

THE PRICE OF ADMISSION: BINDING MEMBER STATES TO UN-RATIFIED TREATIES?

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Note to participants in the Delegating Sovereignty conference: This paper analyzes the prevailing model of delegation to international organizations (IOs). According to this model, delegation is a two-step process in which the first step—becoming a member of an IO—is far less consequential, both legally and politically, than the second step—ratifying treaties that the organization adopts. I analyze the costs and benefits of the two-stage model and how and why states occasionally deviate from it. I also consider an important but under-examined counterexample—the power of the International Labor Organization (ILO) to police member states’ compliance with un-ratified labor treaties. The ILO’s unique authority raises the provocative question of whether states would benefit in other contexts from delegating authority to bind all IO members to treaties that the organization’s membership later adopts.

I welcome your comments and suggestions on this preliminary draft, in particular on Part IV which is still tentative and partially incomplete.

Membership in international organizations (“IOs”) is *de rigueur* for the world’s nations. From small, weak, and historically idiosyncratic states to large and powerful countries, all are members of multiple IOs, organizations whose subject matters are as wide-ranging and diverse as the world’s problems are myriad.¹ Joining an IO entails a delegation of sovereignty to IO officials—and to IO member states acting collectively—to engage in the activities and achieve the objectives set forth in the organization’s founding treaty or charter.² States join and work within IOs to obtain the benefits that membership confers, benefits that include reducing transaction costs, increasing access to information, promoting linkages among issue areas, monitoring member states’ behavior, mediating disputes, and imposing sanctions for noncompliance.³ Even states that jealously guard their autonomy recognize that IO membership has its privileges.

Yet international delegations are limited in a distinctive fashion. With only a sparse handful of exceptions,⁴ IOs (meaning, again, both IO officials and staff as independent

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¹ See <http://www.indexmundi.com/> (listing IO membership on a country-by-country basis); Y.B. Int’l Orgs., Fig. 4.1.2, Number of international organizations by subject groups (2004) (listing IOs by subject matter); see also J. SAMUEL BARKIN, INTERNATIONAL ORGANIZATION: THEORIES AND INSTITUTIONS 2 (2006) (“[T]here are few areas of contemporary life in which there are no IOs creating rules, monitoring behavior, or promoting cooperation.”).

² See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation* 5 (draft of Oct. 31, 2006) (defining international delegations to an “international body” to include grants of authority to “a typical bureaucracy, a temporary commission, a council of states, a board of directors, or even a conference of parties”).

³ See, e.g., Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. Conflict Resol. 3, 8 (1998) (asserting that states “consciously use IOs both to reduce transaction costs in the narrow sense and, more broadly, to create information, ideas, norms, and expectations; to carry out and encourage specific activities; to legitimate or delegitimize particular ideas and practices; and to enhance their capacities and power”).

⁴ The most notable exceptions are the European Union, which adopts directives and regulations with direct effect within the legal systems of its member states, see BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS

actors and member nations actively collectively) cannot impose new international law obligations upon any individual member nation. This omission distinguishes the lawmaking functions of IOs from those of domestic legislatures. In the latter case, legislation approved by the necessary majorities following predetermined procedures binds the entire national polity, opponents and dissenters alike. In the former case, by contrast, each state must give its formal consent to the treaties or other international rules that the organization adopts and to the monitoring and review procedures that accompany them. Stated differently, international delegations involve a two-stage process, in which the first step—becoming a member of an IO—is far less consequential, both legally and politically, than the second step—the voluntary acceptance of new international rules created by the organization.⁵

Scholars of international affairs have given insufficient attention to why states distinguish between these two stages of IO delegation and how and why they occasionally deviate from this approach. The most common exception is the authority of a supermajority of treaty parties to adopt treaty amendments that bind all member states.⁶ Such majoritarian amending power appears in a large number of treaties and IO charters.⁷ But it is limited by a variety of procedural rules that protect state consent.⁸ Moreover, the exercise of such authority is exceptional. Although the empirical evidence is anecdotal, states do not force amendments upon dissenters. Instead, they adopt revisions by consensus or allow amendments to enter into force only for states that have not objected to them.⁹

____ (Philippe Sands & Pierre Klein eds., 5th ed. 2001), and the United Nations Security Council, which creates legal obligations for all UN members when acting under Chapter VII of the UN Charter. See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 199-216 (2005).

⁵ For some IOs, the initial membership decision has significant consequences. A state that joins the World Trade Organization (“WTO”), for example, must also accede to a package of agreements whose many detailed provisions resemble the telephone book of a medium-sized American city. As scholars have emphasized, however, this “single undertaking” aspect of the WTO is distinctive and a radical departure from the previous a-la-carte approach to international trade. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *Int’l Org.* 339 (2002). I discuss the WTO and similar modifications to the two-stage model in Parts II.A & II.E *infra*.

⁶ See ALVAREZ, *supra* note 4, at 336-37 (discussing “deviations from the consent principle” in IOs and treaties); C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 456 (2d ed. 2005) (stating that most IO constitutions contain amendment provisions that allow a “majority of members [to] bind a minority which has not agreed to the amendments at some stage”); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *Colum. L. Rev.* 1492, 1506-15 (2004) [Swaine, *International Delegations*] (reviewing examples of delegations of treaty-amending authority that allow states to bind the entire treaty membership).

⁷ AMERASINGHE, *supra* note 6, at 454-57 (surveying amendment procedures in treaties establishing IOs); Bernhard Boockmann & Paul Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, 6 *Int’l Envnt’l Agreements* 113, 117-25 (2006) (surveying amendment procedures in 400 environmental agreements, protocols, and annexes).

⁸ See Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 *Leiden J. Int’l L.* 1, 15-23 (2002) [Brunnée, *COPing with Consent*] (comprehensively reviewing mechanisms used by environmental treaties to protect state consent, including adoption of amendments by consensus, ratification requirements, application of amendments solely to ratifying states, and opt-out procedures); see also AMERASINGHE, *supra* note 6, at 454-57 (same, for treaties establishing IOs). For a more detailed discussion of treaty amendment procedures, see *infra* Part II.E.

⁹ See, e.g., ALVAREZ, *supra* note 4, at 372 (noting that states “resort to consensus whenever possible” for treaty-making within IOs); Duncan B. Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties,*

Outside of treaty amendments, there are few exceptions to the two-stage delegation model, and, in particular, virtually no instances of delegating to IOs the authority to bind member states to treaties they have not formally ratified. This will come as no surprise to international legal scholars. As the Vienna Convention on the Law of Treaties provides (in what is, sadly, one of its least abstruse articles), “[a] treaty does not create either obligations or rights for a third State without its consent.”¹⁰ States have defended this position against occasional UN proposals to modify it.¹¹ Studies of IO treaty-making have also refused to elide the distinction between a state’s decision to join an IO and its subsequent decision to ratify the treaties the organization adopts. To the contrary, they have stressed that even member states which “take part in the process of adopting a convention within the framework of” an IO retain “complete freedom of choice on the question of whether to become a party to that instrument later on.”¹²

From a traditional doctrinal perspective, therefore, the message is clear and unequivocal: compelled adherence to un-ratified treaties adopted by IOs is anathema. Stated differently, the explicit or implicit assumption in international law is that the two-stage model of international delegation is the only model compatible with state sovereignty and with the requirement of formal consent to new international commitments.

In this Article, I challenge this traditional doctrinal defense of the two-stage model in three distinct ways. First, I use a rational choice approach to analyze the two-stage model’s ability to promote international cooperation. This analysis extends existing doctrinal accounts of IO treaty-making beyond their current restricted focus on state consent and sovereignty. And it reveals that the two-stage model has both significant costs as well as significant benefits for states that engage in international cooperation.

and the Changing Sources of International Law, 23 Berkeley J. Int’l L. 137, 171 (2005) (“[I]n practice, extra-national actors [i.e. actors to whom states have delegated treaty-revising authority] have not actually amended treaty obligations for objecting states, even in the absence of ‘opt-out’ clauses.”).

The recent amendment to the Trade-Related Aspects of Intellectual Property Rights Agreement expanding the availability of compulsory licenses for patented medicines provides a telling example. After more than three years of intensive negotiations, the WTO membership as a whole adopt the amendment by consensus. WTO General Council, Amendment of the TRIPS Agreement: Decision of 6 December 2005, WT/L/641 (Dec. 8, 2005). More significantly, the membership decided that the new provision would “take effect for the Members that have accepted [the amendment] upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it.” WTO Agreement, Art. X(3). States chose this procedure over another clause in the WTO Agreement that allows less important amendments (i.e. those that do not “alter the rights and obligations” of the parties) to “take effect for all Members upon acceptance by two thirds of the Members.” *Id.* art. X(4). For a more detailed discussion of WTO amendment rules, see Swaine, *International Delegations*, *supra* note 6, at 1507-08.

¹⁰ Vienna Convention on the Law of Treaties, art. 34, *opened for signature* May 23, 1969, U.N. Doc. A/Conf. 39/27, 1155 U.N.T.S. 321 (1980).

¹¹ See REVIEW OF THE MULTILATERAL TREATY-MAKING PROCESS, UN Doc. ST/LEG/SER.B/21, at 148-58 (1985) [hereinafter MULTILATERAL TREATY-MAKING] (reviewing the vociferous state objections to a suggestion by the UN Secretariat that certain treaties “provide for their automatic entry into force except in respect of States that voted against adoption or that submit an opting out notice”).

¹² Sands & Klein, *supra* note 4, at 277.

Second, I consider the different ways in which states customize the two-stage model to mitigate its problematic aspects while maximizing its benefits. Some of these alterations are well known; others have rarely been discussed. Among the many varieties of custom tailoring, the International Labor Organization (“ILO”) stands out. Since its founding nearly ninety years ago, the ILO has enjoyed a quasi-legislative power to monitor compliance with un-ratified labor treaties.¹³ Even more strikingly, the organization has repeatedly augmented this delegated authority, with the support or at least acquiescence of its most powerful member states. The ILO’s experience, although distinctive in ways that I describe below, belies the doctrinalists’ claim that binding states to un-ratified treaties as a condition of IO membership is repugnant to international law.

The ILO’s power to bind states to legal commitments solely by virtue of their status as IO members suggests a third and more provocative question—whether there are grounds for reconsidering the two-stage model more generally. From a rational choice perspective, states could reap substantial gains from delegating authority to bind both themselves and other IO members to treaties later adopted by the organization’s membership. I catalogue and analyze those benefits and then consider the crucial and contested issue of whether the gains outweigh the sovereignty and legitimacy costs of such capacious delegations.

The remainder of this Article proceeds as follows. Part I first describes the core elements of the two-stage model of international delegations and its grounding in state consent. After a brief overview of the cooperation-enhancing functions of IOs, Part I analyzes the benefits and costs of the two-stage model using examples from different issue areas. Part II analyzes the different IO and treaty design features that states and IO officials use to customize the two-stage model. These modifications include pairing IO membership to substantive obligations, duration and renegotiation clauses, treaty housecleanings and ratification campaigns, regime shifting between rival IOs, and delegating treaty amending authority to a majority or supermajority of member states. Part III examines a major exception to the two-stage model—the ILO’s power to impose international obligations on member states who refrain from ratifying treaties that the organization adopts. I review the history of this authority, explaining why ILO member states chose to confer such a unique power on the organization and why they augmented that power at key points in its history. Part IV analyzes the benefits and costs of binding IO member states to un-ratified treaties.

I. THE TWO-STAGE MODEL OF DELEGATION TO INTERNATIONAL ORGANIZATIONS

Lawmaking and monitoring—the creation of new rules of international law and the review of adherence to those rules by states—are two of the most important functions that IOs perform. These lawmaking and monitoring functions are enormously varied. Some IOs generate new legal rules through diplomatic conferences of government representatives. Others confer drafting authority on committees of experts, which present near-final treaty text to IO political bodies for approval. Still others involve extensive

¹³ For an interdisciplinary analysis of the ILO’s rich and varied history, see Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 *Vand. L. Rev.* 649 (2006) [Helfer, *Understanding Change in IOs*].

interventions by IO officials, who review texts for coherence to existing legal rules and political viability. Procedural differences in lawmaking—such as the state and non-state actors involved, the voting rules they use, and the speed at which they generate new rules—are equally wide-ranging. Variations in monitoring are, if anything, even more pronounced. They range from contentious litigation of treaty obligations before a permanent international court or tribunal, to non-judicial review mechanisms by expert or political bodies, to less onerous self-reporting procedures.

Amid this diversity, one common pattern stands out. Nearly all IOs of the last century follow a distinctive two-stage pattern of delegation. This two-stage model disaggregates two different types of legal commitments: (1) obligations that arise as a result of joining an IO (such as funding, administrative support, housekeeping matters, and, occasionally, substantive rules), and (2) obligations contained in international agreements that the organization later adopts, including the obligation to submit to any associated monitoring procedures. IO membership confers the right to participate in the negotiation of these treaties and to vote for or against their adoption. But that right in no way entails the correlative duty to ratify the treaties or to accept them as legally binding. To the contrary, each member reserves to itself the prerogative to accept or reject the treaties even after they have been adopted by the organization’s membership as a whole.¹⁴

A. The Two-Stage Model and State Consent

The accepted doctrinal explanation for the two stage-model is consent. Nothing in international law compels a state ratify a treaty.¹⁵ Ratification or accession is a discretionary act, one undertaken after government officials weigh the benefits and costs for the state of accepting the package of rights and obligations that each treaty contains.

International law is at its most controversial and contested when it deviates from scrupulous adherence to the consent principle. A major focus of the opposition to the International Criminal Court, for example, is the inability of non-members to exempt their nationals from the Court’s jurisdictional reach.¹⁶ Similar contention surrounds the overlap of treaties and custom. Commentators have criticized the ICJ’s judgment in the

¹⁴ See, e.g., CLIVE ARCHER, *INTERNATIONAL ORGANIZATIONS* 37 (2001) (“The inviolability of sovereignty [is] protected within [IOs] by the doctrine that states cannot be bound by agreements to which they are not party. This would effectively rule out decisions by anything short of unanimity . . . and by executive secretariats or councils which could act without the express consent of all the membership.”); Sands & Klein, *supra* note 4, at 277 (stating that IO member states “take part in the process of *adopting* a convention within the framework of the organisation . . .—retaining a complete freedom of choice on the question of whether to become a *party* to that instrument later on”).

¹⁵ Or virtually nothing. The only exception would be a resolution of the UN Security Council demanding that a UN member state accede to a treaty or undertake obligations equal to those that the treaty contains. The Security Council recently ordered North Korea to do precisely this. See Security Council Res. 1718, ¶¶ 3-4 (2006), <http://www.un.org/News/Press/docs/2006/sc8853.doc.htm> (“demand[ing] that [North Korea] immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons” and “return to the Treaty”).

¹⁶ Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute’s Unlawful Application to Non-State Parties*, 44 Va. J. Int’l L. 63 (2003); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-party States*, 64 Law & Contemp. Probs. 13 (2001).

Nicaragua case¹⁷ in part because the Court treated the provisions of multilateral treaties as customary law, obviating a jurisdictional bar to applying the treaties themselves.¹⁸ Arguments that rely on *jus cogens*—rules perched at the apex of the international law hierarchy—to trump a state’s non-ratification of treaties, reservations, and persistent objection to the formation of new custom have garnered similar objections.¹⁹

From a doctrinal vantage point, the consensual underpinning of the two-stage model of international delegation bolsters the legitimacy of IOs and of their future treaty-making by grounding both upon a fundamental principle of the international legal system. From a rational choice perspective, however, the two-stage model creates considerable costs as well as benefits. In the sections that follow, I first identify how IOs enhance interstate cooperation in general and treaty-making in particular. I then analyze the salutary and deleterious aspects of the two-stage model before exploring the mechanisms that states use to mitigate the latter while increasing the former.

B. The Cooperation-Enhancing Functions of IOs

Disaggregating the requirements of IO membership from the obligations of subsequently-adopted legal instruments helps states to manage risk and reduce uncertainty. Risk and uncertainty are pervasive features of international affairs. States often have incomplete information about the nature of the problems they face or the appropriate ways to resolve them. They also face uncertainties about the preferences of other states and of their own domestic constituencies. Adding to these unknowns, exogenous shocks can rapidly shift the political and legal landscape in ways that pose fresh and unexpected challenges to interstate cooperation.²⁰

These risks and uncertainties increase the cost of entering into binding international agreements as the first step in the process of resolving transborder problems collectively. As a practical matter, states may simply lack the information and experience needed to draft a new treaty. As a political matter, they may refrain from joining a treaty without some assurance of a future payoff in exchange for accepting constraints on their present behavior. Yet if transborder collective action problems are ever to be remedied, the process of cooperation must begin in some fashion.

IOs provide a forum in which states can safely take their first “baby steps” and lay the groundwork for more ambitious treaty-making endeavors.²¹ The cooperation-enhancing

¹⁷ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

¹⁸ See John Morss & Mirko Bagaric, *If We Can’t Have Global Democracy, Let’s All Be Americans: Injecting Principle Into the International Lawmaking Process*, 15 *Transnat’l L. & Contemp. Probs.* 217, 229 (2005).

¹⁹ See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 *Duke L.J.* 485, 518, 536 (2002).

²⁰ See Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 *INT’L ORG.* 761, 766–67 (2001) (analyzing different types of uncertainty that states seek to minimize by creating international institutions).

²¹ To be sure, IOs are not the only way that states manage uncertainty and risk. Another strategy is to create a shallow framework convention or non-binding declaration and then supplement it over time with

functions of IOs affect all facets of the international lawmaking process, from information gathering and issue identification to agenda setting and facilitating the adoption of new treaties. Where basic uncertainty exists about the nature of the problem or the feasible strategies for addressing it, IOs can serve as neutral purveyors of information and disseminators of knowledge.²² In this role, IO officials and staff gather the necessary facts from members, experts, and other affected parties, synthesize the data into useful forms, and make it available to the membership as a whole.

These transparent information-gathering exercises provides a basis for fashioning legal rules and monitoring mechanisms to regulate specific transborder problems. Leadership and skill in agenda setting facilitate this intermediate stage of collective action.²³ The functions that IO officials perform at this juncture include the ability to “(1) propose areas of topics on which collective treaty-making would be beneficial; (2) mobilize potential collaborators from both within and outside the organization; (3) shape the agenda by providing productive frameworks for negotiations; (4) build consensus; and (5) broker compromises.”²⁴ These activities are especially useful where the impetus for regulation is a single powerful country or a coalition of like-minded states. By filtering these initiatives through impartial international procedures, IOs can “launder” proposals that would be viewed as illegitimate if offered by these states directly.²⁵

The process of lawmaking often begins with declarations or resolutions that act as focal points for states with divergent interests. Generating broad agreement on these nonbinding objectives and standards facilitates the subsequent negotiation of legally binding instruments. IOs can help states to make the jump from soft to hard law by providing legal and technical expertise to government negotiators and, in some IOs, taking the laboring oar in drafting treaty texts.²⁶ Even after an organization’s political bodies have approved a new treaty, IO officials need not sit idly by hoping that states will deposit their instruments of ratification. To the contrary, they can engage in proactive “ratification campaigns” that cajole members states to accede to the treaty.²⁷

deeper and more precise treaties or protocols. See Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION* ___, 65 (Eyal Benvenisti & Moshe Hirsch eds. 2004) (stating that “framework conventions promote the emergence of common interests and norms” as well as “[c]ooperation in information-gathering, information-sharing and consultation regarding appropriate responses”).

²² See generally ERNST B. HAAS, *WHEN KNOWLEDGE IS POWER: THREE MODELS OF CHANGE IN INTERNATIONAL ORGANIZATION* __ (1990). [pin]

²³ See ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 117-25 (1964) [HAAS, *BEYOND THE NATION-STATE*].

²⁴ ALVAREZ, *supra* note 4, at 342 (citing Wayne Sandholtz, *Institutions and Collective Action: The New Telecommunications in Western Europe*, 45 *World Pol.* 242, 250 (1993)).

²⁵ Abbott & Snidal, *supra* note 3, at 18-19.

²⁶ See, e.g. U.N. Office of Legal Affairs, *Final Clauses of Multilateral Treaties Handbook*, U.N. Sales No. E.04.V.3 (2003); Int’l Lab. Office, Office of the Legal Adviser, *Manual for Drafting ILO Instruments* (Jan. 2005), available at <http://www.ilo.org/public/english/bureau/leg/man.pdf>.

²⁷ Int’l Lab. Office, *Comm. on Legal Issues and Int’l Lab. Standards, Ratification and Promotion of Fundamental ILO Conventions*, GB.294/LILS/5 at 1 (Nov. 2005), [Int’l Lab. Office, *Promotion of Fundamental Conventions*], available at <http://www.ilo.org/public/english/standards/reim/gb/docs/gb294/pdf/lils-5.pdf>. For a more detailed discussion of ratification campaigns, see *infra* Part ____.

C. The Benefits of the Two-Stage Model

This brief overview reveals the numerous ways in which IOs enhance international cooperation. To maximize these benefits, however, states must reduce the sovereignty costs associated with the decision to join an IO and confer cooperation-enhancing authority upon it.²⁸ The two-stage model of IO delegation—which disaggregates each state’s initial membership decision from the subsequent decision to consent to any treaty that the organization later adopts—minimizes these costs and risks. It allows states to begin the initial phases of cooperation without pre-committing to advance any further along the pathway to more legalized international commitments.

The two-stage model’s reduction of sovereignty costs has several salutary benefits. First, it encourages a large number of states to join IOs.²⁹ Membership plays an essential role in determining the success or failure of international cooperation. States have an incentive to cooperate only if the requisite number of other states also participate. Participation levels below this threshold are often unsustainable.³⁰ The minimum number of participants varies with the issue area and the particular problem states seek to regulate.³¹ For the global public goods or common pool resources that are the bread and butter of many IOs (especially those that regulate transborder environmental harms),³² all or nearly all nations must join the organization. Absent such widespread participation, non-members can free ride on the cooperation of members, causing cooperation to unravel.³³ For these global IOs, therefore, the cost of initial membership must be low enough to encourage participation that is universal or nearly so.

Flexibility and adaptability are a second benefit of the two-stage model. In their status as IO members but not treaty ratifiers, states can experiment with different solutions to transborder problems before committing to any single solution. This approach is

²⁸ See Bradley & Kelley, *supra* note 2, at 7 (defining “sovereignty costs” of international delegations as “reductions in state autonomy” that occur as a result of the “transfer of the state’s decision-making authority to other actors”).

²⁹ Most treaties adopted by IOs are eligible to be ratified only by IO member states. Thus, becoming a member of an IO is a necessary prerequisite to more extensive cooperation.

³⁰ See SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195–220* (2003) (analyzing treaty participation issues, including minimum participation levels, using a game-theoretic analysis).

³¹ *Id.* at 220 (comparing “regional agreements . . . concerning international river courses, closed seas, and regional ecosystems” which require participation by a small number of countries to international agreements regulating “a global resource”).

³² Although “no traditional IO exists to cover environmental concerns at the global level,” there are many “institutional substitutes” that mirror the functions of IOs. ALVAREZ, *supra* note 4, at 319-20 (discussing the United Nations Environmental Program); see also Jutta Brunnée, *The United States and International Environmental Law: Living With an Elephant*, 15 Eur. J. Int’l L. 617, 637 (2004) (“With an institutional core and ongoing regulatory agenda, modern MEAs . . . resemble [IOs] in many respects.”).

³³ See Lisa L. Martin, *The Rational State Choice of Multilateralism*, in *MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM* 91, 97 (John Gerard Ruggie ed., 1993) (“In a multilateral organization with a large number of members having diverse interests, the problem of temptations to free ride will become especially acute.”).

especially useful where member states agree on the need to regulate a particular activity, but are either uncertain or at odds over which regulations to adopt. The nearly twenty-year evolution of international rules governing plant genetic resources (PGRs) provides a telling example. In the early 1980s, member states of the Commission on Genetic Resources for Food and Agriculture (a subsidiary body of the UN Food and Agriculture Organization) adopted a nonbinding declaration stating that PGRs were the common heritage of humanity and should be freely available to all. Over the next decade, a series of agreed interpretations and amendments to the declaration eroded the common heritage principle. They revealed a growing desire to treat PGRs as property that could be controlled by private intellectual property owners or by national governments exercising sovereignty over plant materials located within their borders. By the mid-1990s, the shifting and uncertain nature of these competing approaches led member states to negotiate a new legally binding agreement³⁴ that adopts an innovative “limited common property” rule to regulate the conservation and exploitation of PGRs.³⁵

A third advantage of the two-stage model is the opportunities it provides to socialize states with diverse or conflicting interests.³⁶ The political and expert bodies within IOs provide fora for structured interactions among government representatives and for disclosures about the nature and intensity of preferences and the problems to be regulated. IOs use ritualized or routine behaviors to “elicit expectations of ‘adherence to group goals’ and [to] encourage or reward . . . conforming behavior.”³⁷ Rather than coercing adherence to treaty rules, IOs disseminate information and promote the use of learning to persuade reluctant states of the importance of accepting new obligations. Over time, these techniques increase support for treaty-making initiatives. Peer pressure among members may even trigger “treaty bandwagons” or “norm cascades” that lead to rapid adoption and widespread ratification of new treaties.³⁸ Examples include the ILO Convention on the Worst Forms of Child Labor (150 ratifications in six years) and treaties to combat bribery and corruption (adopted by several global and region IOs during the late 1990s and quickly ratified by their member states).³⁹

³⁴ International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, <http://www.fao.org/ag/cgrfa/IU.htm>.

³⁵ Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132 (1998) (defining “limited common property” as “property held as commons amongst the member of a group, but exclusively vis-à-vis the outside world”); see also Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale Int’l L.J.1, 34-41 (2004) [Helfer, *Regime Shifting*] (analyzing the evolving international regulation of PGRs in detail).

³⁶ For a detailed discussion of socialization of states in human rights regimes, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights*, 54 Duke L.J. 621 (2004).

³⁷ ALVAREZ, *supra* note 4, at 348 (quotation omitted).

³⁸ BARRETT, *supra* note 30, at 260-67 (providing a game theoretic analysis of treaty bandwagons that occur after state ratifications exceed a particular threshold); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 Int’l Org. 887, 895 (1998) (describing the life cycle of international norms and explaining how norm cascades occur once a critical mass of states has accepted the relevant norm). IOs can amplify and focus “peer effects”—the tendency of countries to ratify treaties that their peer group has ratified. Nancy H. Chau & Ravi Kanbur, *The Adoption of International Labor Standards Conventions: Who, When and Why?*, Brookings Trade Forum (2001), http://muse.jhu.edu/journals/brookings_trade_forum/toc/btf2001.1.html.

³⁹ Int’l Lab. Office, Comm. on Legal Issues and Int’l Lab. Standards, *Improvements in the Standards-Related Activities of the ILO: A Progress Report*, GB.292/LILS/7 at 6 (Mar. 2005),

Bifurcating IO membership and treaty adherence yields a fourth and final benefit—segregating states according to their taste for international cooperation.⁴⁰ IOs can be conceptualized as the outer ring of a series of concentric circles whose inner rings represent the treaties that the IO adopts (with the innermost rings representing treaties with the most expansive commitments). Members reveal their willingness to cooperate through the number and type of treaty commitments they accept. Ratification has a preference-revealing function that is valuable for all members. States that are slow to take on international obligations can participate in the negotiation and adoption of new legal rules while preserving the discretion to join “in the future when they are ready and willing.”⁴¹ The decision to ratify or not also yields useful information for the IO’s other member states.⁴² “Willingness to accept a substantively meaningful and highly legalized agreement provides a valuable screening device to determine which states are sincere in their commitment to cooperate.”⁴³ States can use this screening device to create deeper and more ambitious “mini-lateral” treaties nested within a larger institutional structure, facilitating treaty enforcement by restricting membership to genuinely committed states. Taken together, the tiers of membership that the two-stage model makes possible helps to squeeze out the maximum gains from international cooperation.

D. The Costs of the Two-Stage Model

Although the benefits of the two-stage model of international delegation are considerable, they must be weighed against its disadvantages. I highlight these drawbacks below.

Consider first the delays created by formal ratification and accession rules. The entry into force of multilateral agreements adopted by IO treaty-making bodies is a slow and uncertain process.⁴⁴ Some states may choose not to submit a newly-adopted treaty for ratification by their domestic political actors. This is so even if they participated in the treaty’s negotiation and even if the state’s representative signed the agreement. In addition, where a state’s executive submits the treaty to the legislature, approval is by no means assured (as the multi-year debates in the United States Senate over ratification of the UNCLOS and CEDAW treaties aptly illustrate).⁴⁵ Even where a treaty faces little domestic political opposition among member states, widespread ratification can take up to a decade or more as the formal approval process winds its way through dozens of

<http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/lils-7.pdf>; Transparency International, International Conventions and other International Instruments, http://www.transparency.org/global_priorities/international_conventions.

⁴⁰ Cf. Goodman & Jinks, *supra* note 36, at 656 (“An important choice in designing human rights regimes involves deciding between an inclusive or restrictive membership rule in multilateral organizations.”).

⁴¹ Abbott & Snidal, *supra* note 21, at 66.

⁴² Cf. Edward T. Swaine, *Reserving*, 31 *Yale Int’l L.J.* 307, 333-41 (2006) (arguing that reservations reveals useful information about a state’s reputation and its propensity to comply with international law).

⁴³ Abbott & Snidal, *supra* note 21, at 65 (describing a “plurilateral pathway” to international cooperation).

⁴⁴ Negotiating and adopting treaties can also be slow and cumbersome processes. But those delays also exist in a one-stage model of delegation. For additional discussion of these delays, see *infra* Part IV.A.

⁴⁵ [cites] Such delays are unlikely in countries which do not require legislative approval of treaties negotiated by the executive. [cites]

countries. It is little wonder, therefore, that IO officials (and some states) have expressed frustration at the sluggish pace of post-adoption procedures for multilateral treaties.⁴⁶

Timing adversely affects the two-stage model in another way. The political will required for adopting new treaty commitments may be at its zenith when an IO is first established and enjoys strong political support. When member states fail to capitalize on this global “constitutional moment,” they may forfeit the best, perhaps the only, opportunity for comprehensive rulemaking. Months or more likely years later, the geostrategic landscape may be far less conducive to negotiating, adopting, or ratifying new treaties.⁴⁷

International law log rolling is a second cost of the two-stage model. Government delegates who negotiate and vote on treaties at IO conferences are aware that their support for a new treaty does not bind the state they represent. That decision takes place at a later date and in a different forum, when the state’s executive officials and legislators consider whether to ratify or accede to the agreement. Disassociating the decision to adopt a new treaty from the decision to render it legally binding allows IO delegates to vote in favor of treaties whether or not their national governments will ultimately accept them.⁴⁸ In one version of this two-level game,⁴⁹ government delegates who oppose an agreement trade their votes for promises of support for future treaty-making initiatives. In another version, “logics of appropriateness” rather than “logics of consequences”⁵⁰ diminish resistance to new treaty-making and allow delegates “to lend their ears to arguments based solely on principles, rationality and social justice.”⁵¹ The result is the adoption of numerous treaties with dim prospects of widespread ratification, an outcome that has afflicted IOs as diverse as the ILO,⁵² UNESCO,⁵³ and the Council of Europe.⁵⁴

⁴⁶ See MULTILATERAL TREATY-MAKING, *supra* note __, at 149, 154, 157-59 389-92; Lei Shi, *Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law*, 11 U.S.F. Mar. L.J. 299, __ (1998-99) (describing delays in ratifying International Maritime Organization treaties).

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⁴⁷ Cf. ALVAREZ, *supra* note 4, at 367 (noting the difficulty of treaty-making in “the absence of a perceived crisis in the area under discussion” and stating that the influence of some IOs “declines over time”).

⁴⁸ A few early commentators argued that a state which voted in favor of a treaty’s adoption at an IO negotiating conference had a moral obligation to ratify the agreement. More recent studies reject this position. [cites]

⁴⁹ Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int’l Org. 427 (1988).

⁵⁰ STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 5–6 (1999).

⁵¹ Efrén Córdova, *Some Reflections on the Overproduction of International Labor Standards*, 14 COMP. LAB. L.J. 138, 161 (1993). Of course, if a new treaty is perceived as harmful to a state’s interests, it will instruct its representatives to block its adoption. The United States’ strident opposition to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides a recent illustration. See *UNESCO Overwhelmingly Approves Cultural Diversity Treaty*, BRIDGES WEEKLY TRADE NEWS DIGEST, vol. 9, no. 36 (Oct. 26, 2005) (describing “all-out diplomatic offensive by Washington to modify the accord or delay its approval, including a letter from US Secretary of State Condoleezza Rice warning governments that the accord would ‘sow conflict rather than cooperation’”).

⁵² Helfer, *Understanding Change in IOs*, *supra* note 13, at 695-98 (analyzing the log rolling phenomenon as applied to the labor standards conventions adopted by the ILO).

⁵³ Standard-setting instruments of UNESCO, CL/3705 (2004),

<http://unesdoc.unesco.org/ulis/circulars/cl3705.pdf>.

⁵⁴ Complete List of the Council of Europe’s Treaties,

<http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

Cherry picking of obligations is a third disadvantage of the two-stage model. Because each member state decides whether to ratify or reject each treaty that an IO adopts on an *à la carte* basis, members can selectively accept only those agreements that advance their national interests. The absence of a mechanism to ensure that all states accept the same commitments encourages free riding and hold-out behavior. In addition, the lack of a formal nexus among free-standing, subject-specific treaties reduces opportunities to negotiate multi-issue package deals.⁵⁵ Such package agreements increase “the sense of obligation among states” and lengthen “the shadow of the future,” causing states to recalculate their short-term interests as “the immediate costs associated with cooperation [are] offset by long-run benefits of mutual assistance.”⁵⁶

Constraints on socializing outlier states are a fourth cost of bifurcating the decision to join an IO from the decision to ratify the treaties it adopts. The tiers of membership that this separation engenders reveal useful information about states’ preferences for cooperation. But this information-forcing function also has a darker side. It consigns outlier states (at least initially) to the most peripheral class of IO membership, a class whose habitués have the smallest number of treaty ratifications and, as a result, fewer opportunities for international monitoring, shaming, and peer pressure to modify state behavior.⁵⁷ As described above, IO membership itself provides some incentives for outlier states to move toward the more cooperation-minded core of the organization.⁵⁸ But such cooperation-enhancing moves are by no means inevitable, highlighting the importance of institutional design in determining an IO’s ability to socialize its membership subject to the constraints of the two-stage model.

A fifth and final cost of the two-stage model concerns the greater bureaucratization of IOs as compared to ad hoc treaty negotiation conferences. The centralization of IO administrative structures and the (at least minimal) independence of IO officials and staff facilitate the process of international lawmaking.⁵⁹ But they also increase opportunities for “agency slack”—behavior characterized by IOs serving their own interests rather than those of the member states.⁶⁰ Over time, routine behaviors and path dependencies can exacerbate these trends, leading some scholars to claim that IOs have a “propensity toward dysfunctional, even pathological, behavior.”⁶¹ The consequences for treaty-

⁵⁵ David W. Leebron, *Linkages*, 96 Am. J. Int’l L. 5, 11-12 (2002) (discussing “substantive linkage” and “strategic linkage” as alternative ways to connect diverse issues within a single umbrella agreement).

⁵⁶ Martin, *supra* note 33, at 96, 97.

⁵⁷ See Edward Weisband, *Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime*, 44 Int’l Stud. Q. 643, 652 (2000) (recognizing the “irony” that “[m]ember states with dismal records of ratification and commitment enjoy greater immunity against [ILO monitoring] than those with higher levels of commitment.”).

⁵⁸ See *supra* Part I.C.

⁵⁹ See *supra* Part I.B.

⁶⁰ Darren Hawkins et al., *States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 1, 7 (Darren Hawkins et al. eds., 2006); see also MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 43 (2004) (“IOs tend to define both problems and solutions in ways that favor or even require expanded action for IOs.”).

⁶¹ *Id.* at 158.

making are difficult to predict. Agency slack may result in an underproduction of new agreements, as resources are redeployed to tasks that provide greater rewards to IO officials and staff. But it may also generate a surfeit of rulemaking, as bureaucrats seek to prove their worth by encouraging the overproduction of treaties that, in practice, have little effect on state behavior or that disturb the normative clarity of prior agreements.⁶²

II. CUSTOMIZING THE TWO-STAGE MODEL OF INTERNATIONAL DELEGATION

The foregoing discussion reveals that the two-stage model of international delegation has costs as well as benefits. Why, then, has the model remained the dominant institutional form for treaty-making? As I explain below, states select from a lengthy menu of design choices and strategies to tailor the model's application to particular problems of collective action. Such customization mitigates the model's problematic aspects and enhances its benefits. But it also engenders second-order problems, raising fresh challenges to efforts by states to maximize the gains from international cooperation.

A. Pairing IO Membership to Substantive Treaty Obligations

Perhaps the most well-known strategy is to pair substantive legal commitments to a state's decision to join an IO. These substantive obligations vary widely in their breadth and depth. In "constitutional" IOs such as the United Nations, the World Trade Organization, and the European Union, the obligations entail an extensive delegation of authority and a concomitant reduction in the discretion of national decision-makers. In other IOs, substantive commitments are far more modest and enshrine only a general duty to cooperate with other members to achieve a vague set of goals and objectives.

Conditioning IO membership upon the acceptance of substantive legal rules also exhibits temporal variation. In the WTO, for example, states must accept an entire family of trade-related treaties as the price of admission to the world trade club. With only minor exceptions, this same "single undertaking" approach animates negotiations to expand the global trade regime. Awareness that legal commitments included in any future "round" of trade talks will bind the entire membership in part explains the excruciatingly slow pace of WTO negotiations.⁶³ This ongoing commitment to linking IO membership with future treaty commitments does not exist in the United Nations, whose political and expert bodies serve as venues for the adoption of multilateral agreements that member states are free to adopt on an *à la carte* basis.

Pairing IO membership with extensive substantive obligations avoids the cherry picking and log rolling problems of the two-stage model. It also limits the adoption of treaties

⁶² Compare ALVAREZ, *supra* note 4, at 369-70 (discussing the impediments to negotiating the Tobacco Framework Convention within the World Health Organization, many of which were attributable to the organization itself) with Córdova, *supra* note 51, at 151 (criticizing the overproduction of conventions in the ILO and lamenting that "[s]uch well-known and highly praised instruments as those dealing with hours of work, abolition of forced labor, freedom of association, and equality of opportunity and treatment lose prominence when they are lumped in the same category with those dealing with the certification of ships' cooks or paid educational leave").

⁶³ See Steinberg, *supra* note 5, at 359-67.

that are sparsely ratified. But these improvements are not costless. They are achieved by increasing the price of membership and reducing opportunities for preference revelation through states' subsequent ratification decisions.⁶⁴

Whether these tradeoffs yield net improvements depends upon the issues that the IO seeks to regulate. For multilateral and regional economic organizations, erecting a high barrier to membership may be optimal. Joining such a restrictive club is itself preference-revealing and facilitates enforcement of more liberalized trade rules among a smaller and more committed membership.⁶⁵ For environmental protection and global public goods treaties, by contrast, the inability to exclude non-members from the positive externalities generated by IO members may require lowering entry rules to encourage outsiders to join. This can be achieved by reducing the initial commitments that members must accept and then encouraging ratification of deeper protocols and amendments after they have joined the organization.⁶⁶

B. Treaty Duration and Renegotiation Clauses

Duration and renegotiation clauses offer a second way to modify the standard two-stage model. Treaties need not continue indefinitely. Instead, they may last only for a predetermined term of years, after which time the parties must reconvene to consider whether to terminate the agreement, revise its terms, or maintain the status quo.⁶⁷ Well-known examples of treaties with finite duration and renegotiation provisions include the Antarctic Treaty (thirty-year initial term), the Nuclear Non-Proliferation Treaty (twenty-five-year initial term), the International Coffee Agreement (six-year initial term), and the International Sugar Agreement (five-year initial term).⁶⁸

Reducing uncertainty is the standard explanation for why states draft treaties with finite durations and renegotiation clauses.⁶⁹ But these design tools, when applied to treaties

⁶⁴ Even where all IO members must accept a package of substantive obligations, states may reveal their taste for international cooperation in other ways, for example by invoking flexibility provisions, derogation clauses, phase-in options, and other “differential treatment” rules. Laurence R. Helfer, *Not Fully Committed? Reservations, Risk and Treaty Design*, 31 *Yale J. Int'l L.* 367, 375-77 (2006).

⁶⁵ See George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 *Int'l Org.* 397, 398 (1998) (arguing that restricting membership to states committed to a particular cooperative goal and then adding less committed states over time permits “deeper” cooperation as compared to broad, inclusive membership at the initial stages of treaty formation, followed by amendments and protocols).

⁶⁶ See Brunnée, *COPing with Consent*, *supra* note 9, at 15-31;. But see George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 *Colum. J. Transnat'l L.* 465, 467-68 (2000) (critiquing the efficacy of the “transformation model” of international cooperation in which states “generate increasingly greater commitment and deeper cooperation through a process of iterative, state-to-state negotiation”).

⁶⁷ Treaty duration provisions are similar to sunset clauses in domestic legislation. These clauses terminate the law unless a later legislature agrees to extend it indefinitely or for an additional term of years.

⁶⁸ RICHARD BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 50, 96-97 (1981); Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 *Int'l Org.* 289, 305, 313 (2001) [Koremenos, *Loosening the Ties*]; Barbara Koremenos, *Can Cooperation Survive Changes in Bargaining Power? The Case of Coffee*, 31 *J. Legal Stud.* S259, __ (2001). [*get pin]

⁶⁹ Koremenos, *Loosening the Ties*, *supra* note 68, at 291 (“The greater the agreement uncertainty, the more likely states will want to limit the duration of the agreement and incorporate renegotiation.”)

adopted within the framework of IOs, can also improve the cost-benefit ratio of the two-stage model. Forcing states to reassess collectively a treaty's operation and to consider modifications of its terms has several important benefits. First, renegotiation conferences provide an occasion to educate non-party IO members about the treaty's advantages. This socializing function may be particularly effective for member states that have signed but not ratified the treaty.⁷⁰ Renegotiation conferences also offer an opportunity to expand the number of states parties by creating revised package deals attractive to the entire IO membership. Even without these substantive changes, the return to first principles that such conferences engender may create a second "constitutional moment" for the organization that facilitates widespread treaty ratification.

C. Treaty House Cleanings and Ratification Campaigns

IOs can also mitigate the costs of the two-stage model by reviewing the corpus of adopted treaties and weeding out agreements that are outdated and promoting agreements that are central to the organization's mission. The ILO has been the most active IO in orchestrating such treaty house cleanings. During its nearly ninety-year existence, the ILO has adopted a staggering 185 conventions and 195 recommendations.⁷¹ Many of these instruments regulate workplace problems that no longer exist; others were adopted during in the two decades following the World War I and have since been superceded by more modern instruments covering the same subjects.

In the mid-1990s, the ILO Office (the organization's secretariat) launched a major initiative to prune international labor law's deadwood. After reviewing all ILO instruments,⁷² the Office urged states to denounce moribund conventions and to ratify the more modern treaties that replaced them.⁷³ It also proposed an amendment to the ILO constitution authorizing the organization to abrogate outmoded treaties still in force. More strikingly, ILO officials announced two "ratification campaigns"—one (launched in 1995) to promote the ratification of eight "fundamental" labor rights treaties that comprise international labor law's normative nerve center, and a second (begun in late 2005) to encourage ratification of the proposed constitutional amendment.⁷⁴ The ILO Office has judged the first ratification campaign to be "singularly successful." Over the

⁷⁰ Signatory states occupy a quasi-membership status relative to treaty parties. They are required not to defeat the treaty's object and purpose and may participate as observers at meetings of treaty parties. But they are denied the privileges of full membership, such as voting and participation rights. See Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1615 (2005). As such, signatory states may be especially likely to move from quasi to full membership status in response to the provision of information and socialization that treaty renegotiation conferences can engender.

⁷¹ Helfer, *Understanding Change in IOs*, *supra* note 13, at 653.

⁷² The review identified 73 up-to-date conventions and 76 up-to-date recommendations out of 185 conventions and 195 recommendations—a statistic revealing that more than 60% of ILO legal instruments were outdated. Helfer, *Understanding Change in IOs*, *supra* note 13, at 714-15.

⁷³ The Office's entreaties did not fall on deaf ears. It processed more than 250 denunciations of ILO conventions between 1996 and the middle of 2005, the large majority of which occurred automatically upon the ratification of an up-to-date revising convention. See *id.* at 715 & n.294.

⁷⁴ Int'l Lab. Office, Comm. on Legal Issues and Int'l Lab. Standards, *Improvements in the Standards-Related Activities of the ILO: A Progress Report*, GB.292/LILS/7 at 1 (Mar. 2005), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb292/pdf/lils-7.pdf>.

last decade, it has received more than 450 new ratifications, as a result of which nearly two-third of the organization's members have ratified all eight fundamental treaties.⁷⁵

The ILO is not the only IO to engage in treaty ratification campaigns. The recently-formed Counter-Terrorism Committee operating under the aegis of the United Nations Security Council has spearheaded an effort to increase ratification of multilateral anti-terrorism agreements, and the International Maritime Organization is promoting ratification and implementation of a convention addressing maritime labor and workplace safety at sea.⁷⁶ Individual countries and NGOs have also launched similar efforts targeting human rights and international criminal law agreements.⁷⁷

Treaty house cleanings and ratification campaigns alleviate the deleterious effects of treaty overproduction, cherry picking, and log rolling by emphasizing a core set of legal commitments that have receive an official seal of approval from the organization and its membership. As more and more member states cast off old agreements and ratify new ones, the pressure on the remaining countries to follow suit intensifies. Hold-out states that refuse to join the treaty bandwagon are forced to reveal their opposition to the agreements and risk becoming increasingly isolated.⁷⁸

Ratification campaigns are not unequivocally positive, however. If the treaties being promoted merely codify preexisting domestic practices, even ratification by the entire IO membership will be nothing more than an empty gesture.⁷⁹ Conversely, for treaties that require extensive changes in national legal systems, ratification ensures neither implementation nor compliance. Seen from this perspective, ratification campaigns can divert the organization's attention away from the more difficult tasks of providing technical assistance, monitoring state behavior, and deploying sanctions or other

⁷⁵ As of November 2005, the campaign had yielded 468 new ratifications. Of the ILO's 178 member states, 116 have now ratified all eight fundamental conventions. All together, the Office has received 88% of the total possible ratifications for the eight fundamental treaties. Int'l Lab. Office, *Promotion of Fundamental Conventions*, *supra* note 27, at 1-2.

⁷⁶ Strengthening Cooperation Against International Terrorism, Proceedings of the Vienna 2004 Follow-Up Meeting to the United Nations Counter-Terrorism Committee Special Meeting of 6 March 2003 on Strengthening Practical Cooperation against International Terrorism between Regional and International Organizations, Mar. 11-12, 2004, at 44-45, 74-77 (2005), http://www.unodc.org/pdf/crime/terrorism/UNCTC_Conference_Report.pdf; Int'l Lab. Office, Comm. on Legal Issues and Int'l Lab. Standards, *Improvements in the Standards-Related Activities of the ILO: A Progress Report*, GB.295/LILS/5 at 5 (Mar. 2006), <http://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/lils-5.pdf>.

⁷⁷ See Allison Marston Danner & Beth Simmons, *Why States Join the International Criminal Court* 17-18 (draft of Sept. 12, 2006) (on file with author) (describing efforts by Canada, European Union member states, and NGOs to promote ratification of the treaty establishing the International Criminal Court and the adoption of implementing legislation to give effect to the treaty).

⁷⁸ In the ILO, for example, the Director General publishes a report each year that identifies states that have failed to ratify all eight fundamental labor conventions and requests them to identify the specific obstacles to ratification. Int'l Lab. Office, *Promotion of Fundamental Conventions*, *supra* note 27, at 1. *But see infra* text accompanying note 80 (noting that several powerful and populous states have failed to ratify a majority of the eight fundamental conventions).

⁷⁹ See Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 Case W. Res. J. Int'l L. 387, 392 (2000) (labeling as "shallow" treaties that do little more than codify the status quo).

enforcement tools to achieve genuine adherence to international rules. Even where an IO possesses sufficient resources to engage member states on multiple fronts simultaneously, stressing the formalities of treaty adherence may give an false sense of progress. In the ILO ratification campaign for eight fundamental labor conventions, for example, a simple head count of new treaty accessions fails to disclose that the United States, China, and India—surely among the organization’s most powerful and populous member nations—have ratified only two, three, and four fundamental conventions, respectively.⁸⁰

D. Regime Shifting Between Rival IOs

Where timing issues, log rolling, cherry picking, socialization constraints, agency slack, or a combination of these problems render treaty-making excessively costly in one IO, states can respond not by seeking reforms within that organization but instead by shifting to more hospitable venues. The successful effort by the United States and European Community to move intellectual property issues from the World Intellectual Property Organization (WIPO) to the WTO—and the subsequent reaction by WIPO—provides the most famous illustration of this regime shifting strategy.⁸¹

In the early 1980s, entrenched divisions between industrialized and developing countries thwarted the adoption of new intellectual property rules at WIPO. With treaty negotiations in the specialized UN agency effectively deadlocked, the United States and European Community added intellectual property to the 1986 mandate for the Uruguay Round of trade talks leading to the creation of the WTO. The trade regime was superior venue for achieving American and European interests. The countries’ large and desirable domestic markets provided the US and EC with key negotiating leverage.⁸² And the regime’s amenability to package deals facilitated an exchange whereby developing states agreed to protect foreign intellectual property rights in exchange for reduced trade barriers in industrialized nations for agricultural products, textiles, and other goods.⁸³

The WIPO to WTO regime shift proved highly beneficial for intellectual property-exporting nations. But it also triggered a swift and powerful reaction at WIPO as

⁸⁰ Int’l Lab. Office, *Promotion of Fundamental Conventions*, *supra* note 27, at 3-4. In fairness to the ILO, the report expressly indicates which conventions these three countries, as well as others, have failed to ratify and the reasons for non-ratification.

⁸¹ Helfer, *Regime Shifting*, *supra* note 35, at 18-23. Examples exist in other issue areas. *See, e.g.*, David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 Am. J. Int’l L. 154, 155 (1995) (describing how states dissatisfied with the International Whaling Commission (IWC) created a new intergovernmental organization—the North Atlantic Marine Mammal Commission—which functioned as “an institutional release mechanism compensating for the IWC’s inability to moderate its strong antiwhaling position”).

⁸² Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 Am. J. Int’l L. 231, 232 (1997) (“richer countries tend to be more powerful in trade negotiations than poorer countries since, in the international trade context, ‘power’ may be seen as a function of relative market size”).

⁸³ Helfer, *Regime Shifting*, *supra* note 35, at 23-24; *see also* Michael P. Ryan, *The Function-Specific and Linkage-Bargain Diplomacy of International Intellectual Property Lawmaking*, 19 U. Pa. J. Int’l Econ. L. 535, 541 (1998) (distinguishing between “function-specific” lawmaking in WIPO and “linkage-bargain” lawmaking in the GATT and WTO).

officials and staff worked assiduously to reacquire the trust and patronage of the member countries who had orchestrated the shift.⁸⁴ The result was a healthy competition between the WTO and WIPO for policy dominance and state support.⁸⁵ Within months after the WTO's creation and after more than a decade of inaction, WIPO and its member states returned to intellectual property rule-making with renewed vigor, negotiating a raft of new treaties and undertaking an ambitious program to develop new nonbinding norms.⁸⁶

As this example illustrates, regime shifting counters the deleterious effects of the two-stage model in two distinct ways. First, it provides a fresh international venue in which to launch new treaty-making initiatives, a venue whose different procedural rules and negotiating strategies may expand the zone of international agreement. Second, it creates competition among rival IOs that helps to overcome path dependencies and institutional pathologies in the first organization. When not properly managed, however, regime shifting creates its own set of risks. Competition may lead organizations to engage in behaviors (such as the creation of new bureaucracies) that are inefficient or undesirable from a functional perspective.⁸⁷ And a proliferation of rulemaking venues may artificially increase the demand for new rules, resulting in a surfeit of duplicative and inconsistent treaties that diminish the normative coherence of international law.⁸⁸

E. Delegating Treaty Amending Authority to Member States

Delegating to a majority or supermajority of states parties the authority to adopt treaty amendments that bind the entire membership is the most significant departure from the standard two-stage model. It also diverges from the international law rule requiring an affirmative manifestation of consent before a state is bound to a new legal obligation.⁸⁹ As I explain below, however, commentators' descriptions of such delegated powers are often exaggerated and present a misleading picture of how frequently and to what degree treaty parties actually deviate from the consent principle.⁹⁰

⁸⁴ See J.H. Reichman, *Enforcing the Enforcement Procedures of the TRIPS Agreement*, 37 Va. J. Int'l L. 335, 354 (1997) ("Prior to the Uruguay Round, WIPO lost credit with the industrialized countries because of its scrupulous concern for the interests of developing countries Since the Uruguay Round, WIPO is seen as the cowed and altogether accommodating servant of dominant special interests in the United States and the European Union").

⁸⁵ See generally Joel P. Trachtman, *Institutional Linkage: Transcending "Trade and . . .,"* 96 Am. J. Int'l L. 77, 92 (2002) (discussing "the role of interorganizational competition").

⁸⁶ Helfer, *Regime Shifting*, *supra* note 35, at 25-26.

⁸⁷ BARNETT & FINNEMORE, *supra* note **Error! Bookmark not defined.**, at 37.

⁸⁸ See Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 Geo. L.J. 675, 697-702 (1995) (describing the problem of "treaty congestion" in environmental law, a phenomenon characterized by inefficiencies in operation and implementation, inconsistent obligations, gaps in coverage, and duplication of treaty goals and responsibilities).

⁸⁹ Vienna Convention on the Law of Treaties, *supra* note 10, art. 40.4 (stating that an "amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement"); see also *supra* Part I.A.

⁹⁰ See Swaine, *International Delegations*, *supra* note 6, at 1496-97 (reviewing objections of American commentators to international delegations of legislative power by the United States).

Delegations of treaty amending authority are highly variable.⁹¹ In general, however, they can be grouped into two broad categories: (1) delegations to adopt revisions, protocols, annexes, and other supplementary texts; and (2) delegations to enable these instruments to enter into force without the need for ratification.⁹² The first category relaxes the unanimity or consensus rule for approving amendments and authorizes their adoption by a qualified or a simple majority of states parties. The second class of delegations reverses the default rule of ratification by providing that supplementary texts will enter into force for all treaty parties unless they are rejected by a specified percentage of states within a designated time period. Such “tacit acceptance procedures” also allow individual countries to object to the proposed revisions (usually within the same time period), thus preventing their entry into force for the dissenting nation or nations alone.⁹³

These two types of delegations are inversely related in ways that preserve more than a modicum of sovereign consent. For example, a decision to adopt treaty amendments by a qualified majority vote “is typically used together with a ratification requirement” to “avoid a large loss of control for national actors.”⁹⁴ Conversely, amendments subject to a tacit acceptance procedure are adopted by consensus for similar reasons.⁹⁵ Only in exceptional cases involving ministerial or technical amendments do treaty revision rules even contemplate “permit[ting] a supermajority to adopt changes that are subject neither to ratification nor to objection by any individual party.”⁹⁶ So-called “adjustments” to the ozone-depleting substances regulated by the Montreal Protocol are the most widely cited example. However, the Montreal Protocol is close to unique among international agreements.⁹⁷ In addition, the majoritarian adjustments it authorizes are strictly limited in

⁹¹ For an early and influential survey, see Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in THE UNITED NATIONS LEGAL ORDER 109, 124-35 (Oscar Schachter & Christopher C. Joyner eds., 1995).

⁹² See AMERASINGHE, *supra* note 6, at 454-55 (distinguishing one-step and two-step procedures for revision of treaties establishing IOs, the former requiring only adoption of amendment by the membership and the later requiring, in addition, subsequent ratification by some or all of the treaty parties).

⁹³ Shi, *supra* note __, at 305-07; see also CLEOPATRA ELMIRA HENRY, THE CARRIAGE OF DANGEROUS GOODS BY SEA: THE ROLE OF THE INTERNATIONAL MARITIME ORGANIZATION IN INTERNATIONAL LEGISLATION 69 (1985) (describing the “contracting-out procedure” which “provides protection for States which seek to avoid being bound by [amendments] to which they have objected”); Swaine, *International Delegations*, *supra* note 6, at 1512 & n.71 (reviewing tacit acceptance procedures in environmental agreements). In treaties establishing IOs, where uniformity is essential to the organization’s operation, dissenting states often pay a high price for their objection. They must withdraw from the organization or face expulsion. See AMERASINGHE, *supra* note 6, at 415.

⁹⁴ Boockmann & Thurner, *supra* note 7, at 116.

⁹⁵ Frederick J. Kenney, Jr. & Vasilios Tasikas, *The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 Pac. Rim L. & Pol’y J. 143, 174 n.149 (2003) (“Consensus is particularly important in the IMO context because most IMO treaties . . . operate under the procedure of tacit amendment. . . . To get an amendment . . . approved . . . and to ensure that, after approval, objections are not filed, consensus must be reached before adoption of the amendments.”).

⁹⁶ Swaine, *International Delegations*, *supra* note 6, at 1513.

⁹⁷ There are precious few other examples, either in the environmental context or other issue areas. See *id.* at 1513-14 (discussing Montreal Protocol and Additional Protocol between the United States and the International Atomic Energy Agency); Boockman & Thurner, *supra* note 7, at 121 (surveying amendment procedures in 400 environmental agreements and concluding that only 17 instruments allowed for qualified majority voting without subsequent ratification; of these 17, 16 allowed dissenting states to opt out of the amendments); Brunnée, *COPing with Consent*, *supra* note 9, at 22 (discussing the Montreal Protocol and the Biosafety Protocol and stating that “[o]nly a handful of other examples exist where [multilateral

scope and include numerous safeguards that reduce to the vanishing point the risk that dissenting states will in fact be bound by amendments against their will.⁹⁸ Equally telling is the fact that “all adjustments to the Montreal Protocol to date have proceeded on a consensus basis rather than the supermajority vote provided for in the Protocol.”⁹⁹

As the above discussion implies, delegations of treaty-amending authority reduce cherry picking and log-rolling, with the greatest diminutions occurring for revisions that deviate furthest from the consent principle. In addition, such delegations increase socialization pressures on outlier states by tying them to obligations that bind the entire membership. But these same pressures also decrease the information-forcing effects of ratification (less so where individual opt out procedures exist) while increasing the risk that recalcitrant or poorly-resourced states will be trapped into noncompliance.¹⁰⁰ The faster pace of rulemaking that tacit acceptance procedures allow can also generate a surfeit of treaty revisions that impose undue burdens on member states and trigger calls for reform.¹⁰¹

III. BINDING IO MEMBER STATES TO UN-RATIFIED TREATIES: THE ILO EXPERIENCE

The customizations of the two-stage model analyzed above reveal the varied strategies that states employ to maximize the gains and minimize the costs of international delegations. None of these design choices, however, completely elides the distinction between joining an IO and accepting the treaties or other legal obligations that the organization or its membership subsequently adopts. In particular, none of these design variations give IOs (or their member nations acting collectively) the authority to impose new treaty obligations or treaty-related monitoring procedures on states solely by virtue of their status as IO members.¹⁰²

environmental agreements] allow [conferences of the parties] to adopt ‘adjustments’ to similarly substantive annexes without providing parties with an ‘opt-out’ possibility,” but noting that in those instances “the relevant decisions require adoption by consensus”).

⁹⁸ Adjustments must be adopted by consensus whenever possible and may only be adopted by a two-thirds majority “as a last resort.” The requisite majority “is ‘double-weighted’ and must include a majority of both industrialized and developing countries present and voting.” Brunnée, *COPing with Consent*, *supra* note 9, at 21. In addition, amendments are limited to the adjustment of chemicals that the parties have previously identified as harmful to the ozone layer and targeted for eventual elimination. Amendments that restrict the use new chemicals are subject to a more stringent affirmative ratification procedure. *Id.* at 22.

A second way that states control the treaty amendment process is by selecting the procedure by which a particular revision will be adopted. In the IMO, for example, the United States has argued that it would be inappropriate to adopt amendments to certain maritime treaties using the tacit acceptance procedure rather than requiring individual member state ratifications. Its opposition led to a compromise with European nations in which the IO officials and member states agreed to limit use of the expedited procedure in a variety of circumstances. *See Shi*, *supra* note 93, at 321-24 & n.157.

⁹⁹ Hollis, *supra* note 9, at 171.

¹⁰⁰ *See Shi*, *supra* note 93, at 310, 331 (reviewing complaints that the rapid entry into force of treaty revisions under the IMO’s tacit acceptance procedure has imposed severe compliance and implementation pressures on developing country members of the organization).

¹⁰¹ *Id.* at 311 (noting IMO member states’ opposition to overuse of the tacit acceptance procedure to amend maritime treaties and a subsequent resolution which limited use of the procedure to cases demonstrating a “‘clear and well-documented demonstration of compelling need,’ while taking into account the ‘costs to the maritime industry and the burden on the legislative and administrative resources of Member States’”).

¹⁰² *But see supra* note 4 (discussing UN Security Council).

There is one IO, however, which has long possessed precisely such authority. Since its founding in the aftermath of World War I, the ILO has engaged in treaty-making “with strings attached.”¹⁰³ These strings impose obligations on all member states with respect to all adopted labor conventions, regardless of their ratification status.¹⁰⁴ More strikingly, ILO officials and member states have repeatedly expanded this delegated power. They have done so both formally (by modifying the ILO constitution to increase the organization’s power to review compliance with un-ratified treaties and nonbinding recommendations) and informally (by construing the constitution to bind member states to un-ratified treaties and to authorize the creation of a complaints procedure to challenge states’ failure to comply with a subset of those obligations). How the ILO amassed these capacious rulemaking and monitoring powers is little known outside a small coterie of international labor law enthusiasts. I review that history below, focusing on why such broad delegations of authority served the interests of ILO member states.

A. The Creation of the ILO and the Arrogation of Power by ILO Officials

The founders of the ILO sought to combat the myriad hazards of the early 20th century workplace by creating a new rulemaking body to promulgate and enforce international labor standards. A critical challenge for the organization was how to apply those standards as widely as possible. The ILO’s founders recognized that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”¹⁰⁵ This statement succinctly captures the proverbial race-to-the-bottom, in which each country lowers its labor standards in a bid to attract foreign investment or aid its domestic industries, but which ultimately leaves all countries with the same share of trade and investment but suboptimal labor protections after the race has run its course.¹⁰⁶

One way to avoid these self-defeating policies was to authorize the ILO to function as a true international legislature, promulgating rules that would be automatically binding in the domestic legal systems of its member states. Prior to the First World War, several workers’ organizations lobbied for the creation of an IO with precisely such legislative powers. More surprisingly, the French and Italian delegations to the Versailles peace conference endorsed the workers’ demands, and the British delegate proposed a compromise in which member states would, absent exceptional domestic opposition, be required to ratify labor conventions within one year of their adoption.¹⁰⁷

¹⁰³ ALVAREZ, *supra* note 4, at 331.

¹⁰⁴ See Kirgis, *supra* note 91, at 115 (“a state—merely by being a member of the ILO—incurs significant responsibilities, and subjects itself to peer pressure, regarding not only conventions it ratifies, but also those of which it disapproves”).

¹⁰⁵ Constitution of the International Labour Organization, prmb., June 28, 1919, 49 Stat. 2712, 225 C.T.I.A. 373 [1919 ILO Constitution].

¹⁰⁶ Helfer, *Understanding Change in IOs*, *supra* note 13, at 673-74.

¹⁰⁷ See INT’L LAB. OFFICE, INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 32, 68-69 (1931) [ILO, THE FIRST DECADE].

Government officials ultimately rejected both proposals. However, they took the equally unprecedented step of granting membership to worker and employer groups from each member country.¹⁰⁸ This tripartite structure ensured that the non-state actors closest to the industrial workplace would have a direct and independent voice in creating and monitoring international labor rules. In particular, the drafters agreed that treaties would be adopted by a two-thirds vote of the entire ILO membership, with the result that “in an extreme case a draft convention . . . might be adopted even when the majority of government delegates voted against it.”¹⁰⁹

To provide a counterweight to this tripartite treaty-making power, member states reserved the right to ratify or reject any convention that the organization adopted. But they were not free to ignore the treaties altogether. Instead, the ILO constitution required states to submit all conventions to their respective political branches, which would then “consider the enactment of legislation or other action.” If, however, the government ultimately refused to ratify the treaty, “no further obligation shall rest upon the Member.”¹¹⁰

The goal of this mandatory submission procedure was to encourage states to ratify ILO conventions.¹¹¹ It soon became clear, however, that the procedure would not ensure widespread adherence to international labor standards. To remedy this problem, the ILO Office, with the strong support of labor groups, began to collect and publish information on compliance with un-ratified conventions and nonbinding recommendations. The Office justified this practice on functional grounds, as a means of improving its legal and technical assistance functions. Over time, however, this information-gathering exercise blurred the distinction between ratified and un-ratified treaties and habituated member states to the exercise of enhanced authority by ILO officials and monitoring bodies.¹¹²

B. Codifying the Authority to Monitor Compliance with Un-ratified Treaties

At the close of the Second World War, the ILO membership convened a constitutional conference to consider the organization’s place in the post-war legal order. The result was a major overhaul of the organization’s founding charter, including an expansion of its treaty-making and monitoring authority. Most notably, the new constitution codified member states’ obligation to report on compliance with un-ratified conventions and to

¹⁰⁸ Representatives of governments, organized labor, and employers participate in the work of the ILO in a ratio of 2-1-1, respectively. Worker and employer delegates are independent and do not vote with their respective governments. Helfer, *Understanding Change in IOs*, *supra* note 13, at 651.

¹⁰⁹ ILO, *THE FIRST DECADE*, *supra* note 107, at 69 (initial capitalizations omitted). In practice, the ILO has nearly always adopted conventions by large majorities of governments, workers, and employer delegates. See TORSTEN LANDELIUS, *WORKERS, EMPLOYERS AND GOVERNMENTS: A COMPARATIVE STUDY OF DELEGATIONS AND GROUPS AT THE INTERNATIONAL LABOUR CONFERENCE, 1919–1964* at 66–91 (1965).

¹¹⁰ 1919 ILO Constitution, *supra* note 105, arts. 405.5 & 405.8.

¹¹¹ See E. A. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE* 12 (1966).

¹¹² See ILO, *THE FIRST DECADE*, *supra* note 107, at 267–76, 310–12, 317–20 (reviewing efforts by the ILO Office to overcome obstacles to ratification of conventions and to gather information on the implementation of recommendations); see also HAAS, *BEYOND THE NATION-STATE*, *supra* note 23, at 253 (characterizing the ILO’s “indirect practice of studying the impact of unratified Conventions” as an “accretion[] in institutional autonomy and responsibility”).

identify impediments to future ratification.¹¹³ States were also required to disclose whether they had implemented the organization’s nonbinding recommendations.¹¹⁴

Strikingly, these expansions of the ILO’s constitutional mandate were proposed not by ILO officials but by government delegates. According to the official transcripts of the convention, the United States supported the expansions because its domestic labor standards were consonant with the major ILO conventions, although the country had not ratified many of those treaties due to federalism concerns.¹¹⁵ The organization’s power to monitor compliance with un-ratified conventions would thus impose little additional burden on the United States. But it could be used to highlight labor problems in other countries. The United Kingdom expressed similar views and proposed that member states periodically resubmit un-ratified conventions to their respective national legislatures—a proposal that the United States opposed and successfully defeated.¹¹⁶

Armed with these new monitoring powers, ILO Office began to review reports on compliance with un-ratified conventions and recommendations. Although such reports were often “onerous” and potentially “embarrassing,” by the mid-1960s a majority of member states were regularly or intermittently supplying information concerning these instruments. The least faithful respondents were developing and communist countries, which “apparently preferred defiance of the rules to the risks of exposure.”¹¹⁷ The recalcitrance of these states served as a partial backdrop for the creation of a new monitoring procedure authorizing labor unions to file complaints against ILO member states for infringing the right to freedom of association.

C. The Committee on Freedom of Association

In the late 1940s, with East-West rivalries increasing in intensity, the ILO and the newly-established United Nations began faced a mounting wave of complaints concerning the suppression of trade unions. In response to these allegations, the two IOs established a joint fact-finding and conciliation commission to conduct impartial investigations and

¹¹³ Constitution of the International Labour Organization, as amended Oct. 9, 1946, art. 19.5(e), 62 Stat. 3485, 15 U.N.T.S. 35 [hereinafter 1946 ILO Constitution] (obligating non-ratifying member states to “report . . . at appropriate intervals . . . the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention”).

¹¹⁴ *Id.* art. 19.6(d) (obligating member states to “report . . . at appropriate intervals . . . the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them”).

¹¹⁵ Concerns that United States membership in the ILO would upset the delicate balance between federal and state power were first expressed at the time of the organization’s founding. See Pitman B. Potter, *Inhibitions on the Treaty-Making Power of the United States*, 28 Am. J. Int’l L. 456 (1934) (reviewing objections to the United States’ membership in ILO on federalism grounds). The United States did not join the ILO until 1934, fifteen years after its establishment. *Id.*

¹¹⁶ See Int’l Lab. Office, Official Bulletin, *Discussion and Proposals Concerning the Constitution* 464-66 (Dec. 10, 1945); HAAS, BEYOND THE NATION-STATE, *supra* note 23, at 165 & 545-46 n.73.

¹¹⁷ HAAS, BEYOND THE NATION-STATE, *supra* note 23, at 264-65 & tbl. 5.

assist governments in resolving the complaints. However, the commission could not review complaints without the defending state's consent. Worker groups objected to this restriction on the commission's authority and lobbied the Governing Body, the ILO's executive arm, to establish a rival tripartite committee to review the same allegations.¹¹⁸

The Governing Body agreed to the workers' demands. It bypassed the joint conciliation commission and created a new Committee on Freedom of Association. As a creature of the ILO constitution—including its provision for monitoring un-ratified treaties—the new committee operated “free from the consent requirement.”¹¹⁹ More importantly, the Governing Body authorized the committee to review complaints regardless of whether defending governments had ratified two recently-adopted treaties¹²⁰ protecting the right to freedom of association.¹²¹

The Committee on Freedom of Association received its first complaints from national and international trade unions in 1951. Nominally, the committee possessed only a narrow procedural mandate—to screen the allegations and determine whether they merited submission to the Governing Body. In practice, however, the committee became the de facto mechanism for investigating the merits of a case.¹²² In this expanded role, it quickly evolved into a “revolutionary”¹²³ innovation in ILO monitoring, examining “allegations in situations in which the government concerned had neither ratified [the relevant conventions] nor given its voluntary agreement to the ILO to consider the matter.”¹²⁴ In the ensuing half century, the committee has issued nearly 2,500 decisions addressing a wide range of associational rights issues.¹²⁵

Why would ILO member states agree to create such an intrusive monitoring regime? And, even more surprisingly, why would they acquiesce in the committee's arrogation of

¹¹⁸ See ERNST B. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION: THE CASE OF FREEDOM OF ASSOCIATION* 25-30 (1970); C. WILFRED JENKS, *THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM* 187-200 (1957); HAAS, *BEYOND THE NATION-STATE*, *supra* note 23, at 381-83.

¹¹⁹ HAAS, *BEYOND THE NATION-STATE*, *supra* note 23, at 383; see also N. VALTICOS & G. VON POTOBOSKY, *INTERNATIONAL LABOUR LAW* 295 (1995) (stating that Committee's authority derived from the ILO Constitution, which protects freedom of association, and that, as a result, the committee was authorized to review complaints against member states “by virtue of their membership in the Organization alone”).

¹²⁰ Freedom of Association and Protection of the Right to Organize Convention, 1948, July 9, 1948, ILOLEX No. C87, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087>; Right to Organize and Collective Bargaining Convention, 1949, July 1, 1949, ILOLEX No. C98, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098>.

¹²¹ HAAS, *BEYOND THE NATION-STATE*, *supra* note 23, at 407-08 (“Conventions 87 and 98 are used as the relevant yardsticks for blaming or exonerating governments, irrespective of whether they have ratified these texts. . . . Being explicitly bound by these Conventions is . . . unnecessary because of the more general terms of the ILO Constitution and its capacity to generate binding norms.”) (emphasis omitted).

¹²² *Id.* at 383; ERIC GRAVEL ET AL., *THE COMMITTEE ON FREEDOM OF ASSOCIATION: ITS IMPACT OVER 50 YEARS* 10-11 (2002).

¹²³ Nicolas Valticos, *Les Méthodes de la Protection Internationale de la Liberté Syndicale*, in I RECUEIL DES COURS 85 [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] (1975).

¹²⁴ Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, 15 Eur. J. Int'l L. 457, 481 (2004) [Alston, *Core Labour Standards*].

¹²⁵ GRAVEL ET AL., *supra* note 122, at 11.

new monitoring powers? Ernst Haas's magisterial mid-century study of the ILO answers these questions by analyzing the Cold War rivalries then pervading the organization:

The major democracies never liked the Committee, but they learned to live with it as the best way to counter communist charges with full publicity. . . . The Soviets . . . took special delight in exploiting the procedure for anti-colonial and Cold War purposes, and thus could not very well denounce the machinery when it was turned against them.¹²⁶

In short, the committee expanded and thrived because both democratic and socialist countries utilized this "supposedly harmless procedural device" for their own ends. "As an unintended consequence of [these] propagandistic motives, the ILO clients came to acquiesce in a totally unplanned growth in institutional competence."¹²⁷

D. The Declaration on Fundamental Principles and Rights at Work

The ILO's most recent expansion of its authority to binding member states to un-ratified treaties is also its most ambitious. In the mid-1990s, the organization faced a crisis. It feared being eclipsed by the new and powerful WTO, which was considering adding labor standards to its mandate at the urging of industrialized governments and civil society groups. The issue came to a head at a 1996 WTO ministerial meeting. The trade ministers recognized the relationship between free trade and labor, but rejected calls to enforce labor standards with WTO sanctions. Instead, the ministers "propel[led] the issue back into the ILO's court by reasserting . . . the importance of the core rights dimension of globalization and the leading role of the ILO in managing that issue."¹²⁸

The ministers' actions served as a catalyst for the ILO to return to first constitutional principles. Taking a page from the WTO's book—in particular, its rule that states must accept a package of treaty commitments as a condition of joining the organization—the ILO membership, aided by the ILO Office, sought to develop a mechanism to apply core international labor standards regardless of whether member states had ratified the treaties protecting those standards. The result was the Declaration on Fundamental Principles and Rights at Work,¹²⁹ approved in June 1998 by a vote of 273 in favor, none opposed, and forty three abstentions—a seemingly strong show of public support which in fact masked significant dissension among government, worker, and employer delegates over the propriety of the Declaration and its contents.¹³⁰

¹²⁶ HAAS, BEYOND THE NATION-STATE, *supra* note 23, at 415-16.

¹²⁷ *Id.* at 383.

¹²⁸ Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 Eur. J. Int'l L. 409, 421 (2005).

¹²⁹ Int'l Lab. Org., Declaration on Fundamental Principles and Rights at Work (June 1998), <http://www.ilo.org/public/english/standards/decl/declaration/text/tindex.htm> (follow "text of the declaration" hyperlink) [1998 Declaration].

¹³⁰ Brian A. Langille, *The ILO and the New Economy: Recent Developments*, 15 Int'l J. Comp. Lab. L. & Ind. Rel. 229, 249 (1999) [Langille, *Recent Developments*]. As Brian Langille explains in his blow-by-blow account of the Declaration's genesis, "[v]irtually every aspect of the text of the substance of the Declaration was contested and debated at excruciating length," and "[u]ncertainty as to whether the

In its final form, the Declaration is a succinct restatement of the four core labor rights—freedom of association, the elimination of forced labor, the abolition of child labor, and non-discrimination in employment—protected in the eight “fundamental” ILO conventions.¹³¹ It requires member states “to respect, to promote and to realize, in good faith[,]” the “principles concerning the[se] fundamental rights.”¹³² Because these obligations emanate from the ILO constitution—including its provision for monitoring of all ILO instruments—they apply to all members without regard to the treaties they have adopted or their level of economic development.¹³³ By anchoring these obligations in “the very fact of membership in the Organization,”¹³⁴ the Declaration ingeniously mimics the WTO’s single undertaking approach using the ILO’s existing constitutional structure.

In addition to its normative commitments, the Declaration creates a new monitoring procedure to review government and private sector conduct. The ILO has given this “follow-up mechanism” a high degree of institutional support and funding.¹³⁵ The mechanism features an annual performance review of states which have not yet ratified all of the fundamental conventions and an annual “Global Report” that addresses one of the protected rights in depth. “The aim of each Global Report is to provide an overall picture of the trends and evolution with respect to the right concerned both in countries which have ratified the relevant conventions, and in those which have not.”¹³⁶

The creation of membership-wide obligations and monitoring mechanisms has a partial precursor in the Committee on Freedom of Association discussed in the previous section. But the fanfare accompanying the Declaration’s adoption suggests something considerably more momentous. Many observers heralded the application of legal obligations to all member states as “nothing short of a revolution in legal terms”¹³⁷ and a “‘constitutional moment’ in the life of the ILO.”¹³⁸

Why would ILO members once again expand the organization’s authority to blur the boundaries between IO membership and treaty ratification? Commentators offer divergent ideational and instrumental explanations. For international law optimists and

Declaration would be adopted existed, literally, to the very last moment of the [ILO’s] June conference.” *Id.* at 248, 231. Opponents delayed a vote until many delegates had left Geneva, hoping to reduce the favorable votes below the required quorum. In the end, the Declaration received only nine votes more than the minimum required for adoption. *Id.* at 249.

¹³¹ See *supra* note 74.

¹³² 1998 Declaration, *supra* note 129.

¹³³ See Langille, *Recent Developments*, *supra* note 130, at 244 (stating that Declaration was based on provisions of ILO constitution requiring member states to report on un-ratified treaties).

¹³⁴ *Id.*

¹³⁵ Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 *Eur. J. Int’l L.* 439, 444-45 (2005).

¹³⁶ *Id.* at 445.

¹³⁷ Francis Maupain, *The Liberalization of International Trade and the Universal Recognition of Workers’ Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-up*, in *SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENTS AND HUMAN RIGHTS* 35, 44 (Maria Gavouneli & L.A. Sicilianos, eds. 2001).

¹³⁸ Alston, *Core Labour Standards*, *supra* note 124, at 459 (noting but not endorsing this viewpoint).

ILO supporters, the Declaration reflects a “a moment of renewal and reaffirmation by the [organization’s] nearly global membership of basic constitutional values and commitment to social justice on the basis of economic progress.”¹³⁹ According to this view, the ILO responded to the “identity crisis” that the WTO’s rejection of a trade-labor linkage engendered by rededicating itself to the values and objectives that had animated the organization since its founding.¹⁴⁰

For skeptics and realists, by contrast, instrumentalist logic and state interests explain the Declaration’s genesis. According to these observers, developing countries and employers viewed the Declaration as a way to pay lip service to the linkage between trade and labor but avoid any new treaty obligations or stringent monitoring mechanisms.¹⁴¹ Worker groups emphasized the document’s focus on membership-wide obligations and hoped its follow-up mechanism would evolve into a more legalistic, complaint-driven process, as did the Committee on Freedom of Association before it.¹⁴² The United States backed the Declaration for two reasons: first, to highlight its domestic protection of labor rights while obscuring its failure to ratify all but a handful of ILO conventions,¹⁴³ and second, to legitimize its promotion of workers’ rights in other countries through the imposition of unilateral trade sanctions and the inclusion of labor protection clauses in bilateral and regional trade pacts.¹⁴⁴

The accuracy of these competing accounts of the Declaration’s origins—and their power to predict its future influence on member states’ labor practices—remain subjects of lively debate among ILO officials and academic commentators, a debate that is likely to continue for the foreseeable future.¹⁴⁵

IV. RECONSIDERING THE TWO-STAGE MODEL OF INTERNATIONAL DELEGATION

The ILO’s increasing authority to police compliance with un-ratified treaties elides the different phases of the two-stage model of international delegation. When the ILO imposes obligations on states solely by virtue of their status as IO members, it comes close to exercising the powers of a domestic legislature to bind supporters and dissenters alike. But the ILO’s powers are *sui generis*. And its distinctive history and membership structure make it highly implausible that states will delegate analogous quasi-legislative authority to other IOs in the near term.¹⁴⁶

¹³⁹ Langille, *Recent Developments*, *supra* note 130, at 232 (describing but ultimately rejecting this view).

¹⁴⁰ *Id.* at 233-34.

¹⁴¹ Alston, *Core Labour Standards*, *supra* note 124, at 470-71.

¹⁴² Langille, *Recent Developments*, *supra* note 130, at 247.

¹⁴³ Janet Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 Int’l J. Comp. Lab. L. & Ind. Rel. 269, 279 (2001).

¹⁴⁴ Alston, *Core Labour Standards*, *supra* note 124, at 495-506 (describing the United States’ reliance on the Declaration to support its unilateral, bilateral, regional trade and labor policies).

¹⁴⁵ See Helfer, *Understanding Change in IOs*, *supra* note 13, at 711 (reviewing claims of the Declaration’s proponents and its critics and citing additional authorities); Leah F. Vosko, *The Shifting Rule of the ILO and the Struggle for Global Social Justice*, 2 Global Soc. Pol. 19, 28-32 (2002) (same).

¹⁴⁶ Kirgis, *supra* note 91, at 119. A few UN specialized agencies (UNESCO, WHO, and FAO, to be precise), have mimicked the ILO’s more modest innovations in treaty-making, such as requiring all member states to submit adopted conventions to the appropriate domestic authorities for consideration and

Nevertheless, the ILO's example undercuts the prevailing doctrinal wisdom that binding member states to un-ratified treaties is antithetical to international law.¹⁴⁷ It also suggests the existence of a non-trivial category of cooperation problems for which the benefits of binding the entire IO membership outweigh the costs. When such problems arise, states should rationally delegate authority to bind all member nations to international rules without the need for individual expressions of consent. However, because the costs of such delegations are both immediate and extremely high whereas their benefits are less certain and accrue over an extended period of time, states will refrain from delegating the power to bind dissenters even when it would be in their long-term self-interest to do so.

I accept this approach to state decision-making, but nevertheless seek to identify the conditions under which delegations of legislative authority may be cost-effective. I first review the benefits and costs of a one-stage model and then consider institutional design features that government negotiators might use to minimize the costs and maximize the benefits of binding IO member states to un-ratified treaties.

A. The Benefits of a One-Stage Model

A core benefit of the one-stage model is the enhanced credibility it gives to a state's initial decision to join an IO. Unlike in the two-stage model, IO membership is not an institutionalized version of cheap (or at least inexpensive) talk.¹⁴⁸ To the contrary, membership sends a strong signal of the seriousness of a state's intent to cooperate, including its pre-commitment to whatever rules the organization later adopts. Other than the ILO, the international legal system has no experience with such capacious delegations of legislative authority, making it difficult to predict when such a strong pre-commitment would serve states' individual and collective interests.¹⁴⁹ Pressing global crises whose solution requires the participation of all nations are one plausible candidate, with controlling emissions of greenhouse gases perhaps the mostly likely contender if the physical manifestations of global warming become more pronounced and the existing climate change regime fails.

In addition to enhancing the credibility of membership decisions, a one-stage model of international delegation eliminates or reduces several costs associated with a two-stage model.¹⁵⁰ Perhaps most importantly, since agreements adopted by the organization bind

then "report[] back to the organization" on the actions taken, if any. Sands & Klein, *supra* note __, at 147. In practice, however, these rules are rarely followed. See Kirgis, *supra* note 91, at 117.

¹⁴⁷ Whether such delegations are antithetical to domestic constitutional law is a subject outside the scope of this paper. See Curtis A. Bradley, *Unratified Treaty Amendments and the Constitutional Process* (draft on file with author). It bears noting, however, that state practice on this point is conflicted. On the one hand, several countries interposed constitutional objections to a proposal by the UN Secretariat that treaties automatically enter into force unless a state objects. See MULTILATERAL TREATY-MAKING, *supra* note __, at 250 (Australia), 152 (Germany), 153 (Mexico). Yet these same states are also parties to numerous IO-sponsored multilateral instruments that contain tacit acceptance procedures. [cite Montreal Protocol and IMO website]

¹⁴⁸ [cite UN cheap talk article in IO]

¹⁴⁹ [Barrett on individual and collective rationality]

¹⁵⁰ See *supra* Part I.C (describing the costs of the two-stage model).

all member states, cherry picking among treaties is precluded. As a result, states cannot free-ride on the cooperation of others or engage in hold-out behavior by refraining from ratifying adopted agreements or by threatening to do so.¹⁵¹

A one-stage delegation model also substantially curtails treaty log-rolling and the associated overproduction of legal instruments.¹⁵² The desire by government delegates to trade treaty provisions does not vanish, of course. But the inability of member states to avoid ratifying an adopted agreement channels these trades into a smaller number of negotiations, making the adoption of cooperation-enhancing, multi-issue package deals far more attractive.

Consider next issues of timing. By removing state-by-state ratification, treaties adopted under the one-stage model enter into force far more rapidly. In the analogous area of technical revisions to maritime, communications, and transportation treaties, for example, new rules enter into force for parties to the principal agreement on average between 12 and 24 months after their adoption—far faster than the two-stage model. When these tacit consent procedures are coupled with provisional application rules, amendments become effective immediately.¹⁵³

The time savings achieved by rapid entry-into-force rules must be discounted by the slower pace of negotiating membership-wide legal obligations. Amendments adopted using tacit consent procedures do not appear to take longer to conclude than amendments subject to ratification.¹⁵⁴ However, “governments have been loathe to apply [such procedures] to treaty norms other than rather technical standards usually found in annexes or appendices.”¹⁵⁵ This reticence suggests that the application of the one-stage model to consequential treaty commitments would engender protracted debate.

IOs can facilitate these more extensive negotiations, much as they do in a traditional two-stage model.¹⁵⁶ If anything, the information-gathering, issue-identification, and agenda-setting functions of IO officials and staff will be even more consequential, given the higher stakes associated with any ensuing agreement. However, IOs are likely to assume additional cooperation-enhancing functions in a one-stage model. For example, they can

¹⁵¹ Of course, commitment does not ensure compliance. Treaties that are not incentive-compatible or that allow individual states to reap short-term gains from defection will be at risk of free riding in the form of noncompliance, at least if the agreement fails to include strong monitoring mechanisms. [**Downs & Rock on WTO; Barrett on incentive compatibility**]

¹⁵² Log-rolling is not eliminated, since State A’s delegates can still trade their support for State B’s treaty initiative in exchange for state B’s support of a future treaty advocated by State A. But such trades are dramatically more costly, since, unlike in a two-stage model, state A cannot eschew the obligations in the first treaty by declining to ratify it.

¹⁵³ See Kirgis, *supra* note 91, at 124-33; Peter H. Sand, *International Cooperation: The Environmental Experience*, in PRESERVING THE GLOBAL ENVIRONMENT 237, 251-52, 254-56 (J. Matthews, ed. 1991).

¹⁵⁴ Anecdotal studies of treaty amendment procedures do not reveal a time difference between negotiating revisions that require subsequent ratification as compared to revisions that enter into force without ratification. All other things equal, it is reasonable to expect that states would pay closer attention to negotiating favorable rules for the second type of revision rather than the first. [**cites**]

¹⁵⁵ Kirgis, *supra* note 91, at 134.

¹⁵⁶ See *supra* Part I.B.

create new mechanisms and venues to enhance states' voice in rulemaking—an inevitable byproduct of the closure of exit.¹⁵⁷ In addition, IO officials can help to develop a menu of treaty design features to customize obligations for different categories of states. Phase-in provisions, flexibility clauses, and differential-applicability rules provide a much-needed safety valve for commitments that bind the entire IO membership.

[discuss additional benefits, including impact on socialization?]

B. The Costs of a One-Stage Model

There are serious obstacles to a one-stage model of international delegation. The most obvious are sovereignty costs—defined as “reductions in state autonomy” from the “transfer of the state’s decision-making authority to other actors.”¹⁵⁸ In a recent analysis of the sovereignty costs associated with different types of international delegations, the authors rank legislative delegation—including the power to create or amend treaties—as the most costly.¹⁵⁹ Delegating the authority to compel adherence to un-ratified treaty obligations expands this power to its theoretical limit, although in practice the loss of domestic decision-making power will vary with the delegation’s subject matter and temporal scope.

Concerns with the accountability of IOs and the legitimacy of the rules they generate are a second major concern of a one-stage model. The core conceptual problem is easy to identify. International institutions are difficult for any one nation to influence and even further removed from the myriad government agencies, interest groups, and individual citizens affected by their decisions. In theory, states possess a range of control mechanisms to limit agency slack and limit IO pathologies.¹⁶⁰ In practice, however, these mechanisms are often slow and cumbersome, with the result that IOs often develop in ways that their founding members did not anticipate.¹⁶¹

These sovereignty and accountability concerns have pernicious consequences for many of the two-stage model’s benefits. Perhaps most importantly, they dramatically increase the price of joining an IO by pairing the initial membership decision with a delegation of ex

¹⁵⁷ Closure of exit can occur either because states are formally barred from leaving IOs or because their practical options for defection are reduced or eliminated. See J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403, 2410-12 (1991) (applying the concepts developed by ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970)). For a recent analysis of the relationship between exit and voice in the WTO, see Joost Pauwelyn, *The Transformation of World Trade*, 104 Mich. L. Rev. 1 (2005).

¹⁵⁸ Bradley & Kelley, *supra* note 2, at 7. In theory, sovereignty costs can be incurred without violating the consent principle, since nothing in international law precludes a state from delegating in advance its promise to adhere to treaties yet to be negotiated. As a practical matter, however, broad ex ante delegations entail a considerable diminution of consent given the risks and uncertainties of international politics.

¹⁵⁹ *Id.* at 12.

¹⁶⁰ Michael N. Barnett & Martha Finnemore, *The Politics, Power and Pathologies of International Organizations*, 43 Int’l Org. 699, 718 (1999).

¹⁶¹ A recent wave of scholarship seeking to develop global administrative law principles may eventually yield more robust regulatory mechanisms to police IO decision-making. See Symposium, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 1-377 (2005); Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. Int’l L. 1-278 (2006).

post lawmaking powers. Depending on the issue area, delegating such authority will be unproblematic for some countries. (Low-lying and island nations would, for example, eagerly join an organization empowered to find a multilateral solution to global warming). Other nations may need to be enticed (or coerced) to join through material or financial inducements (or threats). Which form of inducement is used will depend on whether the proponents of the new regime are hegemonic or weak states.¹⁶²

An increase in compliance costs are another negative consequence. It is one thing to adopt rules that nominally bind an entire IO membership. It is quite another to enforce compliance with those rules. The difficulty of achieving compliance with consensual treaty obligations in a decentralized legal system is well known. It would be that much more challenging in a system of ex ante delegation of lawmaking power. One response to this challenge would be to enhance the mechanisms for enforcement and increase the penalties for noncompliance. But such mechanisms and penalties present their own collective action problems.

[discuss additional costs]

C. Triangulating IO Lawmaking Through Institutional Design

[This final section will consider various institutional design features that could be used to increase the benefits and reduce the costs of one-stage international delegations. It may also address how a one-stage model would operate for IOs that regulate collaboration versus coordination games, and public goods versus club goods.]

¹⁶² Cf. Ronald B. Mitchell & Patricia M. Keilbach, *Situation Structure and Institutional Design: Reciprocity, Coercion, and Exchange*, 55 Int'l Org. 891, 902-03 (2001) (analyzing threats and inducements that powerful and weak states, respectively, use in response to asymmetric environmental harms).