

AGORA: THE END OF TREATIES

COLLECTIVE DECISION-MAKING IN INTERNATIONAL GOVERNANCE

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The traditional treaty, conceived of as a contract between states, is in decline. Recent climate change negotiations have produced nonbinding instruments such as the Copenhagen and Cancun Accords; the financial crisis prompted governments to negotiate Basel III, a nonbinding framework for global banking regulation; the nonbinding Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises are developed countries' primary rules governing the conduct of transnational businesses. Clouds loom on the horizon even in those areas in which the treaty's prominence continues, such as investment and trade law. The World Trade Organization (WTO) has not reached a major agreement among its members since its founding twenty years ago, and some states have withdrawn from bilateral investment treaties or the Convention on the Settlement of Investment Disputes Between States and National of Other States (better known as the ICSID Convention).

The retreat of the “contractual treaty”—a legally binding agreement in which the individual's consent to be bound is the crucial juris-generative act—has been viewed with a mixture of dismay and caution. Dismay, that the promise of a strongly legalized international system that seemed so close to fruition in the 1990s with the birth of the WTO, the expansion of bilateral investment treaties (BITs), the negotiation of the UN Framework Convention on Climate Change and the Kyoto Protocol, and the Statute of the International Criminal Court, now appears increasingly out of reach. Caution, that lawyers' self-interested desire to find new sources of law¹ drives the acceptance of nonbinding instruments, a trend that some fear will weaken the normative pull of traditional international law.

In this essay, I argue that the contractual treaty's decline is symptomatic of a more fundamental shift in international governance: a turn towards collective decision-making at the expense of a state's individual authority over its obligations. The crucial shift is thus not within the sources of international law. Rather, we are in the midst of a change in the processes through which international rules are negotiated. In the last several decades, the transaction costs of international rulemaking have risen as a result of increased interdependence and shifting power. States have responded to this change by creating standing “legislative bodies,” such as Conferences of the Parties (COPs), that make collective decisions about the kinds of obligations states may make to each other. As both a legal and a practical matter, these collective decisions constrain individual authority over one's own international obligations. These collective institutions work as a costly commitment device, limiting states' ability to choose which other states to negotiate with on an issue-by-issue basis and thereby ensuring states that they will have the right to participate in future negotiations. But because

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¹ Jean d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT'L L. 1075 (2008).

they can be more confident of a seat at the table tomorrow, states are willing to make greater concessions today—a potentially significant benefit to international governance. At the same time, collective decision-making also introduces the possibility of institutional paralysis. Nonconsensual decision-making and soft law are used to moderate the costs of collective decision-making. The declining role for contractual treaties, and the rise of both “legislative” treaties made by collective decision-making bodies and soft law, are all part and parcel of the greater institutionalization of modern international negotiations.

Collective Decision-making

The contractual treaty is an instrument that emphasizes the individual authority of states over their own commitments. The hallmark of contract is that no party is bound unless it individually consents. During the sixteenth and seventeenth centuries, treaties were viewed as contracts between princes, binding only them and not their successors. The Vienna Convention on the Law of Treaties, most notably in articles 11 and 34, makes consent the touchstone for whether states have undertaken legal commitments. In the United States, the Senate’s reluctance to give its advice and consent to ratification of treaties enjoying broad bipartisan support such as the Convention on the Rights of Persons with Disabilities (Disabilities Convention), in part due to a fear of ceding control of the content of international obligations to international bodies, highlights the premium many states put on individual control of their commitments.

The contractual paradigm is under pressure from two directions. First, as I have recently argued,² modern lawmaking procedures—such as the requirement that a diplomatic conference “adopt” a legal instrument before any individual state can consent to it—increasingly require collective approval of the obligations individual states may make to each other. At the same time, as Andrew Guzman,³ Laurence Helfer,⁴ Nico Krisch,⁵ and Joel Trachtman,⁶ among others, have pointed out, states have de-emphasized the need for states to individually consent to their own legal obligations. Individual consent is thus increasingly marginalized in favor of both collective and non-consensual decision making. Indeed, even where the treaties remain in use, they are negotiated and implemented in ways that elevate the importance of collective processes at the expense of states’ individual procedural rights.

What is Collective Decision-making?

Collective decision-making involves a group decision made pursuant to procedural rules under the umbrella of an international institution. Under collective decision-making, states’ votes together form a single decision about the commitments the institution’s members undertake or may undertake. Critically, collective decision-making can be consensual, as when the decision rule requires unanimity or consensus, or nonconsensual, as when decisions can be made by a majority or supermajority.

Collective decision-making procedures have long existed in international lawmaking, but they have expanded in importance with the rise of standing lawmaking bodies such as Conferences of the Parties⁷ (COPs). COPs, which go by many similar names, exist in most major multilateral institutions and are essentially “international legislatures” comprised of member states. The paradigmatic case of collective decision-making is

² Timothy Meyer, *From Contract to Legislation: The Logic of Modern International Lawmaking*, 14 CHI. J. INT’L L. 559 (2014).

³ Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747 (2011).

⁴ Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71.

⁵ Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AJIL 1 (2014).

⁶ JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW, GLOBAL GOVERNMENT* (Cambridge Univ. Press 2013).

⁷ Jutta Brunnée, *COPing with Consent: Law-making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT’L L. 1 (2002).

“adoption,” the nonbinding act by which a diplomatic conference approves a draft treaty. This act of collective approval is formally necessary before members of the institution can individually consent to be bound. In other words, prior collective approval is necessary before individual member states can make commitments to each other. In the contractual paradigm, by contrast, no prior institutional approval is necessary.

In reality, the distinction between collective and contractual decision-making is really a continuum. States regularly negotiate in groups with some form of collective decision as to when negotiations have concluded. The key difference is the degree to which the collective decision constrains individual decision-making about international commitments. There are at least two ways in which collective decisions such as adoption by international legislatures constrains the choices individual states face in making legal commitments to each other.

First, COPs and other kinds of international legislatures institutionalize membership. This means that they generally lack the ability to exclude outlying member states from voting. By contrast, in “contractual” (or thinly institutionalized) negotiations, if it becomes clear that a state will not join the final agreement or its demands to do so are too steep, the remaining states can simply proceed without the holdout state. COPs remove this flexibility at the collective decision-making stage, even if they retain individual consent such as through a ratification requirement. The collective decision-making process thus becomes of great importance because (1) it occurs prior to any individual acceptance of legal commitments, and (2) it allows states that may have no intention of individually consenting to an instrument to nevertheless influence the content of the legal obligations other states make to each other. If its vote is necessary to an instrument’s adoption, the holdout state gets its say.

Adopting the aggression amendments to the Rome Statute in the Assembly of the Parties illustrates how collective decision-making differs from lawmaking under a contractual model. That decision⁸ in practice required the consensus of all states taking part in the negotiations at Kampala in 2010. This voting rule, in turn, meant that states favoring weaker amendments were necessary if the aggression amendments were to be adopted at all. These states were thus able to extract concessions weakening the aggression amendments, despite the fact that some of these states likely have no intention of ratifying.

Second, collective decision-making bodies typically nest their decisions within pre-existing rules, institutions, and practices that give their decisions meaning and effect. Forum shopping⁹ and regime shifting¹⁰—techniques by which states can reassert control if a collective body is unable to take action they view as desirable—are costly because they require states to incur a set of transaction costs not necessary to decision-making within the established collective framework. Creating an international organization requires the expenditure of both political and financial capital. It also requires time, as core members must agree on the institution’s basic terms. Perhaps most importantly, stepping outside an existing legal framework may entail significant renegotiation of substantive rules. For example, when the COP of the Stockholm Convention on Persistent Organic Pollutants decides to subject a new substance to controls, it need not actually negotiate the legal rules governing the pollutant. Instead, the Convention itself provides default rules. Stepping outside the Convention to negotiate rules for a particular substance, while possible, would allow states to reopen negotiations on the substantive legal rules. Similarly, if a regime comes with a built-in tribunal, such as the International Criminal Court (ICC), stepping outside the ICC framework would prove too costly. States

⁸ Beth Van Schaack, *Negotiating at the Interface of Power & Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 507 (2011).

⁹ Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007).

¹⁰ Laurence R. Heifer, *Regime Shirting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004).

hoping to see the crime of aggression prosecuted by an international court therefore cannot resort to a treaty solely among states interested in a strong definition of the crime.

The Logic of Collective Decision-making

Collective decision-making within international legislatures like COPs is thus costly. By institutionalizing membership and increasing the costs of forum shopping, it requires states to relinquish some freedom to choose their negotiating partners on an issue-by-issue basis. Moreover, it gives states the ability to consent to, and therefore block, other states' legal obligations, a power not present in the "contractual" treaty archetype. It creates the possibility of institutional paralysis, in which states have trouble abandoning an institution but cannot successfully agree on rules within it. Yet today collective decision-making is the primary format through which states attempt to negotiate rules to resolve the world's most pressing problems. Given its costs, why have states chosen this rigid institutional form?

The answer is that collective decision-making reduces the transaction costs of international governance in an age of increasing interdependence and shifting power. It does so by serving as a form of costly commitment. Institutionalizing membership through COPs, especially ones that make decisions through consensus or supermajority rules commits states to negotiating with each other in the future. This commitment is valuable to states because (1) it gives them an institutional mechanism to commit to trade concessions across issues, and (2) it smooths out the effects of changes in power.

Unlike the Cold War that preceded them, the last several decades—with the globalization of markets, the rise of China and India, the agglomeration of Europe, and the fall and rebirth of Russia—have been characterized by both increases in interdependence and more rapid fluctuations in the relative power of states. International financial markets are increasingly tied together, creating systemic risks that do not respect international borders. Many environmental problems, from climate change to depleted fisheries, have the same international dimension. Public perceptions have also changed dramatically since the mid-twentieth century, making the plights of people in foreign countries a matter of public concern. Interdependence increases the demand for international cooperation. As the demand for international cooperation rises, states negotiate with each other across an increasingly large range of issues. Moreover, even within a particular issue area, states do not expect to be able to negotiate a single comprehensive agreement. Instead, they must negotiate over time across related issues.

More negotiations, of course, increase the transaction costs of rulemaking. But increased interdependence is also an opportunity. As states deal with each other across more issues, they have the opportunity to make "gains from trade" if they make concessions to each other across related issues. For example, in multilateral negotiations a developed country such as the United States might make concessions to a developing country on agricultural subsidies in exchange for concessions (or support for concessions from others) on protections for intellectual property in a different negotiation.

The contractual treaty, however, is ill-suited to facilitating these kinds of transactions. Imagine that the exchange of concessions I just described is agreed in principle during the intellectual property negotiations, with the negotiations on subsidies to follow. If the intellectual property provisions are enacted as a stand-alone treaty when negotiations are concluded, the developing country has no formal mechanism through which it can ensure that it gets the concessions it bargained for on limiting subsidies.

Collective decision-making procedures, especially those that follow a consensus or unanimity model as many do, alleviate the difficulties of contractual treaties by giving the developing country the ability to block the adoption of the agreement on subsidies if the agreement does not reflect the concessions it expected to receive. Viewed in isolation, this holdup power might appear to increase the transaction costs of any particu-

lar negotiation. In the long run, however, collective decision-making through COPs can actually reduce transaction costs by creating penalties for renegeing on agreements to exchange concessions across multiple negotiations. These penalties, in turn, encourage states to make concessions because they are confident that their cross-issue bargains will be honored. To give but one example, the “single undertaking” mechanism that characterizes most trade negotiations such as the Trans-Pacific Partnership, through which separate “chapters” on different topics are adopted as a single instrument and “nothing is agreed until everything is agreed,” reflects this logic. Standing legislative bodies stretch the logic of “nothing is agreed until everything is agreed” to apply to everything under an institution’s jurisdiction. If prior agreements are neglected, subsequent negotiations can be held hostage—an incentive to uphold earlier understandings.

Shifting power increases transaction costs too, as states may be reluctant to lock in terms today if they are optimistic about their ability to negotiate better terms tomorrow. At the same time, as interdependence increases states may be wary of being left out of negotiating rules today that shape the world of tomorrow. Collective decision-making addresses these concerns. Institutionalized membership ensures that states that face a relative decline in power will have a voice in future negotiations. Rising powers, in turn, get the ability to influence, and potentially slow down, rulemaking today. They also gain a form of insurance, as they remain members of the institution even if they face a reversal of fortune.

Nonconsensual Decision-making and Soft Law

Collective decision-making, even under unanimity rules, is thus importantly different from contractual decisionmaking. It represents a costly commitment not to exclude other member states from future related negotiations, a commitment that is justified because it encourages concessions among states. Not surprisingly, however, states need a way to modulate this commitment. Allowing one holdout to paralyze international rulemaking completely will rarely be justified by the benefits in terms of facilitating future negotiations. Nonconsensual decision-making and soft law, often identified as the primary challenge to the contractual treaty, largely exist as a safety valve for collective decision-making. Nonconsensual decision-making eases the transaction costs to rulemaking within an institution by reducing the number of parties necessary to adopt a decision. Soft law, by making obligations nonbinding, may ease resistance among dissenting states.

Nonconsensual decision-making takes many forms. Outside of a few well-known examples such as the UN Security Council acting under Chapter VII or technical adjustments to the Montreal Protocol, instances in which an international organization can make a decision that is formally binding on dissenters remain relatively rare. Other forms of nonconsensual lawmaking have flourished, however. Customary international law, for example, does not require a state to expressly consent and imposes a very high burden on state’s seeking to avoid the application of a new rule of custom. Some states, international organizations, and NGOs have thus used claims about what customary international law requires as a substitute for treaty-making, especially in areas like human rights.¹¹ States also codify custom¹² as a way to bind non-parties. For example, Annex B of the U.S. Model Bilateral Investment Treaty requires parties to affirm that the treaty’s rules regarding expropriation and compensation are customary international law. Since both parties to the BIT are bound by it, such a provision’s primary effect is on non-parties that remain bound by customary international law. Thus, although codifying custom uses the treaty, its ultimate aim is to build legal rules binding on states that are reluctant to enter into treaties.

¹¹ Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT’L L. & POL. 1049 (2011).

¹² Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012).

COPs, for their part, increasingly resort to soft lawmaking, rather than formally adopting amendments or protocols. These soft law decisions can sometimes be adopted using nonconsensual decision rules, even if adopting a binding instrument would require consensus. Moreover, the nonbinding decisions and recommendations of COPs are critically important to how these regimes function. They both interpret and implement the treaty commitments and establish non-compliance procedures. For example,¹³ the COP to the Ramsar Convention on Wetlands of International Importance has, through a series of nonbinding decisions and recommendations, shifted the Convention's emphasis away from the parties' original understanding—protecting specifically listed wetlands—towards maintaining the “wise use” of all wetlands within the parties' territory.

Finally, framing a decision as nonbinding may ease resistance to it, whatever the decision-rule. States that are unsure about the rule's wisdom may be more willing to agree if they know the reputational costs of violating it are less. Similarly, states, particularly rising power, may be more willing to allow a decision if they know they can exit from it more easily (and therefore renegotiate it) if they do in fact become more powerful in the future. Nonbinding decisions are easier to exit,¹⁴ precisely because the cost of violation is lower. The Kyoto Protocol's Compliance Mechanism illustrates how soft law can facilitate agreement. The Compliance Mechanism contemplates penalties in subsequent commitment periods for states that fail to meet their emissions reduction obligations. The Mechanism was established by a mere decision of the parties, despite the fact that the Protocol itself provides that any compliance procedures “entailing binding consequences shall be adopted by means of an amendment to this Protocol.” This suggests that states were able to agree on potentially serious penalties for noncompliance, so long as the instrument creating those penalties was nonbinding.

Conclusion

One can overstate the decline of the treaty. Treaties remain a key legal instrument and states continue to regularly enter into them. Bilateral investment treaties and free trade agreements, for example, continue to flourish even if the jurisdictional regime that supports their enforcement is under some stress. Similarly, focusing on the U.S. Senate's unwillingness to give its advice and consent to ratification is misleading. In the United States, the President can make binding international agreements without the Senate and has shown an increasing willingness to do so, as he did when he ratified the Minamata Convention on Mercury. Moreover, the American difficulty ratifying treaties does not seem generalizable to other countries. The Disabilities Convention, for example, was opened for signature in December 2006 and already 145 parties have either ratified or acceded to it.¹⁵

But while rumors of the treaty's death have perhaps been exaggerated, they have not been greatly so. The treaty as contract is well designed for a world in which state power is relatively stable and states negotiate over relatively discrete issues. In the modern world, though, in which states are constantly negotiating the rules governing any given area of the law on a shifting geopolitical landscape, the contractual treaty is inadequate. Its decline should not be greeted with dismay, however. Nor does it signal the end of efforts to legalize and regularize international relations. No one tool of international cooperation should be held sacrosanct. Rather, states have adapted international rulemaking to new circumstances in an effort to make international govern-

¹³ Annecoos Wiersema, *The New International Law-Makers? Conferences of the Parties to Multilateral Environmental Agreements*, 31 MICH. J. INT'L L. 231 (2009).

¹⁴ Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. INT'L L.J. 379 (2010).

¹⁵ Convention on the Rights of Persons with Disabilities, Dec. 19, 2001, 2515 UNTS 3.

ance more effective. We should applaud such efforts, while seeking to understand their causes so that we may more effectively solve the world's most pressing problems.