From Contract to Legislation: The Logic of Modern International Lawmaking

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From Contract to Legislation: The Logic of Modern International Lawmaking

Timothy Meyer*

Abstract

The future of international lawmaking is in peril. Both trade and climate negotiations have failed to produce a multilateral agreement since the mid-1990s, while the U.N. Security Council has been unable to comprehensively respond to the humanitarian crisis in Syria. In response to multilateralism’s retreat, many prominent commentators have called for international institutions to be given the power to bind holdout states—often rising or reluctant powers such as China and the United States—without their consent. In short, these proposals envision international law traveling the road taken by federal systems such as the United States and the European Union: from contractual lawmaking, in which states are free to make commitments to each other and free to decline commitments to which they object, to legislative lawmaking, in which states—through international institutions—make collective decisions about what legal obligations to undertake.

In this Article, I argue that international legislatures—institutions such as the Ministerial Conference of the World Trade Organization (WTO) and the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) that make collective decisions about the legal obligations that members may make to each other—are already numerous. But international legislatures of the kind envisioned by global government’s proponents are unlikely to emerge because the rise of international legislatures is not driven by the desire to reduce the role of holdouts. To the contrary, I contend that legislatures exist to magnify the ability of holdouts to stall and even paralyze lawmaking. Further, I argue that the increased importance of holdouts is, within limits, beneficial for international lawmaking.

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In contractual lawmaking, states are free to expel holdouts from negotiations and make commitments among a smaller group of the willing. Moving from contract to legislation removes this freedom. In the U.S. Congress, the minority’s holdup power is created through procedures such as the filibuster in the Senate and the committee system, under which a proposal with majority support can nevertheless fail to obtain a floor vote due to the opposition of a few key committee members. In international legislatures, this holdup power is created chiefly through a process known as “adoption,” which requires that an institution as a whole, usually by consensus, approve an agreement before any individual member state can sign and ratify it. Adoption does not imply that member states will ratify or be bound by the agreement; as with agreements like the Kyoto Protocol, some states that vote for adoption will not ratify the agreement. Instead, one of the adoption procedure’s main effects is to empower states with no intention of joining a treaty to nevertheless veto its enactment by cooperation-minded states.

The increased holdup power created by legislatures is a feature, not a bug. This holdup power is beneficial because it allows states to enforce legislative bargains: deals in which a state makes concessions in one negotiation in exchange for another state’s concessions in a later related negotiation. Such iterative negotiations—found in free trade talks, environmental regimes, and efforts to establish a robust international criminal law—are a hallmark of modern international lawmaking. Absent some enforcement mechanism, though, states would be unwilling to “trade votes” across negotiations out of fear that other parties would not uphold their end of the bargain. International legislatures thus do not lubricate international lawmaking by allowing states to be bound against their will. Quite the opposite, international legislatures facilitate lawmaking by allowing states to stall lawmaking in the event that a legislative bargain is violated. This rationale for holdup power explains a number of puzzles in international law. In particular, it explains why international legislatures have not adopted robust majoritarian voting and further clarifies how international institutions enforce international law, which critics often claim is unenforceable.

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I. INTRODUCTION

The future of international lawmaking is in peril. Trade negotiations have not concluded a major negotiating round since the creation of the World Trade Organization (WTO) in 1994. The current round of trade negotiations, the Doha Round, has been pronounced dead over and again. Climate change negotiations under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC) have failed to produce a binding agreement on greenhouse gas emissions reductions to replace the Kyoto Protocol. The U.N. Security Council has been unable to comprehensively address the humanitarian crises in Syria. In short, the promise of robust multilateral legal governance that the world welcomed in the early 1990s with the end of the Cold War, the creation of the WTO, and the Rio Earth Summit that produced the UNFCCC and the Convention on Biological Diversity (CBD), appears to have been a mirage.

In response to multilateralism’s retreat, many commentators have called for a renewed focus on methods of international lawmaking capable of binding reluctant states and rising powers like China and India. The claim is that the world’s most pressing problems cannot be solved through traditional treaty-making, with its rules requiring states to consent to their own legal obligations. Instead, modern international law, it is thought, requires the ability to bind holdout states without their consent through majoritarian or super-majoritarian decision-making. In short, these proposals envision international law traveling

1. See, for example, Lawrence Herman & Gary C. Hufbauer, Doha is Dead, FOREIGN POLICY, Sept. 26, 2011; The Doha Round: Dead Man Talking, THE ECONOMIST, Apr. 28, 2011.
7. Guzman, supra note 6, at 749 (“An excessive commitment to consent can cripple efforts to use international law as a tool to help solve the world’s largest problems”); Trachtman, supra note 6, at 253 (“There will be increased demand both for more international law and for more international organizational capacity to provide mechanisms for legislative or decision-making action.”).
the road taken by federal systems such as the United States and the European Union: from contractual lawmaking—in which states are free to make commitments to each other and free to decline commitments to which they object—to legislative lawmaking—in which states, through international institutions, make collective decisions about what legal obligations to undertake.

However, international legislatures— institutions that make collective decisions about the legal obligations that a group of states may make to each other—have already proliferated in recent decades, replacing to a large degree the contractual model of negotiations that dominated international law in the nineteenth and early twentieth centuries. Examples of international legislatures include the Ministerial Conference of the WTO; the Conference of the Parties to the UNFCCC and the CBD, among many other environmental treaties; the Assembly of Parties to the Rome Statute of the International Criminal Court; and of course, the U.N. General Assembly and Security Council.

This move from contract to legislation is puzzling, though. Unlike domestic legislatures, such as the U.S. Congress, international legislatures do not have the robust majoritarian decision-making rules that commentators have predicted and called for. Instead, they preserve the basic requirement that states consent to their own legal obligations before being bound. As a consequence, international legislatures produce instruments that look very similar to those produced by contractual lawmaking. We have thus seen the spread of collective decision-making through legislative institutions without seeing what many assumed would follow with international legislatures: the rise of decision-making procedures that would allow holdouts to be bound without their consent.

In this Article, I argue that the solution to this puzzle lies in understanding that the rise of international legislatures is not driven by the desire to reduce the role of holdouts. Rather, international legislatures exist to magnify the ability of holdouts to stall and even paralyze international lawmaking. Further, I contend that the increased importance of holdouts is, within limits, beneficial for international lawmaking.

Rising interdependence among nations has increased the need for institutional mechanisms capable of enforcing bargains among states. The need for enforcement mechanisms is particularly important where states negotiate for a period of time over a series of related issues. Iterative negotiations of this

8 See infra Section II.
10 Even where agreements do provide for majoritarian decision-making, as the WTO Agreement does, they often express a preference, carried in practice, for decision-making by consensus. See WTO Agreement, supra note 4, art. IX.
kind—found in negotiations over the different chapters of free trade agreements (for example, intellectual property versus trade in goods or services versus investment), different sources of pollution under the auspices of a framework agreement such as the UNFCCC or the Convention on Long-Range Transboundary Air Pollution,\textsuperscript{11} and efforts to build a robust international criminal law—are a hallmark of modern international lawmaking. In these negotiations, states may wish to make legislative bargains in which one state agrees to make concessions during the first round of negotiations in exchange for concessions from other states in a later round of negotiations. States may wish, in effect, to “trade votes” on issues just as domestic legislators do. Such legislative bargains are, however, prone to opportunism by states. A state making a concession in an early negotiation in expectation of receiving concessions in later negotiations needs some guarantee that other states will honor the agreement. Absent such a guarantee, states may be unwilling or unable to bargain effectively across multiple negotiations.

Legislatures solve this problem by creating procedures that allow a single state or small group of states to prevent other states from making legal commitments to each other. Domestic legislatures achieve this task through rules like the filibuster in the U.S. Senate\textsuperscript{12} or the committee system, under which a proposal favored by the majority of a house of Congress can still fail to reach the floor for a vote.\textsuperscript{13} In international legislatures, this holdup power is created primarily by a procedure that requires member states to “adopt” a draft agreement before it is opened for signature and ratification.\textsuperscript{14} This procedure does not exist only, or even primarily, to protect states from being bound by legal rules to which they object. To the contrary, after adoption states generally still have the option to avoid making legal commitments by choosing not to ratify an agreement. Instead, adoption exists to allow states to prevent lawmaking between other groups of states. The threat of holding out gives states that make concessions in an early round of negotiations a stick they can use to ensure that the outcome of later negotiations reflects the overall legislative


\textsuperscript{14} See, for example, UNFCCC, supra note 2, arts. 15–17 (setting out procedures for the adoption of amendments and protocols to the UNFCCC); WTO Agreement, supra note 4, art. X (establishing procedures for adopting amendments to WTO obligations).
bargain. And by ensuring the enforceability of legislative bargains, this holdup power ultimately facilitates international lawmaking.

This insight—that international legislatures confer holdup power on states as a costly commitment device to make legislative bargains enforceable—casts a new light on two important issues in international law. First, it explains why international legislatures have emerged but have not adopted majoritarian decision-making. Unanimous decision-making rules or supermajority voting, coupled with the inability to remove states from legislatures, are necessary to create the holdup power that is central to the logic of international legislatures. Second, critics of international law have posited that it cannot affect behavior due to weak enforcement mechanisms. International legislatures provide an enforcement tool, allowing states to hold up future lawmaking to punish breaches of not only legislative bargains, but also substantive legal commitments. International legislatures are therefore an institutional tool that can magnify the effect of reputational considerations in driving compliance with international law.

This Article proceeds in four sections. Section II documents the shift in international lawmaking from international agreements that are negotiated as contracts to international agreements that are negotiated in legislatures. The rise of international legislatures is critical because the ability of holdouts to use institutional rules to stall lawmaking does not exist in contractual lawmaking, the classic paradigm used to analyze international agreements. In contractual lawmaking, states are free to exclude parties or issues that complicate negotiations, shrinking the size of cooperation in an effort to reach an agreement (although it will not be practical to do so in some circumstances).

Section III briefly reviews the literature on global government. This literature focuses to a large degree on the role of consent in international lawmaking. In general, proponents of more robust global government decry the requirement that states consent before being bound by legal rules on the grounds that the consent requirement frustrates welfare-enhancing changes in the law. Others worry that eroding the consent requirement would delegitimize international law or run afoul of domestic constitutional rules. By contrast I argue that, while the consent requirement and its reform is important, the literature’s focus on consent obscures as much about global governance as it illuminates. International legislatures exist not to eliminate the requirement that

15 See, for example, Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005) (arguing that states comply with international law because of self-interest); John O. McGinnis & Ilya Somin, Democracy and International Human Rights Law, 84 Notre Dame L. Rev. 1739, 1769 and n. 113 (2009) (“Our view, like that of many other modern theorists, is that states do not have a strong tendency to comply with international law for the sake of international law compliance, or even to maintain their reputation among other nation states.”).
states consent to their own obligations; they exist to allow states the opportunity to have a say over the legal commitments other states make among themselves.

Section IV explains the rise of international legislatures and the limits on their jurisdiction. In particular, I argue that by institutionalizing jurisdiction, international legislatures greatly reduce the ability of states to exclude issues or parties that threaten to derail negotiations. Legislatures are in this important way much less flexible than contractual negotiations. This lack of flexibility is the tool states use to credibly commit to legislative bargains.

This lack of flexibility is also at the heart of the crisis in international lawmaking. Holdup power, in order to be beneficial, must also be limited. States have developed a number of tools to narrow the power to paralyze legislative negotiations. Some regimes, such as the General Agreement on Tariffs and Trade and the WTO (GATT/WTO), provide safety valves that allow states to narrow the scope of negotiations by negotiating with only a subset of member states or over a subset of issues. The requirement that states ratify international legislative agreements performs a similar function. By ensuring states that they will not be bound by rules they individually find objectionable, international legislatures ensure that the holdup power they create will only be narrowly used as a bargaining tactic.

The most common tactic states use to animate legislative governance, however, is the fragmenting of jurisdiction among multiple institutions. For example, the UNFCCC negotiates legal rules that aim to affect energy consumption by incentivizing a shift to fuels low in greenhouse gases. At the same time, however, energy production and consumption rules are set directly in organizations such as the International Energy Agency (IEA) and the Organization of Petroleum Exporting States (OPEC). Fragmenting jurisdiction allows organizations such as the IEA and OPEC to function without the paralysis that besets institutions like the UNFCCC. But animating governance within these institutions through narrow jurisdiction has the effect of raising the costs of coordinating legal rules across related institutions, such as the IEA and the UNFCCC. Fragmentation thus animates governance within institutions while inhibiting governance across institutions.

These limits on the holdup power, while partially effective, thus come at a significant cost to multilateral governance—they encourage institutions with

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16 See, for example, WTO Agreement, supra note 4 (discussing existence of Plurilateral Trade Agreements which generally limit scope and number of parties).

17 See Kyoto Protocol, supra note 3.


narrow jurisdiction and make it difficult to coordinate legal rules across institutions. To remedy this deficiency, Section IV proposes a new technique to reduce the costs of legislative paralysis: the use of what I call exclusion clauses. These clauses would permit states under a specified set of circumstances to suspend the right of a holdout state to vote. Doing so would allow a measure that enjoys popular support to advance, while still preserving the ability of states to hold out in the great majority of circumstances. Allowing states to be suspended temporarily would thus encourage legislatures with broad jurisdiction, which would reduce coordination costs, while still preserving the key function of legislatures: facilitating legislative bargains.

II. FROM CONTRACT TO LEGISLATION

For the last two hundred years at least, contract has supplied the primary paradigm for thinking about international lawmaking. During that period, treaties—legal agreements between states—have supplanted customary international law as the primary instrument states use to regulate their activities. Like contracts, treaties are generally viewed as consensual agreements that can only create obligations for those that consent.20 The contractual paradigm thus involves an individualist lawmaking framework in which each state is the master of its own commitments. In this Section, I argue that contrary to this traditional view, since the latter half of the twentieth century and in particular the end of the Cold War, contractual lawmaking by states has been replaced to a significant extent by legislative lawmaking. Legislative lawmaking, as I use the term, is characterized by a set of procedural rules governing collective decision-making processes as to the kinds of commitments a group of states may make. This collective decision-making process, in which the group must first approve the obligations taken on by states individually, differentiates legislative lawmaking from contractual lawmaking. Yet the breadth of this change and its ramifications for how international law is made have gone unexplored, in part because the outcome, a treaty, often looks identical regardless of the lawmaking procedure used.

A. Treaties as Contracts Between States

Treaties, the dominant instruments in modern international law, are often said to be contracts between states. During the sixteenth and seventeenth centuries, treaties were viewed as contracts between princes, binding only upon them and not their successors. Later, as international law matured, the great international legal theorist Grotius developed a general theory of the treaty as a specialized type of contract. This comparison has persisted to the present day, with treaties analyzed as contracts with respect to the bargaining issues present in their formation, enforcement issues related to their implementation, and their interpretation. Indeed, treaty text often makes explicit reference to the contractual paradigm, referring for example to member states as “Contracting Parties.”

The treaty as contractual agreement has been a critical tool of international legal order over the years and remains so today. I define “contractual agreements” as agreements between states that are negotiated between states outside of any overarching institutional framework. Contractual agreements might be “contractual treaties” if they are binding agreements, or they might be “contractual soft law” if they are nonbinding. As with arm’s length contracting between firms, states negotiate the terms of such agreements largely free from the procedural rules and governing principles, not to mention the administrative support staff that comes with institutionalized negotiations. Most importantly, contractual agreements do not involve any collective decision as to the kind of

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22 See Vazquez, supra note 20, at 605–6; McNair, supra note 20, at 106.


24 See, for example, Guzman, supra note 6, at 763 (discussing how treaties, like contracts, create transfers among parties to ensure that cooperation is in each state’s interest); Curtis J. Mahoney, Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties, 116 Yale L.J. 824, 847–51 (2006).


26 For the distinction between hard law and soft law, see, for example, Andrew T. Guzman & Timothy Meyer, International Soft Law, 2 J. Legal Analysis 171 (2010); Gregory C. Shaffer & Mark A. Pollack, Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance, 94 Minn. L. Rev. 706 (2010).
commitments states may make. Any group of states can enter into a contractual
agreement defining the obligations undertaken by the members without seeking
the permission of an institution. This autonomy differs from legislative
lawmaking, in which states collectively decide what kinds of obligations the
institution's members may make under the institution's umbrella.

Perhaps the most prevalent kind of "contractual treaty" today is the
bilateral investment treaty (BIT). These agreements are negotiated on an ad hoc
basis between states; their negotiation is not subject to rules imposed by any
international institution; and two countries entering into a BIT do not first
require the affirmative vote of a collective body such as a diplomatic conference
or Conference of the Parties to a multilateral treaty. The terms of BITs are
therefore determined by the outcome of a procedurally unstructured bargaining
process between states. The unstructured nature of these negotiations is
sometimes lost because of how similar BITs are to each other. But the
convergence of the substance in BITs is, perhaps counterintuitively, at least
partially a product of this lack of institutional structure. Capital-exporting states
have to date by and large been able to dictate the terms of BITs, while capital-
importing states have largely accepted the terms offered. This feature of BIT
negotiations can give BITs the feel of contracts of adhesion, but the point
remains: they are contracts negotiated without many institutional or procedural
formalities.

B. Treaties as Products of International Legislatures

Despite the importance of the contract analogy, many modern treaties are
not negotiated as contracts. Rather, treaties as different as the Kyoto Protocol to
the United Nations Framework Convention on Climate Change and the Rome
Statute of the International Criminal Court are negotiated within institutions that
I shall call "international legislatures." I define an international legislature as an

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28 The law of treaties does provide some basic background rules governing formation of treaties. See generally Vienna Convention, supra note 26. The Vienna Convention, however, is more akin to the basic rules of contract formation found in the common law. It stipulates the steps necessary to enter into a treaty—such as evincing consent to be bound in some fashion—rather than spelling out detailed rules on issues such as voting and agenda control that shape negotiation outcomes.

29 Jose E. Alvarez, A Bit on Custom, 42 N.Y.U. J. INT’L L. & Pol’y 17, 26 (2009) ("[BITs] are more like contracts of adhesion or ‘unequal treaties’ since in the ‘typical’ instance . . . these agreements are imposed by rich capital exporters on poor states desperate for capital and insufficiently prepared to know what they are signing.").

30 Id.

31 The terms "international legislation" and "legislative treaties" are sometimes used to refer to international instruments that create obligations for states that have not expressly consented. See, for example, Bradley, supra note 21, at 396; Andreas F. Lowenfeld, Investment Agreements and
institution in which legal rules are negotiated subject to a collective decision-making process that determines the commitments states may make to each other. This collective decision-making process is governed by a set of procedural rules that vary in terms of their formality across institutions. Collective decision-making is the hallmark of legislative governance. In contractual lawmaking, any state is free to make legal commitments to any other state. Members of an international legislature, however, may not make commitments to each other under the institution’s auspices unless the group as a whole first approves. For example, a protocol to the UNFCCC to replace the Kyoto Protocol cannot be ratified by states until it is first adopted by the Conference of the Parties to the UNFCCC. Also, the WTO’s Ministerial Conference must adopt any changes to any WTO agreements. Subjecting chemicals to the protections spelled out in the Stockholm Convention on Persistent Organic Pollutants (POPs Convention) similarly requires a vote of the Conference of the Parties to that Convention.

International legislatures are widespread and vary considerably in the degree to which they institutionalize lawmaking efforts. Some legislatures are ad hoc diplomatic conferences that are convened for the purpose of negotiating a single instrument and then are disbanded. Examples include the U.N. Conference on the Law of the Sea, which produced the U.N. Convention on the Law of the Sea, and the diplomatic conferences that negotiated the Vienna Conventions on Diplomatic Relations and Consular Relations. Others are standing bodies that engage in continued lawmaking over a period of years. The U.N. Security Council and the U.N. General Assembly are perhaps the best-known examples of standing legislatures, but the Conference of the Parties (COPs) (or similar body) to treaties such as the UNFCCC, the WTO, the International Law,

32 UNFCCC, supra note 2, art. 17.
33 WTO Agreement, supra note 4, art. X.
38 UNFCCC, supra note 2.
POPs Convention,\textsuperscript{40} the Rotterdam Convention on Prior Informed Consent (Rotterdam Convention),\textsuperscript{41} the Convention on the International Trade in Endangered Species of Flaura and Fauna (CITES),\textsuperscript{42} the International Convention for the Regulation of Whaling,\textsuperscript{43} and the International Convention for the Conservation of Atlantic Tuna,\textsuperscript{44} are all standing bodies.\textsuperscript{45}

In addition to the distinction between ad hoc versus standing institutions, international legislatures vary in the extent to which they formalize negotiations through the use of procedural rules. Thus, while the hallmark of legislative lawmaking is collective decision-making about the kinds of legal obligations states may make to each other, the distinction between contractual lawmaking and legislative lawmaking is a continuum between institutions that have highly structured decision-making processes on the one hand, and institutions that have informal decision-making structures on the other hand. Some legislative bodies impose very few procedural rules. For example, the 1919 Paris Peace Conference promulgated rules of procedure that contained only three meaningful articles.\textsuperscript{46} Negotiation in such institutions may not differ markedly from contractual negotiations. By contrast, other institutions impose a host of procedures governing even minor points of parliamentary procedure. The Rules of Procedure of the U.N. General Assembly, for example, have been described as "the fullest and the best developed system of procedural norms of international organizations."\textsuperscript{47} Similarly, the Rotterdam Convention and the POPs Convention both create detailed procedures for legislative action by the COP.\textsuperscript{48} Such institutions come closest to domestic legislatures in modern liberal

\textsuperscript{39} WTO Agreement, supra note 4.

\textsuperscript{40} POPs Convention, supra note 34.


\textsuperscript{45} Other examples of international institutions that can create international legislation include the International Monetary Fund and the institutions of the European Union. See Curtis A. Bradley & Judith G. Kelley, The Concept of International Delegation, 71 Law & Contemp. Probs. 1, 10 (2008).


\textsuperscript{47} Id. at 5 (quoting JAN KOLASA, RULES OF PROCEDURE OF THE UNITED NATIONS GENERAL ASSEMBLY: A LEGAL ANALYSIS 111 (1967)).

\textsuperscript{48} POPs Convention, supra note 34, art. 8; Rotterdam Convention, supra note 41, art. 18.
constitution systems. The effect of this variation in legislatures is to create a continuum between purely contractual negotiations completely undisciplined by procedures and rigorously legislative ones, encumbered by detailed procedures across a range of issues.

Critically, international legislation, the instruments produced by international legislatures, can look identical to contractual agreements when completed. The Kyoto Protocol, for example, is international legislation. It was negotiated and adopted by the Conference of the Parties to the UNFCCC, an international legislature. Just like a contractual agreement such as the North American Free Trade Agreement (NAFTA), the Kyoto Protocol had to be signed and ratified by countries before it came into force. Moreover, international legislative treaties and contractual treaties are equally subject to the law of treaties. This view that treaties are identical no matter how produced is reflected throughout commentary on international law. To give but one illustrative critique, Lord McNair writes:

> If international society wishes to enact a fundamental, organic constitutional law... it employs the treaty. If two states wish to put on record their adherence to the principle of the three mile limit of territorial waters... they use a treaty.... And if it is desired to create an international organization such as the International Union for the Protection of Works of Art and Literature, which resembles the corporation of private law, it is done by treaty.

The resemblance between international legislation and contractual agreements in their final form obscures the fundamental shift that has occurred in international lawmaking. In part, this is because the collective decision that an international legislature makes rarely gives rise to binding obligations absent some further action by states. Instead, the collective decision-making process is most often employed in voting on proposed texts. The most important such vote is on the "adoption" of the final text that is opened for signature and ratification. Adoption is the process used by international legislatures to indicate that they are done negotiating and the draft treaty may now be approved by states.

49 See Kyoto Protocol, supra note 3.
51 See McNair, supra note 20, at 101.
52 See Helfer, supra note 6, at 85 (noting that "deviations from the consent principle... are often linked in ways that preserve a modicum of state sovereignty").
53 See SABEL, supra note 46, at 258–301 (discussing voting procedures at international conferences).
54 See, for example, UNFCCC, supra note 2, art. 17 (stating that the UNFCCC's COP may "adopt protocols to the Convention" but that the entry into force provisions shall be contained in the protocol itself); Convention for the Protection of the Ozone Layer, art. 8, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 (1987) (same).
Adoption is a step that occurs prior to—and is separate from—consenting to be bound by a treaty.\textsuperscript{55}

The Vienna Convention on the Law of Treaties (Vienna Convention) provides default rules for adoption. Specifically, the Vienna Convention provides that a treaty negotiated in an “international conference” shall be adopted by a two-thirds vote of those states present and voting, unless states adopt some other rule by the same two-thirds vote.\textsuperscript{56} If a draft treaty is not adopted by the international legislature that negotiated it, the treaty is unlikely to ever be enacted into law.\textsuperscript{57} It is the procedure of adoption of a draft agreement more than anything else that distinguishes legislative negotiations from contractual negotiations. A negative vote on adoption allows states that have no intention of ratifying a set of obligations to prevent other states from doing so as well—an intermediate step in lawmaking that does not meaningfully exist in contractual negotiations.\textsuperscript{58} As we shall see, the inclusion of this collective decision-making procedure has major ramifications for the design of international legislatures.\textsuperscript{59}

Adopting draft texts is not the only form of decision that international legislatures make. International legislatures can also produce soft law instruments: instruments that are nonbinding but have legal consequences through their interpretation or exposition of what binding legal obligations mean or how they will be interpreted and implemented.\textsuperscript{60} The U.N. General Assembly is perhaps the most prolific legislative institution producing international soft law obligations. Lacking the power to directly pass binding resolutions, the General Assembly passes nonbinding resolutions that purport to interpret binding international legal commitments.\textsuperscript{61} Many COPs also pass copious

\textsuperscript{55} Compare Vienna Convention, supra note 26, art. 9 (discussing the rules for adopting a draft text) with Vienna Convention, supra note 26, art. 11 (discussing means of expressing consent to be bound by a treaty).

\textsuperscript{56} Vienna Convention, supra note 26, art. 9.2. Art. 9.1 provides that adoption of draft texts negotiated outside of conferences shall be by the consent of all states participating in its negotiation. This unanimity requirement for adoption outside of diplomatic conferences is not a meaningful one because outside of institutionalized negotiations states can more easily be removed from negotiations, and therefore their ability to block the adoption of a text can be eliminated.

\textsuperscript{57} For an explanation as to why this is so, see infra Section IV.

\textsuperscript{58} But see supra note 56.

\textsuperscript{59} See infra Section IV.

\textsuperscript{60} See generally, Guzman & Meyer, supra note 27; Timothy Meyer, Soft Law as Delegation, 32 FORDHAM INT’L L.J. 888 (2009).

\textsuperscript{61} See Guzman & Meyer, supra note 27, at 216–17 (describing the General Assembly’s passage of resolutions interpreting the Refugee Convention’s obligations regarding nonrefoulement); Andrew T. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral

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amounts of soft law. These soft law obligations are usually framed as Decisions of the Parties, or some similar kind of instrument, and often purport to interpret or implement the legal obligations contained in related treaty instruments. For example, a mere decision of the parties created the Kyoto Protocol’s compliance mechanism, which establishes an oversight mechanism and provides for sanctions in the event of noncompliance.\(^6^2\) Similarly, the Convention on International Trade in Endangered Species (CITES) has developed a set of rules governing the trade in different kinds of species through a series of decisions of the parties that goes well beyond what is contemplated by the text of CITES itself.\(^6^3\)

To the extent that scholarship has differentiated among treaties, it has tended to do so on the basis of what treaties do, rather than the procedures through which they are negotiated.\(^6^4\) Professor Bodansky, for example, has described the difference between constitutive treaties and regulatory treaties.\(^6^5\) Constitutive treaties are those that create institutions to engage in negotiations, while regulatory treaties are those that create substantive rules of conduct.\(^6^6\) Thus, the U.N. Charter is primarily a constitutive treaty because it establishes institutions such as the General Assembly and the Security Council,\(^6^7\) while the Geneva Conventions are regulatory treaties because they create rules of conduct for states. Professor Trachtman has made a similar distinction between “international constitutional law” and “ordinary international law.”\(^6^8\) Similarly, scholars have noted the move to iterative negotiations in international lawmaking. For example, Professor Setear (among others) has written about the so-called “convention-protocol” approach, in which parties negotiate a framework agreement that elaborates basic principles and contemplates future subsidiary agreements that create rules of conduct.\(^6^9\)

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\(^{62}\) Kyoto Protocol, supra note 3.


\(^{64}\) For a comprehensive discussion of how international institutions can make law, see Jose E. Alvarez, International Organizations as Law-Makers (2005).

\(^{65}\) See Bodansky, supra note 63, at 158–59, 176.

\(^{66}\) Id. at 158.

\(^{67}\) The U.N. Charter contains rules of conduct as well, such as the rules on the use of force and self-defense contained in arts. 2 and 51. See U.N. Charter, arts. 2, 51.

\(^{68}\) See Trachtman, supra note 6, at 255.

These lines of thought clearly implicate international legislatures. International legislatures are, most obviously, created by treaties that might be termed constitutive treaties. And although not usually conceived of in this way, the convention-protocol approach to treaty-making is a form of legislative lawmaking. The framework convention is the constitutive treaty that establishes an international legislature—usually a COP—that negotiates the subsequent protocols. Neither of these schools of thought, however, has paid attention to how legislatures' use of collective decision-making has changed international lawmaking. Instead, framework agreements and constitutive treaties are often treated like memoranda of understanding in business deals; they elaborate basic principles and terms agreed to and set the stage for future negotiations, but the important lawmaking work is left almost entirely for subsequent substantive agreements.

Nevertheless, contractual negotiations are dramatically different from legislative negotiations in a variety of respects. These differences have significant impacts on the outcome of negotiations, on the shape that substantive obligations take. International lawyers and scholars would thus be well-advised to pay greater attention to how institutions structure bargaining, and specifically how they decide between contractual negotiations and legislative negotiations of different scopes. As I explain below, contrary to the conventional wisdom, contractual negotiations offer states much greater flexibility in terms of the managing the scope of their negotiations. This flexibility, as it turns out, is both virtue and vice.

III. THE DEBATE ABOUT CONSENT

Despite the rise of international legislatures over the twentieth century, a number of scholars have continued to call for the expansion of collective decision-making in international law. These scholars have tended to minimize

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71 See, for example, Palmer, supra note 6, at 279 (“The missing link ... is the equivalent of a legislature ... We would envisage the new Environmental Protection Council ... [as] empowered to take binding decisions.”).
the impact of international legislatures because, as discussed in Section II, by and
large the collective decision-making procedures employed by international
legislatures do not directly lead to binding legal obligations. For the most part,
states remain free today to accept or reject international treaties, whether they
are negotiated contractually or in legislatures.\(^2\) The introduction of collective
decision-making through international legislatures has not, as it turns out, been
strongly associated with a move away from the requirement that states consent
to any binding legal commitments they make. For these commentators, a
broader move towards nonconsensual lawmaking is necessary if states are to
confront the most pressing problems of the day. On another view, however,
nonconsensual lawmaking is illegitimate because it disrespects certain core rule-
of-law values, such as democratic accountability and domestic constitutional
norms such as the separation of powers.

In this Section, I explain the arguments for and against nonconsensual
lawmaking. I then argue that this debate over consent has overlooked the key
change in international lawmaking brought about by international legislatures:
collective decision-making in international legislatures has dramatically expanded
the requirement that states consent to each other's legal obligations, and not merely
their own. Moreover, as I discuss in greater detail in Section IV, the benefits of
collective decision-making that explain the rise of international legislatures are
exactly the opposite of the alleged benefits of nonconsensual lawmaking.

A. Nonconsensual Lawmaking and Global Government

There are perhaps few issues in international lawmaking that touch a
stronger nerve than nonconsensual lawmaking. While the requirement that states
consent to their legal obligations is a “fundamental principle of international
agreements,”\(^3\) officials such as former New Zealand Prime Minister Geoffrey
Palmer and scholars such as Andrew Guzman, Laurence Helfer, and Joel
Trachtman have argued that modern international lawmaking should, in at least
some circumstances, include the ability to bind states against their will.\(^4\) Absent
such ability, international law cannot tackle truly global problems such as climate
change.

\(^{2}\) To be clear about terminology, many scholars use the term “legislature” to refer to institutions
that make laws through majority voting.

\(^{3}\) Helfer, supra note 6, at 72.

\(^{4}\) See Palmer, supra note 6, at 273–78; Helfer, supra note 6, at 79–89, 96–123; Guzman, Against
Consent, supra note 6, at 788 (calling for reforms to international lawmaking that could include
“voting by states (as is done in many IOs) or by individuals to elect some form of international
legislative body (as is done in the E.U.)”); TRACHTMAN, supra note 6, at 279 (“I have suggested
that there may be a kind of dynamic imbalance, or cascade, leading from strong dispute settlement
to greater capacity for legislation: from one type of enabling constitutionalization to another.”).
To briefly unpack this logic, consider the basic problem presented by a
lawmaking paradigm in which each subject has to individually consent to its
obligations. In such a world, no state will consent to a legal obligation that
makes it worse off than it would be under the status quo. Therefore, only
Pareto-improving changes in the law will be made—changes in which no state is
made worse off and at least one state is made better off. \[^{75}\]

Procedural rules that require that all changes in the law be Pareto-
improving—that is, that no state be made worse off and at least one state be
made better off—impose a demanding criterion indeed. \[^{76}\] Domestic lawmaking
virtually never imposes such a constraint. Instead, domestic lawmakers like
Congress or administrative agencies are free to impose losses on some groups in
order to pass legislation benefitting other groups. Entitlement programs may
take tax revenue from wealthy states and send it to poor states; health care
legislation may reduce the profits of insurance companies in order to increase
the welfare of patients; reductions in tariffs may cause workers in
noncompetitive industries to lose their jobs while overall putting more money in
the pockets of American consumers. Unlike domestic lawmaking, almost all
international lawmaking, whether contractual or legislative, occurs pursuant to
procedural rules that require states to consent to their own obligations. The
Vienna Convention—the overarching source of rules on treaty formation—
makes consent the centerpiece of its treaty formation doctrine. It defines a party,
a state bound by a treaty, as one “that has consented to be bound by the treaty,”
and it devotes seven articles to describing how that consent can be manifested. \[^{77}\]
This consent requirement ensures that no state will agree to changes in the law
that make it worse off than it otherwise would be. \[^{78}\]

Pareto-improving changes in the law can be contrasted with changes in the
law that increase overall welfare but create losses for some subjects of the law,
so-called Kaldor-Hicks improvements in the law. \[^{79}\] Put differently, many changes
in the law create winners whose gains exceed the losses from the losers.

\[^{75}\] See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 42 (6th ed. 2012).

\[^{76}\] Id.

\[^{77}\] Vienna Convention, supra note 26, arts. 2, 11–17. Exceptions to the rule that states must consent
to legal obligations in order to be bound include the U.N. Security Council when acting pursuant
to Chapter VII; certain technical changes to some agreements, such as the Montreal Protocol; and
customary international law, to which states can be bound without any affirmative indication of
assent. See Guzman, Against Consent, supra note 67, at 775–84 (discussing the exceptions to the
norm of consensual lawmaking).

\[^{78}\] See Guzman, Against Consent, supra note 6, at 752–55 (noting consent ensures states prefer the new
agreement, ensures legitimacy, and protects states and the international system from decreases in
joint welfare of states).

\[^{79}\] See COOTER & ULEN, supra note 75, at 42.
Proponents of nonconsensual lawmaking essentially argue that Kaldor-Hicks improving changes in the law—and therefore nonconsensual lawmaking procedures that facilitate such changes—should be or will be embraced as a way to break the deadlocks in international bargaining. For example, the world’s largest emitters of greenhouse gases, China and the United States, arguably stand to lose from the immediate imposition of drastic climate change mitigation measures. Such measures would likely curb their economic growth at a cost that might arguably exceed the present value of their individual benefits from mitigating climate change. China and the United States will therefore use international law’s consent requirement to avoid immediately effective legal obligations to mitigate climate change. They will do so even though the gains to the rest of the world from their climate change mitigation efforts—gains that China and United States do not themselves capture—might well exceed the losses those countries would suffer in terms of economic development. Nonconsensual lawmaking would solve this problem, permitting countries to impose a loss on China and the United States in order to obtain the welfare gains the rest of the world would enjoy from emissions reductions in those two countries.

This literature on consent thus predicts as a descriptive matter, and calls for as a normative matter, a greater move away from the rule that a state cannot be bound without its consent. There are a number of different reforms that can accomplish this task. For example, an increase in the number of international tribunals charged with interpreting international law creates a system whereby the law can be developed without states explicitly consenting to changes. Soft law agreements, exit clauses, and sunset provisions can be used as a way to weaken the status quo bias created by the consent requirement. And, of course, international institutions could be empowered to make decisions through non-
unanimous voting rules. As Professor Trachtman recognizes, however, these moves towards nonconsensual lawmaking are not likely to go unchallenged. As he puts it, “a move toward enabling international constitutionalization in the form of enhanced legislative capacity [by which he means non-unanimous decision-making] would demand a move toward constraining international constitutionalization.” As we shall see, although often overlooked, legislative governance comes with, and indeed is introduced precisely to create, these constraints.

B. Legitimacy and Sovereignty

A second strain of commentary is fundamentally skeptical of the idea of nonconsensual lawmaking. On this view, nonconsensual lawmaking undermines two important features of international law. First, it can reduce the legitimacy of international lawmaking by removing procedural protections for weak states. Second, nonconsensual lawmaking is viewed as a challenge to state sovereignty and, within the United States, to democratic and constitutional norms. I discuss each critique in turn.

A number of prominent scholars, such as Thomas Franck and Daniel Bodansky, have advocated legitimacy as a major criterion in promoting the efficacy of international law. On this view, states are most likely to comply with international law—and therefore international law is most likely to be successful in solving global problems—when states perceive international law as legitimate. Legitimacy is a famously squishy concept, often in the eye of the beholder, and so in an effort to be precise these scholars have elaborated on what constitutes “legitimate” international law. One of the most famous expositions of legitimacy in international law defines the term as “the belief that the law was made and is applied in accordance with right process.” Inclusiveness—the right to participate in lawmaking—is almost universally

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85 See Trachtman, supra note 6, at 279; Guzman, Against Consent, supra note 6, at 788; Bradley & Kelley, supra note 45, at 10.
86 TRACHTMAN, supra note 6, at 281.
89 See Franck, Fairness, supra note 87, at 26.
identified as a critical component of legitimate process. Procedural norms such as transparency and public access to information also play a role.

One can easily see how nonconsensual lawmaking undermines these views of legitimacy. Nonconsensual lawmaking has, in some of its forms, the possibility of altogether eliminating participation by certain states. Indeed, the U.N. Security Council, perhaps the chief example of an international institution with nonconsensual lawmaking powers, includes only fifteen states. More generally, however, nonconsensual lawmaking might undermine legitimacy by encouraging a majority of states to impose their will on a minority. In international law, notions of legitimacy are tied to notions of consent, and so majoritarian decision-making sometimes faces a per se challenge that it is illegitimate. The history of imperialism and concerns that the international legal order reflects a fundamentally European and Anglo-American set of principles further underscore the importance of the voice that comes with the consent requirement.

What I will call the “non-delegation” view objects to nonconsensual lawmaking (and sometimes to international lawmaking even when it is consensual) on the grounds that it improperly delegates to international organizations (and by extension, foreign governments that have influence over these international organizations) control over legal rules then implemented domestically. Scholars have argued both that such delegation is constitutionally impermissible and functionally undesirable because it transfers lawmaking

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90 See Bodansky, supra note 87, at 599 (noting the importance of democracy and participation to a rule’s legitimacy); FRANCK, FAIRNESS, supra note 87, at 28 (arguing that international law’s power and reach extends to those who have consented to participate in the international community); Rolf H. Weber, The Legitimacy of the G20 as a Global Financial Regulator, 28 B.F.L.R. 389, 401 (2013) (“[I]nclusiveness is a basic source of legitimacy.”).

91 Bodansky, supra note 87, at 600.

92 Id. at 609–10 (noting that even general consent to an institution’s rulemaking procedures may not legitimate subsequent nonconsensual lawmaking by the institution). Other notions of legitimacy do not necessarily rule out the possibility of nonconsensual lawmaking, but they often strain to justify that lawmaking on the grounds of consent. For example, Franck argues that, having consented to join the international community, states thereby have consented to subsequent rules made pursuant to those communities’ norms. See FRANCK, FAIRNESS, supra note 87, at 28–29. The rules and processes that generate norms and legal rules—the secondary rules of lawmaking—change over time, however. See Pauwelyn, supra note 87 (studying the rise of informal lawmaking as a complement and replacement for formal and traditional means of international lawmaking). Indeed, these changes can even happen within institutions, such as when a Conference of the Parties begin to act through non-binding decisions, instead of amendments to its governing treaty. These changes are rarely accompanied by any formal consent process, and so the notion that nonconsensual lawmaking in the abstract can always be justified by some notion of consent is a strained notion of consent indeed.
authority to unaccountable institutions. For example, Curtis Bradley has worried that:

By transferring legal authority from U.S. actors to international actors—actors that are physically and culturally more distant from, and not directly responsible to, the U.S. electorate—[delegations of authority to international organizations] may entail a dilution of domestic political accountability. This accountability concern may be heightened by the lack of transparency associated with some international decisionmaking.93

Similarly, Jed Rubenfeld has noted that:

The antidemocratic qualities of the United Nations, the International Monetary Fund (IMF), and other international governance organizations—their centralization, their opacity, their remoteness from popular or representative politics, their elitism, their unaccountability—are well known.94

The legitimacy and non-delegation schools of thought both find nonconsensual lawmaking undesirable in most instances. The critique of nonconsensual lawmaking does not, however, reject the basic premise of the advocates of nonconsensual lawmaking—that nonconsensual lawmaking might allow some welfare-enhancing changes in the law that are blocked by the consent requirement. Rather, the critique of nonconsensual lawmaking rests on grounds other than welfare: values such as fidelity to constitutional norms, the direct accountability of lawmakers, and basic notions of due process and participation that some fear may be lost in a nonconsensual environment. In other words, scholars defend the consent requirement largely on non-welfarist grounds.

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94 Jed Rubenfeld, The Two World Orders, 27 WILSON Q. 22, 34 (2003). Rubenfeld goes on to suggest that “world democracy” might be an acceptable solution to this suggestion. Id. at 35. By world democracy, however, he appears to mean a democracy modeled on domestic legal institutions, subject to elections, rather than international institutions that operate with governments choosing representatives who then vote on international legal measures.
C. Consenting to the Obligations of Others

Commentary on international lawmaking is thus stuck on consent. On the one hand, the literature on nonconsensual lawmaking and global government sees international lawmaking as paralyzed by the consent requirement. Commentators have argued for relaxing the consent requirement by moving towards international lawmaking processes that resemble domestic lawmaking procedures. On the other hand, nonconsensual international lawmaking is often perceived as antithetical to democratic and constitutional values.

While consent undoubtedly is a critical issue in international lawmaking, this focus on consent alone obscures as much as it clarifies. The confusion about consent arises because both those for and against nonconsensual lawmaking emphasize the role of consent on a state’s own legal obligations. Yet this literature does not explain the central puzzle of perhaps the most common form of nonconsensual international lawmaking, legislative governance: in the decades since the Second World War international legislatures have proliferated, but they have failed to adopt on a large scale voting rules that would allow majorities to bind dissenting minorities. We have thus gotten legislatures without getting rid of the consent requirement. We have a form of governance thought to empower majorities without having the specific rules necessary to accomplish that feat.

As I explain in Section IV, the rise of international legislatures has little to do with eliminating the consent requirement in international law. Instead, the introduction of legislative governance to international law is about expanding the power of minorities to block majoritarian rulemaking. International legislatures, in other words, create a requirement that states consent to each other’s legal obligations. International institutions’ relatively stable membership and their voting rules mean that minorities can block majorities from adopting rules that, in the absence of the institution or the minorities’ presence in it, they might otherwise be able to enact. Moreover, as I explain below, this holdup power created by legislatures is a good thing because it actually facilitates bargaining among states.

Before turning to that analysis, however, it is useful to contextualize the role of international legislatures in a broader discussion of legislatures. Domestic

95 Of course, in theory states can always step outside an international organization in order to make a contractual treaty with a subset of an institution’s membership if efforts at a legislative treaty are defeated. As discussed in Section IV, this kind of forum shopping is costly for a number of reasons. These costs and the limits they put on forum shopping give leverage to minorities within legislatures because they make legislatures a more important vehicle for lawmaking. In situations in which forum shopping costs are low, the leverage of minorities is reduced due to states being able to exit more freely. See Meyer, Exit Costs, supra note 84 (arguing that states may deliberately reduce the exit costs associated with an international agreement in order to facilitate renegotiation).
From Contract to Legislation

legislatures, such as the U.S. Congress, are often thought to exist to implement majority rule. After all, formally ordinary legislation can be passed by a simple majority vote of both houses. This feature allows dissenters to be overridden and allows the passage of Kaldor-Hicks improving legislation, as discussed above.

As is well-known, however, the U.S. Congress (to take an example of a domestic legislature) has many procedural rules that are counter-majoritarian. Perhaps the most obvious is the filibuster in the Senate, whereby a minority of senators can block a majority from acting. In fact, the internal organization of Congress is designed to create veto points that undermine the majoritarian structure of Congress’s basic voting rules. The committee system used in both houses of Congress famously allows very powerful committee chairs and committee members to prevent legislation from reaching the floor, even when the measure would pass if it could get out of committee. Weingast and Marshall famously argued that the committee system is established in this way in order to enforce legislative bargains. Agreements to trade support on one legislative matter for support on another are not enforceable before any court. The possibility therefore exists that legislators will refuse to honor agreements to swap votes. The committee system deters this form of opportunism, and thus facilitates legislative bargains, by creating property rights in committee assignments. Committee members can use their privileged position on a committee to interfere with their colleagues’ agendas. This possibility provides an incentive for legislators to honor their agreements. Renege on a deal to trade votes with a colleague and you may find your future priorities buried in that colleague’s committee, no matter how popular they may be in the house as a whole.

The rise of international legislatures, and the use of collective decision-making that facilitates rather than mitigates the power of minorities, is consistent with this account of how domestic legislatures work. Legislatures may allow for majoritarian decision-making, but they do so within a more complicated

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96 See David Schleicher, City Unplanning, 122 Yale L.J. 1670, 1700-1 (2013) (discussing political science literature on how legislatures prevent the cycling that results from majority rule).

97 See, for example, Dan T. Coenen, The Originalist Case Against Congressional Supermajority Voting Rules, 106 NW. U. L. REV. 1091, 1096 (2012) (describing the filibuster procedures). Other examples would include the use of holds by individual senators to prevent certain pieces of business, such as nominations, from proceeding to a floor vote.

98 See, for example, Shepsle & Weingast, supra note 13 (cataloguing the literature on, and analyzing the role of, congressional committees).


100 Id. at 144.
framework. That framework is designed not simply to provide for untrammeled rule by the majority. Rather, it exists to support the enforceability of bargains that cannot be enforced by courts. Bargains among states acting as international lawmakers are not dramatically different from bargains among domestic legislators. The argument about the organization and purpose of international legislatures, to which I now turn, thus treats international lawmaking—not as a *sui generis* form of law—but as a species of lawmaking with much in common, and much to learn from, its domestic analog.

IV. A THEORY OF INTERNATIONAL LEGISLATURES

In this Section, I propose a theory explaining the rise of international legislatures and the limits on their jurisdiction. I begin by contrasting contractual lawmaking and legislative lawmaking. The key insight is that contractual lawmaking is more flexible than legislative lawmaking in at least one key respect: in contractual lawmaking reluctant parties or thorny issues are more easily excluded. Legislatures rarely permit negotiations to be “scaled down” through exclusion as can be done in contractual negotiations. This observation runs counter to the conventional wisdom, which views legislative governance linked to majoritarian decision-making as more flexible than contractual negotiations weighed down by the consent requirement.

International legislatures, I argue, exist precisely to create this kind of inflexibility. Moving bargaining into a legislative institution creates a collective decision-making process in which holdout states can prevent cooperation-minded states from making commitments to each other, a possibility that does not exist in contractual bargaining. I explain how these costs are in fact valuable to states. Granting states holdup power through legislative bargaining allows states to use the threat of holding out in future lawmaking efforts to enforce legislative bargains. The inflexibility of international legislatures is thus a commitment device that ultimately lubricates international lawmaking. On the other hand, holdouts are costly to present bargaining efforts, and so states will seek to place some limits the use of holdouts through a variety of legislative techniques. I conclude this Section by analyzing several such techniques, most notably fragmenting jurisdiction over related issues among multiple institutions.

A. Contractual Versus Legislative Negotiations

1. Contractual negotiations.

When states sit down to negotiate contractual agreements, they control both the number of issues in the negotiation and the states that will ultimately be bound by the resulting agreement. I refer to the membership of a negotiating body and the issues under negotiation as the jurisdiction of the negotiating body.
Where legislatures are concerned, this jurisdiction is formal. Legislatures can only permissibly make rules for states and on issues within their jurisdiction. For contractual negotiations, no such formal jurisdiction exists. Because contractual negotiations lack formal jurisdiction, states can both expand or reduce the issues on the table and the number or identity of the members in order to reach an agreement that states are both willing to participate in and likely to comply with.\textsuperscript{101} Contractual negotiations are thus more flexible than institutionalized negotiations in which modifying the jurisdiction of the institution requires the consent of the institution’s members, some of whom may be opposed.

Traditionally, commentators and policymakers have focused on how states negotiate agreements by expanding the issues and parties at the table.\textsuperscript{102} Adding issues and parties creates more possible bargains because it expands the number of issues across which trades can be made. States can then yield on points that are of little interest to them, but of much interest to other parties, in exchange for concessions that are of greater value. This ability to make issue linkages is valuable because it can respond to threats by holdout states (states that refuse to join the agreement unless they are offered better terms) to exit the negotiations.

Contractual negotiations, however, have the crucial feature that, precisely because they lack institutionalized jurisdiction, they can discard issue linkages that are not valuable to them. States can thus shrink the scope of contractual negotiations to a single very narrow issue, such as inspection procedures at international ports.\textsuperscript{103} Perhaps one of the most well-known issue linkages to be thrown out is the linkage between forest preservation and climate change at the 1992 Rio Earth Summit. There, developing states opposed linking forest preservation to climate change on the grounds that they stood to lose the potential for economic development in a forestry convention without receiving sufficient offsetting benefits.\textsuperscript{104}

\textsuperscript{101} International agreements generally have to satisfy both a participation constraint (states must be willing to sign up to the legal rules being negotiated) and a compliance constraint (states must be willing to abide by the rules). See Scott Barrett, Environment and Statecraft: The Strategy of Environmental Treaty-Making (2003). Controlling the number and identity of negotiating parties and issues on the table allows states to try to create agreements that satisfy both of these constraints.


The fact that issue linkages can be discarded in ad hoc bargaining when they are not value-creating probably accounts for many commentators' intuition that issue linkages are generally used to facilitate welfare-increasing trades among states.\textsuperscript{105} In contractual negotiations resulting in agreements, we would only expect to observe issue linkages when they improve welfare.\textsuperscript{106} Where membership is concerned, states likewise can be allowed to go their own way when their participation is not necessary, or they can have their demands accommodated when their participation is meaningful and the threat of exit is credible. Thus, American and E.U. participation on free trade is very meaningful, and so developing states followed the Americans and the Europeans from the GATT to the WTO.\textsuperscript{107} American membership in the Rome Statute of the International Criminal Court is not worth the concessions it would require, and so other states preferred to proceed without the United States.\textsuperscript{108}

Contractual bargaining thus allows for the possibility of excluding holdout states rather than making issue linkages necessary to satisfy the holdouts. Put differently, contractual bargaining allows states to shrink the scale of cooperation when doing so improves the value of the agreement to its potential members. Of course, the structure of a problem may make it so that exclusion is not feasible and issue linkages are necessary to create side payments. For example, cooperation on international watercourses generally requires the participation of the upstream state.\textsuperscript{109} And cooperation on certain issues will require some minimum level of participation in order for it to be worthwhile for participating states.\textsuperscript{110} Treaties like the International Convention for the Prevention of Pollution from Ships (the “MARPOL Convention”) frequently

\textsuperscript{105} See, for example, Joel P. Trachtman, Regulatory Jurisdiction and the WTO, 10 J. INT’L ECON. L. 631, 632–33 (2007).

\textsuperscript{106} This is not to say, of course, that all issue linkages are welfare-enhancing. The most notable example of an issue linkage that is thought not to be welfare enhancing is the inclusion of TRIPs under the auspices of the WTO. Commentators have worried that the intellectual property rules enshrined in the TRIPs Agreement actually make developing states worse off than they were under the pre-TRIPs GATT regime because developing states now must pay considerably more for, perhaps most importantly, patented medicines. The logic of issue linkages that do not improve the position of all states relative to the status quo is that some powerful state is able to remove the status quo as an available option. Thus, the U.S. and the E.U. withdrew from the GATT 1947 and acceded to the WTO, forcing states that wished to maintain favorable market access to follow suit.


\textsuperscript{110} BARRETT, supra note 101.
require ratification by states that account for a certain amount of economic activity. The MARPOL Convention, for example, requires ratification by at least fifteen states accounting for fifty percent of the world's shipping tonnage. These provisions ensure that the treaty does not enter into force unless there is a critical mass of states justifying the costs of cooperation. But in general, contractual bargaining allows states greater flexibility in adjusting the number of parties and issues under negotiation, either in the interests of expanding cooperation or narrowing it. The importance of this point cannot be overstated. As governance of major international issues such as climate change and trade has moved from contractual bargaining to institutional bargaining, states' discretion to shrink the scope of cooperation has been greatly reduced.

2. Institutional bargaining.

Bargaining over the creation of legal rules within legislatures changes this dynamic entirely. Excluding, and to a lesser extent adding, both new members and new issues is much more difficult when jurisdiction has been institutionalized. Therefore, perhaps counterintuitively, legislative governance is less flexible than contractual negotiations.

First, bargaining within institutions fixes the identities of the members because international legislative institutions do not usually have mechanisms to remove states that obstruct bargaining. While states often have the right to voluntarily exit, a majority has no means to adjust downward the parties whose consent is necessary. The result is that holdout states have the ability to paralyze institutional negotiations in a way that they could not paralyze contractual negotiations. By contrast, holding out in contractual negotiations is a risky proposition because if your participation becomes more trouble than it is worth, the remaining states can move forward without you.

Moreover, voting rules in international legislatures create a high bar for action. Many institutions require consensus and those that do not still usually require supermajorities. The combination of these two features means that, in most international legislatures, a single state or a small group of states can veto actions favored by a majority of cooperation-minded states. Put differently,

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112 Id.
115 See Helfer, supra note 6.
international legislatures create institutionally-specific bargaining power that does not exist in contractual negotiations.

The U.N. Security Council is the most obvious example of an institution whose rules give states considerably more bargaining power within the institution than they have outside of it. France, the U.K., and Russia all wield vetoes on the Security Council that make their assent necessary for collective action under the Security Council’s auspices, even though in the absence of the Security Council many security problems could quite easily be addressed without those three nations’ participation, and even over their objections. An even more technical example is the negotiation of the crime of aggression in the Conference of the Parties to the Rome Statute. Although the voting rules of the COP required only a two-thirds vote of the Statute’s membership to adopt the proposed aggression amendments, a number of delegations failed to present credentials entitling them to vote. Thus, while in principle the COP’s decision rule would have allowed states to adopt a robust definition of the crime of aggression over the objection of the U.S. and its allies, in practice the decision rule as applied required consensus. As a result, states such as the U.S. that have little intention of ever ratifying the Aggression Amendments were able to use the vote on adoption to force a weaker definition of aggression than that which would have been adopted if those states had not participated in the negotiations.

When faced with persistent obstructionism, often the best that cooperation-minded states can do is threaten to decamp to another institution with different membership. States frequently engage in this kind of forum shopping, but it is not costless. Establishing a new institution requires political capital and resources to invest in negotiating the institution’s framework agreement and endowing it with any necessary administrative resources, such as a secretariat. Moreover, shifting governance to a new institution can be both politically and legally costly. The political costs can come from a backlash if


moving institutions is perceived to be illegitimate. Developing countries, for example, have pushed back against the shift of intellectual property governance into the WTO with the TRIPs Agreement. The legal costs can come if linkages to other legal rules or institutions are lost. For example, parties to the Rome Statute cannot easily establish an alternative treaty defining aggression more strictly. The International Criminal Court would not have jurisdiction over violations of the stricter definition of aggression, which would prevent prosecutions—a key goal of parties to the Rome Statute.

Second, institutional bargaining can also limit the issues on the bargaining table through the jurisdiction of the institution. For example, Article II of the WTO Agreement, entitled “Scope of the WTO,” provides in relevant part that “[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.” Similarly, legislatures might expressly limit an institution’s jurisdiction, as the UNFCCC does in limiting the institution’s scope to “greenhouse gases not controlled by the Montreal Protocol.” It is difficult, however, to cabin off issues that are within the institution’s jurisdiction. Holdout states can take other issues within the institution’s jurisdiction hostage as a way to extract concessions on the issues they care about. For example, many environmental regimes involve negotiations over both substantive environmental standards and financial assistance for developing states. Developing states will frequently insist on financial assistance as a quid pro quo for agreeing to substantive rules proposed by developing states. Indeed, they may extract these concessions even when the substantive standards do not affect them. The Copenhagen and Cancun Accords, which established a “pledge and review” system whereby states would make unilateral commitments on greenhouse gas emissions reductions, involved the creation of the Green Climate Fund to assist developing states in engaging in clean development. The Green Climate Fund ensured the support of developing nations, support necessary to eventual adoption of the Accords at Cancun by the UNFCCC COP.

121 WTO Agreement, supra note 4, art II.1.
122 UNFCCC, supra note 2, art. 4.
123 See, for example, UNFCCC, supra note 2, art. 11; Convention on Biological Diversity, supra note 5, art. 20.
124 See HUNTER ET AL., supra note 104, at 708–9 (describing the negotiations over climate finance generally and the Green Climate Fund specifically).
Third, and to a lesser extent, institutions also inhibit issue linkages created by adding new members to an institution or adding new issues. Many institutions require the permission of the existing membership before a new member may be admitted. For example, states cannot join the WTO or the E.U. until the existing membership approves accession. A state or coalition within an institution might have an incentive to block new members, thereby frustrating attempts to create issue linkages through expanded membership. Similarly, efforts to expand the issue jurisdiction of an institution can be frustrated by unwilling members, and acting outside the institution can be costlier than acting within the institution.

Legislative bargaining thus differs significantly from contractual bargaining because issue linkages cannot be manipulated as easily, and specifically because the jurisdiction of a legislative institution cannot easily be narrowed to deal with holdout problems. Thus, while institutions create economies of scale (in terms of administrative costs of iterative negotiation) and can ease informational problems, they can also dramatically complicate negotiations by expanding the number of states necessary to the adoption of a cooperative program. Voting rules, of course, can reduce this pressure. But unanimity rules (or vetoes for particular states, as in the U.N. Security Council) are not uncommon in international legislatures. If an institution requires unanimity or consensus, as institutions such as the UNFCCC do, then one state or a small group of states can prevent lawmaking on an issue unless their demands are satisfied. Even if only a supermajority is required, a group of like-minded states can still block lawmaking efforts. Unlike in contractual negotiations, these reluctant members cannot be removed. Moreover, appeasing them through issue linkages is at least somewhat more difficult than it might be in contractual negotiations because making additional issue linkages often requires the consent of the institution’s membership (although the possibility of side agreements among a subset of members can ameliorate this difficulty). As I explain in Section IV.C, rather than move wholesale to majoritarian decision-making, international legislatures have tried to reduce the governance costs imposed by international legislatures through a series of rules aimed at preserving states’ ability to veto action by the group in certain circumstances, while at the same time permitting states to refuse themselves to be bound.

Legislative institutions are puzzling, then, because they have the very real potential to prevent welfare-enhancing transactions. This governance cost is created by the possibility of opportunism by holdout states. States may hold out

because they are not made better off by the proposed set of rules, or they may hold out hoping for a larger share of the gains from cooperation. Whatever the reason, moving to an institution carries a significant cost in that it removes the threat of expulsion as a check on this kind of opportunism. In other words, it makes exit a one-way right of the holdout, rather than a right of the group. 126 How do we explain states' decision to give holdouts this kind of power, and what are the limits on their willingness to do so?

B. The Logic of Holdup

If the conventional wisdom that legislative institutions allow more flexibility in lawmaking by circumventing consent is incorrect, why do states nevertheless prefer to bargain within international legislatures? I argue in this Section that the holdup power created by international legislatures is valuable as a form of hostage-taking. States face a range of problems in which they negotiate iteratively. These include environmental treaties in which states negotiate protocols governing different sources of pollution at different times, as well as trade agreements in which states negotiate across a range of trade liberalization issues to be adopted as a "single undertaking" when negotiations on all matters have concluded. Iterative negotiations are best accomplished through legislatures because states can use the holdup power created by the institution to enforce bargains struck during earlier negotiations.

1. Enforcing legislative bargains.

The holdup power created by international legislatures is beneficial to states because it allows them to enforce two different kinds of bargains. First, holdup power allows states to enforce what are essentially "vote-trading" bargains across treaty negotiations when those negotiations do not occur simultaneously. 127 Second, it allows states to use bargaining to punish each other for violations of existing legal obligations. In this way, legislative institutions support both future lawmaking efforts and provide an institutional foundation that amplifies the reputational mechanism that drives compliance with much of international law.

Where legislative bargains or "vote-trading" is concerned, two states might wish to agree on a coordinated position on negotiations over two different issues. Although I shall use the term "vote-trading," in reality such agreements more often involve the adoption of unified negotiating positions across multiple

126 Of course, as noted above, the group retains the ability to move to a different institution, although doing so has costs. What the group cannot do, though, is use the same institution without the presence of the holdout.

127 Weingast & Marshall, supra note 99, at 144.
issues, including agreeing to vote for the adoption of draft agreements reflecting those positions. For example, State A might agree to take a less favored position on Issue 2 in exchange for State B agreeing to support State A’s proposal on Issue 1. As long as State A (State B) values the difference in the joint negotiating position on its more important issue, Issue 1 (Issue 2), more than it values the difference in negotiating position on the issue less important to it, Issue 2 (Issue 1), then this agreement creates “gains from trade.” Each state gets more from vote-trading than it would by taking its preferred position on an issue-by-issue basis.

This agreement, however, is subject to transaction costs arising from the possibility that a state will renege unless the negotiations occur simultaneously. In simultaneous negotiations, the states each perform their part of the agreement (taking the less preferred position on the issue that is less important to them) at the same time, removing fears that a state may back out of its commitments. But for a variety of reasons, it may not be feasible to conduct simultaneous negotiations. First, the informational and administrative costs of bargaining across multiple issues at once might be prohibitive. Second, tackling too many issues at once might not be politically feasible, particularly where a variety of other states with different priorities are involved. Third, the state of scientific or technical research may not be suitably developed on the second issue if, for example, the issue is an environmental or health issue. For all of these reasons and more, states might decide to negotiate over some issues now and others later.

Agreements to swap votes therefore involve the possibility of opportunism. State A, receiving support on Issue 1 during the first negotiation, may decide not to support State B during the second negotiation. The credibility of these commitments can be bolstered by making joint negotiating positions public. Doing so increases the reputational harm if a state subsequently changes its negotiating position. And although vote-trading agreements themselves are not usually legally-binding agreements, a bilateral treaty reflecting the unified position can have the effect of making it more costly for one of the states to take a contrary position in a subsequent multilateral negotiation. Doing so without the first state’s consent could mean violating the terms of the bilateral treaty. For example, the U.S. and Canada are both parties to the Convention on Long-Range Transboundary Air Pollution (“LRTAP”). Under LRTAP’s auspices, two protocols have been negotiated placing limits on sulphur dioxide

130 Convention on Long-Range Transboundary Air Pollution, infra note 11.
emissions.\textsuperscript{131} The U.S. and Canada, however, preferred to work out a joint position on sulphur dioxide in the context of a bilateral framework, the 1991 U.S.–Canada Bilateral Air Quality Agreement.\textsuperscript{132} Both the U.S. and Canada thus had to ensure that any commitments they made within LRTAP were consistent with their bilateral agreement if they wished to avoid violating one of the agreements.\textsuperscript{133}

Opportunism can also be deterred through ordinary means: retaliation, reciprocity, and reputational sanctions. But retaliation and reciprocity are often costly to both states, making their use less likely.\textsuperscript{134} Reputational mechanisms, for their part, only put a thumb on the scale in favor of compliance.\textsuperscript{135} Moreover, weak states may fear that the threat of sanctions of whatever kind will not constrain powerful states. The sanctions may not be costly to powerful states, and where negotiations are concerned powerful states may have more or better alternative cooperative partners available to them. That is, weak states may fear that in contractual negotiations they might be excluded from future negotiations, thus narrowing their options to impose sanctions at all.

Shifting governance to a legislature constrains this kind of opportunism in two ways. First, as discussed above, usually legislatures do not allow states to be excluded in subsequent negotiations because they present a risk of holding out.\textsuperscript{136} Thus, shifting governance from contractual negotiations to legislative negotiations ensures states that they will have a seat at the next round of negotiations. Of course, merely being present would not be sufficient to guarantee a state the ability to enforce a prior bargain. Therefore, in addition to guaranteeing voice in a way that cannot be done in contractual negotiations, international legislatures give states the ability to paralyze an institution.

Consider, by way of example, negotiations to conclude the Trans-Pacific Partnership (TPP), a regional free trade agreement between the U.S., Mexico, 


\textsuperscript{133} Indeed, precisely to avoid inconsistent agreements, the U.S. declined to ratify the First Sulphur Protocol. See Hunter et al., supra note 104, at 521–31.


\textsuperscript{135} See generally Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 Cal. L. Rev. 1825 (2002) [hereinafter A Compliance-Based Theory].

\textsuperscript{136} There are exceptions. See infra Section V.
Like other regional free trade agreements, the TPP will cover multiple areas including "chapters" on trade in goods, trade in services, intellectual property protection, investment, as well as labor and environmental standards. Like any complicated agreement, negotiations occur over a period of time. As states finish negotiating particular chapters, the chapter is "closed," meaning that negotiation will not be permitted further on the chapter. Nevertheless, the entire agreement must eventually be adopted as a "single undertaking" once negotiation on all chapters is complete.

States wish to negotiate across all of these issues in a single agreement in order to benefit from the opportunity to make concessions on a broader range of issues. Why, though, do states delay enacting the closed chapters? After all, each chapter could be signed as an individual treaty once it is "closed." Member states would therefore not need to delay the benefits of cooperating on some issues while other issues were still being negotiated. The answer—and part of the logic of the single undertaking, in which "nothing is agreed until all is agreed"—is to ensure that states that made concessions in chapters negotiated first are satisfied with the reciprocal concessions they receive in later chapters. Moreover, the ability to hold up the entire agreement before its adoption ensures states that they will continue to have leverage to stall the agreement going forward, even among other states, if they do not receive concessions in the later rounds of the kind they expect.

A similar logic applies to the second kind of bargain enforced through legislatures: the substantive legal commitments contained in an agreement (as opposed to only legislative bargains). States can prevent the adoption of a legal instrument in retaliation for past violations of substantive commitments. For example, imagine that the U.S. violates its free trade commitments to China by erecting unlawful barriers to the entry of Chinese products. China can respond by preventing the adoption of American proposals within the WTO. Unlike retaliatory sanctions, such as the imposition of trade barriers, using its holdup power to retaliate for violations of legal obligations is relatively costless, and thus an attractive option for aggrieved states.


140 Id.
Two key points follow from this insight about the role of legislatures. First, unanimity or supermajority decision rules in international legislatures—which are inconsistent with the idea that legislatures are about eliminating the consent requirement—are not so puzzling after all. Rules that require consensus or large supermajorities before a draft agreement can be adopted give states the ability to hold out precisely and perhaps counter-intuitively to encourage lawmaking. In other words, requiring large majorities or unanimity gives states the ability to bargain more effectively across issues. Taking unified negotiating positions across multiple issues would be difficult in the absence of legislatures because of the weak mechanisms that exist to enforce vote-trading agreements. Moving negotiations inside a legislature thus gives a single state or a group of states (depending on the rules necessary for adoption) what is essentially a property right over the institution as a whole. They can prevent the institution from moving forward. While this gridlock is costly at the time it occurs, in a wide range of cases that gridlock will be justified in terms of the gains from trade it permits in lawmaking efforts.

Second, this theory of international legislatures helps explain how international institutions enforce international legal obligations, a central concern of both critics and defenders of international law. International law has long been understood to rest on a foundation of repeated interactions. States are locked into ongoing relationships with each other, and so violations of commitments in the present can be punished in the future. International law and international relations scholarship for many years understood the mechanism for this punishment to be the possibility of a reciprocal withdrawal of benefits or outright retaliation. Reciprocity and retaliation are tactics that are premised on the present withdrawal of benefits or imposition of sanctions, respectively, to enforce past bargains. Thus, Antigua might suspend concessions made under the TRIPs Agreement in reaction to the U.S.’s refusal to allow Antiguan companies to offer online gambling in the U.S., a violation of the General Agreement on Trade in Services. More recently, scholars have focused on how compliance can be driven by reputational considerations. If states do not honor their commitments in the present, they may not be able to

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141 See Weingast & Marshall, supra note 99.
143 Guzman, A Compliance-Based Theory, supra note 135, at 1849.
extract concessions from partners in the future. The reputational mechanism for enforcing international obligations is different from reciprocity and retaliation in that it relies on bargaining over future deals as a way to enforce past deals. If a state has failed to honor its past commitments, thereby worsening its reputation for compliance, other states will be unwilling to enter into new commitments with that state unless the terms are sweetened.

International legislatures are a way to institutionalize and magnify the importance of reputational considerations. This observation is significant because many scholars have worried about whether reputational effects are significant enough to drive compliance. This concern is amplified where weak states are concerned. The fear is that weak states have no choice but to accept the terms offered by powerful states, even if they expect powerful states to fail to comply with their obligations. Yet legislative institutions are crucial to enforcing bargains precisely because they allow states to hold future cooperation hostage in the event of present failures in compliance. They thus greatly amplify the role of bargaining in enforcing existing transactions.

2. Climate change.

Climate change negotiations within the UNFCCC not only illustrate how international legislatures can expand the scope of bargaining, but also demonstrate the danger of paralysis that can result. Like other framework conventions, the UNFCCC establishes a legislature in the form of the Conference of the Parties. Like other legislatures, the UNFCCC COP has soft lawmaking authority, as well as a role to play in the process of hard lawmaking. The COP’s soft lawmaking authority comes from, inter alia, its authority to “[m]ake recommendations on any matters necessary for the implementation of the Convention.” Decisions of the Parties of the UNFCC taken in the form of recommendations are not formally binding, but they are soft law by virtue of the fact that they interpret and implement the binding obligations laid out in the


147 Guzman, A Compliance-Based Theory, supra note 135.

148 Brewster, Unpacking the State’s Reputation, supra note 146; Brewster, The Limits of Reputation on Compliance, supra note 146.


150 UNFCCC, supra note 2, art. 7.

151 Id.
UNFCCC and its related instruments. The COP also has the power to adopt protocols, amendments, and annexes to the Convention, often by a supermajority vote only.

The UNFCCC and the Kyoto Protocol illustrate how international legislatures can be used both to enforce vote-trading bargains and substantive obligations. With respect to the first, the UNFCCC reflects at its core a central, if only partially explicit, bargain: developed states will take action in the short-term to mitigate climate change while developing states will undertake such measures (with financial assistance from developed states) in the future. All subsequent climate change negotiations have been held hostage to the willingness of states to block the adoption of measures that do not respect this agreed framework. On the one hand, countries such as China and India have used their position to prevent the adoption of measures that might impose climate mitigation obligations on developing countries. In the absence of the UNFCCC, one might imagine the E.U., which has shown a willingness to go alone on climate change, attempting to negotiate regionally or bilaterally with developing countries on mitigation commitments. But the existence of the UNFCCC as a legislature allows China and India to discipline developing countries and block action that smaller developing countries might not be strong enough to withstand on their own.

If legislative governance operates to prevent weaker developing states from negotiating mitigation commitments, it also operates to put greater pressure on developed countries to uphold their end of the climate change bargain. In 2009, a small number of parties to the UNFCCC negotiated the Copenhagen Accord, a nonbinding instrument that they hoped would be adopted as a Decision of the Parties and would provide a framework for

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152 Technically, protocols have their own COPs, but usually these COPs are the same as the COP of the framework convention, less any members of the latter that have not ratified the former. See Kyoto Protocol to the United Nations Framework Convention on Climate Change arts. 13, 37 I.L.M. 22, 2303 U.N.T.S. 148 (adopted Dec. 11, 1997).

153 See UNFCCC, infra note 2, art. 15 (authorizing the COP to adopt amendments to the UNFCCC by three-quarters vote if consensus cannot be obtained); id., art. 16 (authorizing the same procedure for adoption with respect to annexes), id., art. 17 (authorizing the adoption of protocols).

154 Compare UNFCCC, infra note 2, art. 4.2 (committing developed states to adopt national policies on the mitigation of climate change) with id., art. 4.1 (requiring all parties, including developing countries, to inter alia “[t]ake climate change considerations into account”).

emissions reduction after the Kyoto Protocol lapsed in 2012.\textsuperscript{156} Yet a small group of states blocked the adoption of the Copenhagen Accord on the grounds that it did not do enough in terms of developed countries’ obligations to undertake serious mitigation efforts.\textsuperscript{157} Although ultimately unsuccessful—the Copenhagen Accord was adopted at the next COP meeting in Cancun—these states were able to delay the adoption of the Copenhagen Accord and put pressure on developed states to elaborate on its obligations. Perhaps most tellingly, they were able to enforce the organizers of the Cancun COP to reinterpret the COP’s consensus decision-making rule to mean that a measure could still pass over the objection of a single member.\textsuperscript{158}

This gridlock in the climate change regime is a source of extraordinary frustration. Many commentators have the sense that if either the dichotomy between developed and developing states could be abolished or if greater nonconsensual lawmaking were permitted, an effective climate change regime could be put in place.\textsuperscript{159} This article’s analysis, though, suggests that the climate change regime is functioning as it was intended, and indeed might not exist absent the grand bargain struck at its inception. Developing states were unlikely to agree in the early 1990s to a climate change regime in which they were required to sacrifice their economic development priorities to mitigate environmental harms caused largely by the historic economic activities of developed countries. The “common but differentiated” responsibilities framework at the core of the UNFCCC’s tacit bargain was a necessary compromise. Most importantly for our purposes here, the COP acting as a legislature has enforced this bargain by preventing renegotiation of its terms outside of the COP. Instead, developing states have been able to use the COP’s rules on adoption of instruments to keep developed states to the central premise of the UNFCCC.

Second, the Kyoto Protocol’s Compliance Mechanism contemplates using future bargaining as a tactic to generate present compliance. The Compliance Mechanism—established by the Marrakesh Accords, a nonbinding decision of the parties to the Kyoto Protocol—provides that where a state violates its


\textsuperscript{159} See, for example, Pauwelyn, supra note 155; Guzman, Against Consent, supra note 6.
emissions reduction obligations under the Protocol, it shall be penalized by deducting 1.3 times the amount of excess deductions from that country’s permitted emissions in the commitment period that was to follow the 2008–2012 period established by the Kyoto Protocol.160 Because the emissions reductions obligations for subsequent commitment periods are to be established by subsequent negotiations, the real effect of this penalty hinges on the willingness of states to impose the penalty through bargaining procedures. Scott Barrett has argued that this feature of the compliance system will not work precisely because states will simply require that their permitted emissions be increased by the amount of the penalty required by the Marrakesh Accords before they will agree to any subsequent protocol.161 While surely a penalty that hinges on future negotiations is less credible than one that does not, this particular bargaining mechanism should not simply be judged relative to the perfect compliance system. Rather, it should be judged relative to the more likely alternative: a complete lack of a compliance mechanism. Explicit authorization to use bargaining as a means of penalizing past breaches is an improvement over a world without penalties.

C. Limiting the Influence of Holdup Power

Legislative governance in international law is thus a form of costly commitment. It allows states to take negotiations hostage in order to enforce bargains. International legislatures animate governance not through the imposition of voting rules calling for less than unanimity; rather, legislative institutions lubricate international lawmaking precisely because they impose governance costs in the event that states renege on their agreements. Nevertheless, states will not go to any length to enforce their bargains. Instead, they will impose institutional rules that limit the governance costs created by international legislatures. In this Section I discuss four institutional features states have developed to limit the costs legislatures impose on bargaining: (1) fragmentation, (2) safety valves, (3) ratification requirements, and (4) the use of soft law. Each of these features of legislative governance allows states to delink issues that otherwise might be linked through legislative jurisdiction, thereby reducing the possibility of holdouts paralyzing governance across multiple issues. Of particular note, fragmentation—the creation of multiple nonhierarchical institutions to deal with related issues—reduces the governance costs with institutions but raises the coordination costs between linked issues.


161 BARRETT, supra note 101, at 386.
1. Fragmentation.

Perhaps the most prevalent response to the institutional governance costs imposed by international legislatures is the fragmentation of international law, a phenomenon in which international regimes frequently make rules in overlapping areas but lack any hierarchical relationship to each other. I focus here on the fragmentation of legislative jurisdiction—that is, the division among institutions over lawmaking authority. Fragmentation is a rational response to the governance costs imposed by international legislatures because it delinks lawmaking over two issues that might otherwise be linked. For example, the harvesting of whale meat is controlled by the International Whaling Commission, which sets quotas for whale catches, while the trade in whale meat is governed by the COP to the Convention on International Trade in Endangered Species (CITES). \(^\text{162}\) Rules governing greenhouse gas emissions are negotiated within the COP to the UNFCCC, unless the greenhouse gases are also ozone-depleting substances, in which case they are governed by the COP to the Montreal Protocol. \(^\text{163}\) The COP to the UNFCCC also tries to influence energy consumption by raising the cost of using greenhouse-gas intensive fuels. A variety of other international legislatures, including the International Energy Agency (IEA) and the Organization of Petroleum Exporting Countries (OPEC), work on this same issue. And of course, probably the most well-known example of fragmentation is the way in which the WTO deals with (or fails to deal with) environmental issues raised by its trade rules. \(^\text{164}\)

Legislative fragmentation reduces the ability of states to use the legislative apparatus to take issues hostage by increasing the costs to linking issues. These costs arise for several reasons. First, because international legislatures have jurisdictional limitations, it is costly for states to try to expand beyond that jurisdictional mandate. For example, in order to try to defeat Proposal 1, a state might attach Proposal 2 to a package deal, hoping that opponents of Proposal 2 will oppose the package deal in an effort to defeat Proposal 2. Fragmenting legislative jurisdiction makes this very difficult to do, however, because it may take Proposal 2 outside of the jurisdiction of the legislature, precluding a package deal of this kind. Similarly, a state might take a particular issue on which there is consensus hostage in order to get its way on another issue within the institution's jurisdiction. To give a more concrete example, OPEC states have over many years opposed aggressive action to combat climate change within the

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\(^{162}\) Compare ICW, supra note 43, art. 5, with Convention on International Trade in Endangered Species of Wild Fauna and Flora, supra note 42.

\(^{163}\) Compare UNFCCC, supra note 2, with Montreal Protocol, supra note 113.

COP to the UNFCCC. They have done so out of fear that robust rules on greenhouse gas emissions would negatively impact the oil markets on which they thrive. Meanwhile, however, the Montreal Protocol has become the most successful climate change regime in existence. In response to the gridlock with the UNFCCC, the parties to the Montreal Protocol recently expanded the Protocol's efforts to control ozone-depleting substances with climate effects. Because ozone-depleting substances do not meaningfully affect their economic interests, OPEC states have no significant objections to reducing ozone-depleting substances through the Montreal Protocol. But if ozone-depleting substances were within the UNFCCC's jurisdiction, proposals to control them might well fail because their governance would be tied to the fate of greenhouse gases.

A similar way in which fragmentation might reduce governance costs is by committing related issues to institutions with different memberships and different voting rules. States, of course, can and do coordinate their positions across institutions, but fragmenting jurisdiction can frustrate efforts to link two issues across institutions by subjecting the issues to different decision-making procedures. Different memberships and different voting rules may mean that while paralysis can occur in one institution, it cannot occur in another institution. For example, the Montreal Protocol allows adjustments to the control measures imposed by the treaty to be made by a two-thirds vote, while the UNFCCC operates by consensus. Thus even if OPEC states wanted to hold regulation of ozone-depleting substances hostage to regulation of other greenhouse gases, blocking at least some measures within the Montreal Protocol would require more votes than would blocking action within the UNFCCC.

Fragmentation is costly to states, however, for the same reason it is a benefit. By making issue linkages more costly across institutions, fragmentation may (1) deter valuable issue linkages, and (2) may make coordinating legal rules across institutions more difficult.

First, jurisdictional limitations and differences in membership and voting rules can discourage valuable issue linkages as well as harmful ones. States are masters of the institutions they create and so they can, collectively, expand the issues within an institution's jurisdiction. They can also use side agreements to make deals outside of the jurisdiction of a legislative institution. These tools are, however, limited in their effectiveness. Expanding the jurisdiction of an institution requires the consent of its members. Many states, though, may refuse to expand an institution's jurisdiction because they fear the long-term

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166 See Montreal Protocol, supra note 113, art. 2.
consequences of placing more issues within a body’s control. Benvenisti and Downs, for example, have argued that powerful states deliberately try to keep governance within institutions with narrow jurisdiction that they control in order to prevent weak states from using issue linkages to form coalitions.

Fragmentation also imposes significant coordination costs for states across institutions. Some issues, like energy and climate change, are functionally linked even if they are not institutionally linked. In other words, policies made on one issue may have direct effect on behavior relevant to another issue. For example, a carbon tax might change consumers’ energy consumption patterns, linking climate policy directly to energy markets even if no de jure linkage between the UNFCCC and energy regimes such as the IEA and OPEC exists. These kinds of functional linkages put pressure on states to coordinate legal rules across functionally related issues. Fragmentation may deter coordination, however, forcing states to choose between competing priorities. The result can be that states select policies that favor one interest over another interest due to institutional governance costs, rather than what policy would maximize the welfare of their citizens.

How do states evaluate these costs and benefits of fragmentation? The lack of international legislatures with broad jurisdiction suggests that states have a preference for animating governance within issues over attempting to coordinate policy across issues. That is, fragmentation seems to be a useful tool for limiting the risks to international cooperation posed by legislative governance. To return to the example of energy governance, the fact that multiple international institutions set rules that influence the price of fossil fuels is a critical source of coordination costs. Viewing the institutional environment we face today, it may seem obvious that an institution such as the UNFCCC should be created to deal with the environmental side effects of energy consumption. After all, domestic regulatory structures often divide among different agencies direct regulation of an economic activity and the regulation of its environmental consequences. But it is not at all obvious from an initial standpoint that a new institution was necessary.

Most of the major emitters in the world in 1992 were OECD countries and therefore members of the International Energy Program (IEP) Agreement, which created the IEA. A plan to reduce global emissions through binding legal obligations applicable only to developing countries (in other words, an agreement very similar to the Kyoto Protocol) could thus have been worked out through the OECD as an amendment to the IEP Agreement. Such an

167 Benvenisti & Downs, supra note 119, at 610.
arrangement would have had the benefit of allowing closer coordination between developed countries' general energy consumption policies and their climate change-specific efforts.

Instead, nations opted for a U.N. organization open to all states. There are a number of sensible reasons to have created a new organization to deal with climate change that is open to all states and operates by consensus. Most notably, climate change is a problem that affects all nations to one degree or another, and so universal participation might be thought necessary to confer legitimacy on the institution. Relatedly, solving the climate change problem in the long run requires the participation of developing countries, such as China and India, that are not members of the IEA. Therefore, a climate change regime based in the OECD might not have seemed a feasible long-term solution due to participation problem. Finally, the architecture of the UNFCCC/Kyoto Protocol was based to a large extent on the successful Vienna Convention/Montreal Protocol framework that governs ozone-depleting substances. Viewing climate change as an environmental problem and an air pollution problem specifically, it was perhaps natural to look for examples of successful air pollution institutions upon which to base the climate change regime.

But part of any decision to create a new organization to deal with climate change must take into account the effect of bargaining within the institution, including considerations of its jurisdiction, both in terms of membership and issues and its procedural rules. Nations regularly negotiate global accords in bodies that do not include all possible members. Indeed, not infrequently institutions exclude states that are especially important to the issue on which states are trying to negotiate rules. Negotiations are done this way precisely to influence the bargaining process by removing potential holdouts. The OECD has several times tried to negotiate a multilateral agreement on investment, for example, precisely because doing so within the OECD allows member states to present other states with a take-it-or-leave-it offer.\footnote{Meyer, Codifying Custom, supra note 129, at 1063–68.} The E.U. and WTO have expanded in similar fashion. So there is no particular reason that the IEP Agreement could not have been used as a vehicle to negotiate a climate change regime nested within a broader energy institution. Indeed, there are calls for the IEA to consider expanding to include non-OECD countries such as India and China, based purely on the rise of China and India as energy consumers. Linking climate change to energy consumption within the IEA would thus have complemented, rather than distorted, the historical pressures on the IEA to expand.

The decision thus far not to expand the IEA, either in terms of issue jurisdiction or membership, most likely reflects a preference among IEA
members to cabin the governance costs posed within the institution at the expense of the creating greater coordination costs across institutions. Linking climate change policies to general energy consumption policies would introduce distributional considerations unique to climate change to broader energy consumption policies. Most obviously, if the IEA expanded in membership to include countries like China, it would bring Chinese consumption policies into conflict with European countries' more restrained consumption policies aimed at phasing out dependence on oil.

Even if the IEA and the IEP Agreement did not expand their membership, including binding climate change measures within their ambit could disrupt cooperation between major energy consumers. As is well-known, the climate change regime suffers from divisions not only between developed and developing states, but also among developed states. While the E.U. is eager to press ahead on climate change measures, the U.S. insists that no deal for legally binding emissions reduction measures should be struck until China and India are on board. Introducing this division over climate change measures into the IEA/IEP Agreement could threaten to embroil cooperation on energy security with disputes about how best to manage the environmental consequences of energy consumptions. Thus, even from the standpoint of developed countries, dividing jurisdiction for energy-related matters between the IEA and the UNFCCC marks a commitment to delink to a large extent bargaining over energy consumption measures from bargaining over climate change mitigation. The cost of coordinating across institutions thus animates governance on energy security at the expense of possible gains in the climate change regime.

2. Safety valves.

Another tactic states have developed for mitigating the governance costs imposed by legislative governance is the use of what I shall call safety valves. Safety valves are provisions that permit states to bargain on issues within the institution's jurisdiction outside of the institution. When faced with stalled negotiations within an institution, states can use a safety valve to shift governance to another forum with narrower jurisdiction. By narrowing the scope of negotiations, states are often able to make progress when negotiations in an international legislature with broad jurisdiction are hobbled.

Two examples illustrate the point. First, the GATT/WTO authorizes states to negotiate regional trade agreements (RTAs). These agreements can justify

otherwise impermissible discrimination between the products of different countries. They have also become increasingly important over the last two decades as trade negotiations have stalled within the WTO. The WTO estimates that today 379 RTAs are in force. RTAs offer states the possibility of negotiating with fewer parties, thereby reducing the likelihood of holdups. They also allow states to design the jurisdiction of the new free trade institution with limited reference to the jurisdiction of the WTO. Member states are thus not constrained by the jurisdictional limits on the WTO in deciding which issues to negotiate over in an RTA. Indeed, many RTAs narrow their territorial jurisdiction while expanding their issue jurisdiction to include environmental, labor, and investment provisions outside of the WTO's purview.

A second example is the Basel Convention on the Transboundary Movement of Hazardous Waste (Basel Convention). Article 11 of the Basel Convention authorizes parties to negotiate agreements governing trade in hazardous waste with non-parties provided that such agreements “do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention.” This provision exists as an exception to the Convention’s normal rules forbidding trade in hazardous waste between parties and non-parties. The exception primarily operates to permit the United States to remain outside of the Convention but still trade in hazardous waste by concluding agreements with parties, including most notably OECD states. This kind of safety valve alleviates pressure on the COP to the Basel Convention by allowing the United States to remain outside of the institution, rather than putting pressure on the United States to join. Having the


173 See WTO, Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/region_e.htm (noting that the WTO has been notified of 575 regional trade agreements, 379 of which are in force).


175 Id.


177 Id. art. 11.

178 Id. art. 4.5.

179 See HUNTER ET AL., supra note 104, at 956–57.
United States in the institution, which has negotiated a range of issues including stricter limitations on trade in hazardous wastes as well as a liability protocol, could derail the COP's ability to function. The United States might decide to join and then become obstructionist. Provisions such as Article 11 allow possible holdouts a way to remain outside of the institution, thus animating governance within the institution.\footnote{Admittedly, this ability comes at a cost. The purpose of the ban between trade in parties and non-parties is precisely to encourage states to join the treaty. Art. 11 only permits trade between parties and non-parties pursuant to an agreement with similar environmental standards, but nevertheless one might worry that Art. 11 defeats the purpose of Basel's trade limitations.}

Safety valves are a special case of regime shifting. Regime shifting refers to a situation in which states shift governance of an issue from one institution to another institution.\footnote{See Helfer, supra note 119 at 14.} For example, intellectual property governance has largely been shifted from the World Intellectual Property Organization to the WTO under the auspices of the TRIPs Agreement.\footnote{Id. at 18.} Safety valves are a special case, however, because an overarching treaty explicitly authorizes them. They therefore exist precisely to allow states to negotiate in alternative fora and therefore, when done consistent with the terms of that authorization, do not create the kinds of tensions that can emerge when states simply decamp from one institution to establish a rival.

3. Ratification and soft law.

Another way states can mitigate institutional governance costs is through the use of ex post ratification requirements or by giving states the ability to opt out of a specific legal obligation. Generally, this procedure allows a majority or supermajority of states to adopt a set of rules within an institution, but either requires each state individually to ratify the instrument or provides each state with an opportunity to escape being bound by objecting. The framework/protocol agreement model, such as has been used for the ozone and climate regimes, follows the former model.\footnote{See supra Section IV.B.2.} Members of the framework convention, for example either the Vienna Convention for the Protection of the Ozone Layer or the UNFCCC, vote to determine whether the COP will adopt protocols. The protocols themselves do not become binding on individual states unless they ratify the protocol.\footnote{See supra Section II.B.} The latter model is followed by institutions such as the International Whaling Commission (IWC). Member states have an
opportunity to avoid being bound by the IWC’s decisions by objecting to the rule within ninety days from its promulgation.¹⁸⁵

Scholars have tended to treat ex post ratification of majoritarian decision-making as a backdoor requirement for unanimity.¹⁸⁶ But this conflation of ex post ratification with unanimity fails to appreciate the distinction between contractual negotiations and legislative negotiations. Ex post ratification requirements in legislative treaties assure states that they need not be bound by a treaty whose adoption they have allowed. In this way, ex post ratification requirements recreate the consent requirement of contractual negotiations, but they also allow states to vote for a measure’s adoption without having to accept obligations contained therein. This freedom is critical because it divorces a state’s own calculus about ratification from its decision as to whether to hold up the institution. Because states know they need not be bound by rules they find objectionable, states that do not intend to ratify a measure can allow cooperation-minded states to use the institution to negotiate rules. Paralyzing dissent is therefore confined to situations in which states are sincerely using the ability to holdout as a negotiating tactic or to punish noncompliance.

Put differently, the ex post ratification requirement facilitates legislative governance by narrowly tailoring the incentives to hold up an institution to those situations in which the hold up power is being exercised for its intended purpose. And by narrowly tailoring the incentives to use this hold up power, rules on ex post ratification thereby encourage the greater formation of legislative institutions. Ex post ratification, in other words, is critical to obtaining the benefits of international legislatures—the ability to bargain more effectively within institutions. Ex post ratification, in other words, is critical to obtaining the benefits of international legislatures—the ability to bargain more effectively within institutions. Seen in this light, concerns that international legislatures are insufficiently nonconsensual because they still require states to individually ratify an agreement before being bound (or give them the option to opt out) take on a different hue. Ratification requirements (or opt-out provisions) animate governance by reducing the incentives to be obstructionist during negotiations and voting on adoption of a legal instrument.

¹⁸⁵ ICW, supra note 43, art. V, ¶ 3. The persistent objector doctrine in customary international law (CIL) might also be justified on these grounds. Although CIL is theoretically consensual, no affirmative act of state consent is necessary for a state to be bound by a rule of CIL. See Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law 5 (1998). CIL is thus importantly different from ad hoc treaty negotiations in the way in which legal rules are made. The persistent objector doctrine makes the process of CIL formation something more akin to the negotiation of a treaty within an institution. While affirmative consensus is removed as the rule of decision, there remains the opportunity to opt out.

¹⁸⁶ Helfer, Non-Consensual Lawmaking, supra note 6, at 85; see also Michael J. Gilligan, The Transaction Costs Approach to International Institutions, Power, Interdependence and Non-State Actors in World Politics: Research Frontiers 50 (Helen V. Milner & Andrew Moravcsik eds. 2009).
A related tactic states can use is soft law decision-making. Soft law decisions are not subject to ratification by the parties, and therefore deprive states of the individual ability to opt out of a commitment. At the same time, violations of soft law rules are not subject to the same kind of sanctions as violations of hard law rules. Therefore, the decision to cast a COP's decision as soft law may reduce opposition to it among states whose primary concern is not bargaining, but rather their own ability to comply in the future.

V. EXCLUSION CLAUSES

The logic of international legislative governance pushes states towards increasingly institutionalizing governance on a small scale. States rationally choose to commit international governance to institutions with narrow jurisdiction to allow limited forms of hostage-taking. But states then face a quandary. On the one hand, the inability to delink issues in legislative governance puts pressure on institutions to make ever-greater linkages, increasing the internal governance costs imposed by institutions until many institutions, such as the WTO and the UNFCCC, collapse under their own weight. On the other hand, they cannot coordinate policies effectively across institutions. In this Section, I offer a solution to this dilemma: international legislatures should have the ability to suspend the participation of a reluctant member or expel a member entirely in narrowly defined circumstances. I refer to clauses authorizing suspension or expulsion as exclusion clauses because they authorize a legislative body, in particular circumstances, to exclude one or more of its members from voting. Below, I explain how the logic of exclusion clauses can invigorate international legislative lawmaking, and I discuss how such clauses might be drafted. I then discuss a limited form of exclusion clause that already exists, so-called democracy clauses.

A. The Logic of Exclusion

The logic of exclusion is relatively straightforward. In collective decision-making, the identities and preferences of member states, in addition to the decision rule, matter. Consider by way of example the North American Free Trade Commission, composed of representatives from the United States, Canada, and Mexico. Pursuant to Article 1131 of the North American Free Trade Agreement (NAFTA), the Free Trade Commission can by a unanimous vote issue "interpretative notes" clarifying (and therefore possibly changing) the 187 See supra Section II.B.

188 Guzman & Meyer, supra note 27, at 177 ("The key distinction between hard and soft law is that the former imposes greater costs on the violating state than does the latter.").
meaning of NAFTA rules. In 2001, the Free Trade Commission issued a note clarifying that the standard of protection afforded investors under NAFTA Chapter 11 is equivalent to the minimum standard of treatment under customary international law, rather than the higher standard that a NAFTA arbitration tribunal had applied in the Metalclad decision. The three states were able to agree to this rule change because their preferences were closely aligned—in part because each state stood to be a respondent in investor-state arbitrations brought under NAFTA. Imagine, though, that one state had wanted the higher standard of protection for investors applied, perhaps because it had little foreign investment within its own borders and thus was unlikely to be a respondent. Under the Free Trade Commission’s voting rules, the outlying preferences of a single state would defeat a change in the rules.

The ability to exclude the outlying state from the decision-making process solves this problem. If two states are able to make the decision on behalf of the institution by excluding the third from the decision-making process, they can effectively present the third state with a take-it-or-leave it offer. The third state (or coalition of states, in a broader multilateral institution) can either stay within the institution subject to the changed rules or they can depart. But they can no longer as easily block change within the institution. Exclusion thus offers the possibility of animating international lawmaking by selectively removing the holdup power of outliers and persistent dissenters.

Suspending the holdout’s rights to vote allows the institution to enact measures favored by its remaining members. By suspending the recalcitrant member, states are therefore able to get the benefits of legislatures—both the administrative and informational advantages, as well as the ability to use legislative institutions to enforce bargains—while taking a greater number of actions that improve overall welfare. More generally, the selection of cooperative policies is not as beholden to outliers. The threat of an exclusion vote, for example, might deter states seeking to profit from holding out. Legislative

189 See NAFTA, supra note 50, arts. 1131(2), 2001; see also Meyer, Codifying Custom, supra note 129, at 1015 (arguing that “clarifying” rules usually involves changing the rules, with associated distributive consequences).


192 NAFTA, supra note 50, art. 2001(4) (providing that all decisions of the Free Trade Commission shall be taken by consensus unless the parties decide otherwise).
policies would thus come much closer to the policies preferred by the mainstream members of the legislative body.

The idea of "excluding" states from international institutions—or more generally of excluding members of a legislative body from voting in accordance with an institution’s rules—may seem outlandish and undemocratic. The practice of excluding states from the decision-making processes of institutions that nevertheless affect them, however, is quite common in international governance. Normally, though, exclusion is used at an institution-wide level, rather than within an institution at an issue-specific level. In other words, states are regularly excluded from institutions entirely until such point that their joining the institution does not disrupt the institution's decision-making processes. Under this logic, a group of states creates the institution and its rules, and then other states join and accept the institution's existing rules. These later-joining states lack the ability to influence the laws governing their conduct that the founding members of an institution enjoyed; indeed, they are often excluded from the founding coalition for precisely this reason! Moreover, exclusion has also been shown to deepen cooperation among states. Downs, Rocke, and Barsoom have shown that sequential accession to multilateral institutions can lead to stricter legal rules as measured against an institution that has universal membership from the outset.

This process of sequential accession, in which states join existing institutions without having the ability to negotiate their rules, has been used to build institutions such as the GATT/WTO and the European Union. Currently, negotiations over the Trans-Pacific Partnership have proceeded similarly, with countries such as Japan admitted to negotiations only after a number of major issues have been resolved. Similarly, during the 1990s, negotiations over a Multilateral Agreement on Investment took place within the

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193 Whether it is "undemocratic" depends on what one means by the term. If one means that a state can have its ability to control its own obligations reduced through a procedure in which its participation is limited, then it may be undemocratic. On another view, however, allowing holdouts to defeat the will of a large majority of states is "undemocratic."


195 See WTO, How to Become a Member of the WTO, http://www.wto.org/english/thewto_e/acc_e/acces_e.htm (explaining that countries seeking to accede to the WTO must agree to terms and conditions which include "commitments to observe WTO rules").

196 Downs, et al., supra note 69, at 414.

197 See Interview by Mohammed Aly Sergie with Mireya Solís, senior fellow at the Brookings Center for Northeast Asian Policy Studies, Japan Boosts the Trans-Pacific Partnership, COUNCIL ON FOREIGN RELATIONS, Aug. 9, 2013, http://www.cfr.org/japan/japan-boosts-trans-pacific-partnership/p31206 (stating that Japan was admitted to TPP negotiations after "most technical aspects of the agreement" were completed).
OECD. The hope was that the OECD’s membership, consisting of capital-exporting countries, would be able to negotiate a multilateral agreement among themselves that non-OECD capital-importing countries would later have to accept as a fait accompli.\textsuperscript{198}

Thus, the concept of exclusion is not new in international governance. With a notable exception I discuss below, most such exclusion has been institution-wide exclusion rather than issue-specific exclusion.\textsuperscript{199} Issue-specific exclusion, however, is quite common in domestic legislatures. Perhaps its most common forms are legislative override provisions that authorize a change in the normal procedural rules used to make laws in order to eliminate a veto point.\textsuperscript{200} Usually, but not always, override provisions substitute extraordinary but more concentrated support among a proposal’s supporters for the broader support ordinarily required. The most famous example of such an override provision is Article 1, Section 7 of the U.S. Constitution permitting two-thirds of each House of Congress to override the President’s veto.\textsuperscript{201} The override provision effectively excludes the President from the lawmaking process in which he ordinarily participates by eliminating the requirement that he consent to a law’s passage. The Constitution substitutes supermajority support in two of the three institutions normally required for consent to a law’s passage for majority consent among all three institutions.

Other kinds of override rules exist, not all of which require formally greater numerical support to override dissenters. The filibuster rules in the U.S. Senate grant a determined block of forty-one senators (41 percent of the institution’s membership) the ability to block a proposal favored by the majority.\textsuperscript{202} In response to the widespread use of the filibuster to delay presidential nominations, most notably of judges, the Senate recently changed the filibuster rules through a simple majority vote.\textsuperscript{203} Such a change is made possible by Senate rules that allow a simple majority to determine procedural rules in the Senate,

\begin{itemize}
  \item \textsuperscript{198} See Meyer, Codifying Custom, supra note 129, at 1059.
  \item \textsuperscript{199} See infra Section V.B.
  \item \textsuperscript{200} One can think of override provisions as a subset of exclusion clauses. Override provisions would be those kinds of exclusion clauses that require that a particular procedure fail before the override procedures can be used to exclude a dissenter. For example, Congress cannot override the President’s veto until after the President has vetoed a bill.
  \item \textsuperscript{201} U.S. CONST. art. I, § 7, cl. 2.
  \item \textsuperscript{203} Jeremy W. Peters, In Landmark Vote, Senate Limits Use of the Filibuster, N.Y. TIMES, November 22, 2013, \url{http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?_r=0}.
\end{itemize}
including rules on filibustering. In other words, Senate rules allowing it to determine its own procedures by a simple majority vote act as an override provision, increasing the opposition needed to defeat a proposal from 41 percent to 50 percent plus one.

The ability to change filibuster rules in the Senate—and the fact that the filibuster rules have not been changed—highlights another important point about exclusion clauses. Whatever the formal rules that exist for deploying exclusion clauses, about which I will say more below, the use of exclusion clauses is also constrained by political factors. Norms of reciprocity that exist in long-term relationships between legislators, political parties, and in the case of international law, states, will often mean that exclusion clauses will not be used on a particular issue even when the necessary number of states has preferences that would otherwise permit exclusion. However, the possibility that they might be invoked facilitates bargaining between factions that might otherwise become entrenched in their positions. The threat of exclusion is, in other words, at least as important as exclusion itself.

B. Drafting Exclusion Clauses

How, then, would states import exclusion into institutions, such that states can be excluded from decisions on specific issues without being entirely excluded from the institution? In this Section, I first discuss possible variations before considering practical considerations that limit what kinds of exclusion clauses states are likely to accept.

At a general level, the most likely possibility would be that states would be able to introduce a decision of the parties that allowed them to temporarily suspend the voting rights of another member state. The measure would be subject to a vote. One can imagine a number of different variations on what precisely the clause would require. For example, the vote might require a supermajority to pass, or perhaps even unanimous support among states other than the target of the measure. Exclusion clauses would also have to define the scope of an exclusion action. Such clauses might be broad, meaning that a state


205 Technically, the percent needed to defeat a bill does not rise all the way to 51 percent because in the event of a fifty-fifty tie in the Senate, defeating the bill would require the vote of the Vice President. U.S. Const. art. I, § 3. 51 out of 101 is slightly less than 51 percent.

206 Many treaties defer to the COP the decision on the adoption of rules of procedure but do stipulate voting rules in the treaty. Exclusion clauses would therefore in most cases have to be included in the treaty itself, rather than deferred to the rules of procedure adopted by the legislature.
can be excluded for a period of time or from a range of issues by a single decision of the parties. As discussed below, violation of MERCOSUR’s democracy clause, which guarantees that member states will have a democratic form of government, can be and has been the basis of indefinite suspension from all manner of participation in the organization’s decision-making.\textsuperscript{207} On the other hand, a narrow exclusion clause would be limited to a single issue or a particular pending proposal. Congress’ ability to override the President is a narrow provision, insofar as it is limited to a defined bill that the President has already vetoed. In extreme cases, in which a state has been a persistent roadblock to lawmaking, an exclusion clause might authorize outright expulsion. Procedurally, an exclusion clause might require a trigger event before it can be activated. For example, an exclusion clause might require that a particular state vote against a measure, say, three times before the clause can be used against it. This kind of exclusion clause is really an override clause akin to the U.S. Congress’s ability to override the President’s veto. The target is not entirely excluded from the voting process; rather, the voting rules specify in advance that in a later stage of voting on a proposal the rules may be changed to eliminate the effect of a negative vote cast in earlier voting. Alternatively, an exclusion clause might be introduced without any predicate events being required. In such cases, the governing coalition denies the dissenters the right to cast a negative vote in the first place. Exclusion clauses might also mandate a “cooling off” period, requiring parties to attempt in good faith for a certain period of time to negotiate with the dissenting state. Although one can of course imagine exclusion clauses that do not require a cooling off period, such clauses are commonly included in treaties as a precursor to initiating formal dispute resolution.\textsuperscript{208}

While in principle there are many potential variations between possible exclusion clauses, they need to satisfy two conditions to be both practical and useful. These conditions place limits on what exclusion clauses can look like and the situations in which they can be used. First, exclusion clauses need to be incentive-compatible, meaning that states individually prefer to join an institution with an exclusion clause than remain outside it. Second, the exclusion clause must be credible, in the sense that states can plausibly threaten to invoke it in at least some circumstances. I discuss each of these conditions and their ramifications in turn.

The logic of exclusion outlined above suggests that at least in some instances exclusion can improve overall welfare by allowing legislatures in limited circumstances to eliminate the holdout power of particular states.

\textsuperscript{207} See infra Section V.C.

\textsuperscript{208} Christoph Schreuer, \textit{Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road}, 5 J. WORLD INV. & TRADE 231, 232 (2001).
Exclusion, in effect, moderates some of the negative side effects of the holdup power that legislatures are deliberately designed to create. In order for states to adopt exclusion clauses, however, such clauses must not only increase overall welfare. They must also increase individual welfare or, in other words, they must be incentive-compatible. If a state is not made individually better off by joining an institution, it will not do so no matter how significant the gains to the general welfare may be.

This condition suggests several important ramifications for when and how exclusion clauses should be drafted. First, it suggests that exclusion clauses should be extraordinary remedies. Put differently, the ex ante probability that an exclusion clause will be used at all (and therefore against any particular state) should be low. The rationale for this limitation is two-fold. On the one hand, as the probability of exclusion clauses being used against it increases, each state’s individual utility from joining an institution declines. However, this decline in individual utility is offset by making the international legislature more effective, thereby allowing welfare-enhancing changes to the law. The question is therefore whether the marginal benefit to an individual state of increasing the ability of a legislature to act outweighs the marginal cost of it being more likely that a state will be excluded.

There are good reasons to think that the marginal costs of exclusion rise faster than the marginal benefits from more effective governance. As exclusion rules become easier to use, they start to become indistinguishable in effect from voting rules that allow majoritarian or super-majoritarian voting. States do not, after all, need exclusion rules if they wish to have the power to regularly override outliers. Majority or supermajority voting rules allow a large coalition to impose their will on dissenters without needing to invoke fancier procedures. Significantly, however, such rules are rarely authorized in institutions entitled to make binding rules, although they are authorized more frequently where institutions make soft law rules. This is consistent with the fact that, as I have argued, legislatures are more about creating holdup power than removing it. Their value is in facilitating bargaining through an exchange of hostages, so to speak, rather than through their ability to facilitate nonconsensual decision-making. International legislatures thus need a mechanism that preserves the holdout power that legislatures are designed to create while providing an extraordinary remedy in cases in which legislative gridlock threatens major global priorities shared by large numbers of states.

Second, no state should believe itself to be disproportionately likely to be a target of exclusion—what I refer to as the “neutrality principle.” In other words, the ex ante probability that an exclusion clause will be used against a particular

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209 See supra Section III.A.
state should be spread evenly among states. If a state is reasonably certain an exclusion clause will be used against it, the state will be unwilling to join the institution. In these situations, an exclusion clause simply redistributes the gains of cooperating within the institution from the likely target of exclusion to other states. A neutrality principle that dictates that no state be an obvious candidate for exclusion can guide both the situations in which they are deployed and how exclusion clauses are drafted.

Most obviously, the neutrality principle makes exclusion clauses much more viable in contexts in which it is not immediately obvious which states will be the target of exclusion votes. Certain kinds of agreements may therefore not be good candidates for exclusion clauses. Consider the effect of including an exclusion clause in the UNFCCC. Suppose that overall global welfare would increase if nations agreed on a set of international rules governing climate change mitigation efforts. The gains from climate change mitigation outstrip the losses. Certain countries, however, might stand to suffer reduced welfare from such a plan (China and India, for example, which are industrializing rapidly, or Russia, which will be able to access additional mineral resources currently under permafrost in Siberia if the climate warms sufficiently). These countries would not join a climate change institution if they could predict that, upon joining, a set of rules that hurt them would be implemented and applied to them. This point is general: states must benefit in expectation from joining an institution before they will do so. Exclusion clauses have the potential in certain circumstances to reduce, in expectation, the welfare of states that are likely targets of exclusion. If their expected gains from joining the institution become negative because of how they anticipate an exclusion clause will be used, they will not join. For example, whaling nations like Japan, Norway, and Iceland might object to an exclusion clause in the International Convention on the Regulation of Whaling, reasoning that anti-whaling nations would use it to disqualify them from votes on whether to maintain the existing moratorium on commercial whaling.

Exclusion clauses may also be more palatable to states in institutions with broad jurisdiction. In such institutions, states can more easily bargain across issues. Broad jurisdiction may thus ease the concerns of a likely candidate for exclusion by providing it with diplomatic tools and bargaining power it can use to reduce the probability it ever actually becomes an exclusion target. States that are potential targets of exclusion votes on one issue can therefore use the threat of reciprocal exclusion votes on other issues, and the promise of concessions on other issues, to neutralize the threat. Broad jurisdiction is a double-edged sword, of course. Neutralizing the threat that exclusion clauses will be used decreases the clauses’ value, assuming a clause is included in an agreement. But it may increase the clauses’ value ex ante by inducing states to sign up.

Similarly, states will be more likely to accept exclusion clauses when an institution’s other members include allies. Allies increase the likelihood that
states will be able to use politics and diplomacy to protect themselves from exclusion votes. For example, organizations such as the IEA have mulled whether states such as China and India should be offered membership. If the IEA had an exclusion clause that, say, required a unanimous vote of all states other than the target state, however, membership for only China or India might not be that attractive. Membership for both might be more attractive to each, though. Either would be able to veto an exclusion vote against the other.

This last example also underscores how the neutrality principle can be respected through drafting even when a state is a likely target of exclusion. Voting rules requiring large supermajorities or even unanimity among states other than the target state make diplomatic tools more effective at defusing the risk of exclusion. In the case of a unanimity rule, a state need only get a single ally to protect it. Such voting rules reduce the probability that an exclusion clause will be used, thereby increasing its palatability. Incorporating procedural triggers into an exclusion clause can also protect likely targets. For example, a clause might provide that a state can vote against a particular measure three times before it can be the subject of an exclusion vote, and the state can only be excluded on the exact same measure it has voted against. As with override votes in Congress, such a provision limits the scope of an exclusion vote. It also makes the likelihood of an exclusion vote lower by imposing procedural hurdles that other states may not be able to overcome.

These conditions, to be sure, reduce the effectiveness of exclusion clauses as tools to eliminate holdouts. In part, the incentive-compatibility condition mandates this result. A second-best alternative may in reality be the only feasible alternative, given that states have to consent to the institution and the exclusion clause in the first place. In this sense, exclusion clauses might be analogous to escape clauses, such as those that exist in the GATT/WTO. Escape clauses authorize a state to depart from its legal obligations in specified circumstances. These clauses are puzzling because they reduce the overall welfare of states by allowing states to unilaterally violate their substantive commitments. Alan Sykes, however, has shown that escape clauses are necessary for domestic


211 India and China are not in general allies and are at times rivals on the geopolitical stage. In the context of the IEA, however, they would be natural allies as developing countries in an organization with members that are predominantly developed states.

212 GATT, supra note 170, art. XIX(1)(a).


214 Id.
governments to have the proper incentives to join an institution. Like the limits on exclusion clauses, escape clauses increase welfare by inducing states to join an institution, even though they reduce welfare conditional on a state having already joined the institution.\(^{215}\)

Despite the necessity of limiting the use of exclusion clauses, especially to respect the neutrality principle, to be effective at all, the threat that an exclusion clause will be used in at least some circumstances must be credible if an exclusion clause is to add value. I focus on the threat of exclusion because it is not necessary that an exclusion clause ever actually be used. Often the threat of exclusion may facilitate bargaining with a holdout.

This “credibility” condition highlights the importance of two aspects of exclusion clauses already referenced: (1) exclusion clauses should be narrow in scope, and (2) exclusion clauses should include procedural triggers making exclusion mandatory in some circumstances.

Narrowing the scope of exclusion clauses reduces the stakes of being excluded, thereby increasing the credibility of the threat to exclude. For example, a threat to entirely exclude a country like India from all decision-making at the WTO because it is an obstacle to negotiating a WTO agreement on investment is incredible. The cost to India of being completely excluded from all decisions would be quite high, and India might well be inclined to respond by leaving the WTO entirely. India’s participation in the WTO is too valuable to other countries to risk over an isolated issue. Total exclusion, therefore, is an incredible threat because the costs of following through on the threat are greater than the benefits. A narrower exclusion clause, however, might be more credible because using it is less costly to the target state, and therefore is less likely to produce retaliatory action by the target that would be costly to the excluding states. Narrow exclusion clauses might be limited to a particular measure that has already been defeated or to a single upcoming vote. Exclusion clauses might be limited by subject matter as well, not applying to particularly sensitive decisions. For example, exclusion votes might be permissible to make technical changes to agreements (such as the inclusion of new chemicals in an agreement like the Stockholm Convention on Persistent Organic Pollutants), but not to make fundamental changes (for example, the kinds of controls required for listed substances under the Stockholm Convention). Finally, exclusion clauses could be narrowed temporally. A state might, for example, have its voting rights suspended for a week and then automatically reinstated.

Automatic triggers for exclusion votes might also increase the credibility of the threat. Purely discretionary mechanisms—exclusion clauses that make

\(^{215}\) Id. at 281–82.
exclusion votes entirely optional—suffer from the drawback that states may be unwilling to take the initial step of calling for an exclusion vote. States may be reluctant to force a confrontation and therefore an exclusionary clause may lose its teeth. Automatic procedural triggers requiring an exclusion vote to be held force the vote to occur. For example, a treaty might provide that in the event a state votes against a measure in, say, four consecutive legislative sessions, that automatically triggers a vote by the remaining members on whether to exclude the holdout. To be sure, states may still seek to avoid confrontation by voting against exclusion. But automatic triggers can at least reduce the procedural hurdles to a vote occurring, thereby marginally increasing the credibility of the threat of exclusion.

Finally, it is worth considering some objections to the idea of exclusion clauses. First, one might worry about the opportunistic use of exclusion clauses, driven by powerful countries, because such use reduces overall welfare. States’ ability to holdout, after all, is a device used for their protection to ensure that they have consented to matters that affect them. For the reasons set forth above, however, exclusion clauses are likely to be difficult to use, meaning that opportunistic use of exclusion clauses will be rare. Moreover, exclusion clauses will likely require large numbers of states to support excluding a single state or small group. Given the disparities in numbers, in most cases the welfare gains of the many will outweigh the costs to the few.

Second, one might view exclusion clauses as illegitimate insofar as they suspend the voting and/or participation rights of states. Exclusion clauses, however, are not illegitimate so long as they are included in an institution’s constitutive documents, such that all states are on notice of how the provision will work when they join. In such situations, states have agreed to the exclusion clauses as simply another procedure available within the institution’s governance structure. When Congress overrides the President’s veto of a legislative bill, we do not say that the President’s role has been usurped. Rather, the act of overriding the veto signals that there is particularly strong support in favor of a measure, justifying—in accordance with a rule laid down in advance—a departure from the normal rule that the President must concur in legislation.

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In sum, exclusion clauses paradoxically offer the possibility of truly global governance by allowing institutions to selectively make rules with less than the

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216 To really make such a procedure effective, states would also have to have the ability to require a vote on the matter. Absent the ability to force a vote, a holdout state might be able to block a measure simply by preventing a vote.
full participation of their membership. The widespread use of exclusion clauses would make legislative governance the reverse of contractual governance. In contractual governance, issue linkages are made selectively while in legislative governance they are, largely irrevocably, institutionalized. Exclusion clauses would allow issue linkages to be institutionalized subject to selective delinking in the interests of facilitating governance. The ability to delink would encourage states to broaden the jurisdiction of legislatures in order to reduce coordination costs across institutions. Exclusion clauses would thus address some of the costs of fragmentation.

Indeed, making exclusion issue-specific within an institution may actually lift overall inclusion. Member states will be more willing to admit new states if they know that those states are not going to be able to take the institution hostage. Additionally, states may be more willing to grant an institution broad issue jurisdiction if they know that members are not going to be able to hold all issues within the institution’s jurisdiction hostage. In this way, exclusion clauses may help reduce concerns about fragmentation. As institutional jurisdiction broadens, states can more easily coordinate policies within a single institution. The alternative—bargaining across multiple institutions with different voting rules and different memberships—creates transaction costs sufficiently high that such coordination among different regimes is unlikely to ever blossom. Put differently, if legislatures with broad jurisdiction do not emerge because of the need to temper the costs of holdouts, then exclusion offers an alternative way to reduce those costs.

C. Democracy Clauses

The notion of exclusion clauses may seem radical. After all, states jealously guard their ability to control their international legal commitments. One may be forgiven, therefore, for wondering whether exclusion clauses are a feasible proposal. Would states really agree to join an organization knowing that the organization’s other members may decide to suspend it for the very purpose of overriding its dissenting vote?

The answer appears to be “yes.” A number of international organizations already authorize a member’s suspension in the event that a member violates (or in some cases threatens to violate) commitments to the protection of certain liberal democratic values, most notably a democratic form of government.217

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217 There are other examples of treaties authorizing suspension. For example, the U.N. Charter provides that a member “may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council” if the Security Council has taken “preventive or enforcement action” against the member. U.N. Charter art. 5. Similarly, many constitutive treaties, such as the Constitution of the World Health
These so-called “democracy clauses” are the closest provision to the kind of exclusion clauses I propose in this Article. They exist in agreements such as the Treaty on European Union,\textsuperscript{218} the Charter of the Organization of American States,\textsuperscript{219} MERCOSUR’s Ushuaia Protocol on Democracy,\textsuperscript{220} and UNASUR’s Additional Protocol on Democracy.\textsuperscript{221}

Technically, the suspension of privileges that can be imposed under the democracy clauses flows from a breach of the substantive guarantees of a democratic government embodied in the democracy clauses.\textsuperscript{222} However, several recent uses of democracy clauses highlight how they can be used to solve bargaining problems, with violations of the democracy clause providing only a pretext. Most recently, in June 2012 MERCOSUR suspended Paraguay’s participation following the impeachment in a two-day proceeding of Paraguayan President Fernando Lugo in what was widely perceived to be akin to a coup d’etat.\textsuperscript{223} MERCOSUR member states wanted to admit Venezuela as a full

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\textsuperscript{218} Consolidated Version of the Treaty on European Union, art. 7(3), Oct. 26, 2012, O.J. (C 326) 13 [hereinafter TEU] (providing that following violations of the guarantees of democracy and human rights in the treaty, “the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”).

\textsuperscript{219} Protocol of Amendments to the Charter of the Organization of American States, (“Protocol of Washington”), art. 9, Dec. 14, 1992, 33 I.L.M. 1005 (“A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established.”).

\textsuperscript{220} Ushuaia Protocol on Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile, arts. 4–5, July 24, 1998, 2177 U.N.T.S. 383 (providing that violation of the guarantee of democracy may result in the “suspension of the right to participate in various bodies of the respective integration processes”).


member of MERCOSUR. Admitting a new member requires the consent of Paraguay, Brazil, Argentina, and Uruguay, but the Paraguayan Senate had been the lone holdout in refusing to admit Venezuela. When the Paraguayan Senate impeached President Lugo, the remaining MERCOSUR members used the democracy clause to suspend Paraguay’s participation in MERCOSUR and then admitted Venezuela as a full member. Enforcing MERCOSUR’s democracy clause thus had the added benefit of solving a bargaining problem that had persisted since 2006.

Similarly, in 2000 the E.U. imposed sanctions on Austria following the inclusion in the government of ministers from the xenophobic Freedom Party. In February 2000 the E.U. forbade Austria from meeting with the E.U. at higher than a technical level and excluded Austria from deliberations on matters that included the admission to the E.U. of former communist countries bordering Austria. Following the imposition of sanctions, the Austrian stock market declined significantly and foreign investors expressed some trepidation about new investments in the country.

As these examples illustrate, democracy clauses have in practice served at least two functions. First, sanctions imposed against a country have the effect of putting pressure on a government to protect the democratic rights of its citizens. Democracy clauses have been lauded for this role, linking the benefits

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225 Id.

226 Id.

227 American constitutional history offers a similar example of using exclusionary practices as an end run around procedural rules designed to slow lawmaking. Following the Civil War, states that had been part of the Confederacy were required to ratify the thirteenth, fourteenth, and fifteenth amendments (after those amendments were passed in Congress without Southern representation) as conditions for readmittance into the Union. See White v. Hart, 80 U.S. 646, 648 (1871); Wayne D. Moore, The Fourteenth Amendment’s Initial Authority: Problems of Constitutional Coherence, 13 TEMP. POL. & CIV. RTS. L. REV. 515, 519–21 (2004); CONG. GLOBE, 40th Cong., 2d Sess. 453 (1868) (discussing S.J. Res. 86, which declared the adoption of the fourteenth amendment).

228 Purdy, supra note 222, at 293–94.

229 Id. at 294.


231 See, for example, Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 INT’L ORG. 217, 220 (2000) (explaining that regimes that impose sanctions on countries for violating citizens’ rights allow national governments to “lock in . . . democratic institutions”).
of economic integration with the human rights protections a government offers its own citizens.\textsuperscript{232}

Second, the ability to suspend states' voting and participatory rights gives the remaining members some control over the identity of negotiators at the bargaining table. States that select governments with preferences that are too far from the preferences of the other members of an organization can be disqualified from participation. Purported violations of the democracy clauses can serve as a useful pretext to resolve bargaining impasses. As both the Paraguayan and Austrian situations illustrate, what constitutes a breach of the democracy clause is somewhat in the eye of the beholder.\textsuperscript{233} Especially in the case of Austria, the Freedom Party Ministers at issue were democratically elected and had taken no action that violated the Treaty on European Union.\textsuperscript{234}

Although overlooked in commentary on democracy clauses, the ultimate success of democracy clauses in enforcing human rights guarantees likely hinges on this benefit. Absent this benefit, punishing a state for violations of a democracy clause may be a net loss for other states. But seen from the standpoint of bargaining, democracy clauses will be enforced when doing so is in the interest of states that must negotiate with the violating state. Legislative institutions thus create incentives for states to monitor each other's democratic process, a benefit overlooked in the literature on linking human rights and economic integration.

The potential for democracy clauses to resolve legislative gridlock nevertheless remains an open question. Democracy clauses are likely not broad enough to solve all of the bargaining problems that states might wish to solve. Democracy clauses, after all, require a trigger event related to the breach or risk of a breach of a commitment to a democratic form of governance and/or human rights. Whether an event qualifies is not justiciable, and so states have a

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\textsuperscript{234} Purdy, \textit{supra} note 222, at 295. Art. 7 of the Treaty on European Union does not require a breach before sanctions can be imposed. Rather, it only requires a determination that there is a “clear risk of a serious breach.” See TEU, \textit{supra} note 218, art. 7(1).
\end{footnotesize}
great deal of latitude in applying the democracy clauses. But there are still likely to be many situations in which a holdout has not breached the terms of a democracy clause even plausibly. In these situations, states are unlikely to invoke a democracy clause, even pre-textually.

More generally, the set of countries likely to violate democracy clauses and the set of countries that holdout in a legislative institution may not overlap. For example, developed countries that have played a role in stalling negotiations in the Doha Round cannot be plausibly targeted through the use of a democracy clause. This fact raises two additional and related problems with the use of democracy clauses. First, democracy clauses will be ineffective against many developed countries that are liberal democracies but may still prevent welfare-enhancing negotiations in international legislatures. Second, because of this disparate impact, countries that are not stable liberal democracies such as China may object to the use of democracy clauses and refuse to include them in many multilateral agreements. These countries can easily see that democracy clauses only benefit stable liberal democracies such as the United States, Canada, and European countries.

Democracy clauses themselves are thus not likely to provide a solution to bargaining problems in international organizations. They do, however, indicate that states are, at least in some circumstances, willing to place their ability to participate in the hands of other members of their respective organizations. Democracy clauses may also tell us something about the kinds of conditions that need to be attached to exclusion clauses to make them palatable to states. Democracy clauses are usually agreed to by democratic governments that perceive little cost to themselves in agreeing to the clause. After all, the democracy clause enlists international organizations in preserving the democratic form of government in its member states. This observation suggests that exclusion clauses are more likely to be adopted when they are restrictive and unlikely, ex ante, to be used against the governments that agree to them. In short, exclusion clauses exist and are possible under some circumstances. Greater experimentation will tell us more about the kinds of conditions under which states might find them acceptable.

VI. CONCLUSION

Multilateral cooperation is critical to resolving many of the world’s most pressing problems: poverty, climate change, and humanitarian crises, to name but a few. As states have become increasingly interdependent, they have turned to legislative forms of lawmaking. But international legislatures, to the chagrin of some, have not eliminated the requirement that states consent before being bound by legal rules.
But appearances can be deceiving. International legislatures facilitate international lawmaking by serving as commitment devices of sorts. The fact that legislatures are in some ways less flexible than contractual negotiations—contrary to the conventional wisdom—serves to lubricate bargaining by giving states a tool to enforce legislative bargains. This need for an enforcement tool across related negotiations explains the rise of international legislatures in modern times.

Despite their key role in facilitating legislative bargains, no one can deny that multilateral lawmaking needs to accelerate if we are to successfully confront the challenges of the day. The current ennui in multilateral governance calls for fresh ideas. Many will object to the proposal that states can be suspended or excluded from international legislatures simply for exercising their right to refuse to support new legal instruments. But the age of islands of sovereignty, if it ever existed, is long since past. In today’s interconnected world each country is part of the main. International regimes need to reflect this delicate balance between the needs of the whole and the needs of the individual. As of yet they do not, but there is hope.