

# SOVEREIGNTY AND THE RIGHT TO BE LEFT ALONE: SUBSIDIARITY, JUSTICE-SENSITIVE EXTERNALITIES, AND THE PROPER DOMAIN OF THE CONSENT REQUIREMENT IN INTERNATIONAL LAW

MATTIAS KUMM\*

## I

### INTRODUCTION

When a state invokes a right to sovereignty against demands made from outside its borders, the state is implicitly claiming that it has a right to be left alone and to do as it deems fit without externally imposed constraints. It is uncontroversial that sovereign states may do as they please without such constraints across *some* domain. States are institutions, which, from a normative point of view, are conventionally imagined as constituted by their citizens for the purpose of enabling and structuring practices of collective self-government. They are not only or even primarily globally authorized, decentralized administrators implementing international norms, even if they also have such a role to play as trustees of humanity.<sup>1</sup> So, to the extent sovereign states are sites of collective self-government, there must exist some domain over which the national community is in authority and not subject to external constraints. The question, then, is how to determine the boundaries of this domain and thus the boundaries of a state's right to be left alone. Here the principle of subsidiarity has an important role to play.

At its core the idea of subsidiarity as a jurisdictional principle amounts to the proposition that the more local unit should have jurisdiction to regulate an issue, unless there are good reasons for the overarching, more central level to step in. Applied to the domestic jurisdiction of states in their relationship to international law, this translates into the claim that states should have the *prima facie* authority to determine what qualifies as a policy challenge and how to respond to it legally, unless there are good reasons for international law to

---

Copyright © 2016 by Mattias Kumm.

This article is also available at <http://lcp.law.duke.edu/>.

\* Inge Rennert Professor of Law, New York University; Managing Director of the Center for Global Constitutionalism, WZB Social Science Center Berlin & Research Professor for “Rule of Law in the Age of Globalization” Humboldt University, Berlin.

1. See generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013).

restrict what states may do and impose its own solutions. As a matter of positive international law, such an understanding of subsidiarity espouses the idea that sovereign states, as the primary building blocks of the international legal system, establish the institutional framework within which citizens practice collective self-determination. Reasons for the *prima facie* prioritization of states as sites for collective self-determination are numerous: they range from the virtues of relative decentralization of power to respect for local identities and preferences.<sup>2</sup> There are also, of course, many reasons for legally restricting a state's authority and empowering more centralized institutions, which this article will analyze. Nonetheless, any conclusive justification offered for centralizing regulatory authority must also reflect concerns for the advantages of local decisionmaking and strike a plausible balance between competing concerns. The principle of subsidiarity as a general architectural principle should be seen as structuring the process of justifying restrictions on state sovereignty by international law.<sup>3</sup>

Questions of jurisdiction and potential violation of the principle of subsidiarity in international law can arise in a wide range of contexts. Such questions have traditionally been associated primarily with substantive concerns regarding allocation of power and authority: Are there, for example, compelling justifications for a specific regulatory issue to be addressed on a more central, rather than a more local level? Are there compelling reasons for the EU to strike a balance between the rights of those who want to smoke in public places and the right of those who wish to not be burdened by the effects others' smoke in public, or should such a decision be left to the Member States?<sup>4</sup>

Questions about the form of involvement by the local or central authority are also relevant to such an analysis. For example, provided that there are good reasons for international law to establish some protections for outsiders who face risks relating to the civil use of nuclear energy by neighboring states, should such protections be procedural only,<sup>5</sup> or should international law establish minimum standards that any civilian's use of nuclear energy must comply with? In such a scenario, is only the first approach compatible with subsidiarity, or is there a good justification for the more intrusive, minimum-standard approach?

---

2. For an overview of the range of concerns in play, see P. Berman, *Taking Subsidiarity Seriously*, 94 Colum. L. Rev. 331 (1994); see also A. ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* (Oxford Univ. Press 2002).

3. See generally Andreas Føllesdal, *The Principle of Subsidiarity as a Constitutional Principle of International Law*, 2 GLOBAL CONSTITUTIONALISM 37 (2013) (exploring various approaches toward framing states' roles in international governance).

4. See Mattias Kumm, *Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L. J. 503, 506–24 (2006).

5. These procedural forms of protection could take the form of requirements taking into account outside interests in cost-benefit analysis and allowing outsiders to participate in national administrative and judicial proceedings, for example. The Aarhus Convention takes such a procedural approach. See United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

The principle of subsidiarity should also be understood to have a procedural dimension in addition to its substantive aspects. The specific procedure used to authoritatively decide policy questions relating to subsidiarity is often itself an issue that must be resolved with subsidiarity concerns in mind. Procedural subsidiarity concerns are weakest if the generation of an international legal obligation depends on that state's consent, as is the case in the ordinary treaty-making process. Nonetheless, even if a state specifically consents to such a restriction on its freedom of action, such a decision might still raise substantive subsidiarity concerns. Perhaps a Member State government only agreed to support, say, an EU measure prohibiting smoking in public spaces, because the political costs of imposing such a ban as a national measure would have been high or because the international process provided a welcome opportunity to impose a desired policy result on other states as well. Those reasons are not good reasons justifying the centralization of regulatory decisions. But even if substantive subsidiarity concerns do not disappear just because a government gives its consent, actual consent requirements still mitigate procedural subsidiarity concerns by giving a state the possibility to escape regulation by vetoing it. Subsidiarity concerns become stronger when the state is only one actor among others in the juris-generative process and when consent is no longer a necessary requirement for a state to be bound, as is the case, for example, with regard to customary international law (CIL) or majoritarian decisionmaking within treaty-based regimes. Subsidiarity concerns become stronger still when the role of states is even more marginal, as is the case, for example, with binding decisions of the United Nations Security Council for the great majority of states not represented in the Council.

## II

### SOVEREIGNTY AND THE BOUNDARIES OF STATE CONSENT: BETWEEN SUBSIDIARITY AND COSMOPOLITAN DUTY

The focus of this article is the jurisdictional principle of subsidiarity as it relates to the consent requirement in international law. More specifically, the central question is: *What is the domain over which states should be free to do what they like, subject only to obligations they have assumed voluntarily?* Call this the "domain of subsidiarity." Conversely, what lies outside of this domain? Under what circumstances is it justified for international law to impose legal obligations on sovereign states without their consent? Call this the "domain of cosmopolitan duty." Under what circumstances is the fact that a state has not given its consent to a particular rule of international law compatible with the principle of subsidiarity properly understood? How should the boundaries between the domain of subsidiarity and the domain of cosmopolitan duty be drawn? Framing the issue in this way proves useful in determining the structural contours of a sovereign state's right to be left alone.

This is not only a question of political morality, useful to provide a critical perspective on existing international law; it is also a question relevant to the

interpretation and progressive development of international law. Questions of subsidiarity arise when a state finds itself with specific obligations under international law that it has not actually consented to. Most obviously, that is the case when a state is bound by norms that qualify as general principles of international law or CIL. But the issue is also relevant where states enter into treaties that establish institutions authorized to either create new obligations or to authoritatively interpret often highly abstract provisions of a treaty. In these cases, the link between these specific obligations and the consent of states can be highly attenuated. Because the connection between state consent and international legal obligations incumbent on the state is increasingly either nonexistent or attenuated,<sup>6</sup> subsidiarity concerns are, unsurprisingly, emerging as a theme in international law.<sup>7</sup>

This article explores the delimitation of the domain over which a state can plausibly invoke “sovereignty” and correctly insist that a matter falls “essentially within the domestic jurisdiction of the state,”<sup>8</sup> opposing the interpretation or progressive development of international legal norms, be it by way of CIL, general principles, or progressive interpretation of existing treaties. The idea of “sovereignty”<sup>9</sup> and “essentially domestic jurisdiction of the state,”<sup>10</sup> as well as the test for finding general principles in international law or CIL or the appropriateness of a particular progressive development in international law, should incorporate considerations relating to subsidiarity. Interpretive questions relating to the content of such concepts, tests, and interpretations cannot plausibly be resolved by reference to conceptual analysis, canons of interpretation, or historical analysis alone. They should be resolved by arguments that take seriously a commitment to subsidiarity as a structural principle of the international order.<sup>11</sup> To put it another way, if a legal requirement derived from a putative general principle of law or putative rule of CIL clearly violated the principle of subsidiarity, such a violation establishes a strong interpretive presumption that there is no such requirement as a matter of international law in the first place. Conversely, if claims about CIL or general principles of law are clearly justifiable under a proper understanding of subsidiarity as it applies to that context, claims invoking state sovereignty and matters falling under the “essentially domestic jurisdiction of the state”<sup>12</sup> must be rejected as false.

---

6. See Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT’L L. 1, 2–7 (2014).

7. See generally Føllesdal, *supra* note 3.

8. See U.N. Charter art. 2, ¶ 7.

9. *Id.*

10. *Id.*

11. See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258, 291 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

12. See U.N. Charter art. 2, ¶ 7.

This article does not describe in greater detail how the subsidiarity principle might infuse the structure of the relevant tests.<sup>13</sup> It instead focuses on gaining a deeper understanding of how the subsidiarity requirement ought to be understood in normative terms as it relates to states and international law. Ultimately, this article seeks (1) to provide, at least in general terms, a clearer understanding of subsidiarity as the domain over which international law should not bind states without their specific consent, and (2) to define the limits of the domain of cosmopolitan duty under which the interpretation of international law should not be unduly restricted by concerns over the absence of state consent.

Even framing the issue in this way means rejecting a widely held traditional view of the foundations of international law. Such a framing presupposes that state consent is not the foundation of international law. Or, if state consent is misleadingly said to be the foundation of international law, it is only foundational in the weak way that citizen consent is supposed by many political theorists to be the foundation of domestic law: only hypothetically and subject to a reasonableness requirement.<sup>14</sup> Actual consent plays a more attenuated legitimating role, as decision-making authority is vested in majoritarian legislative, technocratic, administrative, or public-oriented judicial authorities.

It is not only descriptively the case that considerable parts of international law are hard to reconstruct as being based on state consent. From a normative perspective too, state consent cannot plausibly be the foundation of international law. The legitimacy of a sovereign state is not self-standing. Rather, a sovereign state's legitimacy and its legal order also depends on its integration into an international system whose purpose it is to first establish the conditions under which the exercise of state sovereignty is legitimate.<sup>15</sup>

To substantiate that claim and to make substantial progress toward the delimitation of the domain of subsidiarity and the domain of cosmopolitan duty, this article suggests that drawing state boundaries and pursuing national policies generate justice-sensitive externalities that national law, no matter how democratic, cannot claim legitimate authority to assess. Rather, it is the purpose

---

13. Questions include: Should the test operate independently of standard interpretative canons and tests? Should it be integrated in some way? If so, how exactly? For example, might considerations relating to subsidiarity be relevant for deciding between competing Treaty interpretations, because one impute respect for subsidiarity concerns to be reflected in the object and purpose of the Treaty under Art. 31 (1) of the Vienna Convention on the Law of Treaties? Should subsidiarity concerns play role in determining how widespread or uniform state practice has to be to meet the test for establishing a rule of CIL? This would mean that the requirement would go up, if there are weighty subsidiarity concerns that speak against such a rule and, conversely, it would go down if there are strong subsidiarity related arguments in favor of adopting such a rule. For exploration of a flexible test that accommodates relevant normative concerns, see Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

14. For a classical discussion of the problems of consent based theories, see A. JOHN SIMMON, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 57–100 (1979).

15. The following draws heavily on Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 605 (2013).

of international law to authoritatively address problems of justice-sensitive externalities of state policies. International law seeks to create the conditions and define the domain over which states can legitimately claim sovereignty.<sup>16</sup> States have a standing duty to help create and sustain an international legal system that is equipped to fulfill that function.<sup>17</sup> Only a cosmopolitan state—a state that incorporates and reflects in its constitutional structure and foreign policy the global legitimacy conditions for claims to sovereignty—is a legitimate state. But what does this mean specifically for determining whether a particular provision of international law violates the principle of subsidiarity by reference to this underlying purpose of international law?

The fact of interdependence—that policies generate externalities on other states—has often been invoked as a generic argument in favor of international law.<sup>18</sup> But as will become clear, interdependence and the more effective provision of public goods globally is not itself an argument against denying states the authority to determine for themselves whether and how to address issues relating to the provision of public goods.<sup>19</sup> It may be true that international law is a means to reap the benefits of better cooperation and coordination between interdependent actors. But this assertion merely provides a functional argument for states to sign up for certain kinds of international cooperative endeavors. It does not, without further argument, undermine the claim that it is within a state's authority to decide on how to address concerns surrounding the provision of public goods.

The issue is different, however, when not just any externalities, but specifically justice-sensitive externalities, are in play. Part III discusses how the presence of justice-sensitive externalities undermines claims to legitimate national constitutional authority. Then, in part IV, this article then focuses more closely on three kinds of externalities, the normative concerns they raise, and the structure that international law needs to have to be able to address these concerns adequately.

### III

#### WHY DO JUSTICE-RELEVANT NEGATIVE EXTERNALITIES UNDERMINE CLAIMS TO LEGITIMATE AUTHORITY?

Consider the following four examples as illustrations how a wide range of national policy choices implicates justice-sensitive externalities: First, a state decides to intervene militarily in another state; second, a state decides to embrace nuclear power stations not far from state borders and adopts nuclear safety standards that adjacent states claim are dangerously low; third, a state

---

16. *Id.* at 612.

17. *Id.*

18. *See, e.g.*, ERNST-ULRICH PETERSMANN, INTERNATIONAL ECONOMIC LAW IN THE 21<sup>ST</sup> CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS (2012).

19. *Contra id.*

decides what level of carbon-dioxide emissions strikes the right balance between concerns about global warming and economic competitiveness; and fourth, a state decides how to allocate resources and sets priorities for law enforcement in clamping down on transnational organized crime. In all of these cases, outsiders may be affected in a way that raises concerns about whether their interests have been appropriately taken into account or whether others have unjustly burdened them.

This article describes and closely analyzes different kinds of externalities and the justice-related problems they raise. State policies often have justice-sensitive external effects. What follows from this fact is that a state has a duty to be aware of those externalities and to take them into consideration when conceiving and implementing national policies that avoid doing injustice. This requires state actors to conceive of themselves as something more than just participants in a practice of national self-government concerned with how public policies affect national constituents. Instead, when enacting policies that generate justice-sensitive negative externalities, states have a duty of justice to also act as trustees of humanity.<sup>20</sup> For a state's policies to be just, the state must adequately take into account the legitimate interests of affected outsiders.

But that awareness alone is not enough. It is not sufficient for a state to attempt to do justice to outsiders by way of respecting their legitimate concerns in the policy-formation process. How justice concerns should be addressed is often subject to reasonable disagreement. States, even when following a constitutionally well-designed democratic policy process, lack the authority to determine unilaterally how reasonable disagreement should be resolved. The range of questions over which a state can plausibly claim legitimate authority is limited to questions that do not raise issues of justice-sensitive externalities. A sovereign state and its constitution established by "We the People" can only claim legitimate authority over a domain in which there are no justice-sensitive externalities.

Instead, when justice-sensitive externalities are in play, a state is under a duty to support, help develop, and subject itself and its constitutional system to the authority of an appropriately structured system of international law. Consequently, given states' limited authority to settle reasonable disagreements relating to justice-sensitive externalities, the central task and purpose of international law is to authoritatively settle these issues and thereby determine how claims of justice by outsiders limit what states may do. If a state does not accept the restriction of its authority and help support a constitutional system of international law that is adequately equipped to address these issues, it could overstretch its claim to legitimate authority and effectively insist on a relationship of domination regarding those who are externally affected.

---

20. See generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013). See also Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009) (arguing that the concept of sovereignty should derive not from the state as such but from the rights and interests of humanity).

To understand why this overreaching would occur, it is useful to think about the grounds for legitimate authority in the domestic context. Under what might be called the “standard account” of legitimate authority within the constitutionalist tradition of the eighteenth century,<sup>21</sup> the starting point is establishing just relations between free and equal persons—a task continually hampered by two problems: a motivational problem and an epistemic problem. Because of these problems, it is not sufficient for each actor to publicly profess allegiance to justice; something more is required—the subjection to constitutional authority. Why is that necessary? Why can’t all agents simply agree to do the right thing and to get along?

First, there is the problem of motivation. By themselves, individual actors might not always be motivated to do what justice requires when they experience a conflict between what they want to do and what they recognize as an obligation of justice. The institutionalization of a constitutional system seeks to add nonmoral incentives—the threat of institutionalized sanctions of some kind—to support and stabilize justice-respecting behavior.<sup>22</sup> The threat of sanctions has a double role in this regard. On the one hand, the addressee of the law has an additional incentive not to defect from a commitment to justice, in the face of what might appear to be other competing interests, because of the threat of sanctions. The threat of sanctions makes it easier to fight temptations and the desire to ignore internationally imposed requirements of justice. On the other hand, the threat of institutionalized sanctions provides an assurance of reciprocity. The threat assures that an actor seeking to comply with duties of justice will not end up the “sucker” when, in a reciprocal relationship, the other side takes advantage of justice-compliant behavior but refuses to comply with its obligations.<sup>23</sup>

Second, there is an epistemic problem. Even assuming that all relevant actors are motivated in the right way, they might still disagree about what justice actually requires. No procedure guarantees the agreement of well-informed and appropriately disposed intelligent actors, even regarding specific questions of justice. Given disagreement over questions of justice, appropriately structured procedures are necessary to authoritatively determine what claims of justice are to be recognized as valid. The alternative would be to have the more powerful side dictate and enforce its conception of justice against the weaker side. That, however, would be a form of domination. It would privilege one side over the other without good reason.<sup>24</sup> The actors are, therefore, under an

---

21. The following argument roughly tracks traditional Kantian arguments. For contemporary discussions of reasonable disagreement and its connection to the establishment of legitimate authority, see SAMANTHA BESSON, *THE MORALITY OF CONFLICT: REASONABLE DISAGREEMENT AND THE LAW* (2005) and JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

22. See BESSON, *supra* note 20; WALDRON, *supra* note 20.

23. Given the uneven role that sanctioning illegal behavior plays in international law, the weight of this argument will depend on the nature of the sanctioning regime in place in a particular regulatory domain.

24. If constitutionalism is connected to the idea that justice requires the absence of domination,

obligation to establish and subject themselves to a system of constitutional authority that provides appropriately impartial and participatory procedures to contest existing conditions and practices, that resolves disagreements, and that ensures that the results are reasonable and justifiable to all concerned. These, in a highly stylized form, are some of the key steps for the justification of legitimate authority within the liberal, democratic–constitutionalist tradition.

If the arguments relating to justice-sensitive externalities that are standard fare in philosophical accounts of the duty of individuals to help establish and subject themselves to appropriately structured constitutional authority on the state level are correct, the problem replicates itself in the relationship between states.<sup>25</sup> Questions of justice also arise between independent self-governing entities and the individuals that comprise them. These questions often become contentious because of the interplay between mixed motivations and epistemic problems, leading to disagreement and distrust. The history of foreign policy—even of powerful liberal democracies—provides ample illustrations of disregard and bias against outside interests. Even if liberal democracies were to do a better job of taking into account those interests than other forms of government,<sup>26</sup> the problem of bias does not disappear. Given that statesmen have an incentive to focus on the concerns of national constituents, the structural bias of national political processes regarding questions of justice-sensitive externalities is obvious enough. Furthermore, even though states are obligated to do justice with regard to individuals whether or not there are appropriate assurances of reciprocity,<sup>27</sup> many obligations under international law exist subject only to the condition of reciprocal compliance.<sup>28</sup>

Furthermore, the kinds of justice questions that arise in relation to negative externalities of national policies are clearly issues upon which reasonable disagreement often exists. Even if reasonable people might agree that the appropriation of territory by way of military force is a violation of another sovereign's right, what kind of measures may be used to retaliate against violations of legal obligations by another state? What kind of weapons may a

---

then reasons simply invoking facts about power relationships are never good reasons, and both sides claim to have justice on their side. For theories that link the constitutionalist tradition to the idea of justice as nondomination, see RAINER FORST, *THE RIGHT TO JUSTIFICATION* (2011) and PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (Oxford Univ. Press 1999).

25. For the first development of this, see IMMANUEL KANT, *PERPETUAL PEACE* 128–36 (M. Campbell Smith trans., 1917) (1795).

26. It is reasonably well established that democracies tend not to go to war with each other. See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011) (providing an overview of the debate and literature relating to the “Democratic Peace” thesis). Moreover, there seems to be a correlation between liberal democracies, opening up markets to participate in the global economy, and the degree of multilateral legal integration as reflected in membership in international institutions. *Id.*

27. This is also recognized under positive international law with regard to certain obligations. See, e.g., G.A. Res. 56/83, art. 50, annex, *Responsibility of States for Internationally Wrongful Acts* (Dec. 12, 2001).

28. In case of noncompliance, a state can take countermeasures in the form of nonperformance of its obligations vis-à-vis the noncompliant state. See, e.g., *id.* arts. 49–53.

state seek to acquire? What kind of national counterterrorism efforts are minimally necessary to ensure that a state does not unwillingly become a safe haven for international terrorists committing violence on the territory of another state? What level of pollution of a river is acceptable upstream, given cross-border downstream usage? What levels of carbon-dioxide emissions are acceptable in light of the consequences of global warming? These kinds of questions give rise to debates in which actors might reasonably disagree about what exactly justice requires in a given context.

Because of the pervasiveness of reasonable disagreement, these are not the kinds of issues over which a state's constitutional system, no matter how internally democratic, can claim legitimate constitutional authority. Claiming authority to resolve questions of justice concerning outsiders, who by definition have no equal standing in the domestic policy-formation process, is an act of domination. The enforcement of a conception of justice by a powerful actor or a hegemonic coalition of actors against others making competing claims is an act of domination if those hegemonic actors refuse to subject themselves to an impartial procedure providing equal participatory opportunities for those whose reasonable justice claims are implicated. With regard to issues concerning justice-sensitive externalities, each state is under a standing obligation to support, help further develop, and subject itself to a constitutional system of international law that is equipped to authoritatively address these issues. Such a system would have to provide an impartial and appropriately participatory procedure to resolve these issues in a way that is reasonable and justifiable to all concerned. The point of such a system of international law is to define the domain over which states can legitimately exercise sovereignty and for which "We the People" can claim self-governing constitutional authority.

#### IV

##### THREE KINDS OF EXTERNALITIES

The centrality of justice-sensitive externalities in understanding both the limits of national constitutional authority and the purpose of international law warrants a closer analysis of the concept and its main practical manifestations. More specifically, this article distinguishes three kinds of externalities. Each type of externality raises distinct normative concerns and accounts for specific structural features of international law. Here, the article describes these externalities, the kinds of justice concerns they raise, and the basic features that international law must have to adequately address them.

##### A. Structural Externalities: Establishment of Borders

The first kind of justice-sensitive negative externality is structural. It is linked to the fact that a people governing itself within the institutional framework of the state requires the establishment of borders. The claim to self-government—or, using the territory within the state borders as is deemed desirable by "We the People" organizing their lives together—has an external

corollary in the claim to a collective right to exclude others from crossing national borders and entering. States generally claim a sovereign right to freely determine who they let in or refuse. Importantly, this sovereign right restricts the liberty of those intending to cross a state boundary and seeking to move to the territory of another state, whether to find a better life, or for any other reason. How can such exclusion be justified?<sup>29</sup> What justifies the state's coercive force that someone might encounter at the border when they seek to enter without meeting established national requirements?

The claim to sovereignty over territory by "We the People" can be, and has been, analogized to the claims to property over land by individuals in a domestic society. In both cases, the claim of the rights-holders is that they should be able to use land and to exclude all others as they deem fit. Generally, arguments in favor of a world divided into distinct and separate sovereign states focus on an array of benefits for assigning special responsibility to a group of persons to a specific piece of land connected to the cultural production of meaning, creation of social trust, and solidarity.<sup>30</sup> But any successful justification for a right to exclude outsiders seeking entry has to satisfy some additional conditions. To take the example of a strong defender of property rights, even John Locke insisted that the right was subject to the proviso that there has to be "enough and as good left in common for others."<sup>31</sup> Even though every appropriation of property is a diminution of another's rights to it, it is justifiable so long as it does not make any party worse off than they would have been without the possibility of such appropriation. The standard of "as good" in the context of claiming exclusion from territorially-based practices of self-

---

29. This issue has spurred a rich literature in recent years. *See generally* JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* (2013) (Discussing a variety of justifications and concluding that none of them can justify the actual exclusionary practices states tend to engage in); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009) (arguing that birthright citizenship can be understood as a type of property inheritance); David Miller, *Immigrants, Nations, and Citizenship*, 16 J. POL. PHIL. 371 (2008) (outlining the various incentives that impact nation formation); Mathias Risse, *On the Morality of Immigration*, 22 ETHICS & INT'L AFF. 25 (2008) (arguing that immigration controls are frequently used as mechanisms to limit access to resources).

30. *See generally* JOHN RAWLS, *THE LAW OF PEOPLES* (1999) (arguing for gains generated from a formation of society as a Society of Peoples); DAVID MILLER, *ON NATIONALITY* (1995) (suggesting the benefits of nationalism as a basis of state organization).

31. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175 (1974). This Lockean Proviso was reintroduced into the modern debate about the original appropriation of property by Nozick's work and refers to John Locke's argument in the *Second Treatise of Government* that the recognition of a right to appropriation of property did not do injustice to others now precluded from making use of the appropriated land. *Id.* at 174–82. Locke argues as follows:

Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough, and as good left; and more than the yet un-provided could use. So that, in effect, there was never the less left for others because of his enclosure for himself: for he that leaves as much as another can make use of, does as good as take nothing at all. No body could think himself injured by the drinking of another man, though he took a good draught, who had a whole river of the same water left him to quench his thirst: and the case of land and water, where there is enough of both, is perfectly the same.

JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 33 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690).

government requires that the person denied entry must have access to the territory of a state where, at the very least, his or her rights are not violated in a serious way. That is, in order to justify excluding a person from a state, that person must have access to some other state that does not violate his or her rights. Anything else could not plausibly qualify as “as good” in the relevant sense. If State A meets this requirement, it succeeds in creating the preconditions for State B’s legitimate assertion of its right to exclude individuals from State A seeking entry into State B. When, in a concrete situation, an individual finds herself subject to a state that clearly does not fulfill its sovereign obligations to respect, protect, and guarantee her rights, and she decides to exercise her right to exit that state and to seek entry elsewhere, the latter state lacks clear justifications for excluding her entry.

Thinking about borders and the right to exclude along these lines helps to highlight the importance of two core features of international law. On the one hand, international law seeks to create the conditions for the legitimate exercise of the right of a sovereign to exclude. All states are required by international law to respect, protect, and fulfill the human rights of those subject to their jurisdiction.<sup>32</sup> On the other hand, international law limits the sovereign right to exclude in cases where these conditions are not met, particularly in the case of refugees.<sup>33</sup> This way of conceiving of international human rights law provides a hard ground for why international law concerns itself with how states relate to their citizens and why a great deal of human rights law is binding on states whether or not they have specifically signed and ratified human rights treaties.<sup>34</sup> Solidarity with all members of the human community is not the only reason for states to be concerned that human rights are respected everywhere.<sup>35</sup> It is also in

---

32. Maria Green, *What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement*, 24 HUM. RTS. Q. 1062, 1071 (2001).

33. See Convention Relating to the Status of Refugees, art. 1, July 28, 1951, 189 U.N.T.S. 137, amended by the 1967 Protocol of United Nation Convention Relating to the Status of Refugees (defining a refugee as a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of his country of nationality and is unable or, owing to fear, is unwilling to avail himself to the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to fear, is unwilling to return to it”).

34. On the one hand this means that international human rights law is best interpreted as binding all states, irrespective of whether they ratified the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, either because human rights constitute general principles of law or because they qualify as CIL or, most plausibly, some combination of both. An open question is whether states are under a duty to subject themselves to some form of compulsory international human rights adjudication, such as it exists in the context of the European Court of Human Rights or the Inter-American Court of Human rights. For an argument that there is such a duty, see generally ALON HAREL, *WHY LAW MATTERS* 16–42 (2014). Also of central importance are the related questions of on what grounds and to what extent international human rights courts should grant deference to national institutions by way of recognizing a “margin of appreciation.” For a critical account, see George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705 (2006). The answers to these questions require arguments that go beyond the scope of this article.

35. Other reasons states might have for internationally entrenching human rights protection are self-interested. They include, but are not limited to, preventing refugee flows associated with human

the states' interest to ensure the necessary preconditions for the justifiability of their national exclusionary practices.

### B. Justice-Sensitive Externalities of National Policy

Beside the fact that states establish borders and claim the right to exclude, there are justice-relevant externalities related to states implementing national policies, burdening outsiders with harms, and threatening harm or risks. These externalities range from the obvious to the subtle. On the obvious end of the spectrum, some states embrace an aggressive, expansionist foreign policy. An imperial policy of domination and expansion subverting the political and territorial independence of neighbors is obviously not justified, even when such a policy enjoys widespread democratic support in the aggressor state and that state has a well-structured national constitutional system.

Less obvious examples raise significantly more pervasive concerns and do not concern foreign policy directly. Consider the establishment of nuclear power plants in states with insufficient safety standards near international borders. Or consider lax carbon-dioxide emission standards contributing to global warming but the detrimental effects of which might be moderate in the polluting jurisdiction, yet might nonetheless lead to severe droughts causing starvation, severe flooding resulting in the necessity to relocate millions, or even the wholesale sinking of island-states elsewhere. Less dramatically, imagine an upriver riparian state polluting a river to such an extent that it imposes severe harms downstream within the territory of the downriver state.

Finally, and more subtly, extraterritorial effects raising justice concerns may also be connected to states failing to exercise their responsibility to prevent their territory from being used as a base to organize, plan, and inflict harm in other jurisdictions by other actors. Justice concerns are not merely raised by negative externalities of state action, but also by omissions that result in the failure to realize positive externalities when the state has a responsibility to act. Here, the issues raised include failing to undertake adequate counterterrorism efforts by effectively granting safe harbor to terrorist organizations or failing to crack down on other forms of organized crime with potential cross-border effects.

Given that these are areas in which states lack legitimate authority to effectively control what may or may not be done, no injustice is done to states when they are subjected to legal obligations without having consented to them. On the contrary, deep legitimacy questions arise when individual states have the capacity to effectively veto the emergence of universally binding obligations in contexts where the behavior of an individual state raises justice-sensitive externality concerns. Thankfully, international law has developed capacities to

---

rights violations of other states, or locking in human rights domestically, which makes it more difficult for new rights-averse political movements to overthrow the old order. For the latter argument see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

generate universally binding legal obligations that overcome the blocking power of individual states that refuse to give their consent. Regarding the use of force and questions of peace and security, the United Nations Security Council has interpreted its competencies broadly, and functions (albeit often unsatisfactorily) as a world legislator operating by qualified majority vote in areas concerning threats to international peace and security.<sup>36</sup>

Furthermore, in many cases involving these types of concerns,<sup>37</sup> international courts and tribunals have interpreted the requirements for CIL in a way that reflects the underlying purpose of international law. When justice-sensitive externalities are in play, judges tend to interpret the requirements of CIL<sup>38</sup> as if these requirements reflect the idea of a decentralized, informal, quasi-legislative, qualified-majoritarian process—not the idea of implied consent by states.<sup>39</sup> Here, the fact that a state can find itself subject to international legal obligations without its consent presents no problem as a matter of principle. And here, the only issue concerns the question whether the process by which new legal obligations are generated is fair and allows for adequate participatory opportunities by all states. How to interpret the requirements for CIL in a way that is responsive to requirements of procedural fairness raises interesting questions. But the real problem is the extent to which powerful states remain in a position to veto juris-generative efforts. Requiring consent in these contexts is international law's equivalent of Lochnerism<sup>40</sup> in U.S. constitutional law: misguided assertions that majoritarian processes could not create legitimate obligations absent the consent of the parties on whom burdens are imposed. The veto claimed and exercised by the five permanent members in the Security Council raises more legitimacy issues than any erosion of the consent requirement. To address these concerns, creative interpretive proposals aimed at qualifying the veto right and narrowing the capacity of

---

36. See Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175 (2005).

37. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 772–74 (2001) (arguing that the standards for determining whether CIL exists with regard to a particular issue might be sensitive to the particular function that international law needs to fulfill in the respective area). For similar ideas focused on the role of national courts engaging international law more generally, see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241 (2008).

38. See *supra* text accompanying notes 8–9.

39. The legitimating idea of consent of states in international law could be analogized to the idea of consent in domestic constitutional theory. Individuals are subject to the laws of the land, whether or not they have explicitly or implicitly consented to them. Consent is only relevant in the sense that liberal political philosophy refers to the idea of “reasonable consent,” which remains an operative ideal standard for assessing claims of justice. Actual consent matters only in a limited domain—the domain of private law contracts—where individuals are in authority and can control the obligations they have with regard to others.

40. See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (holding that a New York law limiting the number of hours a baker could work was an arbitrary interference with the right and liberty of the individual to contract; instead of legislative majoritarian intervention, only specific consent of the parties could justify such restrictions).

individual states to block otherwise universally binding decisions point in the right direction.<sup>41</sup>

### C. Externalities of National Policies That Do Not Raise Justice Concerns

All of the above examples describe externalities that raise justice concerns. A wide range of externalities, however, do not.<sup>42</sup> Outsiders have no claim of justice against a state's political community that fails to take into account their well-being when making a decision that has external effects. Outsiders have a right not to be unjustly harmed by a state, but those governing themselves within the framework of the state have a right not to be required to make themselves a mere instrument of the well-being of others. Much could be said about why this is so and what exactly follows from this,<sup>43</sup> but here it must suffice to put forward a couple of basic distinctions and examples for illustrative purposes.

First, the failure to realize positive externalities—due to an omission by a state—is a justice concern only in cases where there is a positive duty of justice for the state to act. A state is under a positive duty, for example, to ensure there are no harms emanating from its territory.<sup>44</sup> Here, the relevant externalities concern justice claims by outsiders.<sup>45</sup>

There is no general duty of a state, however, to take into account and further the welfare of outsiders in the same way it would insiders. When debating whether more money should be spent on social security to strengthen those that are weakest in society, it is not plausible to insist that money has to be spent to raise the level of those worst off globally up to that of those worst off nationally. It does not constitute unjustified discrimination that state social-security benefits are not available to every person on the globe. Nor does state action raise justice concerns by adopting a national economic policy that is focused on increasing national welfare, but that has a welfare reducing global effect. States are not under a general duty to ensure that outsiders benefit as much from state policies as nationals; they are trustees of humanity only to the extent that outsiders can make plausible claims of justice that a state is required

---

41. See, e.g., *Peters*, *supra* note 20, at 539–40 (arguing that a veto cast under certain circumstances should be regarded as null and void).

42. For an account of the different normative significance of different kinds of effects that informs the distinction between justice-sensitive externalities and non-justice-sensitive externalities, see Alec Walen, *Transcending the Means Principle*, 33 *LAW AND PHIL.* 427–64 (2014).

43. For a more fully developed moral theory that makes sense of these basic non-utilitarian intuitions, see *id.* For a discussion of the role of deontological restrictions in various areas of the law, see generally Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, in *PROPORTIONALITY AND THE RULE OF LAW* 67–89 (Grant Huscroft, Bradley Miller & Gregoire Webber eds., 2014).

44. For a good overview on the way this principle operates in the area of environmental international law, see generally JULIO BARBOZA, *THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW* (2011).

45. This is also true when those harms are brought about not directly by state action, but by private actors such as terrorists or other forms of organized crime.

to respect. Beyond that, states have special obligations toward only their own citizens and states rightly make their citizens' well-being the paramount concern.

Second, even the infliction of negative externalities does not always constitute a justice-sensitive externality.<sup>46</sup> There is no injustice done to outsiders, for example, when a state engages in protectionist policies and denies or prohibitively taxes market access of certain goods and services. There is no legitimate justice claim against one political community for failing to realize economic benefits for another political community. Even if a state initially opened its borders for certain trades and later unilaterally closed them again, thus imposing severe losses on outside traders who had relied on making such trades, these are not negative externalities that raise justice concerns. Just like a shopkeeper has no claim of justice against a patron who decides to no longer patronize his shop, the importer has no claim to justice against a state deciding to close its borders to a certain kind of trade. In these types of cases, the actions of one state merely change the circumstances for another state or individual.<sup>47</sup>

When there is a high level of interdependence—situations in which subjects mutually find themselves subjected to the infliction of externalities by outsiders—states have an interest in coordinating policies and cooperating with one another to maximize the welfare of their constituents and ensure Pareto-optimal policies. This is what most countries have done across a wide range of goods and services to mutually profit from more open markets within the context of the World Trade Organization or other regional trade regimes. Once a country has legally committed itself, bilaterally or multilaterally, to grant access to certain goods and services, the situation changes. In such a context, the negative externalities connected to a failure to comply with contractual obligations generally constitute justice-relevant harms. But they do so only because of violations of agreed commitments and not independently from such commitments. *In such a context, voluntary legal commitments are constitutive of plausible justice claims.*

This, then, is the proper domain of consent-based interactional treaty law. Here, treaties are the functional equivalent of private-law contracts in domestic law. Consent is not the foundation of international law, but there is a domain in which sovereign states can claim to be free to do as they deem fit and subject themselves only to obligations they have freely accepted. There is a domain in which consent is rightly regarded as constitutive of legal obligations. This is the domain over which a sovereign has authority.

---

46. Walen, *supra* note 42, at 427–64.

47. See, e.g., ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 267–300 (2009).

#### D. Beyond Harm? Tortious Complicity, Consent-Based Social Practices and Good Samaritan Duties

Critics may suggest that the account provided so far overstates the scope of the domain of subsidiarity. They might ask: Is the domain of cosmopolitan duty appropriately circumscribed by the idea of justice-sensitive externalities or harms? Doesn't this account complacently ignore deep global injustices? Shouldn't cosmopolitan duties also include robust duties of redistributive justice?

Strong cosmopolitan redistributive theories of social justice that place no significance on the fact that the world is divided up into states are difficult to square with the premises of the argument presented here. But those theories are not only unhelpful for the purposes of critically reconstructing existing international law; they are also not persuasive in moral terms. The account provided here does not complacently normalize deep injustices. Rather, it provides the basis for a different and arguably more persuasive account of exactly wherein the injustices lie. Here it must suffice to make three points.<sup>48</sup>

A justice-sensitive externality account has significant reach. A great deal of misery and extreme poverty in the world is connected to corrupt, despotic, and kleptocratic governments that ruin the life prospects of the citizens who, by virtue of having been born in that place, happen to have drawn the short straw in the birthright lottery. On the one hand, the existence of such deficient government structures might be understood as the legacy of the historical injustice of colonialism,<sup>49</sup> raising the questions of whether and to what extent ex-colonial powers ought to face up to compensatory claims. But such claims are burdened with the problem of responsibility allocation in the context of a long chain of causal events, as well as pragmatic concerns relating to closure and the passage of time.

More promising is a perspective focused on the present: when kleptocratic despots loot, ravage, and pillage their country for their own purposes, they generally do so with the help of weapons bought from developed countries, with expertise and license fees provided by helpful multinational companies, all the while receiving symbolic validation and diplomatic recognition and protection under international law. In that sense, developed countries are invariably complicit in the misery that characterizes many despotically-run or failing states, whose citizens are condemned to live in misery.<sup>50</sup> This complicity in

---

48. For an excellent overview of debates on global distributive justice, see Michael Blake & Patrick Taylor Smith, *International Distributive Justice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/spr2015/entries/international-justice/> (last visited Apr. 15, 2015).

49. For an overview of the discussion on the relevance of colonialism for different kind of state failures, see James Mayall, *The Legacy of Colonialism*, in MAKING STATES WORK: STATE FAILURE AND THE CRISIS OF GOVERNANCE 36 (Simon Chesterman, Michael Ignatieff & Ramesh Thakur eds., 2005).

50. For an extensive analysis of these relationships in the context of oil, see LEIF WENAR, BLOOD OIL: TYRANTS, VIOLENCE AND THE RULES THAT RUN THE WORLD (2015).

injustice is just another justice-sensitive externality of state behavior. Such complicity might plausibly give rise to justified demands of tortious liability against states that either provide regimes with weapons or permit multinational companies to cooperate with and finance the organized criminals who have happened to have captured the levers of power. Arguably one of the scandals of existing international law is the extent to which complicit states are shielded from accountability under prevailing rules of state responsibility.<sup>51</sup> Overhauling those rules is likely to not only have greater ameliorative impact; it would also address, more directly than alternative proposals, exactly what is unjust about present relationships.

Furthermore, treaties that establish long-term, relatively encompassing cooperative endeavors arguably create further duties of justice among the participants—the duty to share the benefits of the joint cooperative endeavor fairly. What justice in this sense requires depends to some extent on the structure of the practice that states have consented to be part of. Long-term and sufficiently deep forms of cooperation, even when they are entered into voluntarily, are just and fair only if they ensure that the cooperative benefit is shared fairly by all participants.<sup>52</sup> Questions as to the implications for redistributive claims among states participating in the basic global economic structures established by the World Trade Organization, the International Monetary Fund, the World Bank, and investment protection regimes are beyond the scope of the article. Here it must suffice to point out that it is conceptually possible for long-term, treaty-based cooperation to provide the grounds for further claims of distributive justice. Here, too, there is no stipulation of an abstract cosmopolitan duty to redistribute. Claims of justice attach to structures of social cooperation grounded in consent.<sup>53</sup>

Finally, beyond tortious liability and duties to fairly share the benefits of cooperative endeavors, there may well be Good Samaritan duties that apply to well-off states in their relationships with states burdened by unfavorable conditions. Nothing in the framework developed here precludes the duty to assist other peoples living under unfavorable conditions.<sup>54</sup> But this residual duty will rarely ground an obligation for which there are not independent moral grounds justified within the developed framework, which grounds duties that

---

51. States are responsible for assisting another state in committing an internationally wrongful act only if they do so with knowledge of the circumstances of the internationally wrongful act. Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 16, Nov. 2001, Supp. No. 10 (A/56/10), ch. IV.E.1, <http://www.refworld.org/docid/3ddb8f804.html>. In other words, delivering weapons to dictators only engages international responsibility if it can be proven that the delivering state knew of the concrete atrocities for which those weapons would later be used. For an analysis of the current law, see HELMUT PHILIPP AUST, *COMPLICITY AND STATE RESPONSIBILITY* (2011).

52. Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF., Winter 2007, at 3, 21.

53. In that sense, notwithstanding the quite different focus of the article, it is perfectly compatible with basic positions such as those advocated, for example, by Thomas Pogge, *¿Qué Es La Justicia Global? [What is Global Justice?]*, 10 REVISTA DE ECONOMÍA INSTITUCIONAL, no. 19, 2008, at 99.

54. See RAWLS, *supra* note 30.

generally go considerably further than Good Samaritan duties in the Rawlsian tradition plausibly might. If that is true, Good Samaritan duties are mostly distractions in debates about cosmopolitan duty. Talk of solidarity tends to detract from the fact that rich and powerful states bear considerable responsibility for many of the most atrocious forms of contemporary injustice and deprivation.

## V

### CONCLUSION

This article addresses the delimitation between the domain of subsidiarity—the domain over which states should be free to do as they deem fit, subject only to obligations they have actually consented to—and the domain of cosmopolitan duty—the domain over which international law can plausibly claim authority over a state, whether or not it has consented to a particular obligation. By discussing the concerns that govern the delimitation of these domains, the article addresses key issues relating to the limits of sovereignty understood as a right to be left alone. The concept of justice-sensitive externalities is critical for this discussion. The article differentiates between different kinds of justice-sensitive externalities, distinguishes justice-sensitive externalities from externalities that are not justice-sensitive, and discusses how these externalities matter. The article does not purport to resolve all baseline issues; it only begins to discuss implications that are to be drawn from the analysis for the reconstruction or critique of some central international law doctrines. The contribution of the article, then, is primarily structural: it clarifies the range of reasons that are relevant for delimiting the domain of subsidiarity. And it clarifies how the role of consent differs across different subject-matter areas, depending on the kind of externalities implicated. The account provided here explains and justifies why state consent has a different role to play in trade law, for example, than in human rights or law relating to the use of force. The former are structurally more closely aligned with considerations that do not concern justice-sensitive externalities and thus fall under the domain of subsidiarity, whereas the latter is aligned with justice-sensitive concerns and thus falls in the domain of cosmopolitan duty.

Subsidiarity issues arise also within the domain of cosmopolitan duty. Saying that it is not a violation of subsidiarity for international law to bind a state without its consent within the domain of cosmopolitan duty does not settle the question of whether the concrete international obligation imposed on the state is appropriately responsive to subsidiarity concerns. When State A decides to build a nuclear energy plant near the border to State B, and the citizens of State B worry about inadequate safety standards, the existence of justice-sensitive externalities means that no injustice is done to State A were it to confront international legal rules governing this situation that it had not consented to.

But the legal rules it confronts can be more or less intrusive. On the one hand, such rules may be procedural only. The rules might require the state to

take into account the interests of affected citizens in State B on equal terms when using cost-benefit analysis to make the locational decision. The rules may also require that State A permit the participation of affected persons in State B on equal terms.<sup>55</sup> On the other hand, international rules might require that the nuclear power plant meet substantive standards defined, say, by the International Atomic Energy Agency. Whether one kind of approach is preferable over another requires balancing the relevant competing concerns. The principle of subsidiarity, then, would continue to structure discussions among various approaches even within the domain of cosmopolitan duty. But given that the general issue is one falling within the domain of cosmopolitan duty, the remaining substantive subsidiarity issue is not one that needs the consent of the affected state to be legitimate. Whatever a state's view on what the correct, subsidiarity-sensitive regulatory approach might be, the state generally ought to respect how international law settles the issue.

Conversely, even when a state explicitly gives its consent to a treaty, the question remains whether the specific content of the international obligation it has consented to is compatible with a commitment to subsidiarity. Imagine that a state delegates decisionmaking to an international organization, empowering it to make all rules it deems fitting and proper for the regulation of a common market, without tying that authorization to subsidiarity requirements. If that international body then proceeds to enact rules relating to smoking in public spaces or other cases in which there is no discernible reason for international rather than national regulation, then such regulation is not compatible with the principle of subsidiarity and can be criticized as such. The fact that consent was granted does not mean that such a measure cannot be criticized as a violation of the principle of subsidiarity. But if the organization is acting within its delegated powers, the state cannot complain that the organization is not acting within its authority, because such authority had been specifically granted. The state can only articulate its critique as one of policy, not as a critique of the international institution's authority. If, on the other hand, international law purported to regulate questions that fall within the domain of subsidiarity without authorization by the state, that state would act within its authority to determine that such international legal rules are not only bad policy, but are *ultra vires* and outside of the authority of international law.

---

55. This is the approach taken, for example, by the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of the United Nations Economic Commission for Europe (UNECE), June 25, 1998, 2161 U.N.T.S. 447.