AGORA: THE END OF TREATIES

REPORTS OF THE DEATH OF TREATY ARE PREMATURE, BUT CUSTOMARY INTERNATIONAL LAW MAY HAVE OUTLIVED ITS USEFULNESS

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Legal rules come and go. Methods of producing law may also flow and ebb. The authors of the call for papers[1] in connection with this online Agora suggest that there is possible evidence that treaty as a method of producing international law is ebbing, and may be dying. I see no such evidence at present; rather, I argue here that the dying source of international law is not treaty but custom. In the more distant future, however, treaty, too, may become obsolete or at least less salient.

There are four categories of tools of international social cooperation: (i) international law produced through treaty (referred to herein simply as treaty); (ii) international law produced through custom, known as customary international law (CIL); (iii) international law produced through international organization decision-making (international legislation); and (iv) non-legal cooperative institutions (soft law). One of the signal characteristics of treaty is that no state is bound that has not explicitly and specifically consented. In order to sharpen the difference between treaty and international legislation, let us focus on international legislation produced by majority voting, which today is rare outside the European Union, but which may bind states without their specific consent.

Each of treaty, CIL, international legislation, and soft law has its domain—particular social parameters determine which tool is used in particular contexts. As conditions change, it must be true that one's domain would expand while the others' would decline.

The Vitality of Treaty

Let's begin with the facts about treaty. *AJIL Unbound* editors note[2] that a few states have pulled out of BITs and ICSID, and other states are threatening withdrawal from those or from the ICC. The number of pullouts and threatened pullouts is rather small, however, and the growth in BITs in preferential trade agreements, bilateral tax treaties, and adherences to trade, environmental, human rights, and other treaties has been enormous over the past fifty years. Even the few pullouts in the past few years are probably swamped by new treaty adherences over the same period. Moreover, there simply is no doubt that over any extended period for the past century, the trend has been positive.

So, we must look elsewhere for evidence of decline, and *AJIL Unbound* editors suggest that major multilateral negotiations have stalled. But this observation is also tremendously sensitive to the period observed. If

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[1] Emily Cumberland, *Call for Papers: "The End of Treaties? An Online Agora"*, 108 AJIL UNBOUND (Feb. 19, 2014).

[2] *Id.*

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we reach back ten or fifty or one hundred years, it would not be correct to say that multilateral negotiations have stalled. Rather, the trend line is upward and convex.

But perhaps we are observing an inflection point and the emergence of a new trend. Indeed, multilateral negotiations could be a victim of their own success: the low-hanging fruit of international cooperation has been harvested, and the additional areas of cooperation will be more costly to achieve or may provide smaller benefits. This certainly seems to be a reasonable diagnosis of what has happened in the field of international trade. The General Agreement on Tariffs and Trade (GATT) process, beginning in 1947 and continuing through the formation of the World Trade Organization (WTO) in 1995, produced tremendous increases in welfare through reduction of tariffs to negligible average amounts among developed countries. How might we match that kind of increase in welfare in the future? Reduction of regulatory barriers to trade in goods and services can provide large welfare increments, but this reduction will come at the cost of regulatory autonomy and will require a more complex machinery for negotiations than has yet been developed in the multilateral system. Another source of potential great gains is liberalization of migration, although this possibility raises very difficult political, social, and economic issues.

But just because we have harvested some of the low-hanging fruit does not mean that treaty is dead. Just the opposite: treaty will grow in scope and complexity, because these types of gains, though difficult, are worth achieving. It may also be possible that after a period of accelerated international integration, there would be a period of retrenchment and digestion, before further liberalization may be achieved.

The Death of Custom

CIL must have seemed like a good idea when it was invented. The types of things covered by early CIL addressed what Wolfgang Friedmann[3] called "the law of coexistence" and mainly addressed the terms upon which states would interact informally. In 1964, he argued that "in international law it is today of both theoretical and practical importance to distinguish between the international law of 'coexistence,' governing essentially diplomatic inter-state relations, and the international law of co-operation, expressed in the growing structure of international organization and the pursuit of common human interests."

As Friedmann explained, early international law only needed to be concerned with the right to territory, the commencement and conduct of war, and the treatment of emissaries. These bodies of law arose through CIL. These were the modest requirements in a world where there were few externalities or public goods worth addressing and where most cooperation problems could be addressed through ad hoc and informal diplomacy. Under greater interdependence, an international law of cooperation is needed.

CIL is increasingly ill-fitted to respond to the needs for international law of cooperation. CIL seems primitive, and more importantly, limited in its flexibility. First, most CIL is universal, so it is tough to develop differentiated rules, such as those found in treaty law. For example, the WTO treaties contain all sorts of very specific schedules of commitments, while the application of "common but differentiated responsibilities" under the Kyoto Protocol resulted in different obligations for developing and developed countries, and international human rights treaties are tailored for specific countries through reservations, understandings, and declarations. Along similar lines, it sometimes makes sense to have international legal "transactions" on a basis not of "in-kind" reciprocity, but on a basis of different types of commitments. CIL simply cannot handle this type of customization of obligations.

Second, because it originates in behavior, CIL cannot easily be specified in detail, and it cannot be specified in advance of actual practice. So, it is difficult to specify obligations clearly in advance, and this difficulty may

[3] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

prevent an equilibrium of law and compliance from developing at all. One advantage of treaty is to provide a focal point that can induce equilibrium behavior.

Third, it is doctrinally uncertain how CIL changes, and it is difficult in practical terms to effect change in CIL. Treaty, on the other hand, can clearly be amended, although the requirement of unanimity makes it difficult also to amend treaties, especially those with more than a few parties.

The only modern advantage of CIL over treaty is that it is possible to make CIL without actual unanimity. Unless a state is a persistent objector, the CIL rule will bind it, and even if a state persistently objects, the rule may come into existence for others. This advantage is janus-faced because it can promote the growth of CIL, but may do so without consent, or even legitimacy. The legitimacy problem was thoughtfully developed in 2000 by J. Patrick Kelly in "The Twilight of Customary International Law."[4]

The Domain of Soft Law

The authors of the call for papers conjecture that perhaps soft law may replace treaty. Of course, not all international cooperation takes legal form. As Andrew Guzman and Timothy Meyer explain,[5] there is no reason to believe that soft law could not be a satisfactory, indeed an optimal, tool in particular cases. This is clear in theory, and the fact that states make soft law suggests that it serves some social purposes. Some scholars have recently argued that in particular contexts, such as international finance or carbon reduction, soft law is superior to hard law.

Economists speak in terms of self-enforcing contracts, and the same characteristics that result in stable contracts in the absence of external coercive enforcement also can support national constitutions and international law. Why are some of these self-enforcing contracts labeled "international law," while others are informal? One answer is behavioral or constructivist: rules that are cast as international law instead of as informal rules may be seen by citizens, and perhaps by governments, as meriting greater respect. But is there a reason for these beliefs, and is there also a rationalist reason for distinguishing between law and non-law? In other words, under what circumstances will future international rules be made in the form of law, as opposed to in the form of soft law?

As Guzman and Meyer point out, soft law may serve well where the only goal is coordination—where states do not gain from defection. Where, on the other hand, a state may gain by violation, as in cases of externalities or public goods, cooperation as opposed to coordination is needed. Soft law can support cooperation, provided that the incentives for compliance are sufficient. There will, however, be circumstances in which hard law will provide a stronger basis for cooperation, while soft law will fall short. Thus, soft law would not be a satisfactory method of cooperation in all cases.

First, soft law may not bring to bear the kind of reputational consequences that could promote compliance. Second, a rule's designation as law brings into play a substantial set of default rules within the international legal system, thereby filling in a large portion of the "incomplete contract" regarding states' obligations and expectations under that rule, including the scope of remedies for violation. Third, it may be that designation as law serves to link compliance/noncompliance with any particular legal rule to other rules, thereby extending the possible scope of retaliation to fields that might not otherwise be considered "fair game." With regard to this last point, we might say that designation as law increases the returns to compliance by placing the general sense of international legality at stake. That is, if State A can be a scofflaw in one sector, what prevents State B from being a scofflaw in an area that injures State A? In this sense, there is a

[4] J. Patrick Kelly, *The Twilight of Customary International Law*, 40 V.A. J. INT'L L. 449 (2000).

[5] Andrew T. Guzman & Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 (2011).

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possibility for implicit multilateral retaliation, even if formal international law doctrine does not permit multilateral retaliation.

Thus, by including a particular rule in international law, states accept that the rest of the legal system is now open to being compromised or weakened by noncompliance with that rule. That is, by violating one legal rule, a state may undercut the entire legal system. This connectedness adds strong incentives for compliance, and no single legal rule needs to be a self-enforcing contract by itself.

We might assume that legal rules are chosen over other types of rules—rules are designated "law"—when the legal method of cooperation is superior to the other methods. States may be expected to move from non-international law equilibrium behavior to international law where the latter either makes equilibrium possible that would not otherwise be possible, or enables that equilibrium to be achieved more efficiently than through other means. Institutions are chosen for cost and benefit reasons.

So, designation as "law" certainly has meaning and social effects. Treaty has a different domain from that of soft law, and we can expect that domain to remain robust.

The Birth of International Legislation

There is a problem with treaty. Implicit in treaty is a kind of narrow reciprocity: each individual treaty must provide benefits to each adherent in order to induce that adherent to adhere. Even more difficult, if the benefits are not distributed evenly, those receiving less of the benefits might have incentives to withhold approval until the payoffs are shared more equally. There can, of course, be linkages between a particular treaty and other behaviors, and states may make side-payments, but this may raise transaction costs. There would be some beneficial international arrangements that would not be made.

Within the domestic sphere, we generally do not use an analog to treaty to make legal rules. Private actors use contracts, and within the United States, states occasionally make arrangements by "compact," with the approval of Congress. The more common way in which law is made, however, is by legislation. This is because legislation, based on majority voting, can be made more easily than treaties. Of course, it is unusual for international organizations to have legislative power based on majority voting. Examples of some organizations that have this power include the European Union, the International Monetary Fund, the World Bank, and the UN Security Council in particular circumstances.

The requirement of consent or unanimity-based decision-making cannot be defended by a reference to democracy. It can only be defended by such a reference to the extent that the national desire is negative or defensive—to the extent that the goal is to defeat legislation that may be adverse, in contrast with a goal to pass legislation that is beneficial. This can easily be seen where a single small state has the capacity to block decisions that are desired by the overwhelming majority of states. This cannot be explained in terms of democracy.

Furthermore, for a similar reason, the requirement of consent or unanimity-based decision-making cannot be defended by a reference to rights, or national autonomy. We might begin by saying that a decision rule of unanimity in international law protects national autonomy, just as a supermajority or unanimity rule in municipal legislation protects individual autonomy. Yet, again, this is seen purely from a defensive standpoint, where autonomy means being left alone, and does not include the ability to influence the behavior of others. Assuming for a moment that a state has equal interests in avoiding constraints on its behavior and procuring constraints on other states' behavior, then any voting rule should be equally attractive compared to any other voting rule. What you lose in legislation constraining others, you gain in autonomy, and vice-versa. But if there is a surplus to be gained from making a certain amount of international law, a constitutional arrangement that results in a less than optimal amount of international law is undesirable.

Giovanni Maggi and Massimo Morelli show[6] that a key parameter in determining whether to choose majority voting as a rule of decision in an international organization is the governments' discount factors, representing their patience. As Maggi and Morelli explain, their model posits that

> the voting rule is chosen ex ante, under a veil of ignorance about future issues. Thus, the optimal voting rule maximizes the ex ante expected utility of the representative member subject to self-enforcement constraint: a government must have incentive to comply with the collective decision even if it happens to disagree with it.

With high discount factors—greater valuation of future payoffs from cooperation—there are smaller incentives for defection and less need for what Maggi and Morelli determine are the compliance benefits of a rule of unanimity. Greater likelihood of repeated play and greater frequency of interaction—increasing the amount at stake over a shorter time—also promote compliance. But note that the frequency of interaction parameter need not be limited to interaction within a particular organization or issue area. And I have suggested above that particular international obligations need not, taken on their own, be self-enforcing.

Maggi and Morelli's model "predicts that a non-unanimous rule is more likely to be adopted in organizations where governments are more stable, and in 'busier' organizations." They also find that greater correlation in the preferences among member states increases the likelihood of a non-unanimous voting rule. Furthermore, a nonunanimous rule may be efficient where there is external enforcement.

For the first thirty-two years of the existence of the European Union, legislation was generally made by unanimity.

In 1989, under the Single European Act, the European Union determined to make most of its single market legislative decisions through qualified majority voting. Within the scope of the single market, this system has transcended treaty. As states consider greater reduction of regulatory barriers to trade, whether in the multilateral system or in regional systems such as the currently proposed Trans-Atlantic Trade and Investment Partnership, they may consider greater resort to majority voting to establish broader reciprocity over time, without the need for specific reciprocity at each moment of decision. The future of international law may come to include more mechanisms of this nature, thus supplanting treaty.

Conclusion

Reports of treaty's death are indeed premature, because treaty can still serve important purposes. But it may be that in the longer-term future, treaty's time will come. This will not be because soft law can occupy the field, or because we have somehow achieved all the international cooperation that we need, but because more efficient ways of making international rules will be developed to respond to the real limitations of treaty. This is what seems to be happening today to CIL: the kinds of problems that we have to deal with today can often be better addressed through written commitments that give us the opportunity to tailor rights and obligations to complex circumstances and needs.

[6] Giovanni Maggi & Massimo Morelli, *Self-Enforcing Voting in International Organizations*, 96 AM. ECON. REV. 1134 (2006).