THEORY, CONSENT, AND THE LAW OF TREATIES:

A CROSS-DISCIPLINARY PERSPECTIVE

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The Status of Theory in International Law

The international legal system has usually been compared unfavourably with other kinds of legal systems. Those of us charged with the task of rebuttal must deny the relevance of such comparison, arguing the uniqueness of the world community, whether described narrowly in statist terms or very broadly in homocentric terms. Many of us may be prepared to go further and point to encouraging signs of progress in "legal development" at global and regional levels.

However, now that we have a universal system of legally independent and nominally sovereign nation-States, it has become extremely difficult to demonstrate universal governmental commitment to a complete and coherent stock of legal norms in the various areas or sectors of the international legal system. Because of the central role assigned to consent in the traditional theory of international law, modern conceptions within the discipline might be expected to begin with the absence of uniformity and universality and to accentuate what international law might realistically be expected to *become*, rather than what it already is. Becoming, in place of being, is perhaps more easily accepted as the appropriate frame of reference if we adopt the homocentric view of the world community and hold out human welfare as the higher and ultimate purpose of the international legal system.

Many, if not most, theoreticians within the discipline today are inclined to be sharply critical of the status of theory.[1] Charges of disarray are made

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1 For a comprehensive review of theory in international law, see Macdonald RStJ and Johnston DM (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983), [hereafter *Structure and Process*]. On the range of needs that "theory" is called upon to satisfy, see Johnston, "Strains in the Theory of International Law", Proceedings of the

both against theories *of* law and against theories *about* law. In some particularly intractable areas of international law, such as recognition, theory of the first kind (theories of law or "micro-theory") may be likened to "a bank of fog on a still day", obfuscating the ordinary tasks of legal investigation.[2] Theorists of this first kind see little to celebrate in the evidences of doctrinal coherence and of systematically developed *and globally accepted* legal norms.

Those who specialise in theory of the second kind (theories about law or "macro-theory") may be less concerned about the lack of agreement among scholars. From an academic as distinct from a professional viewpoint, there is reason to welcome the infusion of new ideas about international law, however critical in purpose, even those charging international law with "apparent impotence", a "peculiarly fictional sort of existence", and a "rather literary tradition of scholarship".[3] It is surely significant, however, that almost all of these new ideas have come from, or been heavily influenced by, other disciplines (eg sociology,[4] economics,[5] political theory or ideology,[6] philosophy,[7] and literary theory[8]),

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1990 Annual Conference of the Canadian Council on International Law [in press].

2 Brownlie "Recognition in Theory and Practice", *Structure and Process*, p 627.

3 Binder, *Treaty Conflict and Political Contradiction: The Dialectic of Duplicity* (1988), p 27. In support, Binder cites an earlier critic who levels a similar charge at our discipline (Allott, "Language, Method, and the Nature of International Law" (1971) 45 British YbIL 79 at):"A literary approach to the presentation of international law persists. There have been marginal changes of tone and vocabulary, but there has been preserved an underlying structure of thought and argument which is more literary than scientific ... [and characterised by] the tone of the inspired dilettante [rather than] that of technician."It might be noted that the sting of Binder's accusation was applied in the most sensitive of all areas: the foundational, consent-based context of the law of treaties. Allott is chiefly concerned with the contrast between a modern, policy-oriented style of writing (represented by McDougal) and a classical authoritative style (represented by Gidel).

4 Stone, "A Sociological Perspective on International Law", in *Structure and Process*, p 263. More generally, see Stone J, *Visions of World Order: Between State Power and Human Justice* (1984).

5 See, for example, Petersmann, "International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order", in *Structure and Process*, p 227. Somewhat surprisingly perhaps, the law-and-economics approach to legal theory has not yet been applied systematically to international law.

6 On the general relationship between political science and international law, see Johnston, "The Heritage of Political Thought in International Law", ibid, p

interdisciplinary amalgams (eg policy science[9] and feminist studies[10]), or cross-disciplinary fields (eg environmental studies,[11] and marine affairs[12]).

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179. For an ideological framework, see Kartashkin, "The Marxist-Leninist Approach: The Theory of Class Struggle and Contemporary International Law", ibid, p 79.

7 For over two centuries, international law has had to endure philosophical assaults on its "basis" or "nature" as a legal system, on its "sources", and on its relationship with national law. The concept of consent is closely associated with "will theory". For examples of the philosophical tradition in international law, see Verdross and Koeck, "Natural Law: The Tradition of Universal Reason and Authority", ibid, p 17; and Bos, "Will and Order in the Nation-State System: Observations on Positivism and Positive International Law", ibid, p 51.

8 See, for example, Kennedy D, *International Legal Structures* (1987). For other examples of literary criticism applied to the language of international law, see Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989); Kratochwil FV, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); Carty A, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (1986); and van Hoof G, *Rethinking the Sources of International Law* (1983). For a general review of current trends in literary theory and philosophy see Dasenbrook RW (ed), *Redrawing the Lines: Analytic Philosophy, Deconstruction and Literary Theory* (1989).

9 For a succinct summary, see McDougal and Reisman, "International Law in Policy-Oriented Perspective", in *Structure and Process*, p 103.

10 See, for example, MacKinnon C A, *Feminism Unmodified: Discourses on Life and Law* (1987) and *Toward a Feminist Theory of the State* (1989). Feminist theory has not yet been applied systematically to international law, though see below, p000.

11 The scope of the field of international environmental studies is indicated in Caldwell L, *International Environmental Policy: Emergence and Dimensions* (1984). For a broad, policy science ("field) approach to international environmental law, see Schneider J, *World Public Order of the Environment: Towards an International Ecological Law and Organisation* (1979). See also Johnston, "Systemic Environmental Damage: The Challenge to International Law and Organisation" (1985) 12 Syr JILC 255.

12 Unlike the field of environmental studies, which can be conceptualised around problems and issues on the basis of general concepts of biology or ecology, the field of ocean (policy) studies is too heterogeneous to be brought under a set of unifying concepts. In any event, any tendency to a unifying field theory has been offset in practice by the early diversification of the field into specialised sectors which have relatively little in common.

It might be suggested that there is now a widening gap between those legal theorists who, as disciplinarians, are chiefly interested in doctrinal coherence and those who, as scholars, are chiefly interested in intellectual cross-fertilisation.

The Tension Between Field, Sector, and Discipline

In some degree, the tension between these two kinds of theorists in international law reflects a growing tension on a much broader front, between different kinds of scholars engaged in the reorganisation and deployment of knowledge. This tension might be described as a tension between field, sector and discipline.

Since the mid-20th century one of the most interesting developments in the academic community has been the emergence of numerous cross-disciplinary fields of inquiry. Not least, those of us attached to applied social sciences have an ever-widening choice of such fields within which to pursue a specialised career and to expand our scholarly interests: human rights, environmental studies, geriatrics, indigenous peoples' studies, resource management, marine affairs, women's studies, urban studies, peace and world order studies, dispute resolution or conflict management, strategic studies and scores of others. Through time most of these new, and often cross-fertilising, fields are developed and diversified through the growth of highly specialised *sectors*. For example, the field of marine affairs is now splitting into fishery development and management, deep ocean mining law and policy, offshore hydrocarbon development, shipping and navigation regulation, conservation of marine life, the various sub-sectors of marine pollution prevention and control, ocean boundary-making, and other specialised cross-disciplinary sectors. To take a less familiar example, it might be said that a new field of "peace and world order studies" is in the process of cohering around established fields and sectors, such as arms control and disarmament, defence studies, human rights (including economic and social justice), regional conflicts, revolution studies, the politics of non-violence, international law and organisation, conflict management, women's studies, human ecology, religion and ethics, and alternative futures.[13]

It may be that each of these modern or emerging fields and sectors is bound, sooner or later, to acquire its own paradigm, to assume its own characteristics, determined by what the scholars who come together regard

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13 Thomas EC and Klare MT (eds), *Peace and World Order Studies: A Curriculum Guide*, 5th ed (1989).

as a mutually convenient frame of inquiry.[14] Already one senses a diminishing utility in attempting to generalise about these intellectual developments, but it seems to be true that most, if not all, originate in the perception of a real, existing "problem situation" or "issue context", and almost invariably that originating perception is *governmental*, rather than academic, in purpose and motivation. Whatever course these fields and sectors follow, it cannot deviate altogether from the legitimising need to respond, through collective intelligence, to real (i.e. "real world") problems and issues.

Because of their sense of this legitimising need, specialists in these fields and sectors feel obliged to abandon, or at least modify over a period of time, much of the theory and methodology which they import from the contributing *disciplines*, because of the overriding necessity to blend data and ideas across disciplinary lines within the field or sector. At the risk of seeming to portray shades of grey too starkly as black or white, it might be suggested that cross-disciplinary fields and sectors are more likely than disciplines to generate original policy-related insights. Fields and sectors tend to be developed around a concept of excellence associated with the ideal of insightful *sophistication*, unlike disciplines whose concept of excellence is associated with the ideal of theoretical and methodological *rigour*. In some of these new fields and sectors it may be only a matter of time before the demand for rigour becomes more insistent and eventually matches, or even transcends, the demand for sophistication. At least in the initial period of development, field or sector specialists may be inclined to assume that their "mind-set" (i.e. conceptual or analytical framework) should be derived from the *context*, from the facts to be dealt with, the policy issues posed, and the interests and values perceived to be at stake.

In the meantime, field and sector specialists seem to worship in different cathedrals from their fellow disciplinarians who pursue scholarship solely within the boundaries of their discipline. If it comes down to a question of intellectual allegiance, the former may agree in the meantime to give priority to the need for real world sophistication, with an emphasis on broad factual knowledge and an awareness of context and policy options, rather than to the need for rigour in the theory (and methodology) of the contributing disciplines. Non-specialist

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14 In his famous work, *The Structure of Scientific Revolutions* (1962), Thomas Kuhn argued that the authority of science resides not in a rule-governed method of inquiry but in the scientific community that obtains the result. On the impact of this theory on various disciplines (but not law or international law), see Gutting G, *Paradigms and Revolutions* (1980).

disciplinarians do, of course, make occasional sorties into these cross-disciplinary fields and sectors, partly with a view to maintaining the purity or rigour of the input from that discipline. As fields and sectors become increasingly coherent and influential on the making of governmental (and sometimes industrial) policy, the relevant disciplinary inputs may become increasingly narrow, academic and remote, and perhaps eventually incur the risk of being considered in government (and industry) as irrelevant.[15]

The Study of Treaties as a Discipline

Traditionally, treaties have been the special interest of three disciplines: international law (i.e. the law of treaties), history (i.e. diplomatic and political history), and political science (i.e. international relations, foreign policy studies, and negotiation theory). Of these three disciplines, international law has often been thrust into a central position in light of the practical consideration that governments, as treaty-makers, are expected to operate within a legal frame of reference, and that the crucial question in practice is often whether or not the parties to settlements or arrangements intend that the negotiated instrument should have legal consequences, such as the creation of legal obligations.[16] The legal frame of reference thus serves to limit the scope of inquiry to those instruments which are deemed or demonstrated to have this kind of significance. Legal positivists, holding all international law to be neither more nor less than the expression of sovereign will, reinforce the limiting effects of the legal approach to treaties by insisting on the primacy of *consent* as a core concept underpinning the international legal system.[17] Other kinds of theorists,

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15 The proof of this is found in the diminishing involvement of non-specialist disciplinarians in those hybrid (governmental-academic) conferences and workshops that are such a prominent outlet for cross-fertilisation within most cross-disciplinary fields and sectors.

16 In most of the "mainstream" literature in international law, it is assumed that this is the primary consideration for treaty-makers. In many categories of treaty-making this may be a reasonable assumption, especially where the prospect of judicial enforcement is realistic. In many cases, however, the crucial question has less to do with legal consequence than with operational (i.e. bureaucratic or administrative) significance. Frequently, the key question is whether the negotiated instrument is an acceptable and workable arrangement for the parties or the relevant inter-agency relationship.

17 On "core concepts" as one of the three "sectors" of international law, see Johnston, "Functionalism in the Theory of International Law" (1988) 26 Can YbIL 3 at 29-40. In addition to consent, we might include subjects, sources, custom, jurisdiction, diplomatic and consular protection, recognition, and responsibility among the family of core concepts.

such as "Unitarians"[18] attracted to the prospect of widely shared "general principles",[19] contribute to the limiting purposes of the legal approach to treaties by insisting on the merit of the *analogy* between treaty and contract.[20] Inherent in this disciplinary frame of reference is the assumption that the only negotiated instruments worthy of scholarly consideration are those that pass the *litigational* test. That is, the purposes of treaty-making are assumed to be served, in the final critical analysis, in a court of law or alternative forum for the adjudication of treaty-related disputes.

Limiting as the lawyer's approach is, the historian's approach to treaties tends to be even more restrictive, focusing after the fact on those relatively few instruments judged to have historic significance, either as the expression of a political relationship or as the reflection of a particular national involvement in foreign relations or diplomacy. The consequences

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18 The author has applied this term to international lawyers whose chief concern is to build a complete and coherent stock of norms through the unifying logic of legal doctrine. For a critical view of "Unitarianism" in the context of ocean boundary-making, see Johnston DM, *The Theory and History of Ocean Boundary-Making* (1988).

19 Most "Unitarians" assume or postulate the existence of "underlying", "emergent", or "basic" general principles, which can be drawn together, and then developed, as the corpus of governing norms for the world community. They may differ on where to look, and on what they have found, but they agree on the importance of the quest for normative development in the light of the classical legal virtues of uniformity, universality, consistency, and clarity. See, for example, Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (1953).

20 The most famous of earlier commentators on the treaty-contract analogy began with the formalistic proposition that the "legal nature" of the two is "essentially the same. The autonomous will of the parties is, both in contract and in treaty, the constituent condition of a legal relation which, from the moment of its creation, becomes independent of the discretionary will of one of its parties". Lauterpacht H, *Private Law Sources and Analogies of International Law* (1927), p 156. "It is remarkable how this identification of contracts and treaties finds uniform expression in the way in which modern authors deal with the creation and dissolution of treaties. The essential conditions of a private law contract, i.e. capacity of the parties, a permitted and possible object, and a proper declaration of will not vitiated by fraud, mistake or duress, are as a rule the basis upon which publicists build their exposition of treaties." Ibid, p 160. However, even then, in the early "neo-classical" period of international law, Lauterpacht was ambivalent about the merit of basing the law of treaties on the treaty-contract analogy and the governing consensual concept of "consent to be bound". Ibid, pp 155-180.

of treaty-making are of interest to the historian only if they lend further significance to that relationship or involvement.[21]

Of the three dominant disciplines in the field of treaties, only political science is likely to take a broad, if not comprehensive, view of the phenomenon of treaty-making. Because of the wide-ranging scope and contemporary orientation of their discipline, political scientists are more likely to extend their investigation to the pattern of *treaty practice*, to all evidences of "treaty commitment and behaviour". However, so voluminous is the record of inter-state negotiation in the modern era, political scientists have tended to confine their efforts to the compilation and quantitative analysis of formal treaty commitments[22] or to case studies of selected treaties.[23]

The result is that each disciplinary focus limits the scope of scholarly investigation and restricts one's understanding of this important form of human commitment and behaviour.

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21 For a collection of treaties judged to be of general historic significance, see Day AJ (ed), *Treaties and Alliances of the World* (3rd ed, 1981).

22 The most comprehensive and most valuable compilation of treaties of the modern era is Rohn P, *World Treaty Index* (5 vols, 2nd ed, 1983), which covers the period from 1920 to 1980. For another massive, modern compilation which goes back almost 900 years, see Parry C, and Hopkins C, *Index of British Treaties, 1101-1968* (1970). [For national treaty calendars, see the works of Wiktor (Canada and the United States); Triska, Slusser, Ginsburgs, and others (the Soviet Union); and Johnston, Chiu, Scott, and others (the People's Republic of China). These compilers, it should be noted, are drawn both from political science and international law.]

23 Over a dozen multilateral treaties have been judged to have such lasting importance that each has become the focus of a separate "industry" within the scholarly community. Indeed some have become the sole focus of conferences. See, for example, Gifford P (ed), *The Treaty of Paris (1783) in a Changing States System* (1985). Some international lawyers look back on the Treaty of Westphalia (1648) as having exercised a profound and lasting influence on the development of international law. See Gross, "The Peace of Westphalia, 1648-1948" (1948) 42 AJIL 20. Such is the narrowness of the legal perspective on treaties which have had a foundational significance in the history of their nation. See, for example, Orange C, *The Treaty of Waitangi* (1987); and Kawharu I H (ed), *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989).

The Study of Treaties as a Field or Sector

If the study of treaties is to be freed from these disciplinary limitations, it will have to be converted into a cross-disciplinary field, fertilised not only by the relevant sectors of political science and international law (eg foreign policy, public administration, regime formation, international trade law, international resource and environmental law), but also by cross-disciplinary fields and sectors (eg marine affairs, environmental studies, boundary-making, and conflict management).

A comprehensive framework for the study of negotiated instruments would transcend the limiting considerations of legal effect, formality, publicity, political glamour and historic significance, which are, in a sense, imposed by the dominant disciplines. Such a framework would encompass the maintenance as well as the making of all negotiated instruments, both the formal and the informal, the published and the unpublished. A broad, cross-disciplinary, field approach would be designed to distinguish the distributive, administrative, resolutive and demonstrative *functions* assigned to negotiated instruments in the world community today,[24] and thus provide a much more insightful understanding of the purposes of diplomacy and the detailed workings of bureaucracy within treaty-related contexts and situations.

Within a comprehensive "functionalist" frame of inquiry of this sort, it seems likely that, sooner or later, the need for sectoral specialisation within the field of treaty studies would be recognised. The dynamics of treaty maintenance, if not of treaty-making, are quite different in distributive, administrative, resolutive and demonstrative treaty relationships. For example, disciplinary concepts of breach or treaty violation would give

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24 Distributive agreements, which account for almost 90% of all formal bilateral agreements, are those primarily concerned with the distribution, exchange or redistribution of resources, information, ideas, or people (eg trade, development assistance, scientific cooperation, and cultural exchange agreements). Administrative agreements are those primarily concerned with the creation, maintenance and revision of State and inter-State services and related arrangements (eg consular, banking, joint development, communications and transportation agreements). Resolutive agreements are those primarily concerned with the resolution of legal issues (eg nationality and land boundary delimitation agreements). Demonstrative agreements are those primarily concerned with the demonstration or dramatisation of official attitudes (eg peace, friendship, peaceful coexistence, alliance, non-alignment, zones of peace, and non-nuclear agreements).

way to various concepts of "treaty failure", varying with context as well as category.[25]

Moreover, within these functional categories, especially the category of distributive instruments, a high degree of heterogeneity is found. From the functionalist perspective offered within the cross-disciplinary field of treaty studies, as distinct from the formalistic perspective provided within the discipline of law, there is little similarity between trade agreements, cultural cooperation protocols, and fishery access arrangements, though all are distributive in function on the face of things.

Further insights might be derived from a field, as distinguished from a disciplinary, approach to the problems of implementation, compliance, interpretation, dispute settlement, and termination. For example, the tasks of ocean boundary diplomacy and administration take on a radically different significance for a specialist in ocean development and management than for a "mainstream" international lawyer, whose interest in ocean boundary treaties is usually limited to the text of linear settlements and the text of adjudications so generated. The latter is likely to analogise between land and ocean boundaries and stress the primacy of resolutive linear settlements. The former, on the other hand, must develop a professional awareness of the complex assortment of institutional arrangements as well as linear settlements that may need to be negotiated between adjacent or opposite coastal states.[26] These wholly different perceptions of discipline and field are likely to result in divergent attitudes

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25 The traditional notion of a breach of a treaty – and especially the narrow concept of "material breach", as defined in Article 60 of the 1969 Vienna Convention on the Law of Treaties – has a pejorative connotation, which is not conducive to a diplomatic solution between the parties to a treaty-related dispute. It may, therefore, be more constructive to use less accusatory terminology and describe the dispute as one concerning treaty interpretation or application: Rosenne S, *Breach of Treaty* (1985), pp 119–120. A broad approach to "treaty failure" is recommended even by formalists, who recognise that the treatment of the phenomenon cannot be restricted in focus to treaty instruments, but must be extended to a wide range of treaty-related obligations and responsibilities: ibid, pp 3–8. See also Simma, "Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law" (1970) Osterreichische Zeitschrift fur offentliches Recht 205.

26 Contrast the approaches of Johnston, note 18 above, and Weil P, *The Law of Maritime Delimitation – Reflections* (1989). For critical reviews of these works, see (1990) 84 AJIL 616; *Journal of Maritime Law and Commerce* (1990). For favourable reviews of each, see (1990) SIJ Est C L 416; (1990) 21 ODIL 249.

to questions of compliance, interpretation, termination, and other issues in the law of treaties.[27]

The Role of Consent Theory in the Study of Treaties

The law of treaties reflects more clearly than any other area the consensual basis of the traditional theory of international law. Accordingly, there is as much emotion as logic invested in it, so much so that consent theory in that area has the power of myth. If the theoretical foundations of international law are as fragile as the critics contend, then consent theory in the law of treaties may be seen to be, quite literally, indispensable to the maintenance of the discipline, at least in a psychological sense.

On the other hand, if we approach treaty commitment and behaviour within the framework of a cross-disciplinary field of inquiry, we may be able to evaluate the adequacy of consent theory within that context in a more dispassionate, and potentially "scientific", spirit of investigation. At least three major advantages might be expected from such an approach.

First, a field, as distinguished from disciplinary, perspective on treaty commitment and behaviour offers a much wider scope for inquiry into *bilateral negotiations*. The scholar's coverage would extend beyond treaties and other international agreements intended (or deemed) to be legally binding on the parties – that is, those instruments that seem to pass the "litigation test" – to include literally all negotiated instruments, whatever their form or purpose – that is, to all that pass the "operational test" of relevance to routine inter-State relations and intra-organisational activities. The result of such a wide coverage would be to encompass many kinds of bilateral instruments that are deemed to be marginal or

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27 For example, in the matter of treaty termination, legal disciplinarians who stress the need for linear settlements, to enhance the legal values of certainty and permanence, are likely to insist on the analogy between land and ocean boundaries, and thus to assume that Article 62.2(a) of the 1969 Vienna Convention on the Law of Treaties, which provides that "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary ...", should be deemed to apply to all kinds of ocean boundaries, though this may not have been specifically within the contemplation of those who drafted the 1969 Convention. Sinclair I, *The Vienna Convention on the Law of Treaties* (2nd ed, 1984), pp 192–196. For a general application of the "principles of consent" to the termination of treaties, see Plender, "The Role of Consent in the Termination of Treaties" (1986) 57 YbIL 133.

clearly excluded under the restrictive legal definition pivoting on the consensual criterion of intention to be bound.

There are, for example, many examples of bilateral *political accords* that seem to fall outside the traditional legal definition and yet are of extreme operational significance, and sometimes of considerable historic importance.[28] A scholarly framework that excludes such instruments is of limited utility. The same can be said of the exclusion of a proliferating volume of *informal and unpublicised bilateral instruments*, a "vast substructure of intergovernmental paper"[29] consisting of interstate documents variously described as "informal instruments", "gentlemen's agreements", "non-legal agreements", "memoranda of understanding", and "technical arrangements".[30] Such instruments are negotiated by most national governments on a regular, if not day-to-day, basis, and are found to be useful in virtually every area of intergovernmental relations.

The texts of these instruments normally remain unpublished, and often their very existence is known only to a few officials in the relevant sector of bureaucracy and to those directly affected outside government.[31] Usually there are significant advantages for the parties to these

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28 A recent example is the Helsinki Final Act of 1975, which is a formal instrument but deemed to be legally non-binding, despite its very considerable, and rapidly growing significance in the rebuilding of Europe. Schachter, "The Twilight Existence of Non-binding International Agreements" (1977) 71 AJIL 296. For an even-handed treatment of the "Helsinki process", see [Comment], "Treaty and Non-Treaty Human Rights Agreements: A Case Study of Freedom of Movement in East Germany" (1980) 29 ICLQ 787. For a review of Australian government practice in both formal and informal negotiations, see Department of Foreign Affairs and Trade, *The Conclusion of Treaties and Other International Arrangements* (December 1987). In Australian practice the informal instruments are called "arrangements of less than treaty status".

29 Baxter, "International Law in 'Her Infinite Variety'" (1980) 29 ICLQ 549 at 556.

30 Aust, "The Theory and Practice of Informal International Instruments" (1986) 35 ICLQ 787.

31 For example, it is common to implement formal bilateral air services agreements through informal instruments, usually called memoranda of understanding. Those detailed instruments, concerning such important matters as landing rights and related arrangements, are negotiated in close consultation with the relevant airlines and are treated as confidential. Aust, note 30 above, at 788.

arrangements to preserve their "informal" status.[32] Within the discipline of international law, it is normally explained that such an instrument is not of "treaty character" because the parties to it do not intend it to be legally binding, but in truth informal intergovernmental arrangements are an important part of the treaty-making process. Indeed in many States today the number of informal instruments negotiated each year greatly exceeds the number of formal instruments that are intended to be legally binding.[33] Of special operational significance, within this very large family of unpublicised informal instruments, are detailed memoranda of understanding negotiated with a view to the implementation of existing formal agreements of a general kind. Such memoranda rarely suffer from vagueness, unlike many formal agreements, and can acquire legal significance despite their "twilight existence" and the parties' real or apparent intentions.[34]

That most international lawyers should wish to confine their attention to legally binding instruments is, of course, understandable. The emphasis on legal consequences is especially justifiable in those economic sectors of treaty-making that bear analogy with economic transactions, whose viability depends on the possibility of resort to adjudication for purposes of enforcement.

But there are other important purposes to be served by treaty-making, both operational and symbolic, outside the commercial and other economic sectors of inter-State relations. The proliferation of informal administrative arrangements in modern government practice reflects the

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32 They involve less formal procedures and protocol; they avoid constitutional or parliamentary delays; they need not be published or registered; and they are easily amended. In short, they have the merit of speed, simplicity, convenience, flexibility, and confidentiality. There are also some possible disadvantages. Often less care is taken in drafting precise language for informal instruments. Because they are intended to be legally non-binding, they usually lack a dispute settlement clause and therefore might generate disputes over interpretation that cannot easily be referred to a disinterested, third party adjudicator: see Aust, note 30 above, 787–788. Whether these fears are justified in practice is not at all clear.

33 In Australia, between 1 April 1988 and 31 March 1989, the Executive Council approved 54 "treaty actions", but during the same period the Department of Foreign Affairs and Trade was informed of the signature of 93 "arrangements of less than treaty status". Research by Susan Reye of the Attorney-General's Department in Canberra suggests that the true ratio between formal and informal instruments negotiated by the Australian government is at least as much as 2:5 and may be closer to 2:9.

34 Baxter, note 29 above.

increasingly diverse purposes served in intergovernmental negotiations. Even under the restrictive legal definition, it is conceded that "treaties" are called upon to discharge an extraordinarily wide, and widening, range of functions.[35] Logically, functional diversification in practice should result in a commensurate broadening of scholarly inquiry, and if this cannot be easily accommodated within the traditional limits of a discipline, then a cross-disciplinary field of inquiry with a comprehensive coverage of the subject-matter should be developed.

Second, a cross-disciplinary field approach to the study of negotiated instruments would be needed to facilitate scholarly analysis of the immense volume of *multilateral instruments* which have proliferated in the last two or three decades. Usually these agreements are characterised as "formal", and many of them are published, albeit belatedly and often in obscure sources. More often than not, multilateral instruments serve an organisational, rather than transactional, purpose, and have virtually no functional, as distinct from formal, similarity to bilateral contracts in a municipal law system. If there is to be any scholarly and detailed understanding of how the organised world community operates, it is important to develop a field of inquiry freed from the artificial, formalistic constraints imposed by the disciplinary analogy between treaty and contract. Logically, a cross-disciplinary, functionalist approach to multilateral instruments would treat such agreements differentially in accordance with the many different functions they are required or expected to serve.[36] The result of such scholarship might be, eventually, an infusion

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35 Even in its restrictively defined form, the treaty is "the main instrument which the international community possesses for the purpose of initiating or developing international cooperation .... In the international sphere, the treaty has to do duty for almost every kind of legal act, or transaction, ranging from a mere bilateral bargain between states to such a fundamental measure as the multilateral constitutive instrument of a major international organisation (eg the United Nations Charter of 1945)": Starke JG, *Introduction to International Law*, 9th ed, (1984) p 414.

36 The distribution of functions served by multilateral instruments is so different from that associated with bilateral instruments that they represent a special need for reversing the normal sequence "by looking at the behaviour of states to see whether that behaviour enhances an understanding of the law of treaties as detailed in the [1969] Convention and elsewhere": Gamble, "Multilateral Treaties: The Significance of the Name of the Instrument" (1980) 10 Cal WILJ 1. As noted by Professor Rohn, "[our] knowledge of treaties is comparable to a science of economics which is rich in case studies of individual transactions but which has not yet developed the notion of a gross national product": "The UN Treaty Series Project as Computerised

of new thinking about the rules that should be adopted specifically to "govern" the making and maintenance of multilateral instruments.[37]

Third, the emergence of a cross-disciplinary field of "treaty studies" would enable scholars to develop and deploy "functionalist logic".[38] Important fresh insights into this sector of human behaviour would become available by differentiating functionally distinct categories of inter-State agreements and arrangements. Outside a formalistic framework, "functionalist logic" would, for example, permit compatible approaches to the interpretation of functionally comparable categories of instruments in light of the similar "object and purpose" intended to be served by such instruments. The formalistic concept of "breach" would be supplemented by the functionalist concept of "failure" (dysfunctionality). The traditional analogy between treaty and contract would be subjected to critical scrutiny. Not the least of the benefits would be the emergence of a distinct rationale for the treatment of disputes arising out of multilateral instruments, free from the artificial, formalistic bonding between instruments as dissimilar as

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Jurisprudence" (1966) 2 Tex I L F 167 at 169, cited in Gamble, above at 21. This author shares the view of scholars such as Gamble and Rohn that "international law in general and treaty law in particular can be understood best when traditional, microscopic legal studies are bolstered by a broad view of the entire phenomenon of multilateral treaties": ibid at 169, 21 respectively.

37 Surprisingly little change has been made in the formalistic framework of the law of treaties for "atypical" agreements that bear little, if any, analogy with bilateral contracts between individuals. See, for example, Gaja, "A 'New' Vienna Convention on Treaties between States and International Organisations or between International Organisations: A Critical Commentary" (1987) 58 YbIL 253. On some of the practical problems associated with the traditional assumption that global treaty-making operates in conformity with the theory of consent underlying the law of treaties, see Simma, "Consent: Strains in the Treaty System", in *Structure and Process*, p 485. "If any resort to analogy in national law is useful for multilateral treaties, it would be the model of legislation rather than contract. On the face of things, more useful insights might be gained from comparing distributive multilateral agreements with distributive legislation, administrative with administrative, and so on. It seems, wiser, however, to treat multilateral treaty-making as an activity *sui generis*. The process has been described, by an Australian foreign minister, as "'varied, chancy, frequently experimental, and often inefficient'": United Nations *Review of the Multilateral Treaty-Making Process* (1985), p 7. In the case of the 200 multilateral conventions which have been concluded within the United Nations, both the process and the product might be most logically approached as "organisational [rather than transactional] in origin and significance": Johnston, note 17 above, at 31-32, n 98.

38 Ibid.

bilateral commercial contracts and multilateral non-economic treaties and arrangements.

Conclusion

The principle of consent is still widely regarded as central to the concept of legal development as applied to many sectors of the international legal system, not least to that of the law of treaties. If consent in that sector is interpreted restrictively to mean "consent to be legally bound", then the disciplinary perspective prevails and the international lawyer's approach to the study of "treaty commitment and behaviour" is narrow, limiting and distortive, excluding the majority of inter-State instruments of the contemporary era. If consent is interpreted liberally to refer to the consensual nature of the negotiating process, then the field or sector perspective prevails and the scholar's approach to the study of "negotiated instruments" is all-encompassing and reflective of the practice of national governments and international organisations.

It is concluded that both approaches are legitimate, and indeed necessary. The disciplinary approach is legitimised by the *frequent need* to negotiate formally finding commitments for commercial and other economic reasons, especially in light of the *occasional need* to resort to adjudication for purposes of enforcement. The field or sector approach is legitimised by the *day-to-day need* to comprehend the operational treatment of all negotiated instruments at the international level.