this illustrates how the profound task of ICs in developing international law should make us wary of the risks of powerful actors using ICs to craft international law in their interest by bringing cases or submitting amicus briefs in favour of one interpretation or the other. Resourceful and informed actors may exploit such strategies to the detriment of other affected parties, who may have much at stake but be less powerful.

4.4 Problem types beyond free riding

The challenge of free riders occurs among actors with a particular configuration of preferences, in which free riders would prefer to not comply with the rules regardless of whether others do. Focusing on free riders risks drawing attention away from other common constellations of preferences. At least two problem types merit attention for our topic of concern.[54]

---

[48] On the related issue of 'leakage', cf. Scott Barrett, 'Coordination vs. Voluntarism and Enforcement in Sustaining International Environmental Cooperation' (2016) 113(51) Proceedings of the National Academy of Sciences of the United States of America 14515.

[49] Kal Raustiala, 'Police Patrols and Fire Alarms in the NAAEC' (2004) 26 Loyola of Los Angeles International and Comparative Law Review 389; Carrubba and Gabel (n 4). Some suggest that the value added of ICs may be greater in such cases than in the aggregate-efforts cases.

[50] Helfer (n 31).

[51] Karen J Alter, *The New Terrain of International Law: Courts Politics and Rights* (Princeton University Press 2014).

[52] Across a range of theories of international relations. See Robert O Keohane, 'The Theory of Hegemonic Stability and Changes in International Economic Regimes' in Ole R Holsti, Randolph M Siverson and Alexander L George (eds), *Change in the International System* (Westview Press 1980); John J Mearsheimer, *The Tragedy of Great Power Politics* (WW Norton and Co 2001).

[53] Bodansky (n 5) 663.

[54] There are vastly more permutations of pay-offs, especially with more than two players in sequential and iterative games. For further details as regards the somewhat underdeveloped relationship of game theory to law, cf the classic Douglas G Baird, Robert H Gertner and Randal C Picker, *Game Theory and the Law* (Harvard University Press 1996); Gregory Shaffer and Mark Pollack, 'Hard and Soft Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012).

One important and frequent problem type is *assurance games*. These situations arise among individuals who each prefer to cooperate, but only under certain conditions: they must regard the rules as fair, and they must believe that most others also cooperate.[55] These *conditional cooperators* do not prefer free riding, and they do not require sanctions to comply. However, they may need reasons to hold that the system is fair, as well as trustworthy monitoring to confirm both others' belief in the fairness of the system and general compliance. Some features of human rights regimes have these characteristics. States within the European Union, for example, must all be subject to the European Convention on Human Rights; states may have no interest in free riding on other states' compliance with that treaty, but they may have good reason not to wish to pool decision-making for EU legislation with states who do routinely flout it. Even among able and willing states, each may need to be assured of each other's human rights compliance. ICs may contribute to such monitoring, although human rights ICs also perform valuable tasks for other actors than states. Since these ICs are somewhat independent of domestic government, they can perform similar important tasks for individuals and organizations *within* and *across* each state. These ICs provide both correction mechanisms and assurance about their government's compliance. These tasks are also overlooked by the public goods theory's exclusive focus on free riding.

A second problem type where the parties prefer to cooperate rather than free ride is known as the '*battle of the sexes.*' It denotes situations in which the parties disagree about *how* to cooperate, since each alternative allocates benefits and burdens differently among the parties. Such situations where the mode of cooperation is underdetermined are frequent in international relations and elsewhere.[56] Conflicts about the details of how to liberalize trade, or how to combat climate change, are cases in point. While it may be true that trade or investment treaties bring benefits to all states, critics maintain that the distribution of these benefits among states is grossly unfair, yet still better for the powerless states than no access to these markets.[57]

The public goods theory of authority brackets such distributive conflicts completely, rendering itself useless for understanding many real conflicts and even deadlocks. It may be argued that this statement is too pessimistic, since such bargaining problems are in some sense 'nested within' or limited by the parties' overarching commitment to comply with whatever alternative is agreed. It might appear that rational actors in such 'battle of the sexes' situations would be strongly motivated to agree since they have a strong preference for cooperation over non-cooperation. Thus, regarding environmental issues, Barrett writes:

> How would the emission limits for individual countries be chosen? This is the bargaining problem. If countries were 'symmetric', bargaining would be simple. […] Asymmetry makes bargaining more complex, but so long as collective action promises all countries an aggregate gain, there will exist an allocation of responsibility that will be acceptable to every country (this allocation won't be unique and may require side

[55] Ostrom, Walker and Gardner (n 32); Margaret Levi, 'A State of Trust' in Margaret Levi and Valerie Braithwaite (eds), *Trust and Governance* (Russell Sage 1998); Barrett (n 48); Niels Petersen, 'Customary International Law and Public Goods' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (CUP 2016) 258.

[56] For fruitful elaboration, cf. Shaffer (n 6).

[57] Daniel Behn, Ole Kristian Fauchald and Malcolm Langford, 'A Global Public Good? An Empirical Perspective on International Investment Law and Arbitration' (13th Annual Conference of the European Society of International Law, Naples, 7-9 September 2017) <https://www.jus.uio.no/ior/english/people/aca/malcolml/public-goods-final-submitted.pdf > accessed 15 January 2021; for some empirical evidence cf. Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on Investment Treaty Arbitartion' (2017) 18(1) Journal of World Investment and Trade 14, 8.

payments, but these are relatively minor points compared with the imperative to avoid catastrophe).[58]

Unfortunately, this type of collective action problem may occur even if the stakes are 'minor' compared with a non-cooperative outcome. The parties might not agree to their second-best alternative at the first-stage bargain, and so never reach the second stage where all would comply with the agreed rules—in effect creating a game of 'chicken'.[59] Thus Bodansky reports that: 'Many developing countries have been reluctant even to discuss the overall level of global emissions reductions without some agreement first on the burden-sharing issue'.[60]

Many real-life situations present mixes of these and other games. One additional confounding feature is that actors may be uncertain about each other's preferences, and hence about which type of game they are part of. Conditional cooperators may fear the existence of free riders among them, and parties may be unsure whether they are in a battle of the sexes, since there may not be any outcome which all parties will prefer over not cooperating at all.

5. Discussion

How and when can ICs enable states to obtain the GPGs they seek, and have reason to secure? These comments largely draw on existing research, to indicate how a broader appreciation of game theory than employed by the standard theory may facilitate our assessment of the legitimacy of particular ICs, as well as their legitimacy in comparison to alternative institutions. I first consider how ICs may fit the standard theory by not only decreeing or permitting sanctions but also otherwise influencing states' payoffs from the various options. I then return to reconsider the four scope conditions of the standard theory and explore some implications for ICs. The fourth, affecting fair distribution of benefits and burdens among states, merits particular attention. I consider some of the challenges ICs face, and how some of tasks may be better performed by bodies other than ICs. The climate change challenge is a suitable example, and one that illustrates the limitations of the standard public goods theory.

5.1 Sanctions

The standard public goods theory of legitimacy focuses on the role of sanctions in shifting actors' preferences over given alternatives. From that point of view, international law and ICs are often lamented as weak and without 'coercive power', making them ineffective in enabling states to secure GPGs. This is an overstatement on three counts: even if ICs lack 'coercive power,' some may trigger either direct or indirect sanctions, and ICs can add to states' alternatives.[61] Some ICs decree sanctions directly: regional human rights courts impose monetary awards, and the Inter-American Court of Human Rights (IACtHR) has required states to repeal laws, establish the crime of extrajudicial killing in its domestic law, grant victims' families' free health care, and erect a monument to the memory of the victims.[62] The risk of being found in violation of treaty obligations may itself promote state compliance, if only to avoid reactions from actors other than ICs. ICs have been designed and have themselves

[58] Scott Barrett, 'Why Have Climate Negotiations Proved so Disappointing' in *Sustainable Humanity, Sustainable Nature: Our Responsibility* (Pontifical Academy of Sciences 2014) 263 <http://www.pas.va/content/dam/accademia/pdf/es41/es41-barrett.pdf> accessed 15 January 2021.

[59] Stephen D Krasner, 'Global Communications and National Power: Life on the Pareto Frontier' (1991) 43(3) World Politics 336.

[60] Bodansky (n 5) 657.

[61] Helfer (n 31).

[62] *Barrios Altos v. Peru* (Judgment) [2001] IACHR Series C No 75. This is not to say that all states comply with all sanctions, cf Cecilia M Bailliet, 'Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America' (2013) 31(4) Nordic Journal of Human Rights 477.

developed strategies so that many states will suffer repercussions from important international and domestic parties if they fail to comply to rulings. There are informal impacts: several, but not all,[63] states are vulnerable to reputational costs if they are not members of a treaty, or are found in violation of it—'naming and shaming,' among either international peers and actors[64] or powerful domestic actors. In the case of human rights, a government found in violation of its obligations may expect reactions from civil society groups, opposition parties, and other 'compliance constituencies'. The IACtHR's choice of sanctions illustrate how the 'weak' IC may strategically trigger negative reactions from third parties with a more direct impact on the state.[65] Regarding trade, if the WTO AB rules in favour of a state, that state may impose carefully circumscribed 'countermeasures' otherwise prohibited.[66]

ICs may also help shift payoffs for states in other ways when they are part of *new* options created by other states. More formally, states sometimes set up treaties with ICs, so that, for example, only WTO members, who must be subject to the WTO AB, may enjoy WTO privileges.[67] Treaties may even rely on existing ICs as gatekeepers for the benefits that states are seeking; the most prominent example may be membership in the European Union, which requires that a state sign up to the European Convention on Human Rights and its court.

The upshot is that even by the terms of the standard public goods theory of legitimate authority, international law and ICs may enjoy legitimate authority insofar as they can influence states' preferences and hence actual choices among their alternative modes of action. ICs may do so by both triggering sanctions and contributing to new options that facilitate states' efforts and objectives. Several authors note that ICs' 'reactive' dispute-settlement function make them more effective in preventing defection by a few and when cases are not too costly, but less suitable when the GPG is prevented by many actors each adding only marginal damage to an aggregate with large harmful effects.[68]

I now turn to the possible functions of ICs in relation to collective action problems beyond those circumstances where the standard theory was intended to apply.

5.2 When the value of 'public goods' is contested

The standard theory takes actors' preferences regarding certain outcomes as given, and is exclusively concerned with cases where these preferences converge, meaning when all actors have the same (linear) payoff functions. To label an outcome as a '(global) public good' may deflect attention from the important issue of whether this scope condition actually holds in such cases:

> Most authors who use the term 'public goods' in international law discourse, use it to refer to values or interests that are considered to be good for the international community as a whole[69]

Central points of concern for the legitimate role of ICs are *who* judges an objective to be a global public good and *on what grounds*. For instance, some states question the value of various

[63] Emilie M Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press 2013).
[64] Thomas Risse, Stephen C Ropp and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (CUP 2013); Barrett (n 48); Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).
[65] Xinyuan Dai, 'Why Comply? The Domestic Constituency Mechanism' (2005) 59(2) International Organization 363; Simmons (n 64); Alter (n 51).
[66] DSU (n 36) art 22.2.
[67] cf Barrett (n 42) .
[68] For attempts to hold parties responsible for aggregate harms, cf *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10.
[69] Nollkaemper (n 7).

treaties' objectives, be they more international trade or responsibilities to receive refugees or provide humanitarian assistance. At least three aspects merit mention regarding ICs.

Firstly, the existence of an IC that identifies and specifies GPGs may give states incentives to join a treaty in order to influence that interpretation.

Secondly, for the most part ICs will only perform tasks for the states who have agreed to the relevant treaties. Crucial states may refuse consent to treaties necessary to secure cooperation required for the GPG.[70] This is one reason why several authors note that state consent serves to undersupply treaties and their IC, and hence GPGs. Indeed, a recalcitrant powerful state may abuse its bargaining power so much that other states will not agree to a treaty at all—because it insists on options outside the domain of battle of the sexes.

Yet there are also reasons in favour of states' formal veto in the form of consent. It *sometimes* protects them against abject domination by more powerful states, although the latter sometimes get what they want and weak states consent to what they must. States who do not accept a particular treaty and an IC it establishes may not always be seeking to free ride, but simply not want the outcome, at least not as defined in the treaty. This has two implications for the legitimacy of an IC. First, even if it is authorized to interpret and adjudicate on the basis of a treaty, the question of whether that objective is actually shared by the states remains open. Second, even if states do consent, informed and freely, their objectives and choice of means merit scrutiny. The standard public goods theory takes those preferences of the parties as ultimate normative premises. It remains to be determined whether states have good reasons to pursue their stated objectives, such as more free trade, or more of the benefits that accrue from such an alleged GPG.

A third issue concerns fragmentation among ICs that states have agreed to in pursuit of particular GPG, say international trade and human rights. States have several objectives and strategies for pursuing them, by means of various treaties, ICs, domestic constitutions, and legislation. Consent to one IC does not indicate the relative value of this GPG or the treaty norms relative to these other important values and objectives. This general 'balancing' challenge applies among many objectives, including GPGs. There may be disagreements among states about these matters, such as the scope of human right norms versus free trade versus environmental protection. Still, different ICs must somehow perform the important tasks of interpreting and adjudicating on the basis of such fragmented international law.[71] Indeed, some may regard harmonization of international law as a GPG itself, and one that ICs contribute to. But we should be cautious. Some conflicts are resolved by means of *jus cogens* norms, the precise content of which is also contested.[72] Some treaties also recognize various conflicts when they specify exception clauses, such as for human rights or international trade.[73] Even in these cases ICs must exercise discretion in their 'balancing'. The judgments of ICs may exacerbate fragmentation, or contribute to harmonizing international law one way or the other, more

[70] Andrew T Guzman, 'Against Consent' (2012) 52(4) Virginia Journal of International Law 747, 767, 789; Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' 2016 29(2) Leiden Journal of International Law 289; Krisch (n 3).

[71] United Nations General Assembly, Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682.

[72] Hilary Charlesworth and Christine Chinkin, 'The Gender of *Jus Cogens*' (1993) 15(1) Human Rights Quarterly 63; Andreas Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at Re-Appraisal' (2005) 74 Nordic Journal of International Law 297; Matthew Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges' (2015) 5(1) Asian Journal of International Law 26; UNGA, 'Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur' (12 February 2018) International Law Commission Commission 17th session UN Doc A/CN.4/714.

[73] cf Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) arts 7.2, 8.2, 9.2, 10.2 and General Agreement on Tariffs and Trade (GATT) (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194, arts XX-XXI.

systematically or less, more or less intentionally. ICs then extend and constrain some legal norms over others, and giving priority to some over others. This important task involves explicit and implicit, unavoidably value-laden choices by ICs that merit more scholarly attention.[74] The upshot for our discussion is that such tasks also arise among the different GPGs. Examples include how to specify the human right to strike relative to freedom of movement across borders in the EU, and rights to vaccines relative to intellectual property rights.[75]

5.3 ICs may affect states' preferences

The standard public goods theory assumes that parties' fundamental values or objectives are static, and does not address how these are created or modified. Other theories in economics and social sciences do take on this subject, including both 'constructivist' and 'liberal' theories of international relations.[76] ICs contribute to these processes by serving several important functions for states' ability to secure GPGs as well as other objectives.

New treaties with judgement-issuing ICs create new opportunities for states. Club members might secure outcomes hitherto out of reach. ICs can foster new forms of reputation that states may value in order to appear more or less reliable and trustworthy. They can engage in strategic practices of naming, shaming, or 'outcasting'.[77] ICs' interpretive function, for GPGs but also more broadly, opens up completely new venues for states to influence the content of international law, such as joining treaties in order to change them from within, strategic litigation, amicus briefs, and so on.

ICs may also affect more profound changes in states' preferences: the monitoring, arguments, signaling, and sanctions that ICs contribute to may shift governments' perceptions of the games they are playing, and hence sometimes bring about changes in the game, as well as in states' longer-term interests and objectives.

For example, states may realize that the collective action problems of climate change cannot be boiled down to a simple free rider problem but is actually genuine disagreement about proposed common actions and what fair distributions of burdens are. They may come to believe that the challenges are not so much in figuring out how to deal with shirkers, but how to provide credible assurance about others' compliance in a battle of the sexes.[78] The information ICs bring to the parties and the public at large may then leave states with different conceptions of their own long-term interests, since at least in some issue areas their environment is either less or more of a Hobbesian state of nature than they thought. They may need more or fewer sanctions against free riders, and more or fewer monitoring mechanisms. The monitoring and sanction-

[74] Contributions include José E Alvarez, 'How Not to Link: Instututional Conundrums of an Expanded Trade Regime' (2001) 7 Widener Law Symposium Journal 1; José E Alvarez, 'Beware: Boundary Crossings - A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17(2) Journal of World Investment and Trade 171; Pauwelyn and Elsig (n 34); Nollkaemper (n 7) 781-782.

[75] Sybe A de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' 9(1) Utrecht Law Review 169; OHCHR, 'Resolution 2000/7: Intellectual Property Rights and Human Rights' UN Doc E/CN.4/SUB.2/RES/2000/7 ; Holger Hestermeyer, 'International Human Rights Law and Dispute Settlement in the World Trade Organisation' in Martin Scheinin (ed), *Human Rights in 'Other' International Courts* (CUP 2019); Laurence Helfer, 'Intellectual Property and Human Rights: Mapping an Evolving and Contested Relationship' in Rochelle Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (OUP 2018).

[76] For overviews, cf Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012); Andrew Moravcsik, 'Liberal Theories of International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2012).

[77] Hathaway and Shapiro (n 32).

[78] Petersen (n 55) 258-259; Vinod K Aggarwal and Cédric Dupont, 'Goods, Games, and Institutions' (1999) 20(4) International Political Science Review 393.

triggering by ICs may enable clubs of willing states to cooperate in fruitful ways even when other states refuse.[79]

Indeed, authoritative ICs sometimes help change not only states' objectives but what states and the system of states *are*. ICs are the creations of states, but they also specify state sovereignty. The legal powers of sovereignty as regulated by international law include both some forms of immunity from outside interference and an ability to enter inter-state agreements.[80] Some argue that this is part of one GPG, namely 'respect for sovereignty'.[81] ICs delineate the states' scope of immunity concerning how to treat their inhabitants, and the content of treaty obligations they may consent to. When effective, ICs thus specify the scope of sovereignty that states have, and consequently what they are.

> A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.[82]

ICs may remove one obstacle H.L.A. Hart identified against regarding international law as a system of law, namely that it lacked a system of adjudication.[83] Optimists may therefore claim that ICs are fundamentally transforming international relations, lamented for centuries as a nasty state of nature, toward a legal order among states with a 'common superior on earth, to judge between them'.[84]

5.4 ICs promote and affect domestic contestation

The standard public goods theory leaves aside how each actor comes to prefer some outcomes over others. For processes within states, several ICs serve important roles. At least two merit mention. ICs may affect decision-making and policy preferences within states. Regarding international trade agreements, a state may claim an exemption from the agreement in order to regulate certain products or services on certain grounds, such as if it is necessary to protect public morals or human, animal, or plant life or health, to conserve exhaustible natural resources, or for national security reasons.[85] The WTO AB may grant such exemptions, but to reduce the risk that they are disguised restrictions on international trade, the state must provide a convincing, good-faith justification to show their necessity. The ECtHR may likewise grant a 'margin of appreciation' to a state restricting certain human rights or 'balancing' among several. But it tends to require that state authorities have performed a good-faith 'proportionality test' in order to receive such a margin.[86]

Such calls by ICs for public justification nudges a state to more carefully consider plausible alternatives and their impact before arguing in favour of one. This may also hold for GPGs. Such deliberations would not always occur otherwise.

A second way that an IC affects domestic preferences for objectives and policies is when it mobilizes segments of the population and shifts political power and influence among them.

---

[79] David G Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (CUP 2011).

[80] James Crawford, 'Sovereignty as a Legal Value' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012).

[81] Inge Kaul and Ronald U Mendoza, 'Advancing the Concept of Public Goods' in Inge Kaul and others, *Providing Global Public Goods: Managing Globalization* (OUP 2003).

[82] James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) 5.

[83] H L A Hart, *The Concept of Law* (Clarendon Press 1961) 233.

[84] John Locke, *Two Treatises of Government* (New American Library, Mentor 1963) 2.19.

[85] GATT (n 74) art XX and – for security – art XXI.

[86] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the Strasbourg Court* (CUP 2015); Follesdal (n 33).

States who ratify human rights treaties have experienced such effects.[87] The judgments and interpretations by ICs, and expectations thereof, may also influence political and social processes broadly. Businesses, investors, human rights groups, or indigenous populations mobilize for strategic litigation to affect the political agenda, or to identify and authorize rules that will benefit them or their objectives in later political or legal settings. Groups may use IC judgments to call for political reforms, or for inclusion in domestic decision-making processes. A recent example in the environmental area is the case brought to the ECtHR by six young Portuguese people against 33 countries for failing to avert climate change and hence violating their human rights.[88]

The point here is not that the impact of ICs on domestic political and legal debates is always in favour of GPGs: their judgments and interpretations may also stimulate backlash and calls to renationalize authority, as well as opposition to international cooperation.[89] Either way, these impacts are important features when we assess the legitimate authority of ICs, in ways the standard public goods theory does not aspire to address.

5.5 ICs may promote more fair distribution

The standard theory of public goods for legitimate authority limits its standards of optimal distribution of goods to the Pareto principle: an ethically preferred allocation is one where no one can be made better off without making anyone else worse off. There is little reason to endorse this specific scope condition for research more generally. It is unclear why the Pareto principle is to be accepted as the unique distribution standard, for an allocation involving a small transfer from a vastly affluent person to prevent one death of starvation, contrary to the Pareto principle, is not obviously unethical. Other standards of distributive justice also appear justifiable, and certainly affect conceptions of legitimate authority as well as actors' preferences. Critical legal studies and other critics have identified how international law sustains colonialism and patriarchy.[90] They note the perceived significant impact of the injustice of the world trade system toward less developed states, leading to attempts to reform WTO procedures and rules in its Doha Round, starting in 2001. Likewise, the need for equity and a fair distribution of benefits and burdens are central challenges to international agreements for preventing climate change.[91]

How might ICs contribute to identifying and securing outcomes consistent with the relevant standards of distributive justice? They adjudicate according to relevant treaties and legal method and procedures; insofar as treaty negotiations have secured just distributions of benefits and burdens among the parties to a dispute, IC adjudicate trade or bilateral investment disputes. Legal procedures upheld by impartial judges may also reduce the influence of power imbalances among disputing states, or between accused state and complainant, due to such standards as the rule of law, hearing both sides, equality of arms, and so on.

---

[87] Simmons (n 64).

[88] Chloé Farand, 'Six Portuguese Youth File 'Unprecedented' Climate Lawsuit Against 33 Countries' *Climate Change News* (3 September 2020) <https://www.climatechangenews.com/2020/09/03/six-portuguese-youth-file-unprecedented-climate-lawsuit-33-countries/> accessed 15 January 2021

[89] Erik Voeten, 'Populism and Backlashes Against International Courts' (2020) 18(2) Perspectives on Politics 407.

[90] Anghie (n 41); Simon Chesterman, 'Asia's Ambivalence about International Law' in Simon Chesterman, Hisashi Owada and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (OUP 2019); Hilary Charlesworth, Christine Chinkin and Shelly Wright, 'Feminist Approaches to International Law' (1991) 85(4) The American Journal of International Law 613; Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).

[91] Oran Young, 'Does Fairness Matter in International Environmental Governance? Creating an Effective and Equitable Climate Regime' in Todd L Cherry, Jon Hovi and David M McEvoy (eds), *Toward a New Climate Agreement: Conflict, Resolution and Governance* (Routledge 2014).

At least two caveats merit concern regarding ICs and distributive justice, relating to the significance of unjust treaties and the interpretation of treaties. There is no clear reason to believe that an international treaty *per se* satisfies whatever defensible standards of distributive justice are relevant, among or within states. Treaty negotiations by domestic elites among international unequals may merely result in domination by new means. This raises important issues concerning how responsible international judges should interpret and adjudicate cases brought before them, not least the appropriate role of considerations of equity.[92]

Consider now how ICs interpret and develop international law, assessed by standards of distributive justice. ICs are often required to develop international law, if only to 'fill the gaps' left by states when agreeing to a treaty aimed at securing a GPG. One might expect and even support the idea that international judges should be primarily guided by the states' express 'object and purpose' with the treaty, but decide among any remaining interpretive choices by considering distributive justice, as is consistent with standards of legal method. One drastic example mentioned above is the European Court of Justice retrofitting the GPG of human rights into the EU treaties.

While this account of how international judges should use their discretion may be laudable, in several of the cases surveyed above there are reasons to be wary concerning the authority and the qualifications of the IC. Firstly, international judges may see no reason to rely on such external standards; their professional specialist background and institutional setting may lead them to decide cases independent of outside references.

Secondly, if a treaty fails to detail the allocation of benefits and burdens among state parties, we may have low expectations of what ICs can actually do. Consider situations where an IC must choose among interpretations in 'battle of the sexes' circumstances. Any choice will benefit some parties to the detriment of others, compared to alternative interpretations. The losers are likely to question the IC's impartiality and authority, pointing out that alternative interpretations would be equally consistent with the text and equally efficacious in securing the GPG. In domestic legal orders the legislatures and executives address such issues; in democracies these bodies will be responsive to a broad range of the affected citizens. Disagreements about distributions of benefits and burdens are settled by democratic majority rule constrained by constitutional protections. But when an IC makes a judgment in such cases, the benefits or burdens can be distributed in different ways not specified by treaty because the states could not agree on this distributive conflict. Critical states would seem to have a good point: the authority of the IC is at stake, since it claims that its interpretation should count as a reason for that state to defer, excluding or displacing its reasons to act otherwise.[93]

A justification of this exercise of authority by the IC would presumably refer to the need for a well-qualified and suitably placed umpire in such settings, whose inevitably somewhat arbitrary choice of one among several acceptable options is decisive for the relevant states. One point in favour of authorizing ICs in this way is that they have some independence from states. They may therefore be aware of negative externalities for third parties, and may interpret treaties and allocate benefits and burdens in light of considerations of fairness and equity.

But such claims on behalf of an IC are overdrawn. Several premises concerning judges' professional backgrounds and features of how ICs function attest to this.

International judges are not necessarily experts on international relations or on public policy. They may therefore easily misjudge the consequences of their interpretations, compared to experts or democratically accountable bodies better positioned to predict the impact on various affected parties of the interpretive alternatives which 'balance' the conflicting values

[92] Vaughan Lowe, 'The Role of Equity in International Law' (1992) 12 Australian Yearbook of International Law 54; Robert Howse, 'The Concept of Odious Debt in Public International Law' (2007) United Nations Conference on Trade and Development, Discussion Paper UNCTAD/OSG/DP/2007/4.
[93] Bodansky (n 5) 652.

and objectives. To be sure, they do receive such information from the parties to the disputes brought before them, and some ICs permit amicus briefs that can identify further implications. Yet even these measures can perpetuate biased or partial information.

ICs are reactive, responding to cases brought before them. On one hand, the independent IC can address a single dispute about how to share benefits and burdens, and thereby set rules and settle expectations for many actors in ways that promote the GPG.[94] This renders them liable to develop international law in directions strategically important to those parties who have the will and resources to bring cases. For our purposes this may have implications for which GPGs the IC identifies, and how it specifies them.[95] A further risk is that any sector IC will favour concerns and GPGs within its domain—be it trade, investment, or human rights—in its attempt to 'balance' these against such GPGs as environmental concerns.[96]

We might hope that ICs would reduce their unintended bias and learn about the broader implications of their interpretations by admitting amicus briefs from third parties. Some ICs do accept amicus briefs. The WTO AB's decision to do so has provoked explicit protests from state parties, no doubt because they see that such briefs may influence the judgments, for better or worse.[97] To be sure, some parties may seek to intervene 'in the public interest' in pursuit of GPGs, and amici might identify and argue for GPGs.[98] But certainly there is a risk that those who engage and seek to influence an interpretation pursue their own other interests rather than GPGs, and seek certain specifications of a GPG rather than others. Amicus briefs do increase ICs' responsiveness, but may exacerbate bias.

6. Beyond both the standard theory and ICs: The Paris Compliance Committee as a case

Honing in on the main point of this contribution requires considering the limitations of both the standard public goods theory and ICs. My reflections have sought to show how the limited scope conditions of the standard public goods theory has led to undue focus on free riders, and too much despair on behalf of international law and ICs who lack sanctioning power. This myopia and pessimism are not shared by recent literature. A main implication developed above is that ICs may still be legitimate due to a range of other functions they can carry out to alleviate collective action problems in pursuit of GPGs. In particular, they may provide valuable information and assurance among states.

These claims on behalf of ICs should not be overstated, however. They are legitimate only if their tasks require such adjudicatory authority, as they claim. To situate the more modest upshot of these reflections, I return to one issue they seem less suitable for: some of the challenges in combatting climate change.

ICs are not well-suited to settling 'battle of the sexes' problems among states who want to cooperate yet disagree about preferred solutions, that is, the burdens of climate policies. If states have not been able to agree to such specifics in a treaty, an IC is hard put to authoritatively and arbitrarily impose one solution on many in the form of an interpretation and judgment.

In such circumstances, bodies other than ICs may serve important tasks in bringing states toward sufficient agreement in the direction of GPGs without the need to claim adjudicatory authority to override states' preferences. The body's task may rather be to make noncompliance an option states avoid, rather than a choice for which they shall be punished.[99]

---

[94] ibid 660.
[95] Nollkaemper (n 7) 781.
[96] ibid 781; Behn, Fauchald and Langford (n 57).
[97] CL Lim, 'The Amicus Brief Issue at the WTO' (2005) 4(1) Chinese Journal of International Law 85.
[98] Nollkaemper (n 7) 778.
[99] And cf. Kal Raustiala and David G Victor, 'Conclusions' in David G Victor, Kal Raustiala and Eugene B Skolnikof (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory of Practice* (The MIT Press 1998).

This illustrates the importance of preference formation, as explored by constructivist and other scholarship.[100] These bodies may help avoid non-compliance by reducing uncertainty about other parties' preferences, by creating a reputational risk, and by increasing trust and information among them to help determine whether they are indeed moving toward a battle of the sexes situation, so that some solutions may become sufficiently salient.[101] ICs may certainly assist in such monitoring, shaming, and fact-finding,[102] but other agents of management and coordination[103] need to claim less authority and are less judicialized 'systems of implementation review'.[104] Thus, importantly, there may be several GPGs for which yet another IC is not part of the solution, at least not for several of the challenges.

One recent example is the 'Compliance and Implementation Mechanism'[105] ('Compliance Committee') of the Paris Agreement.[106] A paramount challenge of the Paris Agreement is to secure enough participation by enough states to form a club with sufficient levels of commitment to avoid catastrophic climate change. Their coordination can help reach a tipping point that entices more states to join.[107] The complex condition for when the Agreement enters into force is part of the solution. To reduce every state's risk that they would take on burdens to no avail, the agreement will only enter into force after

> … at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.[108]

Note that this clause appears to address conditional cooperators. It does not *prevent* free riders who would not sign the Agreement anyway. They are surely also a problem, but not the only

---

[100] Brunnée and Toope (n 77) and references therein, and Moravcsik (n 77).

[101] Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) Journal of Legal Analysis 171; Gu Zihua, Christina Voigt and Jacob Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement: Conceptual Challenges and Pragmatic Choices' (2019) 9 Climate Law 65; Christina Voigt and Gao Xiang, 'Accountability in the Paris Agreement: The Interplay Between Transparency and Compliance' (2020) 1 Nordic Environmental Law Journal 31.

[102] Helfer (n 31).

[103] Abram Chayes and Antonia H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1998).

[104] Victor, Raustiala and Skolnikof (n 32).

[105] Paris Agreement (adopted 12 December 2016, entered into force 4 November 2016) UN Registration No I-54113, art 15.2; cf Voigt (n 30).

[106] Other bodies with somewhat similar 'weak' powers and less legal authority than ICs, with important differences among them, are various UN human rights treaty bodies, and ASEAN instruments. cf Basak Cali, 'The Legitimacy of Human Rights Treaty Bodies: An Indirect-Instrumentalist Defense' in Andreas Follesdal, Johan K Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (2013); Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012); Gillian HL Goh, 'The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management' (2003) 3(1) Stanford Journal of East Asian Affairs 113; Robert Beckman and others, *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (CUP 2016); Geir Ulfstein, 'International Courts and Tribunals and the Rule of Law in Asia' in Takao Suami and others (eds), *Global Constitutionalism from European and East Asian Perspectives* (CUP 2018); Simon Chesterman, Hisashi Owada and Ben Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (OUP 2019).

[107] The argument is reminiscent of the success of the Montreal Protocol to protect the ozone layer. This was apparently in part due to the Protocol's securing enough signatories to create such a tipping point. A central clause banned the parties from trading in chlorofluorocarbons with non-parties. While some question the likelihood of such successful linkages in other sectors, there are proposals to make trade cooperation conditional on supplying the global public good of reducing greenhouse gas emissions. cf The Montreal Protocol on Substances that Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 3; Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty Making* (OUP 2005); Bodansky (n 5) 660.

[108] Paris Agreement (n 106) art 21.1.

one, and not one that the Compliance Committee is tasked with resolving. The Committee is instead supposed to 'facilitate implementation of and promote compliance with' the agreement. It consists of experts, and has quite different tools and tasks than an IC: it is 'facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive'. It will thus not be a dispute settlement mechanism.[109] Its publicly stated role focuses not on the unwilling states, but on the club of willing yet possibly unable.[110]

The way forward that these states have agreed to contains a striking extent of *differentiation* among the various state parties' obligations, 'among de facto unequal states'.[111] The states have accepted that the agreement should be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of diverse national circumstances.[112] In addition to 'equity', a term which itself is open to several interpretations,[113] possible parameters include 'past, current, and projected future emissions, but also financial and technical capabilities, human capacity, population size and other demographic criteria, abatement costs, opportunity costs, and so on.'[114] A further differentiation concerns development over time: states commit to progressively more ambitious efforts as time passes.[115]

The agreeing states clearly realized that several conflicting objectives and values must be balanced. This was so contentious that they could not agree on some ordering of these parameters among themselves. It was never discussed whether to entrust a separate body such as the Committee with such a quasi-legislative task, regardless of how independent, impartial, and expert it would be. Instead, it is for each state to declare its own milestones in its 'nationally determined contributions' (NDCs), updating and increasing them every 5 years, with transparent reporting leading to a global stocktaking to determine whether the achievements suffice to reach the GPG.[116] These obligations might not be expected to make any difference. Requiring states to do hardly anything different than they would in the absence of an agreement, they are 'shallow' obligations,[117] and mainly procedural rather than substantive. But the fact that states must make their NDCs publicly available in an online registry every 5 years, expressing the state's highest possible ambition and progression,[118] amounts to a public justification by the state of how the NDC reflects 'its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'.[119]

What tasks might the Compliance Committee perform? It may facilitate domestic implementation of efforts and legal compliance, and promote learning and best practices among the states.[120] Actual performance, such as emission cuts, is not directly reviewed by the Committee. But its contributions may facilitate other actors, such as opposition parties and civil society actors, to engage with governments in promoting actual performance on the ground.

---

[109] cf Decision 20/CMA.1 in UN, 'Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of its First Session, held in Katowice from 2 to 15 December 2018' (19 March 2019) FCCC/PA/CMA/2018/3/Add.2, 59 <https://unfccc.int/sites/default/files/resource/cma2018_3_add2_new_advance.pdf> accessed 15 January 2021.
[110] cf Victor (n 79).
[111] Christina Voigt and Felipe Ferreira, 'Differentiation in the Paris Agreement' (2016) 6 Climate law 58, 59.
[112] Paris Agreement (n 106) art 2.2.
[113] Young (n 91); cf Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Brill | Nijhoff 2009).
[114] Voigt (n 30) 66.
[115] Paris Agreement (n 106) art 3.
[116] ibid arts 4.9, 7, 13, 14.
[117] George W Downs, David M Rocke and Peter N Barsoom, 'Is the Good News about Compliance Good News about Cooperation?' (1996) 50(3) International Organization 379
[118] Paris Agreement (n 106) art 4.3.
[119] ibid.
[120] ibid art 15; See Decision 20/CMA.1 (n 110).

Although only coming from some states, these actual effects are especially important for the sort of collective action problems posed by climate change, where full compliance by all is neither plausible in the short term nor required: what is needed is sufficient modification by a sufficient number of states. If those willing states engage 'deeper', at greater cost to themselves, this may be more effective than seeking full compliance with less 'costly' obligations. Again, the focus on full compliance and free riders may be misleading for many GPGs.[121]

Public justifications by each state that interpret and 'balance' the various parameters may also bring several benefits. They may bolster domestic and international pressure to reduce states' temptation to free ride or reduce stated ambitions by appealing to implausible national circumstances or balancing of considerations. They may (or may not) reduce such hypocrisy,[122] at least in states that allow freedom of speech and critical organizations. Indeed, states may transpose the international parameters into legally binding domestic provisions, which voters and other stakeholders can use to leverage more demanding NDCs in the next round. Some publicity may also nudge states to use their discretion in setting NDCs only in accordance with parameters they can expect other stakeholders to agree to.[123]

In due course states may have to give evidence of a public 'proportionality test', holding their NDCs up to more specified and 'balanced' parameters. Public justifications may also foster understanding of the dilemmas faced by other states and the tradeoffs they are making. They may increase mutual trust[124] and 'foster each state's own assessment of the fairness and equity of other states' contributions to addressing the problem.'[125] Crucially, the justifications also reinforce an assumption that the state parties are indeed willing, although sometimes unable, to cooperate more than they do.

Public reasoning may even lead to adjustments and even to some harmonization among the various domestic 'balancings' of parameters in order to achieve the aggregate improvements required. Such changes by states in light of what others do not require the Compliance Committee to play an active role, and certainly not any *adversarial* function, regarding disputes concerning compliance.[126] To the contrary, at this stage, among actors not portrayed primarily as potential free riders, an adversarial independent body would be unnecessary and unhelpful if not destructive—and contrary to its mandate in Article 15.2.

Indeed, neither the Committee nor an IC would be equipped to perform these tasks, to test whether the balancing does indeed reach 'maximum achievable objectives', or determine issues of 'generalizability', that is, whether the same 'balancing' of various standards, applied by all states, would reach satisfactory objective.

For the purposes of appreciating the possible contributions to a GPG by a body that does not even have the authority to adjudicate, several comments are in order. Firstly, these optimistic expectations of how the Committee may foster harmonized 'differentiation' under the Paris agreement are of course not predictions. To unlock the Committee's potential requires several crucial scope conditions. The Committee and other parties must provide credible assurance that most parties believe most others to be conditional cooperators rather than free riders. Even though the Committee does not assess whether the DNCs are as ambitious as possible, the information it helps provide may reassure other states that another state's lack of ambition or implementation is due to inability rather than unwillingness. The Committee's public statements and procedures may bolster such reassurance. To foster such preferences

[121] Raustiala and Victor (n 100) 688.
[122] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke Law Journal 364; Jon Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (2000) 2(2) Journal of Constitutional Law 345.
[123] Voigt and Ferreira (n 112) 74.
[124] Paris Agreement (n 106) art 13.
[125] Voigt and Ferreira (n 112) 60.
[126] For possible adjudicatory tasks regarding noncompliance cf Voigt (n 30) 168.

among states, and correct beliefs about them, international and domestic civil society, rule of law, opposition parties, and free media may be crucial.[127] These 'compliance constituencies' play important roles by expressing, ensuring, and exploiting states' international commitments regarding human rights.[128] Yet domestic governments, social media, and other actors may hinder rather than help such critical voices.

A second, related observation is that optimism may also be premature concerning the beneficial impact of states' public reason-giving on the dynamic, progressive mutual acceptance and adaptation of ever more demanding DNCs. Deliberation may certainly shift preferences, sometimes in normatively preferable ways, but not always.[129] Still, the Committee holds parties accountable to whatever they have actually agreed to, and may nudge them toward more ambitious NDCs in the future.

These hesitations do not detract from the role of the Committee as an example of how bodies that cannot sanction free riders may still contribute in crucial ways—beyond the limits of the standard public goods theory—to solving collective action problems pertaining to GPGs.

Thirdly, even though the Committee and the ratchetting up of self-imposed NDCs by willing states may contribute to controlling climate change, several states may have mixed motives, and several clearly engage in a battle of the sexes. Assurance games are often unstable.[130] And many states, even parties to the Agreement, may seek to free ride.

The political challenges to averting climate change may be very large when faced with even just a few non-compliers, especially if they are heavy polluters, and able but unwilling.[131] But this sketch should indicate that several *other* challenges appear at least as urgent for the GPG of preventing catastrophic climate change. These challenges are beyond several of the scope conditions bracketed by the public goods theory of authority, and they underscore the fact that while ICs are sometimes necessary and legitimate, they may not always be needed. Neither the authority to discipline free riders nor the authority to adjudicate may be required to foster constructive preference formation, to facilitate a responsible domestic balancing of values and preferences, and to determine whether conflicts concerning the distribution of benefits among the parties are indeed cases of battles of the sexes.

7. Conclusion

One important source of legitimation for international law and international courts is that they enable states to secure certain 'global public goods'. International law *may* help, and optimists might draw the unwarranted conclusion that it therefore *will* help if sufficiently transformed:

> The power of international law comes from our belief in it and the purposes it serves: the promotion of peace, human rights, prosperity and the natural environment.[132]

On the other hand, several critics lament the lack of sanctioning power as an Achilles' heel of international law and ICs. Their premise and conclusions are likewise ill-founded. In response, the present reflections have sought to show that the choice of the concept of 'public good' may

---

[127] Voigt and Ferreira (n 112) 72-73.

[128] Simmons (n 64); Xinyuan Dai, *International Institutions and National Policies* (CUP 2007).

[129] Jon Elster (ed), *Deliberative Democracy* (CUP 1998); Andreas Follesdal, 'The Value Added by Theories of Deliberative Democracy: Where (Not) to Look' in Samantha Besson and José Luis Martí (eds), *Deliberative Democracy and Its Discontents* (Ashgate 2005) <http://follesdal.net/ms/Follesdal-2006-delib-dem.rtf> accessed 15 January 2020 ; Jane J Mansbridge, 'Conflict and Self-Interest in Deliberation' in Samantha Besson and Jose Luis Marti (eds), *Deliberative Democracy and Its Discontents* (Ashgate 2005).

[130] Petersen (n 55).

[131] Bodansky (n 5) 662.

[132] Mary Ellen O'Connell, 'Binding on All States All of the Time' (*Opinio Juris*, 20 November 2008) <http://opiniojuris.org/2008/11/20/binding-on-all-states-all-of-the-time/> accessed 15 January 2021.

have had unfortunate framing effects. Economists' 'standard' public goods theory of authority is theoretically and practically incomplete: its scope conditions exclude vast expanses of game-theoretic modelling - and brackets important tasks for legitimate authorities, including ICs.

The risk of uncontrollable free riders has received too much attention from scholars and politicians. This may have occurred to the detriment of several other challenges to secure mutually beneficial outcomes among states with partially concurring and partly conflicting interests. The standard theory is not mistaken, but it misguides our attention. Fortunately, recent literature has brought broader game-theoretic perspectives back into international law, to help us understand and address the many collective action problems for different GPGs.

This discussion has sought to show some of the functions ICs may serve even when they lack enforcement power over free riders. There are many further tasks in the pursuit of truly global public goods for which ICs would be illegitimate. Beyond the scope of the standard public goods theory, ICs may contribute to determining who gets to define and specify global public goods, how states develop and change their preferences and accommodate the needs of their inhabitants, and how the international legal order can reduce the domination of powerful states over others. This is not to say that ICs are a universal solution to all ills in the pursuit of global public goods, but that legitimate ICs may perform a broad range of tasks in enabling states to act better in that pursuit.