The Legalization of Global Economic Governance: Contracting or Multilateralism?

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Abstract:

Political scientists tend to treat legalization as a single category with varying dimensions of obligation, precision and delegation. These legalization variables do not capture variation in the form, nature and structure of legal agreements, thereby missing the varying ways that public interest are or are not protected. This article defines three legal ideal types– transnational private contracting, interstate contracting and principled multilateralism–with a focus on how the choice among these forms excludes actors and implicates public interests. We advance three arguments: 1) states are always making choices, intentionally or tacitly, about which legal type governs international behavior; 2) these choices have distributional and political consequences; 3) global economic governance combines legal forms within regime complexes to either address or exclude public concerns. The focus on legal form is therefore a way to understand how legalized globalization balances and undermines the balance between private and public rights. Political scientists should be studying, investigating, and explaining the full range of these choices and their consequences.

It is well recognized that legalizing and judicializing international agreements transforms the politics that follow. Making an agreement in the form of law creates legal obligations (duties) parties owe each other. Legal rights shape the process and outcome of subsequent bargaining among states and private parties. The involvement of compliance arbiters opens a possible remedy for breach, as well as the risk that rules may be interpreted and applied in ways the negotiating parties did not expect. States and private actors may prefer to avoid third party adjudication, but where neither can block adjudication from proceeding, the prospect of third-party review enhances the negotiating leverage of actors who have law on their side. Legalization and judicialization in these ways transform discussions over what compliance looks like, the nature of negotiation and diplomacy in the wake of the agreement, and how global rules operate in practice.[1]

Political scientists tend to treat legalization as a single category with varying dimensions of obligation, precision and delegation.[2] Yet as lawyers and stakeholders well know, there is important variation in the form, nature, and structure of legal agreements, and advantages and disadvantages associated with these differences. For example, those who care about issues such as refugees, human rights, and environmental protection often prefer multilateral agreements that address problems on a global scale, in part because multilateral policymaking may be more accessible to weaker countries and stakeholders.[3] Powerful states may prefer

[1] Alter 2014. Alter, Helfer, and Hafner Burton, 2019.
[2] Abbott et al., 2000.
[3] Tallberg 2013.

bilateral agreements because fewer compromises may be needed, pressure is a more effective negotiating tactic, and renegotiation is easier. Corporate lawyers and firms often prefer to govern transnational matters through private contracts instead of mandatory public laws because they can set the terms of exchange, choose their adjudicators and the law governing their contracts, and gain firm-specific remedies. This last category– private contracting– often garners less attention because policymakers and scholars tend to focus on agreements drafted by states.

This article uses the device of three ideal types of international legal agreements– transnational private contracts, interstate contracts and principled multilateral agreements–to show what is at stake in the form of legal agreements. Our primary focus is global economic agreements, and our central concern is how the choice among these three legal forms includes and excludes public interests. We focus on the question of "to whom are duties owed?" as well as two additional questions that follow: 1) what types of remedies result from breach? 2) who participates in implementing the agreement and who can be excluded? These questions get at whether actors that are not participants in making an agreement nonetheless obtain rights, and whether actors affected by an agreement may be excluded from consideration in implementing the agreement. Additional features may vary across the ideal types, and the consequences of choice may be broader than the dimensions we are assessing. For example, adjudication of disputes over multilateral agreements is arguably better suited for developing international law that can shape international negotiations. Private contracting might be more flexible and adaptable to market changes. Our goal is to highlight trade-offs, so we will describe the ideal types in stark terms.

We make three claims. First, states are always actively or tacitly deciding which of the three legal types will govern global relations. To advance this claim, we need to show that private contracting cannot govern international economic activity without state assent.

Second, some actors gain legal rights and others are de facto dispossessed of rights and power by this choice. Thus, the different legal forms are not merely functional substitutes. They include implicit decisions about who legal duties protect and who they exclude. In so doing, they establish substantive legal rights and processes that determine participation in subsequent negotiations, shape economic and political outcomes, and constrain the freedom to change extant rules going forward.

Third, international regime complexes—substantively connected regimes that scholars have recognized govern health, security, refugees, tourism, environmental issues, trade, and more[4]—address some issues as private contracts, others as interstate contracts, and still others via principled multilateralism. The choice of contracting or multilateralism to govern specific issues influences how related issues are governed (or not) by other substantively connected regimes and agreements. Consequently, only by examining all three legal forms within a regime complex can one see the choices through which states and private parties address externalities or systematically ignore them. These choices may also generate enforceable legal rights for some stakeholders, while disempowering, excluding, or generating unenforceable rights for other stakeholders. For example, critics have charged that by creating private rights for energy producers, the multilateral Energy Charter Treaty (ECT) complicates state efforts to fulfill Paris

[4] Alter and Raustiala, 2018.

Climate Change commitments.[5] This example demonstrates how earlier distributions of duties and rights can have a downstream impact on states and the world's collective ability to address the challenges generated by globalization. [6]

In what follows, we first situate our analysis in international relations debates about legalization, judicialization, rational design, and international regime complexity. We argue that these debates miss how legal form is consequential and that the choice across the three options may not reflect rational efficiency or optimality. Next, we define the three ideal types, offering examples from global economic law and beyond. We then explain how the three forms work in tandem, developing our argument about international regime complexes. The takeaway for political scientists is that we need to actively investigate the three forms that are part of international regime complexes. The take away for policy-makers is that we should intentionally be using all three legal forms to shore up the pursuit of collective objectives.

I. Legalization, rational design and international regime complexity: Contributions and blind spots

This section situates this study in literature that emphasizes, like we do, the design of international agreements. This literature can be divided into two strands. The first, the legalization and rational design literatures, focuses predominantly on what states decide and do, using deductive theorizing to hypothesize why states make the choices that scholars observe. This literature often implies that individual state choices about how to design international agreements are rational and functionally desirable. The second, the literature on international regime complexity, does not presume that the choice of legal form is optimal or rational. Rather, it emphasizes that legalization decisions are often entrenched and path dependent. We situate ourselves in this second literature, arguing that the existence of all three forms impacts how states and private actors negotiate going forward. In particular, we treat private contracting as a type of international governance that states intentionally or tacitly choose, and we argue that private contracting, and to a lesser extent interstate contracting, can crowd out public concerns. Our focus on global economic governance may mean that we are examining an especially legalized international policy domain, but as our many examples demonstrate, our ideal-type discussion is applicable to a broad range of international subject matters.

The content and structure of international agreements was a focus of two special issues, one focused on legalization dimensions and another on the overall rational design of international agreements. The special issue *Legalization in World Politics* theorized about how international agreements could vary in obligation (nonbinding or binding), precision (how vague or precise the substantive terms of the agreement are), and delegation (whether the

[5] Jennifer Rankin "Secretive court system poses threat to Paris climate deal, says whistleblower" *The Guardian* November 2, 2021 at https://www.theguardian.com/environment/2021/nov/03/secretive-court-system-poses-threat-to-climate-deal-says-whistleblower, last visited December 12 2021.

[6] Alter and Nelson discuss this phenomenon as a "disruptive sequence" where change may be initiated by actions taken in outside institutions, yet comes to impact and constrain decision-making in substantively connected international regimes. Alter and Nelson in progress.

agreement authorizes third parties to monitor and adjudicate aspects of the agreement).[7] The special issue on *Rational Design of International Institutions* explored variation in the design of international agreements, probing the relationship between a set of dependent variables (e.g. number of members, the scope of the agreement, the centralization of institutional tasks, state control mechanisms) and a set of structural-functionalist independent variables (e.g. distributive issues based on the subject-matter of the agreement, enforcement problems given the nature of the issue, the number of actors with joint-welfare concerns, and the extent of uncertainty).[8]

Both the *Legalization* and *Rational Design* issues, as well as literature drawing on and expanding their insights, treat the unit of analysis as individual agreements or even individual obligations. The relevant actors are states, the relevant outcomes are intergovernmental agreements, and the emphasis is on the factors that push states to design specific features of those agreements. These studies often explicitly or implicitly assume a blank slate against which states negotiate. While state interests are factored in, how prior national, international and private legal constraints matter are largely ignored in order to focus on discrete choices that states make during negotiations. Perhaps assuming that states can always renegotiate the agreement, scholars generally do not consider either unintended consequences or whether and how design decisions may impact later negotiations. If international legal agreements create downstream costs—which the literature on credible commitments has long argued they can—changing course may be a difficult or nonviable option. In this sense, the *Legalization* and *Rational Design* projects minimize both the complexity of the international system and the temporal dimension in which international diplomacy occurs.

To be sure, insights from these projects remain relevant for our study. States may sometimes deliberately choose the form of agreement because of that form's effects (as the rational design literature would assume).. For example, Thomas Oatley's *Rational Design* contribution found that some economic governance issues are better addressed multilaterally rather than bilaterally due to the structure of the problem.[9] Power also matters. Ronald Mitchell and Patricia Keilbach focused on how power and the distribution of downstream adverse costs of environmental problems created incentives that the rational design of transnational cooperative solutions reflected.[10] For our purposes, Lloyd Gruber's focus on how power asymmetry shapes international agreements is also relevant. Gruber hones in on how some states gain leverage because they can fairly easily walk away from a cooperative arrangement. We extend his insight about 'go it alone' power to bilateral and private contracting.[11]

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[7] Abbott et al., 2000.

[8] Koremenos, Lipson, and Snidal, 2001. Barbara Koremenos then took the project significantly further, testing updated hypotheses on a random sample of 254 treaties that covered a range of subject-matter issues. (Koremenos 2016.)

[9] Oatley argued that replacing a bilateral financial clearing house with a multilateral system was a first step that later allowed for a multilateral trade system Oatley, 2001.

[10] The authors argue that when the adverse externalities are symmetrical, reciprocity can work as an enforcement mechanism. When adverse externalities are highly asymmetrical, the country causing the bad may lack an incentive to cooperate so that reciprocity may be insufficient to induce compliance. Mitchell and Keilbach, 2001.

[11] Gruber 2000.

Our contribution, though, is to highlight how different forms of agreements—private contracts, interstate contracts, and principled multilateral agreements—influence future agreements, legal processes, and substantive outcomes over time. We extend debates about international economic governance in two ways. First, we introduce private contracting as a de facto state choice. Wherever states do not regulate a transborder issue through multilateralism or interstate contracting, and so long as states and adjudicators will help enforce private agreements, they are implicitly choosing private contracting as the primary legal form of transnational governance. Neo-liberal ideology explicitly sees private contracting as the preferred legal form in which to set the terms of economic exchange. The absence of interstate contracts and multilateral agreements, or the use of those agreements within a regime complex to constrain state-level regulation of private contracts, as in the investment regime, empowers private actors to use private contracts in this way.

Second, rather than study agreements in isolation as the *Legalization* and *Rational Design* frameworks do, we emphasize the presence and interaction of all three forms. Our focus on the form of agreement, and our wider lens into the interaction of different forms of agreements, allows us to examine the extent to which international agreements take into account public interests and externalities created by the underlying economic activity. For example, the World Trade Organization's (WTO) permissive rules regarding the adoption of preferential trade agreements have allowed for the proliferation of these agreements in ways that make the WTO less politically relevant and create an existential threat to Most Favored Nation treatment, the core benefit of WTO membership.[12] This, in turn, has disempowered developing countries that rely on WTO membership and its collective decision-making rules to protect their interests. In this respect, our analysis reinforces and specifies Fritz Kratochwil's claim that legal discourse and practices shape international politics by defining the terms of international relations, and by distributing communication resources in ways that create advantage and disadvantage.[13]

The focus of our analysis is international regime complexes—sets of overlapping institutions and agreements that govern single issue areas. If rational design involves a set of states or actors coming together to resolve a set of cooperation challenges, then international regime complexes are seldom rationally designed. Instead, international regime complexes usually emerge across time via layering and accretion of soft and hard law agreements.[14] Put differently, the rational design project sees states as architects. In the world we describe, states control the permissive conditions that allow for private and interstate contracting, but key contracting decisions are actually made by private parties and the arbiters they select. The decentralized nature of the authors and adjudicators, and the dynamism involved in layering agreements across time, enrich our understanding of international governance by highlighting dynamics absent from work on the rational design of international agreements.

Although our framework can be used to think about why states choose a particular form of agreement to govern an issue, we do not assume that states always have a choice at a

[12] "[N]early five decades after the founding of the [General Agreement on Tariffs and Trade], [Most Favored Nation] is no longer the rule; it is almost the exception…. Sutherland et al. 2004, ¶60.
[13] Kratochwil 1989. See also Risse, 2000. Finnemore and Toope, 2001.
[14] Much of the international regime complexity literature focuses on inter-governmental institutions (IGOs), but the concept itself has never been limited to multilateral IGOs. See: Alter and Raustiala, 2018, 333, 37-40.

particular time as to what form an agreement should take (although, to be sure, they sometimes do). Rather, choices of form that states make at one time may both influence substantive outcomes and also constrain the kinds of choices states make about the form of governance at a later time. Our discussion includes examples where bilateral and multilateral agreements are shaping transnational private contracting, and vice versa. Sometimes interstate and private contracting create entrenched interests that can interfere with establishing more inclusive and comprehensive multilateral agreements. For instance, the current effort to create a global minimum corporate tax rate (under the auspices of the OECD's Inclusive Framework on Base Erosion and Profit Shifting) to discourage tax avoidance by multinational enterprises has been slowed by the networks of private contracts and bilateral tax treaties designed to take advantage of the absence of a multilateral framework. In other instances, the three types of agreements may complement each other. We will use the example of the international investment to illustrate these points.

Also, by treating transnational private contracting as part of global economic governance, we highlight how a highly legalized alternative exists to international problem-solving through interstate or multilateral agreements. As the next section explains, whereas interstate contracting and multilateralism often involves no explicit enforcement mechanisms,cross-border agreements that take the form of private contracts usually include implied delegation to national courts that will make the agreement enforceableThe upshot is that a low level of international legalization might obscure transnational governance by a set of highly legalized private contracts that are enforced via arbitration and domestic courts.

II. Three ideal-types of global economic agreements: Transnational contracting, interstate contracting and principled multilateralism

This section describes three ideal types of transnational agreements.[15] Our primary focus is how the legal form shapes to whom duties are owed. Compulsory dispute settlement amps up the effect of a legal duty, providing possibilities for actors protected by the agreement to claim their legal rights and thus obtain leverage in negotiations over compliance, compensation, and future behavior. In exploring to whom duties are owed, we ask two questions that arise because of the possibility of adjudication and enforcement: 1) what are the consequences of breach?; 2) can affected actors be excluded from the agreement and its implementation? The ideal type discussions highlight contrasts across the three forms of legal agreements. We use the term "pure" when we are referring to unadulterated versions of what each approach has to offer. A pure multilateral system creates duties towards the broadest range of actors with the least exclusion. A pure contracting system involves duties only to contracting parties, with maximum ability to exclude the interests of other states and non-state actors. Hybrids and variations exist, so our ideal types may be better conceptualized as points on a continuum. Table 1 previews the three ideal types, highlighting their differences across three dimensions. Later we will draw from the discussion to expand the elements in this table.

[15] Ideal types are analytical constructs designed to simplify and capture essential elements of a phenomenon. They are not meant to correspond to all characteristics of a phenomena, nor does the term suggest some normative ideal. For more, see Swedberg, 2018.

Table 1: A preview of the three ideal types

	Transnational private contracting	*Interstate contracting*	*Principled multilateralism*
To whom are duties owed?	Contracting parties: Private parties and states engaged in commercial activity.	Two or a few states; sometimes rights extend to the nationals of contracting states.	Narrow or public facing duties that extend to all state parties; participation, observation and enforcement rights may extend to stakeholders and affected private actors.
Consequences of breach	Pecuniary compensation for harms➔ pay or perform logic.	Reciprocal noncompliance; sometimes pecuniary compensation for harm➔ perform, breach or pay logic.	Public findings of noncompliance can result in sanctions and legal liability and/or damage to diffuse reciprocity expectations➔ reputational, outcasting and material repercussions.
Exclusion	All non-parties are excluded.	Most non-parties are excluded.	When practical and desirable, non-parties may be excluded.

Transnational Private Contracting: Firm to firm, or firm to state legal agreements

Transnational private contracting refers to agreements between private entities, as well as commercial agreements between private entities and governments. By its very nature private contracting involves a significant devolution of state power to private entities. A century ago, states viewed the application of their own law by their own courts as a critical way in which the public oversaw private commerce.[16] Today, a first key feature associated with private contracting is that most developed countries allow contracting parties to choose both the law applicable to their contracts and the fora in which disputes will be resolved.

States in which the contract will be enforced determine the limits of private contracting. For instance, domestic law in most if not all contracts prohibit contracts for the sale of people today, although they once were permitted. Likewise, contracts for the sale of certain kinds of products, such as endangered species, drugs or ozone-depleting substances, may be circumscribed by national laws, which in turn may implement treaty commitments.[17] These examples demonstrate how public power has limited the space for private contracting.

In other ways, states have granted private parties considerably more autonomy in transnational private contracting. Contracting parties may choose one state's laws over another's (aka "choice of law"), selecting more or less permissive laws. To escape disliked national frameworks and enforcement mechanisms, contracting parties may act through corporate subsidiaries and thereby select a different state's legal framework, or they may adopt international codes that are privately developed, such as the International Chamber of Commerce's (ICC) Uniform Custom and Practice for Documentary Credits, which sets out rules

[16] Born 2011, 15-25.

[17] Sometimes a state's or a contract's governing rules are influenced by interstate and multilateral agreements. For example, bilateral investment treaties forbid governments from imposing certain kinds of conditions, such as local content requirements, on foreign parties. The multilateral United Nations Convention on Contracts for the International Sale of Goods, which is less constraining for private parties, may displace national contract law.

governing letters of credit used in financing international trade. Domestic arbitration laws that implement the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards generally allow private parties to divest national courts of jurisdiction to resolve disputes, while requiring those same courts to enforce the decisions of private arbitral bodies.

The choice of law and adjudicatory form are indicated in the contract itself. National courts generally respect these choices.[18] Private contracting allows firms to reallocate their assets across borders, and to choose to whom firms sell critical goods, such as medical supplies, lithium for batteries, or COVID-19 vaccines. Governments may use public laws, such as the Defense Production Act in the United States, to limit this freedom for reasons such as national security, and we may well see an increase in state invocations of this power. Outside of these limitations, firms can do as they please. As we will explain, the existence of these choices, acts as a significant limitation on individual state authority because by creating a means for firms to escape national legal rules, a firm's go-it-alone power is enhanced. . ~~For this reason, we treat individual state regulation as partial limitation on private contracting, rather than as an alternative form of international ordering.~~

A second key feature is that private contracts only protect the rights and interests of the parties to the agreement, subject to limitations specified in national laws (e.g. requirements for environmental impact statements or labor rules). When a contract is narrow in scope, such as a contract generating an obligation to sell a certain quality and quantity of goods at a specified price, limiting the rights and duties to the contracting party makes good sense because the contract probably does not implicate the interests of anyone besides the contracting parties. Yet transnational contracts can implicate public concerns. For example, concession agreements involve the state granting profits from a natural resource to a private entity, and sovereign debt contracts promise a repayment from public coffers. Private contracts may also generate externalities such as pollution or contribute to diminished access to finite natural resources like water. As a formal matter, private contracts do not protect rights or interests beyond those spelled out in the text. This ability to ignore others interests extends to the ability to exclude others from deliberations, implementation, oversight, dispute resolution, and even knowledge of the agreement. This exclusion has a benefit to the parties in terms of minimizing their transaction and political costs, but it can have significant costs to third parties (actors impacted by the contract but not signatories to the agreement).

Private contractors can and sometimes do voluntarily incorporate the interests of stakeholders. For example, to fulfill corporate social responsibility pledges, Apple imposed on Taiwan's Foxconn's operations policies on using renewable energy and avoiding hazardous materials.[19] But even when private contracts include obligations to respect third party interests, those third parties often do not have access to legal mechanisms to enforce the commitments. For example, in the early 2000s, employees of foreign companies that sell goods to Walmart sued Walmart in federal court for failing to enforce labor standards contained in Walmart's contracts with foreign producers. The courts dismissed the workers' case, holding that, as third

[18] Abbott 2013 [Abbott, K. W. 2013. Taking responsive regulation transnational: Strategies for international organizations. Regulations & Governance 7(1):95-113. DOI: 10.1111/j.1748-5991.2012.01167.x.]; Perez 2022 [Oren Perez, Transnational Networked Authority, 35 Leiden Journal of International Law, 265-293 (2002)]

[19] Yuichiro Kanematsu, *Foxconn, Apple and the partnership that changed the tech sector*, NIKKEI ASIAN REVIEW (July 13, 2017), https://asia.nikkei.com/Business/Foxconn-Apple-and-the-partnership-that-changed-the-tech-sector.

parties, they had no right to enforce the labor standards contained in the contracts between Walmart and the companies that produce the products Walmart sells.[20] In effect, contracting out the production of goods allowed Walmart to escape responsibility for labor violations for which it might have been liable had it actually owned or operated the companies producing its products.

A third feature is that private contracting may limit a government's policy options. Firms can escape government limits on private action, such as local tax rules or anti-trust laws, via ownership rules. For example, Apple famously assigned its intellectual property to a subsidiary in Ireland and then to one on the Isle of Jersey, a contractual arrangement among affiliated entities that reduced Apple's tax obligations and thus deprived state treasuries, and the public in those states, of tax revenue.[21] Moreover, many forms of market manipulation are entirely legal despite their wider implications. In 2015, Turing Pharmaceuticals, a Swiss company, bought the rights to Daraprim, a critical drug used to treat toxoplasmosis, from Impax Laboratories, a U.S. company. Turing then increased the price of the drug from $13.50 to $750, an increase of over 5,000 percent—a move not uncommon in pharmaceutical markets.[22] Where the pricing and purchase decisions reside in private entities, the state's best option in some circumstances may be to enter the market itself. For instance, in the first half of 2021 the global distribution of COVID vaccines was heavily influenced by private contracts between governments and pharmaceutical companies. Countries like the US and UK that entered into contracts early—when the successful development of vaccines was still somewhat uncertain—had readier access to vaccines. Slower countries, such as the EU and its member states, faced delays despite promised delivery dates. Another example involves Chinese purchases of natural resources in Africa, such as cobalt mines in the Congo that were previously owned and operated by US entities. The sale raises concerns that the new Chinese owners may cause environmental damage and decrease the supply of cobalt to non-Chinese firms, exacerbating supply chain difficulties.

A fourth feature is that private contracts are perhaps the most enforceable type of global agreement. Unlike interstate and multilateral agreements, where the default option is no dispute resolution, for private contracts dispute resolution in national courts is the default option for determining liability and remedy for a breach. Contract law usually follows a pay-or-perform logic, meaning that financial damages are available for breach (although proving breach and significant damage can be an expensive proposition that may deter less wealthy claimants). Indeed, eliminating the possibility of dispute resolution is difficult, if not impossible. This proviso also applies to contracts with states. Historically, states enjoyed absolute immunity, which limited firm's abilities to enforce contracts with states. Starting in the 1960s, a cascading set of state-level decisions have limited the immunity of states with respect to commercial matters,[23] putting such contracts on par with contracts between two private parties.

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[20] *Doe v. Walmart*, 572 F.3d 677 (9thCir. 2009).
[21] Jesse Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.
[22] Andrew Pollack, *Drug Goes from $13.50 a tablet to $750, Overnight*, N.Y. Times (Sept. 20, 2015).
[23] Verdier and Voeten, 2015.

This discussion demonstrates the many ways that contracts enhance private power, and thus the reason that private contracting is a preferred choice for powerful actors, including governments operating through state-owned enterprises. Selecting property-protecting national frameworks for contracts and strong enforcement mechanisms can allow powerful actors to create agreements that weaker actors cannot afford to break and that courts and arbitrators will enforce regardless of the effects on third parties or the public interests. Or, a contract drafter can distance itself from commitments to protect public and third party values by using contracts to outsource compliance and choosing weak laws and weak legal forums, which can make enforcement expensive or impracticable. Meanwhile, private contracts are often neither public nor transparents, making the terms of exchange difficult to regulate even if governments wanted to try. Further, changes in contracting frameworks often grandfather in existing contracts, and in any event one country's governing laws will not impact contracts governed and enforced elsewhere. In these ways, the decentralized nature of contracts and national governing laws means that private parties enjoy significant latitude to set the terms of global exchange for matters that states do not regulate via international agreements.

Interstate contracting: state-to-state and mini-lateral reciprocal agreements

Interstate contracts, as we use the term, are bilateral treaties or treaties with few state parties that are reciprocally enforced. Economic examples include bilateral tax treaties that seek to avoid double taxation, bilateral or minilateral trade and investment treaties (such as NAFTA/USMCA), or antitrust cooperation agreements that seek to facilitate international cooperation in the enforcement of competition law. Non-economic examples include extradition treaties, the Hague Abduction Convention, and many arms control treaties.

In its ideal-type form, interstate contracts create obligations owed only to the other contracting state(s). This relational feature shapes both the subject matter and the approach used in interstate contracting. For example, a tit-for-tat punishment logic can be used to police bilateral extradition or arms control agreements, or agreements governing a shared resource (such as a river). It would make little sense to create a general human-rights protecting interstate contract, since tit-for-tat violations would be self-defeating. This is another way of saying that the problem-structure may determine whether a cooperation problem is amenable to an interstate contracting resolution.

Interstate contracting is closer in form to private contracting in many ways than it is to multilateralism. Interstate contracts in their pure form do not create rights beyond the states themselves. This means that a first key feature and attraction of interstate contracts are that parties are free to exclude, both as a legal and as a practical matter, state and non-state parties with whom they do not wish to cooperate. To be sure, the nature of particular issues might make consulting some stakeholders necessary or prudent. National legislation may also require consultation with stakeholders or limit the ability of a government to contract with countries that are known violators of certain international (e.g. human rights) or domestic (e.g. child or prison labor) legal rules.

A second feature is that interstate contracts may allow powerful countries to obtain rules that they could not obtain in multilateral institutions. For example, preferential trade agreements (PTAs) allow like-minded states to craft new rules that would not be politically

acceptable to WTO members. A hope might be that more countries will join the agreement, or that the provisions will eventually be incorporated by multilateral institutions.[24] Rules on fisheries subsidies were first included in preferential trade agreements, for instance, before eventually being included in a plurilateral WTO agreement in 2022. It is nonetheless the case that for certain types of agreements, such as investment treaties and for intellectual property protections, the bilateral nature and the ability to exclude has generated agreements that better protects the property rights of more powerful actors.[25]

A third feature is that compared to multilateral agreements, exiting or violating an inter-state contract may involve fewer costs. Withdrawal clauses, implied rights of withdrawal under the law of treaties, and sunset clauses exist in both interstate contracts and multilateral agreements.[26] Yet in choosing to withdraw from an interstate contract, the exiting state usually only needs to consider any reciprocal action by its counterparties. Where noncompliance (instead of lawful exit) is concerned, the default rule is that violations of inter-state agreements are subject to liability rules, with violating states under an obligation "to make full reparation for the injury."[27] But often no third-party adjudication exists to determine these liabilities. Bilateral antitrust cooperation agreements or the Trump administration's "Phase 1" trade agreement with China, for instance, have no identified dispute resolution mechanism. States can address this concern by adding different liability or dispute resolution mechanisms. For example, trade and investment treaties regularly create state-to-state dispute resolution procedures that provide international tribunals with jurisdiction over disputes and the ability to issue legally binding judgments. Where dispute settlement exists, states can limit the prospective effect of dispute resolution by keeping arbitration secret, or by issuing interpretive statements that reshape how the agreement is applied in the future.[28] Interstate contracting shares these features with private contracting. Although secrecy and interpretative statements can in principle be used in any kind of agreement, in practice their use depends both on a view that only the parties to the agreement have interests that warrant protection, as well as shared views among the parties that are difficult to obtain in multilateral agreements.

An even greater form of exclusion involves the many actors within states that are excluded from the discussions and processes associated with interstate contracting. In theory, legislative consent to international agreements can ensure a role for democratic participation. In practice, Iinterstate contracts are regularly constructed as executive agreements in order to avoid legislative debates.[29] The Trump administration did this with its trade agreements with Japan, China, and its revisions to the US-Korea Free Trade Agreement. Sometimes governments choose to include certain domestic allies in interstate negotiations–such as business or the military– while excluding other domestic actors that might disagree or seek changes in the

[24] Downs, Rocke, and Barsoom, 1998. Gilligan, 2004.
[25] Weatherall, 2016. Simmons, 2014, Meyer 2012, 1057-1067.
[26] Vienna Convention on the Law of Treaties art. 60.1, May 23, 1969, 1155 U.N.T.S. 331. See also Helfer, 2005.
[27] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art.31.1, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001)
[28] An example is an interpretive statement added by the US, Canada and Mexico to scale back the expansive interpretation of the "fair an equitable treatment" requirements articulated in Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1. Kaufmann-Kohler 2011, 183.
[29] Claussen, 2022.

agreement. For example, the U.S. Trade Representative's Office famously shared drafts of the Trans Pacific Partnership with industry groups but not with other groups, making it difficult for even members of Congress to see drafts.[30] Where stakeholder concerns, such as labor rights, are incorporated into interstate contracts, the absence of mandatory dispute resolution can make it difficult or impossible for citizens to obtain relief from injuries arising from a failure to fulfill the contract as written, even if their government wants to help them.

The larger point is that like private contracting, interstate contracting can be tailored to the specific interests of the negotiating parties. Countries can be easily excluded from agreements, and enforcement can be dialed up or down. Citizens within contracting states may also be more easily excluded through the use of domestic laws that allow governments to negotiate and approve agreements small in scope or on particular topics without legislative or democratic participation. Power and interest may explain where and when interstate contracts are more imbalanced in their distribution of rights and duties across states.[31] Notwithstanding these similarities to private contractinging, to the extent that political leaders can be held accountable for their decisions, interstate contracting may be more politically balanced and more likely to address public policy concerns than private contracts.

Principled Multilateralism: creating duties owed to all

Following World War II, multilateralism became a prevalent way to generate broad-based international norms and laws. John Ruggie created a generic definition of multilateralism as an agreement that "coordinates relations among three or more states on the basis of 'generalized' principles of conduct-that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence…."[32] We classify agreements among a small group of states that are based on specific reciprocity as interstate contracts. But apart from that distinction, we adopt Ruggie's definition.

Ruggie's main point was that principled multilateralism is fundamentally different from bilateralism and imperialism, where the negotiating leverage and the sovereignty of weaker parties are diminished. Power and interest still drive multilateral politics; Ruggie observed that the United States used multilateralism to internationalize its domestic priorities.[33] But multilateralism expands who gets to participate in policymaking. In the past, expanded access meant that compared to the imperial era, multilateralism allowed middle power and weak states to participate in international policy-making. Today, multilateralism often allows non-governmental actors to observe, consult, and lobby international policy-making.[34] In short, unlike contracting, multilateralism includes the widest range of interests, both by incorporating

[30] Ailsa Chang, A Trade Deal Read in Secret By Only a Few (or Maybe None), NPR, May 14, 2015.
[31] Allee and Elsig, 2016, 209-11. [finding that 'stronger' dispute settlement mechanism are associated with deeper preferential agreements.]. Allee and Peinhardt, 2014, 49.[finding that states that host foreign investment importing states have "their hands tied for them" by investment-exporting states] In the non-economic realm, Krcmaric, 2022.. [finding that powerful countries write extradition treaties in ways that facilitate the targeting of political opponents residing abroad].
[32] Ruggie, 1992, 571.
[33] Ibid., 585-9, and 68.
[34] Tallberg 2013.

more state parties and by providing more avenues for third parties and domestic groups to participate.

A first key feature, noted by Ruggie, is that multilateral agreements involve duties owed to all. International law reflects this idea in the rule that says that a material breach of a multilateral agreement by one party does not allow another party to terminate or suspend the obligation.[35] Ruggie draws on Keohane's conception of how specific reciprocity, which is based on self-interest and tit-for tat enforcement, differs from diffuse reciprocity, where state parties are expected consider the larger objectives of the agreement and their duty to contribute one's share and to behave well toward others.[36] Insofar as breach is widely observable, scholars expect that diffuse reciprocity norms will generate reputational costs for breach,[37] and that respect for multilateral norms will build trust.[38]

A second related feature is that multilateral obligations tend to be more enduring, and that exit does not per se lead to the collapse or renegotiation of the larger agreement. Multilateral agreements include a range of adjustable flexibilities.[39] For example, states may customize their individual obligations, such as through the schedules attached to trade and investment treaties describing how general commitments apply to specific goods, services, and sectors; a number of international agreements differentiate between the obligations of developed and developing countries; treaties may explicitly authorize states to prioritize an enumerated set of national policy objectives; and outside of the economic context states may add reservations within limits. At the negotiation stage, states may demand such flexibilities as necessary to secure domestic ratification. Multilateral agreements can also include sunset clauses, such as the Nuclear Non-Proliferation Agreement's provision that forced signatory states to reconvene in 1995 to consider whether or not the agreement would be extended. These flexibility mechanisms facilitate negotiation and ratification, and obviate the need to break and renegotiate agreements. Ruggie claimed that "institutional arrangements of the multilateral form have adaptive and even reproductive capacities which other institutional forms may lack."[40] Studying the survival of international organizations from 1818-2015, Eilstrup-Sangiovanni confirmed this expectation, finding that multilateral institutions are the least likely to end or be replaced for the reasons Ruggie hypothesized.[41]

A third feature is that multilateralism generates a broader group of monitors who work to protect public concerns. Variation in the enforcement mechanisms associated with international agreements has been a principal interest of scholars focused on international

[35] Vienna Convention on the Law of Treaties art. 60.1, May 23, 1969, 1155 U.N.T.S. 331. art. 60.2. As a formal legal matter, the nature and content of multilateral agreements may mean that the international consequences of breach generate liabilities that can only be claimed by an injured state via a traditional dispute. Bringing a case to the International Court of Justice (ICJ) is one way to pursue a state-liability claim.
[36] Ruggie, 1992, 583. Referring to Keohane, 1986, especially at 20.
[37] Keohane, 1986, 19-20.
[38] Rathbun, 2011.
[39] Helfer 2012.
[40] Ruggie, 1992, 568.
[41] Reviewing which international institutions die, Eilstrup-Sangiovanni finds that global institutional changes is most likely after major geopolitical conflict, but that international organizations with global and heterogeneous membership, and diversified and broad remits tend to be adaptable and resilient Eilstrup-Sangiovanni, 2020, 341.

legalization and the rational design of international institutions.[42] Our point is different. As a formal matter, multilateral agreements may only create duties and rights for states, and formal dispute resolution provisions may be weak. . Yet the public nature of multilateral agreements makes it far more likely that non-state actors will feed information to monitoring bodies or to state actors that are in a position to do something about violations of multilateral rules.[43] Because multilateral agreements often have a higher public profile, non-state actors can sometimes publicize violations as a means of pressuring states to bring themselves into compliance.

A separate question is whether stakeholders can participate in a multilateral agreement's negotiation, oversight, or implementation. Sometimes non-state actors are directly involved in oversight,[44] and sometimes non-state actors have standing to lodge complaints.[45] Scholars also find a significant opening up of multilateral organizations to observation and participation in multilateral processes, a development that does not extend to either contracting forms of agreement.[46] Expanded access has been embraced as a way to add to the resource base of international efforts (e.g. The UN Global Fund to fight Aids, Tuberculosis and Malaria),[47] and to ensure local and private interests that may stymie implementation are not excluded from decision-making. Unlike contracting, where negotiating parties decide who to include, multilateral institutions tend to develop general principles that allow all interested parties to apply for recognized participatory rights, such as the WHO's recent Framework of Engagement with Non-State Actors.[48] In this way, a broader range of third parties will gain awareness and meaningful participation rights. Failure to respect these rights can lead states to question and withhold payments to multilateral institutions.

Taken together, the point is that public monitoring of compliance with multilateral agreements is aided by non-state actors. This public monitoring influences state decisions, both individually or collectively, to withhold funding for institutions, sanction states, and at the extreme, resort to outcasting (e.g. social sanctioning that can include exclusion).[49] The economic sanctions that many large economies have imposed on Russia as a result of the Ukraine invasion, which come close to excluding Russia from participating in or exercising rights under WTO agreements, are perhaps the best example of this approach.

A fourth feature is that that multilateralism is more likely to include a Secretariat with some level of authority. Drawing on an International Authority Database of multilateral institutions operating at global and regional level, Michael Zürn notes a growing trend of states creating international authorities with increasing levels of agenda setting, enforcement,

[42] Koremenos, 2007. Allee and Elsig, 2016. McCall Smith, 2000. Keohane, Moravcsik, and Slaughter, 2000. Alter and Hooghe 2016.
[43] E.g. Alter 2014, 253-57, 60-7.
[44] For example, CITES has established a Monitoring the Illegal Killing of Elephants (MIKE) network of state and nonstate actors, overseen by an expert technical advisory group, that monitor elephant populations to assess CITES programs and inform CITES decision-making.
[45] For example, UN and regional human rights bodies are often able to review individual complaints.
[46] Tallberg et al., 2014, 766.
[47] See https://www.theglobalfund.org/en/
[48] "Framework of engagement with non-State actors," ratified by the Sixty-Ninth World Health Assembly, Agenda Item 11.3 (WHA69.10, May 28, 2016)
[49] Hathaway and Shapiro, 2011.

evaluation, knowledge generation, monitoring, norm interpretation, and rule-making authority.[50] Members of these Secretariats (what we might call "multilateral actors") spend time building relationships with stakeholders, both states and non-state actors, and in doing so become more knowledgeable about the details, preferences, and interests of those stakeholders. This knowledge and these relationships may give multilateral actors social and epistemic authority and legitimacy that is independent from the states that created the institution. This authority depends, however, on multilateral actors adhering to their public mandates.[51]

When coupled with robust oversight and/or adjudication, multilateralism can operate on its own momentum, developing principles in response to concerns raised by individual states and stakeholders. We discussed how states use interpretive statements in contract settings to change the prospective effects of legal rules. Multilateral institutions may also issue interpretative statements, declarations, amendments, etc., such as the WTO's Doha Declaration confirming the right of states to declare health emergencies and authorize compulsory pharmaceutical licenses. Yet in the multilateral context, interpretive guidance from states is more difficult to generate because the consensus on interpretive issues is often elusive among large groups. Instead, international adjudicators use disputes to develop legal precedents that can be applied to future disputes between members of a multilateral agreement, even if the precedent was created without the participation of all affected states. In this way, multilateralism, especially when paired with dispute resolution as it often is in the economic context, significantly weakens state parties' control over the implementation of international agreements.

A fifth feature is that exclusion can be harder in multilateral contexts. Multilateral institutions connected to the United Nations generally allow all interested states to join or participate. The choice to work through the UN is, in this respect, an inclusive choice. Other multilateral institutions, such as the European Union or the GATT/WTO begin small and grow through sequential admission of new members.[52] Once new members are admitted, however, subsequently excluding them becomes extremely difficult. "Democracy" clauses in some regional trade agreements permit states to suspend a member that ceases to function as a democracy, as Mercosur did in 2012 when it suspended Paraguay's participation.[53] But most multilateral institutions do not formally permit a member to be kicked out. Russia, for example, has been isolated within the WTO as a result of its invasion of Ukraine, but completely removing it is difficult if not impossible.

Regime shifting is a possible way to exclude states that are already members of multilateral institutions,[54] but one that involves a significant commitment of diplomatic resources and risks reopening settled matters innegotiations in the new forum.[55], While exit

[50] Zürn 2018, 128.
[51] Ibid., 40-47.
[52] Downs, Rocke, & Barsoom 1998, Gilligan 2004.
[53] Democracy clauses can be found in Mercosur Ushuaia Protocol, the Charter of American States, the Treaty on European Union, and Unasur's Additional Protocol on Democracy. See Meyer 2014, 619-623.
[54] Helfer 2004.
[55] Koremenos 2001.

from multilateral agreements is often an option,[56] unilateral exit is considerably less useful as a means of excluding or punishing other states. Exit eliminates any duties owed to the entire membership, but states' outside options are often unattractive. If a state cannot escape the problem the regime addresses (e.g. climate change), or if the regime enjoys near universal membership (e.g. Law of the Seas), exit may mostly limit a state's voice in the shaping of multilateral rules that in many cases the state, or its economic interests, cannot avoid.

This discussion casts multilateralism as public facing, both in terms of goals and implementation. This is certainly how states frame multilateral agreements. The Marrakesh Agreement, the WTO's founding document, identifies raising living standards, full employment, sustainable development of natural resources, and economic development as larger social objectives.[57] Recent WTO Secretaries-General, members of the public, and even member states have increasingly invoked these considerations in debates about how trade can, for example, be used to tackle climate change and environmental degradation. The greater role for the public and public interests in multilateralism, as well as the difficulties in excluding states, distinguish multilateralism, in its ideal form, from either method of contracting.

The three ideal types compared

Table 2 recaps and extends the preview of Table 1, adding corollaries and extensions that come from considering the implementation of agreements, especially the practical consequences of a legal breach. In the remainder of this section, we discussion implications of our three ideal types for the real world.

Table 2: Three ideal types compared

	Transnational private contracting	*Interstate contracting*	*Principled multilateralism*
To whom are duties owed?	Contracting parties: Private parties and states engaged in commercial activity.	Two or a few states; sometimes rights extend to the nationals of contracting states.	Narrow or public facing duties that extend to all state parties; participation, observation and enforcement rights may extend to stakeholders and affected private actors.
Consequences of breach	Pecuniary compensation for harms➔ pay or perform logic.	Reciprocal noncompliance; sometimes pecuniary compensation for harm➔ perform, breach or pay logic.	Public findings of noncompliance can result in sanctions and legal liability and/or damage to diffuse reciprocity expectations➔ reputational, outcasting and material repercussions.
Exclusion	All non-parties are excluded.	Most non-parties are excluded.	UN agreements generally do not exclude. When practical and desirable, non-parties may be excluded from multilateral club goods.

[56] Helfer, 2005.

[57] Marrakesh Agreement Establishing the World Trade Organization preamble Apr. 15, 1994, 1867 U.N.T.S. 154; General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 194.

Dispute Resolution	*Default*: national law enforcement *Likely choice*: arbitration without public rulings.	*Default:* diplomacy *Sometimes choice*: arbitration or international tribunal.	*Default choice*: Diplomacy and informal mechanisms that are not public. *Sometimes choice:* formal mechanisms, including dispute resolution, with international representation and public findings.
Prospective effects	No effect beyond the contract and the ruling.	Parties can add interpretive clauses to counter prospective effects of a legal ruling.	Agreements can be hard to amend, so adjudication can generate sticky prospective effects.
Adjudicatory gap filling	National court adjudication creates gap-filling; arbitration does not.	Arbitration and adjudication generate revisable gap-filling	Adjudication contributes to legal developments that can be difficult to reverse. Consensus rules may limit treaty or interpretive revisions, so that states may no longer be the masters of the agreement.
Flexibility	New contracts replace old ones.	New contracts replace old ones, but stakeholder reliance can impede revision.	Multilateral amendments, scheduling of individual commitments, and (where allowed) reservations add flexibility. Later efforts to augment flexibility may require broad consensus, which can be difficult to achieve.

First, coding international agreements according to the legalization and rational design categories may understate the legalization of international economic governance. Contracting is an alternative way to generate global governance that may be implemented, interpreted, and enforced through arbitration or national courts, or by tit-for-tat responses to violations. Once one includes private contracting in the analytical frame and distinguishes between contracting and multilateral governance, for example, treaties with low degrees of precision or delegation may not signal low degrees of legalization or commitment.

Second, by the same token, scholars tend to focus on examples where states respond to 'overlegalization,' or disliked rulings by withdrawing, or trying to dejudicialize or de-delegate to multilateral actors.[58] Yet as we explained, its usefulness depends on the kind of agreement in question. In multilateral contexts, exit is often not an effective tool of go-it-alone power. For example, President Trump's exit from the Paris Agreement and the World Health Organization did not help the US gain international leverage. This reality is why the latest scholarly study of dejudicialization and de-delegation finds that such efforts seldom happen, or they seldom succeed as a pressuring tactic.[59] By contrast, exit and exit-motivated renegotiation is likely more common in contract settings but may be complicated by the overlapping nature of commitments made in different kinds of agreements. For example, inter-state contracts may be reinforced by private contracts to render withdrawal impractical or useless. If an interstate agreement is seen as creating reasonable expectations upon which firms and individuals understandably relied, the agreement may be reinforced by vested economic and societal

[58] Helfer, 2002. Alter, Gathii, and Helfer, 2016. Abebe and Ginsburg, 2019. Pollack, 2023.
[59] Thatcher, Sweet, and Rangoni, 2023. See also: Alter, 1998. Voeten, 2020.

expectations. In recognition of these vested interests, interstate contracts sometimes contain provisions that extend protections even after a state's withdrawal (e.g. the Energy Charter Treaty, which faces large scale withdrawals at present but can extend obligations twenty years for existing investments).[60] The prospect of compensation may then affect the cost-calculations associated with breaching interstate contracts that are linked with private contracts (e.g. energy contracts), but not other types of inter-state contracts (e.g. arms control and extradition treaties).

Third, agreements close to our ideal of principled multilateralism may be less common in the future. Tom Ginsburg observes that democracies have shaped the current form of multilateralism that this section has discussed, but authoritarian governments may prefer institutions that are narrower in scope and less constraining.[61] Rising nationalism and populism also seems to generate a distaste for multilateralism, even in democracies, as evidenced by Brexit and the Trump withdrawal from the Trans Pacific Parternship. These trends could mean a greater reliance on contracting or new institutions with wide membership (like multilateral institutions) that aim to replicate the features of contracting by allowing domestic leaders to more easily exclude public and third-party concerns as a means of exercising control. China's Belt and Road Initiative, and its model for economic diplomacy more generally, makes substantial use of private and interstatecontracting to spread its influence, as a complement and often an alternative to robustmultilateralism.

Fourth, it is worth underscoring that contracting frameworks are changeable unilaterally. States and their judges may decide not to enforce or to at least review foreign arbitral rulings, to ensure that they do not undermine national public policy or individual rights. The *Achmea* decision by the Court of Justice of the European Union, for instance, famously found that intra-EU investor-state arbitration was incompatible with the supremacy of European law, negating the legal effect of certain arbitration decisions.

We have focused on contracting because choice of law and forum in private contracting has substantially undermined individual state power. States can agree to adjust their national contracting framework collectively, but doing so unilaterally risks capital flight. That said, powerful states are learning to use contracting as a unilateral tool. The global rise of national security screening for investments, led by CFIUS in the United States, may be one example of states leveraging state authority over private contracting as an international political strategy.

III. Mixing and Matching within International Regime Complexes

Thus far, our ideal-type discussions follow the rational design and legalization strategy of considering agreements as discrete entities. This approach implicitly suggests that negotiators at every moment can choose which legal form to use. This is not how global governance actually works. Rather, the three legal forms co-exist at all times. The balance of legal rights at any moment creates a default choice about what happens absent state-level or international-level action. Moreover, contracts, either private or interstate, can constrain the ability of governments to address matters of public interest, either through national regulation or multilateral institutions.

[60] Energy Charter Treaty art. 47(3), Dec. 17, 1994, 2080 U.N.T.S. 95.
[61] Ginsburg 2021.

The major payoff from our discussion of ideal types is to understand these interactive effects. In this section, we offer a brief analysis of the investment law regime complex. We choose this example because, although it is familiar to scholars in the field, our discussion highlights how the freedom private actors had to make contracts, created by interstate contracts, has inhibited efforts to reform the investment law system to take into account broader public interests, especially through the creation of a public-facing multilateral institution.

Investor-State Protections: Bilateralism + Interstate Contracting + Multilateralism

The central tension in international investment law is between the economic interests of private investors located in capital exporting states and the public interests located primarily in the capital importing state. This latter set of interests includes the capital state's interest in economic growth, which broad investor protections might in theory contribute to by encouraging investment. But it also includes a range of other interests and state level actors, such as local governments, national legislators, environmental groups, human rights organizer indigenous peoples, and labor activists. As we explain below, efforts to create a multilateral investment treaty in the late 1940s, 1960s, and 1990s that would to varying degrees have balanced the interests of advanced industrial and developing countrieswere stymied by investment actors seeking to defend their interests and existing contracts.

For hundreds of years, foreign investors have been calling on their home-state governments for help in protecting their investments abroad. In the early 20th century, legal investor protections between independent countries consisted of a mix of interstate contracts and customary international law. Friendship, Commerce, and Navigation Treaties were bilateral agreements that promised investor protection and generally included state-to-state dispute resolution provisions, albeit weak ones that states had trouble using.[62] Thus, as a practical matter, these treaties, as well as customary international law, were enforceable primarily through diplomacy. Following WWII, this system rested on shaky grounds. Bilateral treaties could be repudiated; newly independent countries wanted to end favorable treatments and colonial era concession contracts; and both World War II and Soviet and European nationalizations of key industries created support for the view that private property was not sacrosanct.[63] Seeking to shore up a crumbling system, Western actors engaged in a number efforts to create a new multilateral investment agreement.

The first such effort was the 1948 Havana Charter creating an International Trade Organization (ITO). For domestic and tactical reasons, the United States and United Kingdom created parallel negotiations to draft a General Agreement on Tariffs and Trade (GATT).[64] The larger plan was for GATT provisions to be incorporated into and supplanted by the Havana Charter, which would include a range of other commitments, including investment rules, commodity agreements, and rules on labor protection. The Havana Charter's prospects died in

[62] Miles 2013, 23-4. Coyle, 2013, 315.
[63] Miles 2013, Chapter 2, esp. 74-84.
[64] The domestic reason was the sunsetting of US President Roosevelt's negotiating authority under the Reciprocal Trade Act. The tactical reason was a desire to negotiate key trade provisions among a smaller group of trading states. Meanwhile the sticking point slowing the negotations was a US-UK standoff over sustaining or eliminating colonial trade preferences. Irwin 1998, 345. Irwin, Mavroidis, and Sykes 2008, Chapter 1.

1951 when US President Truman decided not to submit it (again) to the US Congress for ratification. According to William Diebold, the strategy used to derail ratification efforts involved stressing that a better agreement could be reached. "[O]ne of the greatest stumbling blocks for the business groups" was the Charter's investment clauses, which ironically had been added to the Havana Charter at the request of US business groups. Forced to negotiate multilaterally, the Charter's investment provisions included words like "just," "reasonable," and "appropriate." Business interests argued that these clauses were "worse than nothing at all" because they allowed capital importing states room to interfere with private investments for a wider range of reasons than available under FCN treaties and CIL. Implicit in this position was an understanding that US investors were better served by relying on direct pressure and appealing to the US government to defend their interests.[65]

States tried again the 1960s. According to St John, because of Cold War dynamics, foreign policy officials in the United States and Europe preferred a solution that garnered broad international political support. They therefore asked the World Bank to create an investor protection system by building off the latest effort, created within the Organization for Economic Cooperation and Development. The World Bank, however, refused. St John quotes Aron Broches, who argued that

> "if we [the World Bank] were to take [negotiations] over, we would have to look at the other side, namely the obligation of investors. The developing countries would still feel that the Bank presented a proposal cooked up by their adversaries, and the industrialized countries would accuse us of watering down a wonderful document. We were liable to end up having everybody mad at us, or even worse, coming out with a meaningless document. So, we definitely said no to that."[66]

Instead, the World Bank created a multilateral agreement that governed investor dispute resolution–the convention that established and guides the International Center for the Settlement of Investment Disputes (ICSID).[67] States and firms can indicate in inter-state and private contracting dispute resolution will be governed by ICSID, or by other dispute resolution mechanisms including state law. The result was thus a partial multilateralization of the rules on dispute resolution but not the substantive investment rules that addressed the balance between economic interests and other public interests.

Capital exporting states turned to interstate contracting as an alternative that is less efficient, but better able to elicit bargains that favor foreign investors.[68] Following Libya's nationalization of its oil industry in the 1970s, the negotiation of bilateral investment protection treaties (known as BITs) took off.[69] BITs did two major things. First, they clarified that substantive investment rules would continue to be highly protective of private contract rights. This embrace of strongly protective rules ran directly contrary to developing countries' efforts

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[65] "By committing itself to the Charter, ran this argument, the United States would give up its right to take independent action to protect American investors. Acceptance of the Charter would weaken the efforts being made publicly and privately to create a proper "climate" for private investment."" Diebold 1952, 18.
[66] St John 2018, 113.
[67] These conventions, and their elaborations, are explained on a website maintained by ICSID. See https://icsid.worldbank.org/rules-regulations/convention last visited March 23, 2023.
[68] Simmons, 2014.
[69] Bonnitcha, Poulsen, and Waibel 2017, 9-18.

to protect their right to regulate, both via General Assembly resolutions on the New International Economic Order and through regional agreements such as the Andean Foreign Investment Code, which forbade member states "grant[ing] to foreign investors any treatment more favorable than that granted to national investors."[70] Second, most BITs gave private investors the right to bring binding arbitration disputes against host countries, which could (and still regularly do) result in monetary damages. Those awards—which became more frequent beginning in the 1990s—could then be enforced in national courts under either the ICSID Convention or the multilateral New York Convention on the Recognition and Enforcement of Foreign Arbitral awards.

More recently, the 1998 OECD draft Multilateral Agreement on Investment failed in part because it was an exclusive agreement, done within the OECD, that faced opposition from outside the OECD. But it also faced resistance from investors, who argued that the network of BITs provided greater protection than the MAI would. Moreover, negotiations stumbled over what the relationship between the MAI and existing investment treaties would be, a central issue since business groups in capital exporting countries would have balked at sunsetting those agreements completely.[71] Efforts to bring investment law into the WTO in the late 1990s and early 2000s fell prey to similar divisions.

Since then, reform of substantive investment protection has proceeded along two tracks. First, interstate contracts began to strike more of a balance between investor protection and other public interests. Large capital importing economies like China and India refused to agree to the broadest investor protections common in 20th century BITs. Moreover, capital exporting states began entering investment agreements with each other. Fearing suits among themselves, capital exporting states began moderating rules on investor protection, including by incorporating public policy exceptions modeled on GATT article XX into their agreements.

Reform of the dispute settlement system, by contrast, has proceeded multilaterally. In 2017, the task that was assigned in 2017 to the United Nations Commission on International Trade Law (UNCITRAL).[72] Along with a series of procedural reforms designed to ensure the fairness and transparency of investment law proceedings, current proposals aims to incentivize the consideration of wider public interests in ISDS, in part by granting participatory rights to third-parties.[73] The European Union has also called for a multilateral investment court that could ensure greater coherence in the resolution of investment disputes.

With reform proposals evergreen, one can wonder how the system endures. St John examines multiple strategies to exit the system, all of which have been used in different locations.[74] While exit occurs, states tend to follow a path dependent pattern where the executive may declare an intention to withdraw, and it may even withdraw from a BIT, but then

[70] Andean Commission, Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Decision 24 art. 50, Nov. 30, 1976, 16 I.L.M. 138, 153.
[71] Amarasinha & Kokott 2008.
[72] Roberts and St John, 2022.
[73] Columbia Center on Sustainable Investment, et al, *Third-Party Rights in Investor-State Dispute Settlement: Options for Reform* (2019), https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/uncitral-submission-third-party-participation-en.pdf.
[74] St John 2018, 239.

different branches of government agree to adhere to older practices, and competitive dynamics lead to replacing relaxed investor protections with more robust investor protections.[75] BITs and the underlying investments reinforce each other. Even if a country exits its BITs, it usually remains liable to arbitrate disputes related to existing investments for an extended period of time—a measure designed to protect investors' reliance interests. Exiting BITs thus provides capital importing states little additional room to regulate in the public interest in the short term. And in the long run, business interests pressure them to readopt investor protection, ostensibly to encourage a new round of investment. The result is a cycle that inhibits multilateral efforts to negotiate substantive investment rules and slows the pace of evolution in BITs.

IV Conclusion: The Politics of Rebalancing Public-Private Interests

In principle, it is up to states to choose their preferred balance between public and private interests, and whether to rely on market or state-led efforts to promote national objectives. The ability of states to embed their economies in national systems of regulation that reflect the principles and values of a society can be compromised, however, by global economic and political forces. The international regime complexes regulating global exchange have always included transnational private contracting, interstate contracting and multilateralism.[76] For much of the post-WWII era, these systems were guided by the principle that John Ruggie called the "embedded liberal compromise," an understanding that multilateral rules would promote global economic openness, yet states would still be able to use domestic authority to tame the socially disruptive effects of global markets.[77] In many domains, and for a variety of reasons, both the normative basis of this compromise and the capacity of states to fulfill it have eroded.

This article identified dynamics inherent to the contracting form, both private and interstate, that contribute to the exclusion of public concerns, especially (but not only) when a contract beneficiary can legally vindicate contracted promises. Specifically, adjudicators are usually instructed to *only* consider the rights of the contracting parties, and perhaps also limitations imposed by national contracting frameworks. National contracting frameworks, in theory, can address concerns about externalities and third-party impacts. Yet insofar as the parties get to choose the applicable law (choice of law) and the adjudicatory venue (choice of form), contracting parties may be able to escape constraining national legal frameworks.

The article also explained how states create the permissive conditions that allow transnational private contracting to establish the terms of international economic exchange through national contracting frameworks, and by allowing parties to use national enforcement mechanisms. The possibility of escaping national contracting frameworks through choice of law and choice of forum creates pressure on states to loosen the constraints they impose nationally. Tax competition among countries, in which companies threaten to use contracts and

[75] Ibid., chapter 8.
[76] Alter, 2021.
[77] Abdelal and Ruggie 2009, 153, discussing Ruggie 1983, at 393.

the corporate form to shift their profits to low-tax jurisdictions, has put substantial downward pressure on global tax rates, a trend that nations are now trying to address via the OECD-led Two Pillar Solution to base erosion and profit shifting.

Indeed, the ability of corporations to change their corporate seat and reassign property rights may mean that global coordination is the only way to effectively address some problems, such as tax evasion, money laundering, and national security concerns associated with the spread of advanced technology. Interstate contracts and multilateral agreements can thus be used to circumscribe the freedom private actors enjoy to set the terms of exchange without regard to larger consequences, and multilateral agreements can limit the scope for states to do the same. By contrast, they can also be used to expand the private sector's freedom, as in the case of investment treaties or the enhanced intellectual property protections often found in US-style preferential trade agreements. This means that states are always choosing, intentionally, tacitly, and by omission, whether and how much latitude to allow private contracting.

A number of implications follow. We have argued that scholars must pay greater attention to the advantages and disadvantages that each legal form confers, and how the interaction of the three legal forms influences the balance of public and private rights and interests in different issue areas. Global governance has never only been about treaties and multilateral institutions. The result is a rich field for scholars to study whether solving governance problems through private contracts have been successful, how they have promoted or constrained the attainment of larger public policy goals, and how private rights have shaped the evolution of global cooperation. Our discussion of international investment law is well-known among scholars of the subject, but even they do not always pay sufficient attention to the interaction among the different types of agreements.

Other international regime complexes present similar questions. For example, future research might examine how the network of private contracts and corporate subsidiaries enabled by bilateral tax treaties has slowed the process of negotiating and implementing the Two Pillar Solution. Similarly, intellectual property rules that influence access to medicines are established by a web of multilateral agreements and institutions (TRIPs, WIPO, the Berne and Paris Conventions), interstate contracts (TRIPS+ protections in US-style preferential trade agreements), and contracts assigning IP rights around the world. In each of these regime complexes and more, scholars can ask: how do the web of private and interstate contracts within an issue area shape, constrain, or empower existing and potential multilateral institutions? How do states decide which issues should be governed at the multilateral level, and which should be left to interstate agreements or private contracts? What are effective tools for ensuring that private and interstate contracts do not impede the evolution of regime complexes to address new problems and changed circumstances, on behalf of public objectives?

For policy-makers the take-away is that the most effective global governance will ensure that all three forms of agreements work in concert. A failure to do so means that what is given in one kind of agreement may be undermined by another. Conversely, forms of contracting and their various enforcement mechanisms may also be a work-around for multilateral blockages. Even after the US withdrew from the Paris Agreement, for example, US firms voluntarily adopted policies consistent with the kinds of reductions the US had pledged as part of its Paris

commitments. In states that have ratified the Paris agreements, state-level actors have started bringing cases in national courts to pressure their governments to live up to their Paris promises. These workarounds are no substitute for cohesive and coordinated multilateral efforts. Regime complexes tend to generate policy lacunae, and actors often burden shift, saying that the problem is for some other institution or actor to address. For example, the oft-stated World Health Organization goal of healthcare for all is repeatedly stymied by a lack of multilateral and national investment in national health systems. Yet the larger point is that these three types of arrangements will continue to co-exist. Policy-makers must therefore use all three mechanisms to achieve collective goals while preserving the ability of states to make choices about how they regulate their economy.

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