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INTRODUCTION

For decades, international legal scholarship has been mired in an ontological debate regarding its own existence and relevance.[1] This self-doubt can be traced to the intellectual movement which developed following World War II that challenged the relevance of international law.[2] Scholars such as George Kennan and Hans Morgenthau strongly criticized the perception that international law could

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1. *See, e.g.*, Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. INT'L L. J. 149 (1993); Mark W. Janis, *International Law?* 32 HARV. INT'L L. J. 363 (1991); Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 833-34 (1990) (book review); FRANCIS BOYLE, WORLD POLITICS AND INTERNATIONAL LAW 3-16 (1985); Anthony D'Amato, *Is International Law Really Law?* 79 N.W. U. L. REV. 1293 (1984); Ian Brownlie, *The Reality and Efficacy of International Law*, 52 BRIT. Y.B. INT'L L. 1 (1981); LOUIS HENKIN, HOW NATIONS BEHAVE 12-27 (2nd ed. 1979); Richard Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964); J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 49-56 (Humphrey Waldock ed. 6th ed. 1963); Roger Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961); H.L.A. HART, THE CONCEPT OF LAW 208-31 (1961); Glanville Williams, *International Law and the Controversy Concerning the Word "Law"*, 22 BRIT. Y.B. INT'L L. 146 (1945).

2. ARNOLD WOLFERS, DISCORD AND COLLABORATION (1962); ROBERT STAUSZ-HUPE, POWER AND COMMUNITY (1956); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 133, 201 (1954); Reinhold Niebuhr, *The Illusion of World Government*, 5 BULL. ATOM. SCI. 290 (Oct. 1949). More recent criticisms of the relevance of international law have also been made. *See, e.g.*, Charles Krauthammer, *The U.N. Obsession*, TIME, May 9, 1994, at 86; Robert Bork, *The Limits of 'International Law,'* NATIONAL INTEREST 3 (Winter 1989/90); Charles Krauthammer, *The Curse of Legalism*, NEW REPUBLIC, Nov. 6, 1989, at 44; Irving Kristol, *International Law and International Lies*, WALL ST. J., June 21, 1985, at 26.

effectively regulate international behavior.[3] This intellectual movement, which attacked the efficacy of such international institutions as the United Nations, influenced a generation of legal scholars to question the relevance of international law.[4]

In response, international legal scholarship sought to infuse its work with a new sense of purpose. From the policy science approach of Myres McDougal and Harold Lasswell to the legal process work of Abram Chayes and Louis Henkin, these new efforts emphasized the practical implications of international law.[5] For example, the McDougal-Lasswell approach viewed international law as a political process.[6] From their perspective, "law emanates from the unending clashes or

3. GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900-1951 (1951) (condemning the legalistic-moralistic approach to international problems). This approach is based on the belief that "it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints." *Id.* at 95. According to Kennan, the "legalistic approach to international affairs ignores in general the international significance of political problems and the deeper sources of international instability." *Id.* at 99. *See also* HANS MORGENTHAU, POLITICS AMONG NATIONS 312 (6th ed. 1985) (criticizing international law, arguing "[t]hat there can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation.").

4. The term "relevance of international law" was used as the title of a book of essays honoring Leo Gross. *See* THE RELEVANCE OF INTERNATIONAL LAW 1 (Karl Wolfgang Deutsch & Stanley Hoffmann eds., 1971) (asserting the notion that international law is "relevant to the affairs of the world," and that it is not isolated from international politics). Additionally, the introduction states that "law rests upon political foundations, without which law could neither endure nor contribute anything to the improvement of society." *Id.* World politics, however, cannot exist without laws. Furthermore,

> Where law has been broken, it must be rebuilt; where it is missing, it must be developed. Where it exists it must be preserved with a measure of autonomy of its own, so as to serve as a guide and restraint for power, rather than as an excuse of it.

Id. at 1-2. Despite the tone of the title and the introduction, several essays actually raised significant questions about the ability of international law to effectively regulate state behavior.

5. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207-20 (1993) (reviewing post-World War II development of international legal scholarship) (author Anne-Marie Slaughter Burley will hereinafter be referred to as "Slaughter"); David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L. J. 1 (1988).

6. *See generally* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY (1981); TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL (W. Michael Reisman & Burns H. Weston eds., 1976); MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961); MYRES S. MCDOUGAL & ASSOC., STUDIES IN WORLD PUBLIC ORDER (1960); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953 I). *See also* Gray Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41 (1988).

confrontations between claims and counterclaims concerning the distribution of values which constitute a central feature of all social systems."[7] Their work emphasized the role of international lawyers as vehicles for the promotion of public order. In contrast, Chayes and Henkin viewed international law as a legal process.[8] Their work emphasized the functional applications and implications of international law.[9]

Recently, scholars have sought to develop an alternative approach to affirm the relevance of international law. Scholars such as Kenneth Abbott, Edwin Smith, John Setear, and Anne-Marie Slaughter have promoted an interdisciplinary approach to the study of international affairs.[10] Their scholarship is founded in theories of international relations, which seek to provide causal explanations of international phenomenon. Specifically, these theories seek to provide a systematic study of international affairs and to discover the principal variables that influence state behavior. For example, institutionalist theory posits that international institutions play an important role in promoting cooperation among states.[11] Institutionalist theory has been used to examine such diverse issues as the development of the European Union, economic sanctions during the Falkland Islands conflict, and the promotion of international environmental accords.[12]

The application of institutionalist theory by legal scholars seems quite natural. Thus, Kenneth Abbott, John Setear and Edwin Smith have applied elements of institutionalist theory to examine international trade law, arms control agreements and the law of treaties.[13]

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7. Oran Young, *International Law and Social Science: The Contributions of Myres McDougal*, 66 AM. J. INT'L L. 60, 61-62 (1972).

8. *See generally* ABRAM CHAYES, THE CUBAN MISSILE CRISIS (1974); HENKIN, *supra* note 1, *passim*. *See also* DANIEL G. PARTAN, THE INTERNATIONAL LAW PROCESS (1992); ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1968-1969).

9. CHAYES, *supra* note 8, at xii. ("How—and how far—do law, lawyers, and legal institutions operate to affect the course of international affairs?").

10. Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L. J. 139 (1996); Edwin M. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1549 (1991).

11. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 386 (1988) (defining institutions as "persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations").

12. *See, e.g.*, MILES KAHLER, INTERNATIONAL INSTITUTIONS AND THE POLITICAL ECONOMY OF INTEGRATION (1995); LISA MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992); INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter Haas et al., eds., 1993).

13. *See, e.g.*, Setear, *supra* note 10, *passim*; Kenneth Abbott, *"Trust But Verify": The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L. J. 1 (1993); Smith, *supra* note 10, *passim*; Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV.

This article seeks to contribute to this interdisciplinary research agenda. The works of Abbott, Setear and Smith are significant because they describe the benefits of incorporating institutionalist theory in international legal analysis.[14] In contrast to earlier efforts, however, this article provides a broader analysis of institutionalist theory. It does not focus on one element of institutionalist theory; rather, it examines each element of institutionalist theory, describing the diverse mechanisms through which institutions promote cooperation. This piece then examines international law from the perspective of institutionalist theory.

This article is divided into four sections. Section I provides the intellectual foundation of this article and argues why students of international law should develop a theoretical approach to the study of international cooperation. This article suggests that theories of international relations can provide a useful framework for the analysis of international legal issues. Section II examines a prominent theory of international relations—institutionalist theory. It first reviews the underlying assumptions of institutionalist theory and then describes the diverse mechanisms through which institutions promote cooperation. Section III applies institutionalist theory to examine the two principal sources of international law: treaty law and customary international law. It recognizes that both sources of international law contain mechanisms identified by institutionalist theory that promote cooperation. Both treaty law and customary international law influence state behavior by minimizing uncertainty, promoting efficiency and reducing rent-seeking behavior by egoistic states. Finally, Section IV examines the recently concluded Comprehensive Test Ban Treaty[15] from an institutionalist perspective.

In the spirit of interdisciplinary research, this article is beneficial to students of both international law and international relations. This work may be used by students of international law seeking to understand institutionalist theory and its application to international legal scholarship. Furthermore, this paper is useful for students of international relations seeking to understand international law and its application to the study of international relations.

INT'L L. J. 501 (1985). In contrast, the work of Anne-Marie Slaughter emphasizes an alternative theoretical approach to the study of international affairs—liberalism. Slaughter, *supra* note 5, at 226-38. *See also* Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717 (1995); ANDREW MORAVCSIK, LIBERALISM AND INTERNATIONAL RELATIONS THEORY (Center for International Affairs Working Paper, Harvard University, 1992).

14. In addition to these legal scholars, some political scientists have also recognized the benefits of interdisciplinary research. *See, e.g.*, Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121 (1996); Robert O. Keohane, *Compliance with International Commitments: Politics Within a Framework of Law*, 86 AM. SOC. INT'L L. PROC. 176 (1992); Oran Young, *Remarks*, 86 AM. SOC. INT'L L. PROC. 172 (1992); Christopher Joyner, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law*, 81 AM. SOC. INT'L L. PROC. 385 (1987).

15. Comprehensive Test Ban Treaty, Sept. 24, 1996, U.N. Doc. A/50/1027, Annex, 35 I.L.M. 1439, 1439 (1996) [hereinafter Treaty].

I. THINKING THEORETICALLY

Why should students of international law be interested in theories of international relations? Interdisciplinary research is by no means a simple task. It requires mastery of two complex disciplines, with all the attendant intellectual baggage and jargon that accompany these fields. If students are going to undertake the arduous journey of interdisciplinary research, they should be assured beforehand that the trip is worth taking.

A. THE NEED FOR THEORY

To answer this question, it is first necessary to understand the purpose of theory.[16] A theory seeks to provide causal explanations of observable phenomenon and to provide a basis for predicting future behavior.[17] In the absence of theory, the student can only describe observable phenomenon in an *ad hoc* manner. While interesting, these observations cannot provide a framework to guide subsequent analysis. If students seek to move beyond mere observation, to develop causal explanations, and to generate testable hypotheses, they must begin with theory. Indeed, theory provides the intellectual foundation for all scientific research.

The development of theory can be divided into four stages: metaphor, analogy, model and theory.[18] Each stage represents an increasing level of specification. The metaphor involves the least rigorous method of analysis.[19] The next stage of specification is the analogy.[20] The main difference between analogy and metaphor is that analogy requires a tighter specification of correspondences between properties and a closer evaluation of conclusions.[21] The third stage of specification is the model.[22] Here the major distinguishing characteristic is a formal logic that is

16 *See* JAMES N. ROSENAU, THE SCIENTIFIC STUDY OF FOREIGN POLICY 19-31 (1980) (discussing the benefits of thinking about theory).

17. JAMES DOUGHERTY & ROBERT PFALTZGRAFF, JR., CONTENDING THEORIES OF INTERNATIONAL RELATIONS, A COMPREHENSIVE STUDY 16-17 (3d. ed. 1990) (stating that a theory is "an intellectual tool that helps us to organize our knowledge, to ask significant questions, and to guide the formulation of priorities in research as well as the selection of methods to carry out research in a fruitful manner.").

18. Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25, 29-36 (1985). Similarly, Max Black once observed that "perhaps every science must start with metaphor and end with algebra; and perhaps without the metaphor there would never have been any algebra." MAX BLACK, MODELS AND METAPHORS 242 (1962).

19. Snidal, *supra* note 18, at 29 (asserting "[n]o formal deductive apparatus is involved: an implied comparison of two entities is used to infer further properties or conclusions from one to the other.").

20. *Id.* at 31.

21. *Id.*

22. *Id.* at 33.

both deductive and internal.[23] The final stage of specification is the theory.[24] Theory contains a deductive structure in addition to interpretation of both fundamental assumptions and theoretical constructs.[25] A good theory requires satisfaction of the following two requirements: (1) the theory must use a model, containing few arbitrary elements, to accurately describe a large class of observations; and (2) the theory must make concise predictions regarding the results of future observations.[26]

The use of theory in the pursuit of knowledge is most closely associated with the natural sciences. From Galileo to Copernicus, Newton to Einstein, the process of scientific inquiry has been guided by the intellectual rigor and logic of the theoretical approach.[27] It is through this process that we have come to better understand our world and its place in the universe. The rigor and logic of the theoretical approach are not limited to the natural sciences, however; they are also found in the social sciences.[28] For example, political science, economics, sociology and anthropology are each concerned with understanding particular events as well as generalizing about social phenomenon.[29] Thus, the use of theory and the scientific method are prominent in these disciplines. It is not surprising, therefore, that

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23. *Id.* at 32-34 (contrasting the inductive and external logic of analogy).

24. *Id.* at 34.

25. *Id.* (adding that "[t]his richer interpretive structure (as compared to the tighter correspondences in the model) provides for greater richness of explanation. Through it, the theory maintains a greater open-endedness and a surplus meaning which guides revision and extension of the model.").

26. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 9 (1988).

27. *See* THEORIES OF EXPLANATION (Joseph C. Pitt ed., 1988); STEPHEN TOULMIN, FORESIGHT AND UNDERSTANDING: AN INQUIRY INTO THE AIMS OF SCIENCE (1961); GUSTAV BERGMANN, PHILOSOPHY OF SCIENCE (1957); CARL HEMPEL, FUNDAMENTALS OF CONCEPT FORMATION IN EMPIRICAL SCIENCE (1952).

28. *See* KENNETH BORDENS & BRUCE ABBOTT, RESEARCH DESIGN AND METHODS: A PROCESS APPROACH 495-526 (2d ed. 1991); CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970); WESLEY GOULD & MICHAEL BARKUN, INTERNATIONAL LAW AND THE SOCIAL SCIENCES (1970); ALAN C. ISAAK, SCOPE AND METHODS OF POLITICAL SCIENCE: AN INTRODUCTION TO THE METHODOLOGY OF POLITICAL INQUIRY (1975); RICHARD S. RUDNER, THE PHILOSOPHY OF SOCIAL SCIENCE (1966). *But see* G.H. WRIGHT, EXPLANATION AND UNDERSTANDING (1971); PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY (1973). *See also* John Ferejohn, *Structure and Ideology: Change in Parliament in Early Stuart England*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE 207, 228 (Judith Goldstein & Robert O. Keohane eds., 1993) (explaining that the goal of social science theories is to provide causal explanations of events in the same manner that scientific theories provide explanations of physical or biological phenomena). The author further states that social science theories are intended to provide a reasoning for certain social actions. *Id.* These theories seek to answer not only the questions of cause but to provide reasons why people act the way they do. *Id.*

29. *See* J. Donald Moon, *The Logic of Political Inquiry: A Synthesis of Opposed Perspectives*, *in* HANDBOOK OF POLITICAL SCIENCE 131, 182 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

the use of theory is also prominent in the study of law.[30] Indeed, the use of theory is particularly relevant to those scholars seeking to understand the role of law in society.[31]

In sum, theories are necessary to understand, explain and predict social phenomenon. In their absence, all efforts at analysis are nothing more than random guessing.

B. THEORIES OF INTERNATIONAL RELATIONS

In many respects, the study of international relations is an ancient discipline. Efforts to explain international behavior can be found in the work of Thucydides and his account of the Peloponnesian War.[32] Indeed, Thucydides was perhaps the first scholar to specifically examine the causes of war and his conclusions remain equally valid today: "[t]he growth of the power of Athens, and the alarm which this inspired in Lacedaemon, made war inevitable."[33] Similar efforts to describe international behavior can be found in the work of Machiavelli, Hobbes, Rousseau and Kant.[34] Hobbes, for example, noted that in the absence of a common power, or Leviathan, men live in a constant state of war.[35] This description of domestic society was also applicable to international society, where sovereign nations "because of their Independency, are in continual jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another."[36] Kant also recognized the conflictual nature of international society.[37] Even if nations were not involved in active hostilities, there was always a constant threat of war. "Thus the state of peace must be formally instituted, for a suspension of hostilities is not in itself a guarantee of peace."[38] Kant's solution was to identify a series of normative and procedural rules to govern nations in their in-

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30. *See, e.g.*, Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992); David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005 (1989); John Veilleux, Note, *The Scientific Model in Law*, 75 GEO. L.J. 1967 (1987).

31. *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 6-7 (1979).

32. THUCYDIDES, THE PELOPONNESIAN WAR: THE CRAWLEY TRANSLATION REVISED (T.E. Wick ed., Modern Library 1982). *See also* Laurie Johnson Bagby, *The Use and Abuse of Thucydides in International Relations*, 48 INT. ORG. 131 (1994).

33. THUCYDIDES, *supra* note 32, at 14.

34. IMMANUEL KANT, KANT: POLITICAL WRITINGS (Hans Reiss ed., 2d ed. Cambridge University Press 1991); JEAN-JACQUES ROUSSEAU, THE BASIC POLITICAL WRITINGS (Doland Cress trans. & ed., 1987); THOMAS HOBBES, LEVIATHAN (C.B. Macpherson ed., Penguin 1968); NICCOLO MACHIAVELLI, THE PRINCE: A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS (Robert M. Adams ed., 2d ed. Norton 1992) (1513).

35. HOBBES, *supra* note 34, at 185-188. *See also* Michael Williams, *Hobbes and International Relations: A Reconsideration*, 50 INT. ORG. 213 (1996).

36. HOBBES, *supra* note 34, at 187.

37. KANT, *supra* note 34, at 98.

38. *Id.*

ternal affairs as well as in their relations with each other.[39]

As a formal science, however, the study of international relations is relatively new.[40] Indeed, it was not until 1939 that the English scholar E.H. Carr first referred to the science of international politics.[41] Carr viewed the study of international politics as a purposive enterprise, designed to investigate the causes of war and the conditions for peace. This new science would examine world politics, not as it should be, but as it actually was. As the study of international relations developed, so to did efforts to create a more rigorous science. These efforts emphasized the development of theoretical models to examine international affairs.[42] Despite the diversity of thought present in these theoretical approaches, each of these efforts share a common goal—to make the actions of states understandable and to provide a framework in which they can be intelligently described.[43]

At present, the study of international relations encompasses a wide variety of distinct theoretical approaches.[44] For example, there is now a strong emphasis on

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39. *Id.* at 93-108. *See also* Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); Michael A. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHILOS. & PUBL. AFF. 205 (1983).

40. *See* Raymond Aron, *What is a Theory of International Relations?* 21 J. INT. AFF. 190 (1967); Hedley Bull, *International Relations Theory: The Case for a Classical Approach*, 28 WORLD POL. 361 (1966); Morton Kaplan, *Is International Relations a Discipline?* 23 J. POL. 463 (1961); CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS 4-6 (Stanley Hoffmann ed., 1960); QUINCY WRIGHT, THE STUDY OF INTERNATIONAL RELATIONS 23-28 (1955).

41. EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS 1-2 (2d ed. 1964).

42. *Id. See* Jack Levy, *The Causes of War: A Review of Theories and Evidence*, *in* BEHAVIOR, SOCIETY & NUCLEAR WAR 209 (Philip Tetlock et al., eds., 1989) (providing different theoretical approaches to the study of international relations); Stanley Hoffmann, *An American Social Science: International Relations*, *in* STANLEY HOFFMANN, JANUS & MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 3 (1987); PAUL R. VIOTTI & MARK V. KAUPPI, INTERNATIONAL RELATIONS THEORY: REALISM, PLURALISM, GLOBALISM (1987); INTERNATIONAL POLITICS AND FOREIGN POLICY: A READER IN INTERNATIONAL THEORY (James N. Rosenau ed., 1969).

43. Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 503, 505-06 (Ada W. Finifter ed., 1983).

44. Despite these efforts, it is important to recognize the inherent limitations of the scientific method in the study of international behavior. According to Robert Keohane:

> Deterministic laws elude us, since we are studying the purposive behavior of relatively small numbers of actors engaged in strategic bargaining. In situations involving strategic bargaining, even formal theories, with highly restrictive assumptions, fail to specify which of many possible equilibrium outcomes will emerge. This suggests that no general theory of international politics may be feasible. It makes sense to seek to develop cumulative verifiable knowledge, but we must understand that we can aspire only to formulate conditional, context-specific generalizations rather than to discover universal laws, and that our understanding of world politics will always be incomplete.

Keohane, *supra* note 14, at 379-80. *See also* John Lewis Gaddis, *International Relations Theory and the End of the Cold War*, 17 INT'L SEC. 5, 25-29 (Winter 1992/93); John Freeman & Brian Job, *Scientific Forecasts in International Relations: Problems of Definition*

economic theory and other rationalistic approaches which view the state as an egoistic actor seeking to maximize its own interests.[45] The prominence of this movement has led to the regular use of game theory and the microeconomic theory of the firm in the analysis of international relations. The emphasis on rationalistic theories, however, has not diminished the importance of the reflectivist approach.[46] The reflectivist approach recognizes the relevance of ideas and learning in the analysis of international relations.[47] The study of international relations has also become more formalized in its efforts to promote careful empirical research. Indeed, recent scholarship has sought to emphasize the importance of designing rigorous scientific research.[48]

Students of law and international relations share much in common. Both disciplines examine order in international affairs and seek to design mechanisms that facilitate cooperation in an anarchic world. Therefore, "[i]f social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior."[49]

II. INSTITUTIONALIST THEORY

One of the most prominent theories of international relations is institutional-

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and Epistemology, 23 INT'L STUD. Q. 117 (1979); FORECASTING IN INTERNATIONAL RELATIONS: THEORY, METHODS, PROBLEMS, PROSPECTS (Nazli Choucri & Thomas Robinson eds., 1978); Ronald Rogowski, *Rationalist Theories of Politics: A Midterm Report*, 30 WORLD POL. 296 (1978); Gabriel Almond & Stephen Genco, *Clouds, Clocks, and 'the Study of Politics*, 29 WORLD POL. 489 (July 1977).

45. *See* JAMES MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1994); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 27-29, 65-84 (1984); WALTZ, *supra* note 31, at 89-93; ECONOMIC THEORIES OF INTERNATIONAL POLITICS (Bruce Russett ed., 1968); THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960).

46. Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (Spring 1992); Thomas Biersteker, *Critical Reflections on Post-Positivism in International Relations*, 33 INT'L STUD. Q. 263 (1989).

47. Keohane, *supra* note 11, at 389-93.

48. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994); Symposium, *The Qualitative-Quantitative Disputation*, 89 AM. POL. SCI. REV. 454 (1995); DOUGHERTY & PFALTZGRAFF, *supra* note 17, at 41.

> To sum up, the essential function of international theory is to enable us to improve our knowledge concerning international reality, whether for the sake of "pure understanding" or for the more active purpose of changing that reality. Theory helps us to order our existing knowledge and to discover new knowledge more efficiently. It provides a framework of thought in which we define research priorities and select the most appropriate available tools for the gathering and analysis of data. Theory directs our attention to significant similarities and differences, and suggests relationships not previously perceived. At its best, theory serves as a proof that the powers of the human mind have been applied to a problem at hand with prevision, imagination, and profundity, and this proof inspires others to further efforts for purposes either of agreeing or disagreeing.

Id.

49. Slaughter, *supra* note 5, at 205.

ism. While it recognizes the anarchic nature of the international system, it suggests that institutions can improve the likelihood of cooperation.

A. ANARCHY AND THE PROBLEM OF INTERNATIONAL COOPERATION

Most studies of international relations characterize the international system as anarchic in nature, in which there is no common government or formal governance structure among states.[50] Because no central authority acts to monitor state behavior or enforce obligations, states must protect their own interests.[51] As noted by Hans Morgenthau, "[i]t is an essential characteristic of international society, composed of sovereign states, which by definition are the supreme legal authorities within their respective territories, that no such central lawgiving and law-enforcing authority can exist there."[52] The consequences of anarchy are significant. At a minimum, states in anarchy are concerned about power and security.[53] In this environment, competition is endemic and states often fail to cooperate even in the face of common interests.[54]

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50. David Baldwin, *Neoliberalism, Neorealism, and World Politics*, *in* NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE 4 (David Baldwin ed., 1993). *See also* Helen Milner, *The Assumption of Anarchy in International Relations Theory*, 17 REV. INT'L STUD. 67 (1991).

51. In his classic work on governance, Machiavelli recognized that the prince is solely motivated by self-interest. "Thus a prudent prince cannot and should not keep his word when to do so would go against his interest, or when the reasons that made him pledge it no longer apply. Doubtless if all men were good, this rule would be bad; but since they are a sad lot, and keep no faith with you, you in your turn are under no obligation to keep it with them." MACHIAVELLI, *supra* note 34, at 48.

52. MORGENTHAU, *supra* note 3, at 296. According to Waltz:

> [The sovereignty of the state also means that] it decides for itself how it will cope with its internal and external problems, including whether or not to seek assistance from others and in doing so to limit its freedom by making commitments to them. States develop their own strategies, chart their own courses, make their own decisions about how to meet whatever needs they experience and whatever desires they develop.

WALTZ, *supra* note 31, at 96.

53. *See generally* Glenn Snyder, *The Security Dilemma in Alliance Politics*, 36 WORLD POL. 461 (1984) (discussing the dilemma resulting from lack of knowledge of others intentions in the securities realm); Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167 (1978).

54. In this environment, state interaction is often treated as zero-sum. That is, the gains of one state are viewed as the loss of another state. A related issue, and one that has received significant attention, concerns the importance of relative and absolute gains. *See generally* John Matthews, *Current Gains and Future Outcomes: When Cumulative Relative Gains Matter*, 21 INT'L ORG. 112 (Summer 1996); Joseph Grieco, *The Relative Gains Problem for International Cooperation*, 87 AM. POL. SCI. REV. 729 (1993); Duncan Snidal, *Relative Gains and the Pattern of International Cooperation*, 85 AM. POL. SCI. REV. 701 (1991); Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303 (1991); Michael Mastanduno, *Do Relative Gains Matter? America's Response to Japanese Industrial Policy*, 16 INT'L SEC. 73 (Summer 1991).

Several heuristic devices have been used to portray this view of the international system and its effect on state behavior. A common model used is analyzing the international system is the decentralized order of the market.[55] In the decentralized market, there is no formal authority or mechanism to regulate behavior. Firms act as rational, egoistic actors seeking to maximize their welfare. The structural conditions of the market, however, may contribute to inefficient behavior.[56] For example, an actor that cannot be excluded from obtaining the benefits of a public good once the good is produced has little incentive to contribute voluntarily to the production of that good.[57] These actors may seek to benefit from the production of the public good without contributing to its development or maintenance. Under these conditions, the public good may be weakened or extinguished. Alternatively, a public good may never be created if it requires cooperation by several actors. This phenomenon has been referred to as both the logic of collective action and the tragedy of the commons—rational, egoistic actors will seek to maximize individual utility, even at the cost of the common good.[58]

This dynamic also occurs among sovereign states in the international system where there is no formal authority or mechanism to regulate state behavior.[59] In

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55. *See generally* KEOHANE, *supra* note 45, at 27.

56. *See* PUBLIC GOODS AND MARKET FAILURES: A CRITICAL ANALYSIS (Tyler Cowen ed., 1992); Francis Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958).

57. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 6 (1990). A public good consists of two elements: jointness of supply and nonexcludability. Consumption by one user does not reduce the amount of public good available to other users. In addition, no one can be excluded from benefiting from the public good.

58. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965). The logic of collective action was identified by Mancur Olson. According to Olson, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*" In other words, even if all of the individuals in a large group are rational and self-interested, and would gain if, as a group, they acted to achieve their common interest or objective, they will still not voluntarily act to achieve that common or group interest. *See also* TODD SANDLER, COLLECTIVE ACTION (1992); MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION (1987).

The tragedy of the commons was identified by Garrett Hardin. As an example, Hardin described a pasture used by several herders to feed their cattle. Each herder has an interest in allowing his own cattle to use the pasture. However, if each herder allows their cattle to use the pasture without limits, the pasture will gradually deteriorate from overuse. "Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons." Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968).

59. *See, e.g.*, John Conybeare, *Public Goods, Prisoners' Dilemmas and the International Political Economy*, 28 INT'L STUD. Q. 5 (1984); Bruce Russett, *Collective Goods and International Organization*, 25 INT'L STUD. Q. 845 (1971).

this arena, states act as rational, egoistic actors seeking to maximize their welfare.[60] "Like firms in a market, rational self-interested states interact in an effort to improve their own welfare on political, military and economic issues, more or less impersonally, in a decentralized arena."[61] The structural conditions of the international system contribute to inefficient behavior. Thus, states may seek to benefit from the production of a public good without contributing to its development or maintenance. Under these conditions, the public good may be weakened or extinguished. Alternatively, a public good may never be created if it requires cooperation by two or more states. In the international system, public goods include increased national security, open trade and environmental regulation.[62]

The Prisoner's Dilemma provides an even more formal model of the international system and its effect on state behavior.[63] The Prisoner's Dilemma illustrates how competing interests between two egoistic actors can lead to sub-optimal behavior.[64] The Prisoner's Dilemma is typically modeled as a 2 x 2 matrix. Each player has two options: cooperate or defect. The respective payoffs received by the players will depend upon the opposing player's actions. The highest payoff for each player is gained if she defects and the opposing player cooperates. Similarly, the lowest payoff, referred to as the "sucker's payoff," is gained if she cooperates and the opposing player defects. The Prisoner's Dilemma contains four additional

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60. The rationality assumption suggests that states have ordered preferences and pursue those preferences accordingly. Rationality, however, is an ideal. Like individuals, states face uncertainty due to lack of information and limited processing capacities. *See generally* PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT 126-40 (1992); KEOHANE, *supra* note 45, at 65-84, 110-32; HERBERT SIMON, MODELS OF BOUNDED RATIONALITY (1982).

61. Abbott, *supra* note 10, at 375.

62. The Prisoner's Dilemma is one example of game theory, which seeks to provide formal models of social situations. Other games include Chicken, Stag Hunt and coordination games. *See, e.g., Developments in the Law—International Environmental Law*, 104 HARV. L. REV. 1484 (1991); Charles Kindleberger, *International Public Goods Without International Government*, 76 AM. ECON. REV. 1 (1986); Bruce Russett & John Sullivan, *Collective Goods and International Organization*, 25 INT'L ORG. 845 (1971); Mancur Olson & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. & STAT. 266 (1966).

63. The Prisoner's Dilemma is typically described in the following manner:

> Two criminals are arrested, but the district attorney does not have enough evidence to convict either of them for serious charges unless one or both confess to the crime. The district attorney separates the two and makes the following offer to each: "If you confess and your partner does not, I will grant you immunity, and you will walk out free. However, if your partner squeals, and you don't, I'm going to throw the book at you. If neither of you confesses, then I'll have to settle for misdemeanor charges, which will get you each a brief prison term. If you both confess, I'll get you both on felony charges, but I'll argue for shorter sentences than if you do not confess and your partner does. Think about it and tell me what you want to do.

MORROW, *supra* note 45, at 78. *See also* ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 28-29 (1989); ANATOL RAPOPORT & ALBERT CHAMMAH, PRISONER'S DILEMMA (1965).

64. *See* Abbott, *supra* note 10, at 354-75.

elements. First, there is no mechanism for making enforceable threats or commitments.[65] Second, there is no way to ascertain what the other player will do.[66] Third, there is no way to avoid interaction with the other player.[67] Fourth, the payoff structure cannot be altered.[68] The following table illustrates the Prisoner's Dilemma:

		Player 2	
		Cooperate	Defect
Player 1	Cooperate	3, 3	0, 5
	Defect	5, 0	1, 1

If the Prisoner's Dilemma is played for only one round, both players will defect.[69] This occurs for two reasons. Each player has an offensive reason to defect. The highest payoff that can be received requires a player to defect. In addition, each player has a defensive reason to defect. The lowest payoff that can be received occurs when a player cooperates and the other player defects. In this setting, there is no reason to cooperate because there is no likelihood of retaliation and there is no interest in developing a good, or bad, reputation.[70] Indeed, joint defection also occurs if the Prisoner's Dilemma is played for a finite number of rounds.[71]

At first glance, the Prisoner's Dilemma paints a grim portrait for the likelihood of cooperative action among egoistic actors. Further studies, however, have discovered some important exceptions. If the Prisoner's Dilemma is extended for an indefinite number of interactions, cooperation is more likely to emerge between the two players. Robert Axelrod discovered that a strategy of reciprocity (referred to as Tit-for-Tat) could promote cooperation in an iterated Prisoner's Dilemma.[72]

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65. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 11-12 (1984).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 8-9.

70. On the importance of reputation, see David Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (1982) (discussing the role of reputation in game theory).

71. AXELROD, *supra* note 65, at 10. According to Axelrod, "[t]he Prisoner's Dilemma is simply an abstract formulation of some very common and very interesting situations in which what is best for each person individually leads to mutual defection, whereas everyone would have been better off with mutual cooperation." *Id.* at 9; Reinhard Selten, *The Chain Store Paradox*, 9 THEORY AND DECISION 127 (1978); R. DUNCAN LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 94-102 (1957).

72. Robert Axelrod conducted a Computer Prisoner's Dilemma Tournament to determine the best strategy in an iterated Prisoner's Dilemma. Numerous entries of varying complexity were run against each other. The most successful strategy was Tit-for-Tat.

The Tit-for-Tat strategy requires an individual to cooperate in the first round of interaction and match an opponent's moves in subsequent rounds.[73] If an opponent cooperates, Tit-for-Tat strategy rewards the action by cooperating in the next round. If the opponent defects, however, Tit-for-Tat strategy punishes the defection in the next round. In the iterated Prisoner's Dilemma, therefore, the long-term benefits of cooperation outweigh the short-term benefits of defection.[74] According to Axelrod, "[a]s long as the interaction is not iterated, cooperation is very difficult. That is why an important way to promote cooperation is to arrange that the same two individuals will meet each other again, be able to recognize each other from the past, and to recall how the other has behaved until now. This continuing interaction is what makes it possible for cooperation based on reciprocity to be stable."[75]

This view of the international system, which acknowledges the existence of anarchy but also recognizes the potential for cooperation, provides the foundation to the theory of institutionalism.

B. THE THEORY OF INSTITUTIONALISM

The theory of institutionalism begins with two basic assumptions.[76] First, states are the principal actors in international affairs and function as rational, egoistic actors. Second, the international system is anarchic in nature. The fun-

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AXELROD, *supra* note 65, at 27-54. For an analysis of other player strategies in the Prisoner's Dilemma, see Morton Deutsch et al., *Strategies of Inducing Cooperation: An Experimental Study*, 11 J. CONFLICT RESOL. 345 (1967); V. Edwin Bixenstine et al., *Effects of Level of Cooperative Choice by the Other Player on Choices in a Prisoner's Dilemma Game Part I*, 66 J. ABNORMAL & SOC. PSYCHOL. 308 (1963); V. Edwin Bixenstine & Kellogg V. Wilson, *Effects of Level of Cooperative Choice by the Other Player on Choices in a Prisoner's Dilemma Game, Part II*, 67 J. ABNORMAL & SOC. PSYCHOL. 139 (1963).

73. AXELROD, *supra* note 65, at 136-39. A significant limitation to this strategy is that the game can configure forever. *Id.* at 138. This is known as the echo effect. Axelrod suggests that to resolve such problems, "[a] better strategy might be to return only nine-tenths of a tit for a tat. This would help dampen the echoing of conflict and still provide an incentive to the other player not to try any gratuitous defections." *Id.*

74. *See generally* Gary Bornstein et al., *The Effect of Repeated Play in the IPG and IPD Team Games*, 38 J. CONFLICT RES. 690 (1994); Eliot Sober, *Stable Cooperation in Iterated Prisoners' Dilemmas*, 8 ECON. & PHIL. 127 (1992); David Kreps, *Rational Cooperation in Finitely Repeated Prisoner's Dilemma*, 27 J. ECON. THEORY 245 (1982). *But see* Stuart Oskamp & David Perlman, *Factors Affecting Cooperation in a Prisoner's Dilemma Game*, 9 J. CONFLICT RESOL. 359 (1962).

75. AXELROD, *supra* note 65, at 125.

76. *See generally* Robert O. Keohane & Lisa Martin, *The Promise of Institutionalist Theory*, 20 INT'L SEC. 39 (1995); Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, *in* COOPERATION UNDER ANARCHY 226 (Kenneth Oye ed., 1986); Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POL. 1 (1984) (discussing strategic interaction and the prisoner's dilemma); Arthur Stein, *Coordination and Collaboration in an Anarchic World*, 36 INT'L ORG. 294 (1982).

damental element of institutionalist theory, however, concerns the significance of institutions. Specifically, institutionalist theory suggests that institutions can promote cooperation even in the absence of a common government or other formal governance structure.[77]

Institutions are broadly defined as "persistent and connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations."[78] They are not simple, *ad hoc* arrangements concerning discrete transactions. Rather, institutions involve long-term relationships between interested actors. Institutions vary across three dimensions: uniformity, specificity and autonomy.[79] Uniformity refers to the extent that expectations and norms of conduct are shared by participants. Specificity describes the degree to which these expectations and norms of conduct are clearly specified and unambiguous. Autonomy refers to the ability of the institution to act independently without reference or resort to an external agent. As the level of these dimensions increases, the institution becomes stronger and more cohesive.

The underlying nature of an institution resides in its core norms, which are the

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77. *See generally* ORAN YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 15-19 (1994); GOVERNANCE WITHOUT GOVERNMENT: ORDER & CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); ROBERT ELLIKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

78. Keohane, *supra* note 11, at 386. Oran Young defines institutions as "sets of rules of the game or codes of conduct that serve to define social practices, assign roles to the participants in these practices, and guide the interactions among occupants of these roles." YOUNG, *supra* note 77, at 3. Douglass North defines institutions as "a set of rules, compliance procedures, and moral and ethical behavioral norms designed to constrain the behavior of individuals in the interests of maximizing the wealth or utility of principals." DOUGLASS NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 201-2 (1981). Institutions are the intellectual successors of international regimes. Regimes were defined as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area. However, institutions and regimes are viewed as synonymous in this article. *See* Keohane, *supra* note 11, at 384; Stephen Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 2 (Stephen Krasner, ed., 1983). *See also* ORAN YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (1989); Stephan Haggard & Beth Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987). Because of its expansive nature, the concept of institutions is often subject to criticisms of being overbroad and somewhat vague. *See, e.g.*, ARTHUR STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 25-27 (1990); Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, 36 INT'L ORG. 479 (Spring 1982).

79. Robert O. Keohane, *Neoliberal Institutionalism: A Perspective on World Politics*, *in* ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER 4-5 (1989). For a related set of dimensions, see Elizabeth Kier & Jonathan Mercer, *Setting Precedents in Anarchy: Military Intervention and Weapons of Mass Destruction*, 20 INT'L SEC. 77, 87-96 (Spring 1996).

"standards of behavior defined in terms of rights and obligations."[80] In addition, formal or informal rules exist to regulate adherence to these norms. While not required, the norms and rules of institutions are often codified in international agreements and embodied in formal organizations.[81] Institutions include such diverse cooperative arrangements as the European Union (EU), the General Agreement on Tariffs and Trade (GATT), and the North Atlantic Treaty Organization (NATO).[82] They can also include less formal arrangements such as the arms control regime established by the United States and the Soviet Union and the convention on diplomatic immunity existing prior to the Vienna Convention on Diplomatic Relations.[83]

Institutionalist theory suggests that institutions can promote cooperation in the absence of a common government or other formal governance structure. They do so by providing "a stable environment for mutually beneficial decision-making as they guide and constrain behavior."[84] Specifically, institutions promote cooperation in several ways.

Promote Iteration

The Prisoner's Dilemma reveals how cooperation is unlikely to emerge if interaction is limited to a single round. In a discrete and short-term relationship, there is no incentive to cooperate if defection will lead to greater individual gains. Here, parties are typically indifferent to developing a reputation for cooperation. In addition, the fear of retaliation is absent because interaction only lasts one round.

Institutions establish the basis for long-term relationships, thereby replacing short-term calculations with long-term strategic analysis. By extending the relationship beyond a single round of interaction, the importance of reputation and the relevance of reciprocity are significantly increased.[85] In addition, by cluster-

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80. John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT'L SEC. 5, 8 (Winter 1994/1995).

81. Keohane, *supra* note 79, at 5; Mearsheimer, *supra* note 80, at 8-9.

82. *See* Keohane, *supra* note 11, at 384; Lipson, *supra* note 75, *passim*.

83. *See* Keohane, *supra* note 79, at 4.

84. Snidal, *supra* note 14, at 127.

85. For a discussion of how reputation and reciprocity increase the likelihood of cooperation, see generally Eliot Sober, *Stable Cooperation in Iterated Prisoners' Dilemmas*, 8 ECON. & PHIL. 127 (1992); Jack Hirshleifer & Juan Martinez-Coll, *What Strategies Can Support the Evolutionary Emergence of Cooperation?*, 32 J. CONFLICT RESOL. 367 (1988); Kenneth Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, 38 WORLD POL. 1, 12-18 (Oct. 1985); AXELROD, *supra* note 65, at 3-24, 169-91; David Kreps, *Rational Cooperation in the Finitely Repeated Prisoner's Dilemma*, 27 J. ECON. THEORY 245 (1982). Hans Morgenthau also recognized the importance of reciprocity in enforcing rules of international law:

> The great majority of the rules of international law are generally observed by all nations without actual compulsion, for it is generally in the interest of all nations concerned to honor their obligations under international law. A nation will hesitate to infringe upon the rights of foreign diplomats

ing issues together in the same forums over a long period of time, they help to bring governments into continuing interaction with one another, reducing incentives to cheat and enhancing the value of reputation. Finally, by establishing legitimate standards of behavior for states to follow, institutions create the basis for decentralized enforcement founded on the principle of reciprocity.[86]

Thus, institutions contribute to the evolution of cooperation by lengthening the shadow of the future, thereby increasing the importance of reputation and allowing the principle of reciprocity to influence state behavior.

Reduce Transaction Costs

It is generally recognized that transaction costs plague all contractual arrangements. Transaction costs are the costs of arranging, monitoring and enforcing an agreement. They have been defined as the "costs of running the economic system."[87] Transaction costs affect behavior on several levels. They make it expensive and time-consuming for firms to enter into agreements. As a result, contractual arrangements will often be incomplete because transaction costs make it extremely difficult for parties to develop exhaustive agreements that address all possible contingencies that may arise in the course of their relationship.[88] Trans-

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residing in its capital; for it has an interest, identical with the interests of all other nations, in the universal observance of the rules of international law which extend their protection to its own diplomatic representatives in foreign capitals as well as the foreign diplomats in its own capital. A nation will likewise be reluctant to disregard its obligations under a commercial treaty, since the benefits that it expects from the execution of the treaty by the other contracting parties are complementary to those anticipated by the latter. It may thus stand to lose more than it would gain by not fulfilling its part of the bargain. This is particularly so in the long run, since a nation that has the reputation of reneging on its commercial obligations will find it hard to conclude commercial treaties beneficial to itself.

Most rules of international law formulate in legal terms such identical or complementary interests. It is for this reason that they generally enforce themselves, as it were, and that there is generally no need for a specific enforcement action.

MORGENTHAU, *supra* note 3, at 312-13.

86. KEOHANE, *supra* note 45, at 244-45. Keohane defines reciprocity as "*exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad.*" Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 8 (Winter 1986). Keohane further distinguishes between specific and diffuse reciprocity. Specific reciprocity refers to situations in which specified partners exchange items of equivalent value in a strictly delimited sequence. In contrast, diffuse reciprocity refers to a situation where "the definition of equivalence is less precise, one's partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded." *Id.* at 4.

87. Numerous definitions exist for transaction costs. For example, they have been defined as "the costs of all resources required to transfer property rights from one economic agent to another. They include the costs of making an exchange (e.g., discovering exchange opportunities, negotiating exchange, monitoring, and enforcement), and the costs of maintaining and protecting the institutional structure (e.g., judiciary, police, armed forces). SVETOZAR PEJOVICH, ECONOMIC ANALYSIS OF INSTITUTIONS AND SYSTEMS 84 (1995).

88. Geoffrey Garrett, *International Cooperation and Institutional Choice: The Euro-*

action costs also make it expensive for firms to maintain such agreements. In sum, transaction costs provide a significant limitation to the development and maintenance of contractual arrangements.

Transaction costs affect all contractual arrangements, including the development and operation of international institutions.[89] Like firms engaged in private contractual relations, states also involve themselves in the negotiation and implementation of contractual agreements. These contractual arrangements are also subject to transaction costs. Transaction costs make it expensive and time-consuming for states to enter into agreements. Significant costs are associated with bringing the parties together, coming to terms and finalizing the agreement.[90] As a result, international agreements will often be incomplete because states cannot make exhaustive agreements that address all possible contingencies that may arise in the course of their relationship. Transaction costs also make it expensive for states to maintain agreements. Thus, transaction costs provide a significant obstacle to the development and maintenance of international agreements.[91]

Institutions reduce transaction costs in several ways.[92] First, they reduce the

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pean Community's Internal Market, 46 INT'L ORG. 533, 557 (Spring 1992). *See also* David Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (Aug. 1982); Paul Milgrom & Paul Roberts, *Bargaining Costs, Influence Costs and the Organization of Economic Activity*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 60 (James Alt & Kenneth Shepsle, eds., 1990); Ronald Dye, *Costly Contract Contingencies*, 26 INT'L ECON. REV. 233 (1985).

89. For examples of the application of transaction cost economics to international issues, see David Kang, *South Korean and Taiwanese Development and the New Institutional Economics*, 49 INT'L ORG. 555 (1995) (reviewing recent literature on South Korea and Taiwan's economy from a transaction cost approach); Beth Yarbrough & Robert Yarbrough, *International Contracting and Territorial Control: The Boundary Question*, 150 J. INST. & THEOR. ECON. 239 (1994); Hendrik Spruyt, *Institutional Selection in International Relations: State Anarchy as Order*, 48 INT'L ORG. 527 (1994) (discussing the reasons sovereign territorial states replaced other institutional possibilities); Mark Tilton, *Informal Market Governance in Japan's Basic Materials Industries*, 48 INT'L ORG. 663 (1994); Beth V. Yarbrough & Robert M. Yarbrough, *International Institutions and the New Economics of Organization*, 44 INT'L ORG. 235 (1990) (outlining and reviewing several relevant characteristics of the "new economics of organization"); KEOHANE, *supra* note 45, *passim* (discussing the existing cooperation between the advanced capitalist countries).

90. Multilateral negotiations often take many years to complete. For example, negotiations for the 1982 Law of the Sea Convention lasted eight years, while negotiations for the Uruguay Round Agreements took seven years.

91. Friedrich Kratochwil, *Contract and Regimes: Do Issue Specificity and Variations of Formality Matter?*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 73 (Volker Rittberger ed., 1995). Friedrich Kratochwil suggests a comparable approach to the study of regimes and transaction costs. He distinguishes among five forms of contracts: the spot contract, the spot contract with sequential performance, the simple incomplete contract, the complex long-term contract, and a contract imposing obligations on an existing relationship. He suggests that regimes come closest to long-term incomplete contracts. *Id.* at 76.

92. *See generally* KEOHANE, *supra* note 45, at 89-109 (discussing the cost benefits of

costs associated with the negotiation of agreements.[93] In the absence of institutions, states must identify and negotiate each agreement *de novo*.[94] In contrast, an institution provides a preexisting framework for negotiations.[95] Second, institutions reduce the costs of maintaining agreements once they have been reached by providing an organizational framework, an administrative staff and a forum for meetings.[96] Third, institutions minimize the consequences of incomplete agreements by sketching the broad "rules of the game and then delegat[ing] the authority to apply and adapt these rules to specific cases."[97] Alternatively, institutions can establish formal mechanisms that address new issues. For example, the legal system of the EU, which includes the European Court of Justice, the Court of First Instance and the courts of member states, interprets the guidelines set forth in EU legislation. Thus, it "provides a mechanism through which the types of general agreements about the rules of the game supplied by the [EU] treaties and internal market directives can be applied to the myriad interactions that constitute the [EU] economy."[98] Because of its role, many scholars view the EU legal system as an integral component of the EU and instrumental in promoting European integration.[99]

Establish Self-Reinforcing Behavior

Certain mechanisms can promote self-reinforcing behavior. For example, a focal point is a principle or rule around which the expectations and actions of actors can converge.[100] Focal points may exist or develop without conscious effort, or may be constructed from the actions of others.[101] "When one principle singles out a unique equilibrium and other principles do not give a clear-cut answer, the first

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institutions in negotiating agreements).

93. *See id.* at 90 (stating that organized institutions make it more convenient and cheaper than states to negotiate agreements).

94. *Id.*

95. *Id.* at 90-92.

96. *Id.* at 90.

97. *See* Garrett, *supra* note 88, at 557.

98. *Id.* at 558.

99. *See generally* Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993) (developing a theory to explain the impact of the Court in the EU); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991) (discussing the evolution of law in the European Community); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MARKET L. REV. 595 (1989) (discussing the rise of European Community law); Alex Easson, *Legal Approaches to European Integration: The Role of Court and Legislator in the Completion of the European Common Market*, 12 J. EUR. INTEGRATION 101 (1988).

100. *See* SCHELLING, THE STRATEGY OF CONFLICT, *supra* note 45, at 57-58. *See also* David M. Kreps, *Corporate Culture and Economic Theory*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 120-23 (James E. Alt & Kenneth A. Shepsle eds., 1990).

101. *See* Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, *in* Goldstein & Keohane, *supra* note 28, at 173, 176.

tends to be applied . . . ."[102] Path dependence reinforces the behavior of the identified principle or rule.[103] The concept of path dependence suggests that when "a development path is set on a particular course, the network externalities, the learning process of organizations, and the historically derived subjective modeling of the issues reinforce the course."[104] Several elements promote path dependence,[105] including: (1) large setup or fixed costs, which give the advantage of falling unit costs as output increases;[106] (2) learning effects, which improve products or lower their costs as their prevalence increases;[107] (3) coordination effects, which confer advantages to cooperation with other economic agents taking similar action;[108] and (4) adaptive expectations, where increased prevalence on the market enhances beliefs of further prevalence.[109] The phenomenon of sunk costs is another mechanism that promotes self-reinforcing behavior. Sunk costs are precommitted costs originally invested in a project and, therefore, cannot be retrieved.[110] "[I]f these sunk costs make a traditional pattern of action cheaper, and if new patterns are not enough more profitable to justify throwing away the resource, the sunk costs tend to preserve a pattern of action from one year to the next."[111]

Institutions can also promote self-reinforcing behavior in a variety of ways. For example, the norms and rules underlying an institution may serve as a focal point for state behavior.[112] "By embodying, selecting, and publicizing particular paths on which all actors are able to coordinate, institutions may provide a constructed focal point."[113] Institutions allow states to coordinate their actions along a chosen norm or rule, and serve as a guide for other states.[114] As states begin to behave in

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102. Kreps, *supra* note 100, at 121.

103. For a discussion of path dependence, see S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In and History*, 11 J. L. ECON. & ORG. 205 (1995) (illustrating three different forms of path dependence); INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY (W. Brian Arthur ed., 1994); Paul David, *CLIO and the Economics of QWERTY*, 75 AM. ECON. REV. 332-37 (1985).

104. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 99 (1990).

105. W. Brian Arthur, *Self-Reinforcing Mechanisms in Economics*, *in* THE ECONOMY AS AN EVOLVING COMPLEX SYSTEM (Philip Anderson et al. eds., 1988). *See generally* W. Brian Arthur, *Positive Feedbacks in the Economy*, SCI. AM. 92 (Feb. 1990) (discussing the theory of positive feedback).

106. Arthur, *supra* note 105, at 93.

107. *Id.*

108. *Id.*

109. Arthur, *supra* note 105, at 10; NORTH, *supra* note 104, at 94.

110. *See* WILLIAM J. BAUMOL, ECONOMICS: PRINCIPLES AND POLICY 145 (6th ed. 1994).

111. ARTHUR STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 121 (1968).

112. *See* Kreps, *supra* note 100, at 120-31 (providing a general discussion on appreciation of focal points in the corporate setting).

113. Garrett & Weingast, *supra* note 101, at 176.

114. *See* Wayne Sandholtz, *Institutions and Collective Action: The New Telecommunications in Western Europe*, 45 WORLD POL. 242 (1993) (stating that institutions may serve

a certain manner, path dependence reinforces this course of action.[115] Institutions "allow governments to take advantage of potential economies of scale. Once a regime has been established, the marginal cost of dealing with each additional issue will be lower than it would be without a regime."[116] As institutions develop, they become more efficient in their behavior and integrated with other institutions. As a result, institutions increase their influence. Finally, because the development of institutions is both time-consuming and resource intensive, states will be less inclined to violate an agreement and risk losing their underlying investment. Institutions, therefore, impose significant costs on states seeking to withdraw.[117]

Establish Property Rights

The existence of ambiguous property rights can significantly impede cooperation. "Property rights and other entitlements that are poorly defined and costly to determine can be an impediment to bargaining in any market setting."[118] In the short-term, ambiguous property rights may contribute to uncertainty, resulting in increased negotiating costs as states seek to determine their respective rights and obligations. If this uncertainty is not resolved, competition is more likely as states continue to argue over conflicting perceptions on property rights. This uncertainty indeed may lead to confrontations. Further, ambiguous property rights are inefficient, because they impede the proper allocation of resources.[119]

Institutions can play a prominent role in identifying and allocating property rights.[120] The creation of institutions requires states to discuss their respective rights and obligations at the outset. This process can lead to a better understanding of property rights. Moreover, this understanding is often codified in explicit

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as a source to promote technological and market changes).

115. *See* KEOHANE, *supra* note 45, at 92 (stating that institutions encourage agreements consistent with their principles in a particular issue-area while discouraging those agreements inconsistent with the institution).

116. *Id.* at 90.

117. Snidal, *supra* note 14, at 132. *See also* ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970) (analyzing several economic processes designed to resolve a range of social, political, and moral issues).

118. Abbott, *supra* note 10, at 397. *See also* Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 608 (1988) (discussing the development of laws intended to clarify ambiguous property laws); Clifford Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322-26 (1985) (arguing that exchange requires assignment of rights that are specific and narrow); Douglas Baird & Thomas Jackson, *Information, Uncertainty and the Transfer of Property*, 13 J. LEGAL STUD. 299, 312-18 (1984) (emphasizing the importance of an accurate filing system in ascertaining property rights); Thomas M. Carroll et al., *The Market as a Commons: An Unconventional View of Property Rights*, 13 J. ECON. ISSUES 605 (1979) (discussing the relationship between property rights and market activity).

119. Holderness, *supra* note 118, at 322-24.

120. *See* Abbott, *supra* note 10, at 396-98 (discussing the importance of well-defined property rights law); KEOHANE, *supra* note 45, at 88-89; John Conybeare, *International Organization and the Theory of Property Rights*, 34 INT'L ORG. 307 (1980).

language. Such formal codification will reduce uncertainty and promote stable expectations. In addition, institutions can establish mechanisms which clarify property rights in the event a dispute arises. For example, the EU legal system regularly adjudicates claims regarding the rights and obligations of member states.[121] While European legislation sets forth the responsibilities of member states, the EU legal system can adjudicate disputes involving these rights and obligations as well as address any new issues.[122] Thus, this system reduces ambiguities regarding property rights between member states.[123]

Promote Issue Linkage

Issue linkage can provide an important contribution to the development of cooperation.[124] It can increase the amount of bargaining that takes place by promoting trade-offs in one issue area with another.[125] While a state may be unwilling to cooperate on one issue, it may find a compelling reason to cooperate if another issue area is presented.[126] "Clustering of issues under a regime facilitates side-payments among these issues: more potential *quids* are available for the *quo*."[127] In addition, issue linkage can increase the consequences of a rule violation. A violation in one issue area may be punished in another issue area. Thus, "[i]t discourages cheating in much the same way as iteration: it raises the costs of

121. *See generally* GORDON SLYNN, INTRODUCING A EUROPEAN LEGAL ORDER (1992) (discussing the development of the law Community in Europe); L. NEVILLE BROWN & FRANCIS JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (1989); T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (1988) (discussing the basic principles of European Community law); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981) (discussing the case law of the ECJ).

122. *See* SLYNN, *supra* note 121, at 54-61.

123. *Id.*

124. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56-80 (2d ed. 1991) (discussing negotiating techniques); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 13, 285-87 (1982) (discussing the positive impact of linkages in the negotiation process).

125. KEOHANE, *supra* note 45, at 92.

126. The benefits of issue linkage have been recognized for many years. For example, Francois de Callieres noted in 1716:

> An ancient philosopher once said that friendship between men is nothing but a commerce in which each seeks his own interest. The same is true or even truer of the liaisons and treaties which bind one sovereign to another, for there is no durable treaty which is not founded on reciprocal advantage, and indeed a treaty which does not satisfy this condition is no treaty at all, and is apt to contain the seeds of its own dissolution. Thus, the great secret of negotiations is to bring out prominently the common advantage to both sides of any proposal, and so to link these advantages that they may appear equally balanced to both parties.

Francois De Callieres, ON THE MANNER OF NEGOTIATING WITH PRINCES 109-10 (AF White trans., Univ. of Notre Dame Press, 1963) (1716).

127. KEOHANE, *supra* note 45, at 91.

cheating and provides a way for the victim to retaliate against the cheater."[128]

Institutions provide an excellent environment for promoting issue linkage.[129] Indeed, "[w]ithout international regimes linking clusters of issues to one another, side-payments and linkages would be difficult to arrange in world politics; in the absence of a price system for the exchange of favors, institutional barriers would hinder the construction of mutually beneficial bargains."[130] For example, the recent Uruguay Round negotiations provide an example of the benefits of issue linkage. This trade round encompassed a variety of distinct issues.[131] Agreements were reached in such substantive areas as agriculture, textiles, clothing, investment matters, services and intellectual property. Agreements were also reached on procedural issues such as rules of origin, technical barriers to trade, subsidies and dispute settlement. The existence of multiple issues, both procedural and substantive, facilitated negotiations. The multiple issues encouraged states to compromise on some issues in order to gain on other issues.[132] Issue linkage is also important for deterring rule violations. "Linkages among particular issues within the context of [institutions] raise the costs of deception and irresponsibility, since the consequences of such behavior are likely to extend beyond the issue on which they are manifested."[133]

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128. Mearsheimer, *supra* note 80, at 18.

129. *See, e.g.*, YOUNG, *supra* note 77, at 24-26; Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793 (1992) (explaining the relationship between international and domestic structures in the international negotiation process); Axelrod & Keohane, *supra* note 76, at 239-41; James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281 (1983) (discussing the importance of issues and parties as variables in the negotiation process); Ernst B. Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 WORLD POL. 357 (1980) (examining the relationship of interdependence of institutions as well as the need for collaboration); Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425 1979) (emphasizing the importance of linkages).

130. KEOHANE, *supra* note 45, at 91.

131. *See generally* David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 7 (1995) (providing a comprehensive introduction to international law as interpreted and applied by the United States); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829 (1995) (analyzing three different models of the World Trade Organization and how international trade disputes should be resolved).

132. Similar issue linkage occurred during the Third United Nations Conference on the Law of the Sea. *See generally* Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871 (1985) (discussing issue linkage in the law of the sea negotiations); Tommy Koh, *A Constitution for the Oceans*, *in* UNITED NATIONS, THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX (1983).

133. KEOHANE, *supra* note 45, at 97.

Increase Access to Information

In international politics, uncertainty and lack of information are pervasive.[134] States can never be certain of the intentions of other states or the courses of action available to other states.[135] As a result, information is a scarce and valued commodity. Indeed, it is the lack of adequate information that helps fuel the Prisoner's Dilemma.[136] Without adequate information regarding the other player's abilities and intentions, a player's dominant strategy is to defect.[137] Increasing transparency and the distribution of information thus, serve several purposes.[138] It facilitates coordination among states[139] and reduces uncertainty regarding intentions and available courses of action.[140] In addition, such procedures make it difficult for states to conceal potential violations, while making it easier to identify violations.[141]

Institutions can increase the quality and flow of information between states and promote transparency. They can require states to provide information to other states.[142] They can also facilitate the process whereby states gain information on other states through their own verification procedures.[143] For example, the United States and the former Soviet Union recognized the importance of information for the success of their arms control agreements. Thus, they authorized the use of na-

134. *See generally* Abbott, *supra* note 13, *passim* (examining provisions in several international agreements that govern the production of information); Jonathan Bendor & Thomas Hammond, *Rethinking Allison's Models*, 86 AM. POL. SCI. REV. 301, 303 (1992) (detailing a model on decision making policy and amount of information received).

135. *See generally* KEOHANE, *supra* note 45, 92-93 (discussing the importance of information for actors in reaching agreements).

136. *See id.* at 93-96 (explicating three important sources underlying the Prisoners' Dilemma).

137. *Id.* at 93.

138. *See generally* ABRAM CHAYES & ANTONIA H. CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 22-24; 135-73 (1996).

139. *Cf.* KEOHANE, *supra* note 45, at 94 (stating that distribution of information may not be sufficient).

140. *See id.* (recommending certain measures to reduce the risks presented to members because of the uncertainty of predicting others' behavior).

141. *See generally* KEOHANE, *supra* note 45, at 92-96 (discussing the influence of institutions to diminishing the conflicts presented in the Prisoners' Dilemma). Reporting requirements can also influence international behavior by their impact on domestic actors. If a state's international practice is revealed, domestic actors may seek to influence that state's behavior. For a general discussion of the influence of domestic politics on international behavior, see generally DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter Evans et al. eds., 1993); Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988) (discussing the impact of domestic politics on international agreements).

142. Abbott, *supra* note 13, at 40-45.

143. *Id.* at 32-34, 36-40, 45-46. *See also* ARMS CONTROL VERIFICATION: THE TECHNOLOGIES THAT MAKE IT POSSIBLE (Kosta Tsipsis et al. eds., 1986); VERIFICATION AND ARMS CONTROL (William C. Potter ed., 1985).

tional technical means, notification procedures, the exchange of confidential data, and the use of on-site inspections to verify compliance with arms control agreements.[144] Alternatively, institutions can generate and disseminate information to states.[145] For example, the Commission of the European Union conducts extensive research on the economic, social and political status of member states and publishes this information on a regular basis.[146] Publications such as the *Official Journal of the European Communities*, the *Bulletin of the European Communities*, and the *General Report on the Activities of the European Communities* provide member states with information concerning significant developments involving the EU.[147] In addition, institutions can establish confidence building measures which can minimize the likelihood that actions will be misunderstood.[148] By increasing the distribution of information and promoting transparency, institutions reduce the uncertainty faced by states and improve the environment for cooperation.[149]

Monitor Behavior

The need for monitoring state behavior is closely related to the need for greater information. It is widely agreed that for cooperation to evolve, participants must know a great deal about the past behavior of other participants. "While this may be relatively simple in dyadic interactions, the existence of multiple actors greatly increases the probability that players will not know enough about the past behavior of others to make informed strategic choices."[150] If rule violations cannot be effectively identified, the incentives to transgress from such rules are significant. Like the Law Merchant of medieval Europe, there must be a mechanism that paints the scarlet letter of noncompliance on rule violators.[151] Thus, mechanisms that "monitor the behavior of parties to a cooperative agreement and identify their

144. Abbott, *supra* note 13, at 32-46.

145. *Id.* at 34-36. *See also* INTERNATIONAL VERIFICATION ORGANIZATIONS (Ellis Morris ed., 1991); JAMES KEELEY, INTERNATIONAL ATOMIC ENERGY AGENCY SAFEGUARDS: OBSERVATIONS ON LESSONS FOR VERIFYING A CHEMICAL WEAPONS CONVENTION (1988).

146. NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 98-121, 459 (3d ed. 1994).

147. *Id.* at 458-60.

148. Abbott, *supra* note 13, at 46-49. *See also* Barry M. Blechman, *Efforts to Reduce the Risk of Accidental or Inadvertent War*, *in* U.S.-SOVIET SECURITY COOPERATION 466 (Alexander L. George et al. eds., 1988) (discussing the efforts by the United States and the Soviet Union in pursuit of reducing the risk of war); CONFIDENCE BUILDING IN EAST-WEST RELATIONS (Karl Birnbaum ed., 1982).

149. KEOHANE, *supra* note 45, at 92-96; Young, *supra* note 77, at 75.

150. Garrett, *supra* note 88, at 557.

151. Paul Milgrom et al., *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 19 (1990). *See also* Avner Grief et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745 (1994) (concluding that merchant guilds expanded the trade market in the late medieval period).

transgressions are likely to be vital to the retaliatory and reputational processes that undergird the logic of the iterated prisoners' dilemma."[152] Indeed, it has been suggested that if parties are provided with adequate information regarding rule violations, there may be no need for formal sanctioning mechanisms to ensure cooperation.[153] Compliance can be gained through decentralized punishment by informed parties.

Institutions can monitor state behavior and identify potential violations of established obligations. "If institutions can provide this type of information, interactions between self-interested players may then lead to the evolution of cooperation in the manner that is conventionally envisaged (through 'tit for tat' and other trigger strategies)."[154] Monitoring can include reporting requirements, consultation procedures, surveillance techniques, decentralized verification procedures and centralized monitoring procedures.[155] The EU, for example, established various mechanisms to monitor state compliance with EU obligations. The Commission of the European Union is primarily responsible for ensuring that member-states meet EU obligations.[156] Indeed, it is referred to as the Guardian of the Treaties because it is authorized to collect information, investigate non-compliance of EU obligations and pursue litigation against violators if necessary.[157] In addition, the EU legal system creates an effective and broad-based monitoring system.[158] It authorizes member states, other EU actors such as the Commission, European Parliament and the Council of Ministers, and even private individuals, to bring legal actions to enforce EU laws and regulations.[159] Monitoring state behavior through these mechanisms reduces the incentives of member states to violate EU obligations.[160]

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152. Garrett, *supra* note 88, at 540-41.

153. Garrett & Weingast, *supra* note 101, at 179.

154. *Id.*

155. CHAYES & CHAYES, *supra* note 139, at 174-96. Abbott, *supra* note 10, at 367.

156. NUGENT, *supra* note 146, at 112-118. *See generally* RICHARD HAY, THE EUROPEAN COMMISSION & THE ADMINISTRATION OF THE COMMUNITY (1989) (explaining the administration of the European Community, particularly the role of the Commission). *See also* NUGENT, *supra* note 146, at 112-18 (explaining how the Council of Ministers reacts to a Commission proposal for Council legislation).

157. *See* Peter Ludlow, *The European Commission*, *in* THE NEW EUROPEAN COMMUNITY 85, 104 (Robert O. Keohane & Stanley Hoffmann eds., 1991).

158. NUGENT, *supra* note 146, at 166-192. *See also* HENRY G. SCHERMERS & DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES (5th ed. 1992) (providing an overview of the nature of judicial protection in the EU); Ulrich Everling, *The Member States of the European Community before their Court of Justice*, EUROPEAN L. REV. 215 (1984) (discussing the relationship between the Member States of the European Community and the International Court of Justice).

159. SCHERMERS & WAELBROECK, *supra* note 158.

160. *Cf.* E.A. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION—THIRTY YEARS OF ILO EXPERIENCE 1-2 (1966) (examining the supervisory system under the International Labour Organization). Landy noted that "[f]or the adoption of international legislation and its formal acceptance by a growing number of countries cannot, by themselves,

Mediate Disputes

Despite their best efforts, states will inevitably face disputes regarding agreements. These can arise from ambiguities in the original agreement or through changed or unforeseen circumstances. If these disputes remain unresolved, they can damage a relationship. Therefore, the ability to mediate disputes, both potential and ongoing, is essential for maintaining cooperation.[161]

Institutions can establish mechanisms to address issues before they become serious disputes. For example, the 1972 Anti-Ballistic Missile (ABM) Treaty between the United States and the former Soviet Union established the Standing Consultative Commission (SCC) to help mediate issues.[162] Its purpose was to provide a forum for consultation, where questions of fact and intentions could be clarified, with the goal of reconciling differences surrounding implementation of the agreements.[163] By most accounts, it has played an important role in maintaining an ongoing dialogue on the ABM Treaty between the two countries.[164] In addition, institutions can establish mechanisms to address ongoing disputes. For example, the importance of dispute settlement has long been recognized as an integral element of the GATT system.[165] In the Uruguay Round Agreements, the dispute settlement process was significantly strengthened. A Dispute Settlement Body was established to mediate disputes between member states.[166] It provides an extensive range of mechanisms for the settlement of disputes including con-

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add to the stability of inter-State relations, unless there also exists some degree of assurance that the contracting parties really comply with their treaty obligations. This concern that governments respect their pledged word thus emerges as a crucial problem of the contemporary world." *Id.*

161. CHAYES & CHAYES, *supra* note 138, at 201-25; Kreps, *supra* note 100, at 92-93.

162. Robert W. Buchheim & Philip J. Farley, *The U.S.-Soviet Standing Consultative Commission*, *in* U.S.-SOVIET SECURITY COOPERATION: ACHIEVEMENT, FAILURES, LESSONS 254 (Alexander L. George et al., eds. 1988).

163. *Id.* at 256.

164. *See, e.g.*, Sidney N. Graybeal & Patricia B. McFate, *Assessing Verification and Compliance*, *in* DEFENDING DETERRENCE 198 (Antonia H. Chayes & Paul Doty eds., 1989); Sidney N. Graybeal & Michael Krepon, *Making Better Use of the Standing Consultative Commission*, 10 INT'L SEC. 183 (Fall 1985) (discussing the unresolved problems in the area of compliance with existing peace instruments, warning that they are an impediment to the maintenance of existing agreements, and recommending how the Standing Consultative Commission can be better used to resolve such compliance problems).

165. *See generally* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE GATT LEGAL SYSTEM (1993) (presenting a history of the GATT legal system, concentrating on the development of GATT's procedure for adjudicating legal disputes between member countries); Kenneth Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111 (analyzing the highlights of the Uruguay Round multilateral trade negotiations in the area of dispute resolution).

166. *See* William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round*, 19 FORDHAM INT'L L.J. 427 (1995); Andreas Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477 (1994).

sultation procedures, good offices, conciliation, mediation and arbitration. The Dispute Settlement Body may also establish dispute settlement panels to adjudicate claims that remain unresolved. This new dispute settlement process is viewed as a cornerstone of the Uruguay Round Agreements.

Impose Sanctions

Finally, the importance of imposing sanctions on rule violations is evident. If violations are not punished, a state has few incentives for complying with rules. It could free-ride on the cooperation of other states and gain the advantages of cooperation without the attendant disadvantages of noncompliance. Under these conditions, cooperation is less likely to emerge because of the collective action problem. Thus, there must be some consequences attached to rule violations.

Institutions can provide formal and informal sanctions for rule violations. Formal sanctions are typically codified and provide explicit procedures for their imposition.[167] They can encompass political, economic or diplomatic action. For example, the Uruguay Round Agreements contain explicit procedures in the event of a member state's rule violation. The Dispute Settlement Body can issue binding rulings and authorize the suspension of concessions or other obligations to ensure the implementation of its rulings. In addition to formal sanctions, institutions can also provide the basis for informal sanctions. Informal sanctions are not codified and do not contain explicit procedures.[168] Rather, they function on the basis of reciprocity and reputation. While a state may gain a short-term advantage from a rule violation, it may suffer long-term disadvantages by having developed a reputation for rule violation. Other states will be less willing to enter agreements with such states. "The sanction for violating is not penal, but exclusion from the network of solidarity and cooperation."[169] Indeed, "[i]n a world of imperfect information, where others' current and future preferences cannot be known with certainty, reputation has value."[170] A final benefit of institutions is that they provide a collective response to rule violations. Institutions "can help overcome free rider problems by legitimizing and assigning responsibility for retaliation, and by providing for collective enforcement."[171]

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167. *See* CHAYES & CHAYES, *supra* note 138, at 34-87.

168. *See generally id.* at 88-108 (providing information regarding sanctions generally, as well as specific examples); ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984) (discussing in detail the specific types of peacetime unilateral remedies available as well as the legal framework within which they operate). For a discussion of non-legal sanctions in domestic affairs, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990); Stewart Macaulay, *Non-Contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963).

169. ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 183 (1993).

170. Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495, 509 (1991).

171. Abbott, *supra* note 10, at 367. *See also* Axelrod & Keohane, *supra* note 76, at 235-37 (explaining that international regimes have four possible configurations of interest).

The implications of institutionalist theory are significant. It suggests the need to understand the anarchic environment within which states interact. The structural conditions imposed by anarchy have a profound impact on state behavior. Institutionalist theory also suggests the importance of developing mechanisms that work within this anarchic environment to reduce state incentives to defect from agreements, thereby maximizing the likelihood of cooperation.[172]

The preceding analysis of institutionalist theory has identified how institutions can promote cooperation among states even under conditions of anarchy.[173] However, this analysis should not be taken to suggest that institutions provide a panacea for all international conflict.[174] There will inevitably be occasions where institutions cannot promote cooperation. In such cases of deadlock, at least one state may prefer conflict to cooperation. Examples of deadlock are readily evident in international affairs and can be found in a variety of settings including arms races and trade wars.[175] In these cases, it is necessary to change a state's underlying

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172. *See* W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175 (1995) (identifying eight institutional practices and arrangements that are important for protecting public order). These include:

> (1) human rights law, the law of state responsibility, and the developing law of liability without fault; (2) international criminal tribunals; (3) universalization of the jurisdiction of national courts for certain delicts; (4) refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful; (5) incentives in the form of foreign aid or other rewards; (6) commissions of inquiry or truth commissions; (7) compensation commissions; and (8) amnesties.

Id. at 177.

173. The impact of international institutions has been identified in several areas. *See, e.g.*, Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425 (1994); John S. Duffield, *International Regimes and Alliance Behavior: Explaining NATO Conventional Force Levels*, 46 INT'L ORG. 819 (1992); Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 478 (1990); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599 (1986); Robert Jervis, *Security Regimes*, 36 INT'L ORG. 357 (1982).

174. For criticisms of institutionalist theory, see Mearsheimer, *supra* note 80, *passim*; Charles L. Glaser, *Realists as Optimists: Cooperation as Self-Help*, 19 INT'L SEC. 50 (Winter 1994/95); Joseph M. Grieco, *Understanding the Problem of International Cooperation: The Limits of Neoliberal Institutionalism and the Future of Realist Theory*, *in* NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE 301 (David A. Baldwin ed., 1993); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism in* NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE 116 (David A. Baldwin ed., 1993).

175. *See, e.g.*, George M. Downs et al., *Arms Races and Cooperation*, 38 WORLD POL. 118 (Oct. 1985) (explaining the advantages and disadvantages of different arms strategies aimed at promoting cooperation); John Conybeare, *Trade Wars: A Comparative Study of Anglo-Hanse, Franco-Italian, and Hawley-Smoot Conflicts*, 38 WORLD POL. 147 (Oct. 1985) (analyzing three trade wars with the goal of identifying factors which may promote or inhibit cooperation); Kenneth A. Oye, *The Sterling-Dollar-Franc Triangle: Monetary Diplomacy 1929-1937*, 38 WORLD POL. 173 (Oct. 1985).

preference structure before cooperation can emerge.[176]

III. THE RELEVANCE OF INTERNATIONAL LAW

This section applies institutionalist theory to examine international law. Institutionalist theory provides a unique insight into the two principal sources of international law: treaty law and customary international law.[177]

A. TREATY LAW

Treaties are a principal source of international law.[178] A treaty is an international agreement concluded by two or more states that codifies specified norms and rules. Treaties can address an almost infinite variety of issues ranging from economic matters to security issues. In addition to the substantive provisions of particular treaties, there are a broader set of procedural rules which cover such issues as the development, operation and termination of treaties.[179] These rules are codified in the Vienna Convention on the Law of Treaties (Vienna Convention).[180]

Through the substantive provisions of particular treaties and the procedural rules of the Vienna Convention, treaty law promotes cooperation as indicated by

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176. Oye, *supra* note 85, at 4-11; Axelrod & Keohane, *supra* note 76, at 228-32.

177. Article 38 of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

I.C.J. Statute, 59 Stat. 1055.

178. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-39 (2nd ed. 1993); J.L. BRIERLY, THE LAW OF NATIONS 57-69 (6th ed. 1963).

179. *See generally* PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES (Jose Mico & Peter Haggenmacher trans., 1995) (providing a concise overview of the law of treaties, including the history, legal aspects, participation requirements, and effects of treaties); T.O. ELIAS, THE MODERN LAW OF TREATIES (1974); LORD MCNAIR, THE LAW OF TREATIES (1961) (providing a comprehensive work on the law of treaties including the procedural rules of how to conclude, apply, and terminate a treaty).

180. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, at 289 (1969), 1155 U.N.T.S. 331. *See generally* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1984); Richard D. Keaney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970) (providing a general discussion of treaty law and asserting that the treaty is "the cement that holds the world community together").

institutionalist theory. Treaties establish the basis for long-term relationships, replacing short-term calculations with long-term strategic analysis. Promoting such long-term relationships gives rise to stable expectations between states. Treaty law also increases the importance of reputation and the use of reciprocity to enforce obligations. Through such mechanisms as regular consultation procedures, annual review meetings, and dispute settlement procedures, treaties further promote iteration.[181] The Vienna Convention also "reflects a deep and pervasive concern with the promotion of iteration."[182] Its overall structure as well as "its graduated increase in national obligations as the treaty process progresses" encourages the development of long-term relationships.[183] In addition, treaties reduce transaction costs and encourage self-reinforcing behavior. By establishing regularized patterns of behavior, treaties promote efficiency.[184] They allow states to coordinate their action along a chosen rule or norm, thereby reducing costs. Path dependence further contributes to the maintenance of these agreements by reinforcing behavior. Because the treaty process is both time-consuming and resource intensive, states will be less inclined to violate an agreement and risk losing their underlying investment. These sunk costs contribute to the maintenance of the agreement. Finally, treaties define property rights as they set forth the respective rights and obligations of states in explicit language, clarifying expectations and further reducing uncertainty.

In addition, treaties can easily incorporate other mechanisms to promote cooperation. Treaty negotiations readily facilitate issue linkage of both substantive and procedural issues. Formal agreements can increase the quality and flow of information. They can monitor state behavior and identify potential violations of established obligations. Treaties can also establish mechanisms to mediate potential disputes. Finally, agreements can provide formal sanctions for rule violations.

B. CUSTOMARY INTERNATIONAL LAW

Along with treaty law, customary international law is a principal source of international law.[185] State practice that is continuous and long-standing may develop into customary international law and be considered legally binding on those states that acquiesce in its formation and development. Two elements are required for the development of customary international law. First, state practice must be consistent.[186] The emphasis on consistency is based on the notion that customary

181. Setear, *supra* note 10, at 212-16. In addition to intra-instrument iteration, "nations may undertake 'inter-instrument iterations,' which are promises in one treaty to engage in the subsequent set of iterations involved in another treaty." *Id.* at 217.

182. *Id.* at 190.

183. *Id.*

184. *See* William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 995 (1996).

185. JANIS, *supra* note 178, at 41-54; BRIERLY, *supra* note 178, at 59-62.

186. KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 52-65 (2nd ed. 1993); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-6 (4th ed. 1990).

international law depends upon its regular observance in practice. Second, state practice must develop out of a sense of legal obligation.[187] This concept of *opinio juris* provides a qualitative element to the development of customary international law. The basis of customary international law, therefore, is the notion "that states in and by their international practice may implicitly consent to the creation and application of international legal rules."[188]

Customary international law also promotes cooperation as indicated by institutionalist theory. Customary practice promotes regularized patterns of behavior and gives rise to stable expectations between states. It also increases the importance of reputation and the use of reciprocity to enforce obligations. Because it does not require formal negotiations, customary international law reduces transaction costs. Customary international law allows states to establish a binding relationship without resorting to the formalism of the treaty process.[189] In place of formal and time-consuming negotiations, customary international law recognizes the role of state conduct in defining and maintaining relationships between states.[190] As state practice develops into customary international law, it naturally responds to unforeseen contingencies. Customary international law also promotes self-reinforcing behavior. Custom acts as a focal point, providing a guide for state behavior. As custom develops, path dependence further promotes cooperation. Indeed, the role of path dependence is particularly significant in the legal setting, where legal precedent influences both subsequent legal decisions and state action. Finally, customary international law clarifies state expectations about their respective property rights, further stabilizing state relations. Through this process, customary international law guides state behavior in the absence of more formal structures.[191]

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187. *See* Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L. Q. 501 (1995); SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 379-381 (1958) (discussing the elements and conditions of *opinio necessitatis juris*).

188. JANIS, *supra* note 178, at 42.

189. *See generally* Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law From an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109 (1995) (providing an overview of customary international law and attempting to synthesize the academic study of international relations with the discipline of international law); THE POLITICAL ECONOMY OF CUSTOMS AND CULTURE: INFORMAL SOLUTIONS TO THE COMMON PROBLEM (Terry Anderson & Randy Simmons eds., 1993).

190. Charles Lipson, in an interesting article, examined why some international agreements are informal. While his analysis focused on written agreements, his reasons for why states choose informal agreements rather than formal treaties may also apply to customary international law. These include: "(1) the desire to avoid formal and visible pledges, (2) the desire to avoid [domestic] ratification [requirements], (3) the ability to renegotiate or modify as circumstances change, [and] (4) the need to reach agreement quickly." Lipson, *supra* note 170, at 501.

191. *See supra* note 164 and accompanying text. The advantages of informal practice over more formalized agreements has been recognized in various settings. *See generally* Ekkehart Schlicht, *On Custom*, 149 J. INST. & THEOR. ECON. 178 (1993); GEORGE W.

Customary international law, however, suffers from some limitations.[192] It is unclear at what point state practice becomes customary international law. Because it is not explicitly codified, there may be problems regarding interpretation and the scope of obligations. As a result, property rights may not be well specified. It is also less likely that there will be a formal framework to monitor compliance, mediate disputes and impose sanctions for rule violations. These limitations can make customary international law susceptible to violation. They may also give rise to confrontations if states have conflicting interpretations regarding customary international law and seek to use practice to affirm their view of the law.[193]

The rational design hypothesis provides an interesting framework for reviewing this description of international law.[194] According to Kenneth Abbott, the rational design hypothesis "assumes that states act as rational entities pursuing their national interests as they see them. In situations of interdependence, the theory suggests, states will, and should, tend to design their international agreements and institutions to address the particular strategic situations in which they find themselves."[195] Professor Abbott suggests that the rational design hypothesis has nu-

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DOWNS & DAVID M. ROCKE, TACIT BARGAINING, ARMS RACES, AND ARMS CONTROL (1990) (discussing the nature and methods of tacit bargaining and stressing the importance of tacit bargaining as a crucial means for rescuing and maintaining peace); JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER (1989) (discussing social order, including the concepts of collective action bargaining and social norms).

192. *See, e.g.*, Friedrich Kratochwil, *Contract and Regimes: Do Issue Specificity and Variations of Formality Matter?*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 73, 91 (Volker Rittberger ed., 1995); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) (arguing that customary international law is inherently incompatible with national courts, particularly American courts and American political philosophy).

193. *See, e.g.*, William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INT'L & COMP. L. REV. 259, 318-21 (1996) (discussing both general and specific examples of using state practice to assert an interpretation of international law and warning that such methods must be balanced against the potential violent ramifications); AMERICAN SOCIETY OF INTERNATIONAL LAW, NONVIOLENT RESPONSES TO VIOLENCE-PRONE PROBLEMS: THE CASES OF DISPUTED MARITIME CLAIMS AND STATE-SPONSORED TERRORISM 1-4 (1991) (stating that "the very importance of the sea makes it a fertile source of dispute between states with conflicting interests").

194. Abbott, *supra* note 13, at 1.

195. *Id. See also* John Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997). The rational design hypothesis is similar to functionalist theory. According to Keohane, a functional theory seeks to explain particular phenomenon in terms of their effects. "Rational choice theory, as applied to social institutions, assumes that institutions can be accounted for by examining the incentives facing the actors who created and maintain them. Institutions exist because they could have reasonably been expected to increase the welfare of their creators." KEOHANE, *supra* note 45, at 80.

merous implications for the scientific study of international cooperation.[196]

The rational design hypothesis recognizes that both treaty law and customary international law promote cooperation, albeit in different ways.[197] Treaty law establishes formal and explicit agreements to promote cooperation. Customary international law also promotes cooperation, but it does so in the absence of formal agreements. Despite these differences, both sources of international law contain mechanisms identified by institutionalist theory that promote cooperation and influence state behavior. Both treaty and customary international law minimize uncertainty, promote efficiency and reduce rent-seeking behavior by egoistic states. These goals are accomplished in the absence of a common government or other formal governance structures. Thus, international law does not depend on altruism or idealism to influence state behavior.[198] Rather, it functions on the basis of a conscious choice by states seeking to promote their self-interest.[199] Quite simply, international law exists because it advances the overall welfare of its creators.[200] This is an important discovery for students seeking to affirm the relevance of international law.

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196. Abbott, *supra* note 13, at 2 (suggesting that scholars can reason backward from the provision of international agreements and the procedures and institutions they establish to conclusions about the strategic relationship of the parties to such arrangements). In addition to its importance for understanding international politics, the rational design hypothesis shows how international lawyers, expert in the interpretation of international agreements, can contribute to the international relations research agenda. *Id.*

197. There is some debate regarding the hierarchy of sources in international law. Some scholars argue that treaty law is superior to customary international law. Others argue that treaty law and customary international law are equal in status. While this analysis does not suggest that either treaty law or customary international law should be accorded primacy, it does suggest the benefits provided by each form of international law. For examples of these arguments, see JANIS, *supra* note 178, at 10-11; Hiram Chodosh, *An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law*, 28 VAND. J. TRANSNAT'L. L. 973 (1995); Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971 (1986).

198. *See* Snidal, *supra* note 14, at 129; Keohane, *supra* note 11, at 380.

199. It has been suggested that some elements of international law are not the result of conscious choice by states. *See generally* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT Y.B. INT'L L. 1 (1986); Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

200. This is entirely consistent with the notion that legal systems must ultimately serve the interests of the actors that function in their ambit. For an analysis of how legal systems are reactive to the interests of such actors, see generally *Symposium: Positive Political Theory and Public Law*, 80 GEO. L. J. 457 (1992); John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992); Matthew McCubbins et al., *Positive and Normative Models of Procedural Rights: An Integrative Approach to Administrative Procedures*, 6 J. L. ECON. & ORG. 307 (1990).

IV. FROM THEORY TO PRACTICE: AN ANALYSIS OF THE COMPREHENSIVE TEST BAN TREATY

The recently concluded Comprehensive Test Ban Treaty[201] (Treaty) provides an interesting case study. Institutionalist theory suggests that the Treaty must contain certain mechanisms to promote cooperation, particularly in the highly charged realm of nuclear proliferation where the consequences of defection are significant. This final section reviews the Treaty and examines it through the lens of institutionalist theory.

A. THE COMPREHENSIVE TEST BAN TREATY

On January 25, 1994, negotiations began in the Conference on Disarmament for a comprehensive nuclear test ban treaty.[202] After two years of extensive and often contentious negotiations, the United Nations General Assembly adopted the Comprehensive Test Ban Treaty on September 10, 1996.[203] On September 24, 1996 over fifty countries signed the treaty, including China, France, Russia, the United Kingdom and the United States.[204] The Treaty will enter into force 180 days after the date of deposit of the instruments of ratification by all the countries listed in Annex Two to the Treaty.[205] The Treaty, however, cannot enter into force earlier than two years after it was opened for signature.[206]

Article I of the Treaty sets forth the basic obligations of member states. The parties are prohibited from performing any nuclear weapons tests or allowing any nuclear explosion to take place within their jurisdiction.[207] These obligations are

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201. Treaty, *supra* note 15.

202. The Conference on Disarmament is a multilateral forum for negotiating arms control agreements. It is affiliated with the United Nations and is based in Geneva.

203. The Treaty consists of the main text, two Annexes to the Treaty, a Protocol and the Annexes to the Protocol. Each of these elements form an integral party of the Treaty. Treaty, *supra* note 15, art. X.

204. Both India and Pakistan, however, refused to sign the Treaty. Alison Mitchell, *Clinton, at U.N., Signs Treaty Banning All Nuclear Testing*, N.Y. TIMES, Sept. 25, 1996, at A1.

205. Treaty, *supra* note 15, art. XIV(1). Annex 2 lists 44 members of the Conference on Disarmament with nuclear power or nuclear research reactors.

206. Treaty, *supra* note 15, art. XIV(1). If the Treaty has not entered into force three years after the date of its opening for signature, the Secretary-General of the United Nations shall convene a conference of the states that have already deposited their instruments of ratification if so requested by a majority of those states. *Id.* The Conference shall consider and decide by consensus what measures may be taken to accelerate the ratification process in order to facilitate the entry into force of the Treaty.

207. Treaty, *supra* note 15, art. III(1). Article III(1) further states that "each State Party undertakes to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion). Article III(1) adds, *inter alia*, that "[e]ach State Party shall, in accordance with its constitutional processes, take any necessary measures to implement its obligations under this Treaty." *Id.* In

absolute because the Treaty is not subject to reservations.[208]

Article II establishes the Comprehensive Nuclear Test-Ban Treaty Organization (Organization), whose "obligations are to achieve the object and purpose of the Treaty, to ensure the implementation of its provisions, and to provide a forum for consultation and cooperation among States Parties."[209] Three organs are established within the Organization: the Conference, the Executive Council and the Technical Secretariat.[210] The Conference is the principal organ of the Organization.[211] It is composed of all States Parties. It may consider any matter that falls within the scope of the Treaty and can make recommendations and take decisions on any such matters. The Conference oversees the activities of the Executive Council and the Technical Secretariat.[212] The Executive Council is the executive organ of the Organization and is responsible to the Conference.[213] It consists of fifty-one members, which are elected by the Conference.[214] Its primary responsibility is to promote the effective implementation of, and compliance with, the Treaty.[215] The Technical Secretariat is responsible for assisting the States Parties in the implementation of the Treaty and ensuring verification of compliance.[216] The Conference appoints a Director-General who acts as administrator of the Technical Secretariat.[217]

Article IV sets forth a verification regime.[218] Specifically, it establishes four mechanisms to promote verification of Treaty obligations: (1) an International Monitoring System; (2) consultation and clarification procedures; (3) on-site in-

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contrast, the Limited Test Ban Treaty prohibited nuclear weapon testing in the atmosphere, outer space or underwater. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in the Outer Space and Underwater, signed Aug. 5. 1963, entered into force Oct. 10, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

208. Treaty, *supra* note 15, art. XV ("the Article of and the Annexes to this Treaty shall not be subject to reservations.") *Id.* The provisions of the Annexes to the Protocol, however, may be subject to reservations, provided they are not incompatible with the object and purpose of the Treaty. *Id.*

209. Treaty, *supra* note 15, art. II(A)(1) ("The seat of the Organization shall be in Vienna, Austria".). *Id.* at II(A)(3).

210. *Id.* art. II(4).

211. Treaty, *supra* note 15, art. II(B)(24) ([The conference] shall consider any questions, matters or issues within the scope of this Treaty. . . ."). *Id.*

212. *Id.* art. II(25).

213. *Id.* art. II(37).

214. *Id.* arts. II(27),(29).

215. Treaty, *supra* note 15, art. II(B)(37). ("The Executive Council shall act in conformity with the recommendations, decisions and guidelines of the Conference and ensure their continuous and proper implementation.").

216. Treaty, *supra* note 15, art. II(42). An International Data Centre is established as part of the Technical Secretariat. *Id.*

217. *Id.* art. II(B)(26)(d).

218. Treaty, *supra* note 15, art. IV. The Protocol to the Comprehensive Test-Ban Treaty describes the respective elements of the verification regime in greater detail.

spections; and (4) confidence-building measures.[219] The International Monitoring System consists of facilities for seismological monitoring, radionuclide monitoring, hydroacoustic monitoring, infrasound monitoring and respective means of communication.[220] The International Data Centre which is under the authority of the Technical Secretariat, supports this system.[221] In addition, consultation and clarification procedures are available.[222] The Treaty urges States Parties to make every effort to clarify and resolve, among themselves, any matter which may cause concern about possible non-compliance.[223] A State Party that receives a request for clarification must provide such information to the requesting party within forty-eight hours of the initial request.[224] Extensive procedures concerning on-site inspections are also provided.[225] Each State Party has the right to request an on-site inspection.[226] "The only purpose of an on-site inspection is to determine whether a nuclear weapon test explosion or any other nuclear explosion was carried out in violation of the Treaty."[227] Requests for on-site inspections are submitted to the Director-General of the Technical Secretariat and must be voted on by the Executive Committee within ninety-six hours of the initial request.[228] Finally, the treaty establishes confidence-building measures to contribute to the timely resolution of any compliance concerns arising from possible misinterpretation of verification data relating to chemical explosions.[229]

Article V provides several measures to ensure compliance. Both the Conference and the Executive Council have the authority to request a State Party to redress a situation raising compliance problems.[230] "If the State Party fails to fulfill the request within the specified time, the Conference may, *inter alia*, decide to restrict or suspend the State Party from the exercise of its rights and privileges under the Treaty."[231] If non-compliance with the basic obligations of the Treaty may result in damage to the object and purpose of the Treaty, the Conference may recommend to the State Parties that collective measures be taken.[232] Finally, the

219. Treaty, *supra* note 15, art. IV(A)(1). In addition, the Treaty recognizes that States Parties may use national technical means for verifying compliance. *Id.* art. IV(5). National technical means refers to the use of satellite reconnaissance and other national intelligence-gathering measures that do not violate international law.

220. Treaty, *supra* note 15, art. IV(16).

221. *See supra* note 190 and accompanying text. *See also* Treaty, *supra* note 15, art. (18) (stating "[e]ach State Party has the right to participate in the international exchange of data and to have access to all data made available to the International Data Centre.").

222. *Id.* art. IV(30).

223. *Id.* art. IV(29).

224. *Id.* art. IV(30).

225. *Id.* arts. IV(34)-(38).

226. Treaty, *supra* note 15, art. IV(34).

227. *Id.* art. IV(35).

228. *Id.* arts. IV(38), (46).

229. Treaty, *supra* note 15, art. IV(68).

230. *Id.* art. V(2).

231. *Id.*

232. *Id.* art. V(3). The Vienna Convention on the Law of Treaties provides that a viola-

Conference or the Executive Council may bring the issue to the attention of the United Nations.[233]

Article VI establishes dispute settlement procedures. It recognizes that disputes concerning the application or "interpretation of the Treaty must be settled in accordance with the relevant provisions of the Treaty and in conformity with the provisions of the U.N. Charter."[234] When disputes arise regarding implementation or clarification of the Treaty, concerned parties are instructed to negotiate or use any other amicable means to swiftly settle the dispute.[235] The parties can seek recourse from the appropriate organs of the Treaty or, by agreement, may refer the matter to the International Court of Justice (ICJ).[236] The Treaty provides that the Executive Council may contribute to the settlement of disputes by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to seek a settlement through a process of their own choice, bringing the matter to the attention of the Conference or recommending a time-limit for any agreed procedure.[237] "In addition, the Conference shall consider questions raised by States Parties or brought to its attention by the Executive Council."[238] The Conference may also establish organs with tasks related to dispute settlement.[239] Finally, the Executive Council and the Conference are separately empowered to request an advisory opinion from the ICJ on any legal question arising from activities of the Organization.[240]

The Treaty is of unlimited duration.[241] Each State Party, however, has the right to withdraw from the Treaty if it decides that the Treaty jeopardizes its supreme interests.[242] Withdrawal requires giving six months advance notice to

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tion of a provision essential to the accomplishment of the object or purpose of the treaty is considered a material breach of a treaty. Vienna Convention, *supra* note 180, art. 60(3). material breach of a multilateral treaty entitles the other parties, *inter alia*, to suspend the operation of the treaty in whole or in part or to terminate the agreement. Collective measures can include a wide variety of actions including diplomatic, economic or political responses. In addition, more severe measures are permissible. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW provides that "a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 905. This provision is subject to the prohibitions on the threat or use of force in the U.N. Charter.

233. Treaty, *supra* note 15, art. V(4).

234. *Id.* art. VI(1).

235. *Id.* art. VI(2).

236. *Id.* art. VI(2).

237. *Id.* art. VI(3).

238. *Id.* art. VI(4).

239. Treaty, *supra* note 15, art. VI(4).

240. *Id.* art. VI(5). This empowerment is subject to the authorization of the United Nations General Assembly. *Id.*

241. *Id.* art. IX(1).

242. *Id.* art. IX(2).

other States Parties, the Executive Council, the Secretary-General and the United Nations Security Council.[243]

B. THE APPLICATION OF INSTITUTIONALIST THEORY

Institutionalist theory suggests that the Comprehensive Test Ban Treaty must contain certain mechanisms to effectively promote cooperation and reduce the likelihood of defection by States Parties. These mechanisms can be divided into three broad categories: procedural mechanisms, verification regime and dispute resolution.

The procedural mechanisms of the Treaty include the promotion of iteration, the reduction of transaction costs, the development of self-reinforcing behavior and the establishment of property rights. The Treaty promotes iteration on several levels. The Treaty itself is of unlimited duration. While it allows states to withdraw, such action requires six months advance notice.[244] In addition, the organs of the Organization promote iteration through their regular meeting and consultation procedures. Both the Conference and the Executive Council meet on a regular basis. Furthermore, the Treaty provides for ten year Review Conferences to examine the operation and effectiveness of the Treaty. Each of these elements establish the Treaty as a long term obligation and promote regularized patterns of behavior by States Parties.

The Treaty also reduces transaction costs and promotes self-reinforcing behavior. The Organization and its concomitant organs (the Conference, Executive Council and the Technical Secretariat) coordinate activities under the Treaty. This framework reduces costs by providing a central organization and administrative staff. The multilateral verification regime reduces the need for individual states to monitor compliance. The Treaty also promotes self-reinforcing behavior among the States Parties. It provides a guide which allows states to coordinate their action along the norms and rules set forth in the Treaty and subsequently developed by the Organization. Finally, the Treaty sets forth the respective rights and obligations of States Parties in explicit terms, which clarifies property rights. Property rights remain constant because reservations are not allowed and the dispute resolution system affirms these rights in the event of a dispute.

The verification regime is perhaps the most significant component of the Treaty. It gathers and distributes information, promotes transparency, and monitors compliance. To maximize the effectiveness of the verification regime, the Treaty establishes both multilateral and bilateral mechanisms. The International Monitoring System provides a multilateral mechanism for monitoring compliance. The Technical Secretariat is responsible for gathering compliance information and distributing the information to States Parties. In addition, the verification regime establishes bilateral mechanisms for monitoring compliance through the use of consultation and clarification procedures, on-site inspections and confi-

243. *Id.* art. IX(3).
244. *Id.*

dence building measures as well as authorizing the use of national technical means to verify compliance.

Finally, the Treaty establishes a two-tiered system for dispute resolution. It recognizes that disputes may arise with respect to the application or interpretation of the Treaty. Accordingly, it establishes dispute settlement procedures to address these situations. States Parties are encouraged to settle their own disputes. They may also seek recourse from other sources for dispute settlement, including the organs of the Treaty or the ICJ. In addition, the Treaty authorizes the use of sanctions in the event of a situation that raises problems regarding compliance. Sanctions can include restricting a State Party's rights and privileges under the Treaty. If damage to the object and purpose of the Treaty may result from noncompliance, the Conference might recommend the use of collective measures as long as they are in conformity with international law.

The development of the Comprehensive Test Ban Treaty is entirely consistent with institutionalist theory. To address their strategic situation, the States Parties needed to develop a cohesive management structure, a sophisticated verification regime and an effective dispute resolution system. Each of these mechanisms promote cooperation and minimize the possibility of defection. Consistent with institutionalist theory, therefore, the Treaty moves the States Parties away from the pernicious realm of the Prisoner's Dilemma and towards a system of mutual cooperation.

V. CONCLUSION

Theories of international relations provide students of international law with a framework to analyze international affairs. With this framework, students of international law can understand more fully the causes of conflict and the paths to cooperation. Moreover, the interdisciplinary merger of international law and international relations provides the basis for developing stronger and more effective international institutions. This article has identified several elements that can promote cooperation. The typology presented is not a mere academic exercise, however. Indeed, these findings provide a powerful tool when combined with the practical experience of legal scholars and practitioners. In this respect, this article serves a prescriptive role, urging students to recognize the benefits of interdisciplinary research, not just in theory, but in practice as well.[245]

245. For a discussion on the separation of the academic and practical worlds, see David Newsom, *Foreign Policy and Academia*, 101 FOREIGN POLICY 52 (Winter 1995-96); TWO WORLDS OF INTERNATIONAL RELATIONS (Christopher Hill & Pamela Beshoff eds., 1994).