

2018

Unintended Agency Problems: How International Bureaucracies are Built and Empowered

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Recommended Citation

Anu Bradford, Stavros Gadinis & Katerina Linos, *Unintended Agency Problems: How International Bureaucracies are Built and Empowered*, *VIRGINIA JOURNAL OF INTERNATIONAL LAW*, VOL. 57, P. 159, 2018 (2018).

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Unintended Agency Problems: How International Bureaucracies Are Built and Empowered

ANU BRADFORD,* STAVROS GADINIS,** AND KATERINA LINOS***

The ground underneath the entire liberal international order is rapidly shifting. Institutions as diverse as the European Union, International Monetary Fund, United Nations, and World Trade Organization are under major threat. These institutions reflect decades of political investments in a world order where institutionalized cooperation was considered an essential cornerstone for peace and prosperity. Going beyond the politics of the day, this Article argues that the seeds of today's discontent with the international order were in fact sown back when these institutions were first created. We show how states initially design international institutions with features that later haunt them in unexpected ways. In the worst cases, states become so dissatisfied with the institutions they build that they threaten to abandon or dissolve them, shaking the foundations of the international order. Our central argument is that two cooperation problems intersect in unanticipated ways. The first problem—the horizontal conflict—involves the distribution of benefits among states. When states first create an international organization, they seek to capture a big share of the benefits and protect their interests vis-à-vis other states. They do this by demanding voting rules that allow them to block unfavorable decisions, requiring leadership positions for their own nationals, and lobbying to include their priority issues on the organization's agenda. We argue that this initial effort to resolve distributional conflicts is short-sighted, ultimately leaving states dissatisfied with the international organizations they build. The second problem—the vertical conflict among states collectively, on the one hand, and international organization bureaucracies and tribunals, on the other—is worsened by the compromises reached to resolve the horizontal conflict. For example,

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We would like to thank John Armour, Tomer Broude, Kristina Daugirdas, Grainne De Burca, Andrew Guzman, Daniel Keleman, Suzanne Kingston, Aila Matanock, Carolina Milewicz, James Morrison, Duncan Snidal, Alison Post, Matthew Waxman, and participants at the ASIL/ESIL 2015 joint sessions, the Oxford Glass of Research Seminar and the Nuffield International Law Lunch as well as the Columbia/NYU EU law Roundtable for their very helpful comments and ideas. Kelsey Clark, Emily Hush, Laura Jakli and Sarah Lee offered exceptional research assistance.

when states agree that key decisions must be reached by consensus, it becomes difficult to roll back the actions of a wayward secretariat or tribunal down the line. Or, when states place their own nationals in key positions, a multi-national body with an international agenda emerges. Such an international organization can become detached from the national concerns of its creators. Moreover, when states put their key issues on the organization's agenda, a broad mandate results. In turn, a broad mandate empowers the organization's staff to set its own priorities, making state control difficult. Contrary to prior isolated studies on horizontal and vertical conflicts, we are the first to identify how the two conflicts intersect in important and unexpected ways. To find possible solutions, we draw on analogous intersections in corporate law literature, which have been examined more thoroughly.

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I. INTRODUCTION

Populist voices and election outcomes in the United States and Europe have made it clear that international cooperation is not in vogue. International institutions are increasingly associated with all things evil, be it the loss of jobs, the loss of a sense of personal and national security, or the dissolution of local culture and identity as we know it. Nationalist currents have supplanted the notion that common problems are beyond any individual nation's capacity to resolve alone, calling into question the very existence of international institutions as the bedrock of the global order.

Examples abound. Deep discontent with the European Union (EU) is threatening to tear it apart. Up north, the United Kingdom has begun the unprecedented process of negotiating its exit from the EU after a bitter referendum on its membership in the body.¹ British Euro-sceptics have for decades derided regulations and directives issued by Brussels, and have abhorred treaty commitments toward “an ever-closer union.”² Most recently, critics of European integration have directed their ire toward migrants from other EU-member states, claiming that their influx into the U.K. has placed immense strain on the country's welfare programs.³ Yet even when facing mounting criticism directed at the free movement of people, EU institutions remain steadfast in defending the right of all EU citizens to live, work, and receive equal treatment throughout the Union. Along the EU's southern border, Greece in particular has been unable to stem the tide of refugees fleeing upheaval in the Middle East. Once such refugees enter an EU-member state, they enjoy uninhibited access to other member states, due to the abolishment of border controls under the Schengen agreement.⁴ Consequently, the migration problem in the South quickly evolved into a problem for the entire EU. As anger among member states mounted, European Council leadership made an unprecedented move by threatening Greece with temporary suspension from the Schengen zone.⁵ These examples suggest that while European states initially created the EU

¹ Tara Palmeri, *The EU and David Cameron: We Need to Talk About Brexit*, POLITICO (Feb. 2, 2016), <http://www.politico.eu/article/brexit-david-cameron-european-union-eu-migrant-reform/>.

² *Id.*

³ This is recognized as the most controversial part in Britain. See George Parker & Alex Barker, *Cameron's EU Deal: What the UK Has—and Has Not—Secured*, FIN. TIMES (Feb. 3, 2016), <http://www.ft.com/intl/cms/s/0/ed0b3516-c9a6-11e5-a8ef-ea66e967dd44.html#axzz3zXD1smLN>; see also Alberto Nardelli et al., *Fortress Mentality on EU Migration Creates Xenophobia, Warns Italian PM*, GUARDIAN (Jan. 19, 2015), <http://www.theguardian.com/uk-news/2015/jan/19/fortress-mentality-european-migration-creates-xenophobia-italian-pm-matteo-renzi>.

⁴ *Schengen Agreement*, EUR. COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last visited Dec. 3, 2017).

⁵ Jim Brunsten, Kerin Hope & Peter Spiegel, *EU Threatens to Reimpose Greek Border Controls*, FIN. TIMES (Jan. 27, 2016), <http://www.ft.com/intl/cms/s/0/674647a6-c4f9-11e5-808f-8231cd71622e.html#axzz3zXD1smLN>.

as their agent, their roles have reversed. Increasingly, the EU is acting as principal, insisting that member states implement its mounting regulations and rulings, whether in their national interest or not.

At the core of both the horizontal and vertical conflicts lies the EU's doctrines about free movement of people, which mandate that all EU nationals enjoy the privileges traditionally offered exclusively to each member state's own citizens.⁶ The Schengen zone further facilitates free movement by removing border controls.⁷ Although now considered bedrocks of European integration, the free movement principle was not forged in the intense state-to-state negotiations that typically produce EU treaties. Rather, the European Court of Justice (ECJ) relied on scant and cryptic treaty language to give practical significance to these doctrines.⁸ The ECJ often acted at the behest of the European Commission, which brought complaints against member states not pursuing integration in earnest.⁹ It may seem surprising that member states vested EU institutions with powers that are now deployed against them. However, this was a natural response to the horizontal conflict at the time. The ECJ and Commission were entrusted with interpretation and implementation powers because they were established as neutral arbiters, who would not do one member state's bidding against others. This neutral status required the ECJ and Commission to operate outside of any single state's control. Yet, over the years, EU institutions converted this independence into a powerful instrument to pursue their own agenda, even when it ran contrary to the will of governments that established them in the first place.

The EU is hardly the only international organization (IO) threatened by schism. The International Monetary Fund (IMF), another pillar of the post-WWII order, now shares the global scene with the New Development Bank, founded by Brazil, Russia, India, China, and South Africa (BRICS).¹⁰ As these countries' importance in the world economy grew significantly in the past fifteen years, they sought to increase their voice in global fora. These countries thought past attempts to reform the IMF governance structure had not gone far enough, and were dissatisfied by the Europeans' decades-old power-sharing agreement with the U.S., which saw Europeans continue

⁶ Ottavio Marzocchi, *Fact Sheets on the European Union: Free Movement of Persons*, EUR. PARLIAMENT (June 2017), http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_2.1.3.html.

⁷ Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503 (1993).

⁸ Karen Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121 (1998); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

⁹ RACHEL A. CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* 137 tbl.4.5, 139 tbl.4.6 (2007).

¹⁰ Raj M. Desai & James R. Vreeland, *What the New Bank of BRICS Is All About*, WASH. POST (July 17, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/>.

to select the IMF head.¹¹ Thus, when the IMF participated in the Greek bailout under terms generally perceived as more favorable than those extended to non-Europeans, BRICS voiced their opposition in no uncertain terms.¹² Shortly thereafter, in a move steeped in symbolism, they announced their own international development bank initiative.

Nevertheless, it is not only emerging economic powers that question the merits of existing institutions. The United States—the architect of much of the post-WWII institutional order—is also threatening to walk away from the order it created and actively supported throughout the post-WWII era. The new Trump administration is currently renegotiating the North American Free Trade Agreement (NAFTA). It has also threatened to withdraw from, or renegotiate, many other international treaties that, allegedly, do not serve its interests, possibly including the World Trade Organization (WTO). Recent executive orders also aim to undermine institutions such as the United Nations by withholding funding from its operations.¹³ If the United States goes through with its threat to cut at least 40% of its contributions to international agencies, it will severely hamper the ability of those agencies to function. For example, the U.S. currently funds a quarter of UN peacekeeping operations, which, absent U.S. support, may not be able to continue.

In the examples above, and in others discussed below, conflicts between IOs and the states they represent grew so heated that withdrawal of support, exit, or the creation of a competing institution were deemed appropriate responses. Such radical outcomes are hard to explain based on existing accounts of IOs, even those typically critical of these institutions. For example, if one accepts that powerful member states dominate IOs, then it is difficult to understand how IOs develop the strength to turn against these states. On the other hand, if one sees IOs as international bureaucrats spinning out of control, it is hard to understand why states created them in the first place, and why they believe that creating new competing institutions is a plausible alternative.

We argue that these crises are connected at their roots and arise out of the intersection of two challenges that have thus far been studied separately.

¹¹ *Why Have Europeans Dominated the IMF?*, NPR (June 9, 2011), <http://www.npr.org/2011/06/09/137075631/should-a-european-head-the-imf>.

¹² Leonid Bershidsky, *IMF Reform Is Too Little, Too Late*, BLOOMBERG VIEW (Dec. 18, 2015), <http://www.bloombergview.com/articles/2015-12-18/imf-reform-is-too-little-way-too-late>.

¹³ Max Fisher, *Trump Prepares Orders Aiming at Global Funding and Treaties*, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/united-nations-trump-administration.html?_r=0; Geoff Dyer, *Donald Trump Threatens to Pull US Out of WTO*, FIN. TIMES (Jul. 24, 2016), <https://www.ft.com/content/d97b97ba-51d8-11e6-9664-e0bdc13c3bef>; James Bacchus, *Trump's Challenge to the WTO*, WALL ST. J. (Jan. 4, 2017), <https://www.wsj.com/articles/trumps-challenge-to-the-wto-1483551994>; Ayesha Rascoe, *Trump to Begin Renegotiating NAFTA Pact Soon with Mexico, Canada*, REUTERS, Jan. 22, 2017, <http://www.reuters.com/article/us-usa-trump-nafta-idUSKBN156128>.

The first challenge concerns conflicts among member states (horizontal conflicts), while the second challenge focuses on conflicts between member states as a group and the IOs (vertical conflicts). We argue that when IOs are first established, the possibility of horizontal conflict among states looms large in negotiators' minds. States therefore design IOs with features that protect them from the overreach and shirking of other states. However, as these IOs mature—and separate secretariats, courts, and other governance bodies gain power—a deep vertical conflict between the states collectively, and the IOs, begins to emerge. We claim that design features initially designed to protect states from each other ultimately limit states' collective ability to control wayward bureaucracies and courts. In other words, the measures designed to resolve the horizontal conflict inadvertently lay a foundation for a vertical conflict, leading states from one problem to another. Throughout this Article, we will refer to this interaction between the horizontal and vertical conflicts as the “joint problem.”

When today's major IOs were designed shortly after World War II, each government sought to capture its fair share of the gains from cooperation, and worried that foreign governments might make decisions that only benefited them. We call this distributional conflict among states a horizontal conflict. For instance, in setting up the EU's predecessor—the European Coal and Steel Community—France, Germany, and every other state wanted to guarantee receipt of its fair share of the common goods produced by the organization. Of course, this horizontal conflict is not peculiar to the EU; it characterizes every IO. It stems from the fact that modern states understand themselves first and foremost as nation-states, and only secondarily as members of a global community.

One way in which states preserved their power vis-à-vis other states in their initial bargains was by insisting on super-majority or, even more commonly, unanimity for every important decision. Another way in which states sought to prevail vis-à-vis other states was by demanding spots within IOs' bureaucracies for their nationals. Still another technique states employed was geographic; they located IOs far from their rivals' capitals, in small and neutral countries. Finally, states created IOs with relatively broad mandates, in an effort to link diverse issues that were important to different states.

As time passed, IOs grew in complexity. They acquired more powers as states delegated major tasks to bodies that were increasingly independent from state control, such as the European Commission and European Courts, the UN Secretariat, and the WTO dispute settlement body. This delegation of power, while mitigating the horizontal conflict, planted the seeds for an emerging vertical conflict between states as principals and IOs as their agents.

We will show that measures devised to improve each state's bargaining position vis-à-vis foreign states often unintentionally weaken states' collective control over the very institutions they designed. For example, the rule that every state must consent to every major decision means that once power is delegated, it is almost impossible to obtain the votes necessary to rein in wayward bureaucracies and tribunals. Similarly, the rule that every state can place its nationals in key IO positions means that IO secretariats and courts are composed of people from many countries, who in turn develop supra-national affinities, and are more eager to move key powers away from national capitals and toward the IO. Relatedly, IOs are often set up in relatively remote locations—such as Brussels, Luxembourg, Geneva, and The Hague—far from the national capitals of most powerful states. When this happens, civil servants and judges end up socializing primarily with other internationally minded persons, and lose touch with the day-to-day concerns in national capitals. Finally, due to broad IO mandates, IO staff members have greater room to prioritize issues they consider important, sometimes at the expense of member states' interests. Accordingly, such a broad mandate makes it harder to monitor the IO's performance, compromising states' abilities to detect and sanction its wayward activities.

The central claim we will advance below is one of unintended consequences where states, while mitigating one obstacle for cooperation, simply replace it with another. In other words, when addressing the horizontal conflict, states lay the seeds for a vertical conflict. The existing literature on IOs has examined these conflicts in isolation, failing to address the interdependence between the two. In developing our claim, we will build on a prominent tradition in rationalist literature that explores the benefits and costs of centralization and delegation to a neutral actor.¹⁴ We will also draw on important constructivist work that explains how international organizations, like all bureaucracies, create standardization and end up applying path-dependent models to distinct problems.¹⁵ Both the vertical and horizontal conflicts are well explored in various literatures; our innovation is in studying how they intersect.¹⁶

¹⁴ See, e.g., Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 9–29 (1998).

¹⁵ See, e.g., Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 707–27 (1999).

¹⁶ The most closely related literature trends mention, but then bracket, the issue of multiple principals. See, e.g., DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006); Beth A. Simmons, Frank Dobbin & Geoffrey Garrett, *Introduction: The International Diffusion of Liberality*, 60 INT'L ORG. 781 (2006); Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT'L ORG. 811 (2006); Duane Swank, *Tax Policy in an Era of Internationalization: Explaining the Spread of Neoliberalism*, 60 INT'L ORG. 847 (2006); Chang Kil Lee & David Strang, *The International Diffusion of Public-Sector Downsizing: Network Emulation and Theory-Drive*

In elucidating the interrelated nature of vertical and horizontal conflicts, we will turn to corporate law—a field where the joint problem has been widely studied, but on which the literature on IOs has not drawn extensively. Corporate law often delegates major decision-making power to boards, not only to enhance the smoothness of day-to-day operations, but also to protect small, passive shareholders from large, active ones. However, delegating broad powers to a board can entrench the board and allow it to make decisions independent of shareholder concerns. To ameliorate this joint problem, corporate law specifies a series of governance rules, including disclosure obligations, proposal-making rules, and voting rules. We will draw some lessons from corporate law about how specifically to structure and implement transparency and minority protection.

An enhanced understanding of the interdependence between horizontal and vertical conflicts enables us to grapple with the specific contexts and conditions in which the joint problem is likely the most salient. For example, we expect the horizontal conflict to be most acute for young international bodies, and the vertical conflict to become sharper as organizations grow and, critically, delegate more powers to supra-national organs.¹⁷ Additionally, we expect small and large states to perceive the relative threat of the horizontal and vertical conflict to their sovereignty in different ways. While large and economically powerful countries are likely to see centralized institutions as constraints on their power, small countries may benefit from delegation to institutions that gradually come to advance the collective preferences of the member states. We will therefore explore the scope for, and the particular manifestations of, our argument before concluding.

We will conclude by conceding that the joint problem is here to stay; reversing the features that initially created the joint problem is rarely a viable option for states. We are unlikely to see a radical reform of voting rules, the repatriation of internationally minded and networked staff, the relocation of IO headquarters, or the delinking of issues to create single-issue IOs. We will explore how some options to escape the joint problem—exiting from the IO, creating smaller, more homogeneous regional organizations, and creating looser networks of states—each come with benefits, but also major costs. We will not identify a solution to reshape the international institutional landscape. Rather, our goal is to lead states to better recognize important trade-offs as they delegate powers to IOs, enabling them to act

Learning, 60 INT'L ORG. 883 (2006); Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the International Context of Democratization*, 60 INT'L ORG. 911 (2006); Michael J. Gillian, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT'L ORG. 935 (2006); Jon Pevehouse & Bruce Russett, *Democratic International Governmental Organizations Promote Peace*, 60 INT'L ORG. 969 (2006); Irfan Nooruddin & Joel W. Simmons, *The Politics of Hard Choices: IMF Programs and Government Spending*, 60 INT'L ORG. 1001 (2006).

¹⁷ See *infra* Part IV.B. (acknowledging how decision-making bodies based on state representation – such as the World Health Assembly or the Security Council – never fully resolve horizontal conflict).

with an enhanced awareness of future consequences. We will draw on corporate law for specific governance techniques that could ameliorate—without fully resolving—some of the challenges stemming from the joint problem.

The motivation behind our project is primarily descriptive, not normative. Sovereign states delegating power to an IO may find the joint problem disconcerting—but others may welcome its positive outcomes. For example, human rights courts might eagerly challenge states' practices, even in matters of national security or other sensitive state interests. Similarly, the World Health Organization (WHO) might advise against travel to states with emergent epidemics without first consulting with those states, and thus without first taking these states' sovereignty concerns as seriously as they would like.¹⁸ Relatedly, the ECJ moved very quickly toward trade liberalization in the 1970s and 1980s, even though member states would have retained protectionist barriers for longer, as evidenced by the slow pace with which they passed directives and regulations to liberalize markets.¹⁹ Rapid progress toward human rights, infectious disease eradication, and trade liberalization are all arguably desirable from several perspectives, but can be problematic from the perspective of states with more cautious preferences.

The Article will proceed as follows. Section I will describe the origins and types of horizontal and vertical conflicts. Section II will develop the core theoretical argument by explaining how the two conflicts intersect. Section III will draw on corporate law literature to illustrate how the joint problem manifests itself in a different institutional context. Section IV will lay out the distributional consequences associated with the joint problem. The Conclusion will close with a brief discussion of the ways states can respond to the joint problem.

II. PRELIMINARY DEFINITIONS: EXAMPLES OF HORIZONTAL AND VERTICAL CONFLICTS

A. Horizontal Conflict—Distributional Conflict Among States

1. The Origins and Types of Horizontal Conflicts

The primary motivations for pursuing international cooperation are states' needs to address various collective action problems and to share the costs of providing public goods such as peace and security, free trade, and

¹⁸ See, e.g., Yanzhong Huang, *The SARS Epidemic and Its Aftermath in China: A Political Perspective*, in LEARNING FROM SARS—PREPARING FOR THE NEXT OUTBREAK: WORKSHOP SUMMARY 116 (2004).

¹⁹ See, e.g., Alec Stone Sweet & Wayne Sandholtz, *European Integration and Supranational Governance*, 4 J. EUR. PUB. POLY 297 (1997).

environmental sustainability. Pooling resources allows states to harness economies of scale, thereby expanding the availability and sharing the costs of these public goods. It also allows states to better constrain opportunistic behavior such as free riding.

International cooperation typically makes all states collectively better off. Yet, various conflicts of interest make even the most beneficial cooperation challenging. States hold divergent views, for example, as to the precise sectors of the economy that ought to be liberalized, and the optimal balance between free trade and social protections.²⁰ They also disagree on the salience of various security threats, and the appropriate ways to respond to them. States might agree on the importance of “fair” allocation of responsibilities for environmental protection, but cannot agree on what this means when it comes to allocating precise emissions quotas.²¹ When states pool their resources to create an IO, each state wants to enjoy at least its fair share of the goods the IO produces, and to avoid undertaking more obligations than other members. Relatedly, each state wants to contribute no more than its fair share of the operating costs of the IO. We call this distributional conflict over the costs and benefits of joining and governing an IO a *horizontal conflict*, or a conflict between “principals,” as it takes place between legally equal and functionally similar sovereign states.

Sometimes horizontal conflicts manifest as a classic *collective action problem*, where individual interest clashes with group interest. Environmental cooperation efforts often embody this dynamic: each state has an incentive to defect from cooperation and free ride on others’ efforts to protect the global commons.²² Establishing genuine cooperation on global climate change, for instance, would require states to overcome this incentive to free ride on others’ efforts. Yet, collective action problems are not limited to the environmental realm. Free riding can even occur in the context of “club goods” (as opposed to “public goods”) where states should, in principle, be

²⁰ SHAYERAH ILIAS AKHTAR & VIVIAN C. JONES, CONG. RESEARCH SERV., R43387, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) NEGOTIATIONS 11 (2014); FERGUSSON ET AL., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR CONGRESS 4 (2015); Jessica Glenza, *TPP Deal: US and 11 Other Countries Reach Landmark Pacific Trade Pact*, GUARDIAN (Oct. 5, 2015, 8:47 AM), <https://www.theguardian.com/business/2015/oct/05/trans-pacific-partnership-deal-reached-pacific-countries-international-trade>.

²¹ Fiona Harvey, *Everything You Need to Know About the Paris Climate Summit and UN Talks*, GUARDIAN (Nov. 20, 2015, 5:38 AM), <https://www.theguardian.com/environment/2015/jun/02/everything-you-need-to-know-about-the-paris-climate-summit-and-un-talks>; Rowena Mason, *Copenhagen Summit: Developing Countries to Challenge Emissions Limits*, TELEGRAPH (Nov. 30, 2009, 8:32 PM), <http://www.telegraph.co.uk/news/earth/copenhagen-climate-change-confe/6694667/Copenhagen-summit-developing-countries-to-challenge-emissions-limits.html>; Edward Cameron, *What is Equity in the Context of Climate Negotiations?*, WORLD RES. INST. (Dec. 14, 2012), <http://www.wri.org/blog/2012/12/what-equity-context-climate-negotiations>.

²² See generally Scott Barrett, *The Problem of Global Environmental Protection*, 6 OXFORD REV. ECON. POL’Y 68 (1990).

able to limit the enjoyment of public goods to the IO members.²³ In international trade, for example, free riding can take place *within* the WTO itself, although only WTO member states enjoy the benefits of lower trade barriers, making it impossible for non-members to free ride.²⁴ This is because all WTO members benefit from a Most-Favored-Nation principle, which entails each WTO member enjoying the same degree of market access, irrespective of its willingness to open its markets in return.²⁵ The North Atlantic Treaty Organization (NATO) is conversely an example of an IO that can avoid free riding by limiting its security guarantees to its members. But many countries still benefit indirectly from its security umbrella, choosing to enjoy the military protections of NATO without contributing troops or funds in exchange for more direct and tangible security guarantees.²⁶

Even when free riding is not a central concern, various *distributional conflicts* undermine international cooperation. In these instances, each state may be better off cooperating than defecting, but may face difficult questions regarding division of the costs and benefits of cooperation. This is because each state wants to negotiate a bargain that maximizes its (net) gains from cooperation. In the IMF, for example, Executive Board members are often divided by who the Fund should lend to, as well as the amount of funds that should be dispatched. Such disagreements stem from states' varying domestic financial policy considerations (such as the exposure of their respective private sectors to possible insolvency in some country) and geopolitical motivations.²⁷ In the UN, distributional conflict typically focuses on divisions between developed and developing countries. These countries disagree on whether international obligations should be universal or differentiated based on the members' development levels, and hence capacity to comply.²⁸ Another tension stems from the two-tier

²³ Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 678 (2007).

²⁴ *Glossary Term: Free-rider*, WTO, https://www.wto.org/english/thewto_e/glossary_e/free_rider_e.htm (last visited Dec. 1, 2017); Rodney D. Ludema & Anna Maria Mayda, *Do Countries Free Ride on MFN?*, 77 J. INT'L ECON. 137, 137–38 (2009).

²⁵ *Principles of the Trading System*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Dec. 1, 2017).

²⁶ President Trump has repeatedly criticized this alleged free-riding on U.S. security guarantees in the NATO. For this reason, he has gone as far as to threaten not to respect the security guarantees that are at the heart of the treaty alliance. See Carol Morello & Adam Taylor, *Trump Says US Won't Rush to Defend NATO Countries If They Don't Spend More on Military*, WASH. POST (Jul. 21, 2016), https://www.washingtonpost.com/world/national-security/trump-says-us-wont-rush-to-defend-nato-countries-if-they-dont-spend-more-on-military/2016/07/21/76c48430-4f51-11e6-a7d8-13d06b37f256_story.html?utm_term=.d18530e07889.

²⁷ See Mark S. Copelovitch, *Master or Servant? Common Agency and the Political Economy of IMF Lending*, 54 INT'L STUD. Q. 49, 58 (2010).

²⁸ For discussion of this tension in international law, see Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 281–83 (2004).

membership structure in the UN Security Council. Under this structure, permanent members can override other member nations because of their outsized influence over decisions involving international peace and security. That said, the horizontal conflicts between veto-holding members often paralyze the Security Council itself.²⁹

Distributional conflicts can be stark even in an IO like the EU, where membership is perceived as more homogenous, and where member states' interests are likely to be more aligned as a result. The most pressing horizontal conflict dividing the EU today stems from the varying strength of pro-integration parties and Euro-sceptics in domestic political systems. This disparity causes countries to fundamentally disagree on the extent of delegation and, therefore, on the ultimate scope of competences possessed by the EU. Other issues lend themselves to the traditional Right-Left division, such as states' disagreements about the optimal balance between economic and social goals of the EU. Yet, on other issues, conflicts and coalitions shift depending on the individual member state's debtor or creditor status, trade balance, energy infrastructure, share of agricultural production, socioeconomic challenges, salience of organized labor, or strength of environmental interests. These varied political and ideological commitments beget a myriad of horizontal conflicts, and represent a significant and continuing impediment to collective action within the EU.

Finally, horizontal conflicts are not limited to disagreements between states over the substantive content of institutionalized cooperation. They also occur over issues relating to institutional design and governance features of the IO. For example, states may disagree on how much they will contribute to the budget, where the IO will be located, which language(s) the IO will use, which nationals will occupy the most important leadership positions, and so on. States perceive these features as central in defining whose preferences the IO will serve, and the types of agendas it will ultimately advance.

2. Conditions That Exacerbate Horizontal Conflicts

In some instances, horizontal conflicts are particularly severe. We expect horizontal tensions to be most salient under three conditions: first, when states seek to resolve *collective action problems*; second, when cooperation takes place in the domain of *high politics* (as opposed to low politics);³⁰ and finally,

²⁹ See, e.g., Julian Borger & Bastien Inzaurrealde, *Russian Vetoes Are Putting UN Security Council's Legitimacy at Risk, Says US*, GUARDIAN (Sept. 23, 2015), <http://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us>.

³⁰ High politics traditionally refers to cooperation in the national security area, which is considered particularly sovereignty-sensitive. Low politics refers to less contentious policy areas, such as economic cooperation.

where cooperation calls for a *greater number of states* to be involved. Genuine collective action problems, such as climate change, always present incentives for cheating and defection. This breeds distrust among states and deepens horizontal strains. Similarly, issues of high politics, such as national security, entail distinctly sovereignty-sensitive issues, making states particularly fearful of any potential breakdown in relations, and hence wary of one another. We also expect horizontal conflicts to be more prevalent as more states come to participate in the cooperative endeavor, as every collective decision must accommodate a greater number of heterogeneous preferences.

The failure to create a strong IO to govern one of the most pressing collective action problems—climate change—speaks to the severity of the horizontal problem facing states. While the benefits from mitigating climate change would be enormous, the distributional tensions and incentives to free ride have caused a continuing stalemate and the emergence of only weak, non-institutionalized cooperation. Moreover, the number of states involved in global climate talks has only exacerbated the horizontal problem. As a result, any regional IO governing climate change, while arguably less useful, would be easier to establish. It is thus not surprising that the EU has managed to implement EU-level climate policies,³¹ but has not persuaded other states to join the EU at the global level. Whether the IO is designed to facilitate state cooperation in high versus low politics matters as well. Horizontal conflicts tend to be especially stark in matters of national security. Border disputes, for example, always invoke high tensions between the disputing states, and can escalate to military conflict in the worst cases.³² Here, horizontal conflict can be penetrating even where only two neighbors are involved. Examples abound, including the Israel-Palestine conflict, one of the most intractable and long-lasting horizontal conflicts.

3. *Ways to Mitigate Horizontal Conflicts*

One way to alleviate horizontal conflict is to keep IO membership small, as smaller IOs can be better tailored to membership preferences. This strategic choice comes with a cost, however, as the collective benefits of cooperation are more limited when fewer countries contribute to the provision of a public good. For example, a free trade agreement between two countries will entail fewer horizontal conflicts and generate some economic benefits, but will be inherently less valuable than securing nearly universal trade within an entity like the WTO—however contested certain details are.

³¹ See generally *European Climate Change Programme*, EUR. COMMISSION, http://ec.europa.eu/clima/policies/eccp/index_en.htm (last updated Jan. 12, 2017).

³² See, e.g., *Clashes on Thai-Cambodian Border*, BBC NEWS (Apr. 3, 2009), <http://news.bbc.co.uk/2/hi/asia-pacific/7980535.stm>.

Another solution is the establishment of executive organs, where some member states are represented and others are not.³³ For instance, the World Bank has the Board of Executive Directors, the WHO has the Executive Board, and the International Civil Aviation Organization (ICAO) has its Council, among others. These executive boards—which facilitate decision-making—have a much smaller membership than the organization as a whole. They also sometimes have positions reserved for states with particularly strong interests in the IO's area of activity. For instance, the “Principle of the Adequate Representation” in the ICAO Council rules calls for the election of states of “chief importance in air transport,” as well as the election of states that make the “largest contribution to the provision of facilities for international civil air navigation.”³⁴ In so doing, these smaller executive boards begin to resemble corporate boards in ways outlined in Part III below.

Recognizing this trade-off between the benefits of large membership and the rising heterogeneity costs of adding additional members, states often seek to group with like-minded countries. This explains the prevalence and relative success of regional IOs and institutions with highly restrictive and relatively homogeneous membership, such as the EU, the Andean Tribunal, and the Organisation for Economic Co-operation and Development (OECD).³⁵ Another way to alleviate horizontal tensions is to place strong accession conditions on new members to homogenize membership at the outset.³⁶ For example, the WTO requires new members to adopt significant trade liberalization measures before entering; the EU subjects each new member to extensive accession conditions to align the candidate country's economic, legal, and political system closely with the EU; and the Council of Europe requires its members to commit to the protection of fundamental rights.³⁷

³³ We are deeply grateful to Kristina Daugirdas for all of the ideas in this paragraph.

³⁴ See Int'l Civ. Aviation Org. [ICAO], *Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization*, at 18, Doc 7600/8 (2014), http://www.icao.int/publications/Documents/7600_cons_en.pdf.

³⁵ See generally Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U. J. INT'L L. & POL. 871 (2009).

³⁶ See generally Anu Bradford, *How International Institutions Evolve*, 15 CHI. J. INT'L L. 47 (2014).

³⁷ See, e.g., Heather Grabbe, *European Union Conditionality and the “Acquis Communautaire”*, 23 INT'L POL. SCI. REV. 249, 252–53 (2002) (examining the EU's accession conditions and how their ambiguity increases the EU's bargaining power in accession negotiations); Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469 (2000) (mapping the extensive history of negotiations regarding China's accession to the WTO); Julia Ya Qin, *“WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol*, 37 J. WORLD TRADE 483 (2003) (analyzing the additional and stringent rules applied to China); Abdur Chowdhury, *WTO Accession: What's in it for Russia?* (William Davidson Inst., Working Paper No. 595, 2003), <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/39981/wp595.pdf> (discussing the history and challenges of Russia's WTO accession negotiations); See generally North Atlantic Treaty

These efforts to preempt looming horizontal conflicts *ex ante* often fail *ex post*, as the states—or the established IO—have only a limited ability to monitor members' compliance with entry conditions after accession has occurred.³⁸ Further, unlike most clubs that choose to limit membership to like-minded individuals, many IOs have aspirations of universal (or at least broad) membership, so as to increase gains from cooperation, reduce free riding, and ensure that their rules enjoy greater legitimacy and following. This makes horizontal conflicts inevitable. Distributional conflicts also persist because IOs rarely establish mechanisms to increase membership homogeneity over time. In small membership clubs, frequent interaction and socialization can lead to greater similarities in thinking over time. And in some large groups, notably federations and nation-states more generally, significant efforts are made to develop a common history, language, and sense of community and patriotism, all to foster a shared identity between citizens.³⁹ In turn, this greater homogeneity alleviates distributional conflict by legitimizing transfers to fellow citizens. However, to date (with the possible exception of the EU) IOs have made only limited efforts to foster a sense of shared goals and community among their members, thereby keeping horizontal conflict a salient and persistent feature of international cooperation. In all, it is difficult to limit horizontal conflict without simultaneously reducing the gains of cooperation.

art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (requiring potential NATO members accept the obligations of a reciprocal military alliance, which makes it obligatory for any NATO member state to militarily aid of any other NATO state under attack); North American Free Trade Agreement art. 102, Dec. 17, 1992, 32 I.L.M. 289 (1993) (requiring member states to eliminate trade barriers, promote fair competition, increase investment opportunities, and protect intellectual property rights); Org. for Economic Co-operation and Development [OECD] Council, *Roadmap for the Accession of Chile to the OECD Convention*, art. II(A)(ii)(12), C(2007)100/FINAL (Dec. 3, 2007), <http://www.oecd.org/legal/41463062.pdf> (requiring that potential member states to not only share the same fundamental values that the OECD Convention embodies, but also implement policies that demonstrate these countries' commitment).

³⁸ See, e.g., *Report from the Commission of the European Communities—Greece—Report Prepared in Accordance with Article 104(3) of the Treaty*, SEC (2009) 197 final (Feb. 18, 2009), http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/30_edps/104-03/2009-02-18_el_104-3_en.pdf; *Report from the Commission to the European Parliament and the Council on Progress in Romania Under the Co-operation and Verification Mechanism*, COM (2013) 47 final (Jan. 30, 2013), http://ec.europa.eu/cvm/docs/com_2013_47_en.pdf; U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, REPORT ON WTO ENFORCEMENT ACTIONS: RUSSIA (June 2013), <http://www.ustr.gov/sites/default/files/06192013%20Russia%20WTO%20Enforcement%20Report.pdf>.

³⁹ Cris Shore, *Inventing the 'People's Europe': Critical Approaches to European Community 'Cultural Policy'*, 28 MAN, NEW SERIES 779, 784–787 (1993).

B. *Vertical Conflict—Conflict Between States and Independent IO Bodies*

1. *The Origins and Types of Vertical Conflicts*

One way to mitigate horizontal conflict is by creating an international organization. As Ken Abbott and Duncan Snidal argue, states create formal IOs because IO centralization and independence can help reduce conflicts among states.⁴⁰ For example, the WTO is designed to facilitate trade agreements across issue areas so that horizontal conflicts give way to trade deals that benefit all parties. The WTO is also empowered to hold states accountable should they defect from those deals at the expense of their trading partners.

The existence of an independent body capable of acting separate from member states is a critical feature of an international organization.⁴¹ IOs often have both secretariats and plenary bodies in which states are directly represented—compare, for example, the UN Secretariat to the UN General Assembly. When we discuss vertical conflict between member states and IOs, we are primarily concerned about conflict between member states and these independent bodies; the more independent the IO organs, the greater the possibility of vertical conflict.

While delegation to an IO can mitigate horizontal conflict, it often gives way to another conflict—*vertical conflict*. Vertical conflict is where states (as principals) delegate power to an IO (as an agent), and the IO starts to behave opportunistically and in a manner contrary to the preferences of the member states that empowered it. This opportunistic behavior by an agent is often called “agency slack.”⁴² We build on existing work on principal-agent conflict in IOs by illustrating how having multiple states as principals, as opposed to a single principal, further aggravates this conflict.

The vertical conflict between states collectively on the one hand and IOs on the other begins the moment IOs are created. It is considered a common phenomenon, stemming from states delegating important tasks to independent and centralized bureaucracies.⁴³ IOs’ undesirable behaviors can take many forms, including shirking their responsibilities, or allocating

⁴⁰ See Abbott & Snidal, *supra* note 14, at 3.

⁴¹ See JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 6 (2006) (noting that in identifying IOs’ distinguishing legal characteristics “there is wide agreement among lawyers that three elements are important, namely (1) establishment by international agreement between states; (2) of at least one organ distinct from member states and capable of so acting; and (3) under international law.”); see generally Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. J. INT’L L. 325 (2016) (discussing how jus cogens, general international law, and treaties all bind international organizations); Kristina Daugirdas, *Reputation and the Responsibility of International Organizations* 25 EUR. J. INT’L L. 991 (2015) (exploring why it is significant for all IO organs to comply with international law in order to maintain their reputations).

⁴² See generally DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 16.

⁴³ Alvarez, *supra* note 41, at 9–29.

resources to initiatives not initially envisioned by the founding states. Some forms of agency slack—such as when IO staff obtain higher pay for less work than their principals called for—are widely criticized. Other forms of agency slack, however, are praised by other actors, while displeasing to state-principals. For example, many praised World Health Organization doctors' decisions to “[go] on the offensive against China,” investigate SARS, and issue travel advisories without respecting diplomatic protocol and the WHO's own rules.⁴⁴ Similarly, environmentalists have praised WTO appellate body decisions to interpret free trade rules liberally to include environmental concerns, even though key member states argued otherwise.⁴⁵

The extent of vertical conflict depends on the degree of delegation that has taken place. As a result, the agent's operating space—its “zone of discretion”—is often the most consequential strategic decision the principals undertake when they first create the IO. In law and economics terms, this zone is determined by the sum of various competences explicitly (or implicitly) delegated to the IO, minus the control instruments the principals establish to curtail the agent's discretion.⁴⁶ A principal's capacity to control the agent is inversely proportional to the magnitude of the agent's zone of discretion.⁴⁷

Different IOs enjoy varying degrees of discretion. Some IOs possess very limited powers, and remain largely or entirely within the tight control of the principals. For example, the UN Secretariat exercises little independent control over UN Security Council decisions, although it does enjoy significant administrative powers in other areas.⁴⁸ Each resolution reflects an outcome firmly rooted in the Council members' domestic policy positions at any time. The UN Secretariat does not decide whether to impose economic sanctions or undertake military action.⁴⁹ The UN also does not contribute troops to missions.⁵⁰ In these instances, the main purpose of the UN as an IO is to provide an umbrella under which the

⁴⁴ Andrew P. Cortell & Susan Peterson, *Dutiful Agents, Rogue Actors, or Both? Staffing, Voting Rules, and Slack in the WHO and WTO*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 255, 270 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

⁴⁵ See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998).

⁴⁶ Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution*, in *THE JUDICIAL CONSTRUCTION OF EUROPE* 45 (Alec Stone Sweet ed., 2004).

⁴⁷ *Id.*

⁴⁸ See generally RICHARD CAPLAN, *A NEW TRUSTEESHIP?: THE INTERNATIONAL ADMINISTRATION OF WAR TORN TERRITORIES* (2002).

⁴⁹ Those powers belong to the Security Council. See U.N. Charter arts. 39, 41 & 47; see also *Functions and Powers*, U.N. SECURITY COUNCIL, <http://www.un.org/en/sc/about/functions.shtml> (last visited Dec. 1, 2017).

⁵⁰ Although that was envisioned by the UN Charter. See U.N. Charter art. 43.

horizontal conflicts can play out in a predictable and rule-based environment.

The EU is different. EU institutions enjoy a large array of supra-national competences and independent decision-making powers. In some areas of EU law, such as trade or competition policy, delegation to the Commission is nearly complete, giving it almost unlimited discretion.⁵¹ The Commission also has full discretion to bring infringement proceedings against member states that violate EU law.⁵² This power (and frequent practice) of the Commission to sue member states makes it difficult to even portray the Commission as an agent within the control of the principals that initially created it.⁵³ The extent of delegation to the WTO, on the other hand, falls somewhere in the middle: the process of negotiating trade agreements remains largely member driven,⁵⁴ with the WTO Secretariat carrying little influence beyond convening members for trade talks. At the same time, the WTO dispute settlement mechanism with a permanent Appellate Body entails significant delegation, vesting it with the authority to impose large costs on individual states.⁵⁵

IO discretion, combined with the limited ability of states to monitor and sanction the IO, are the key preconditions for a vertical conflict to emerge. Yet vertical conflicts can manifest in many ways. For example, IO secretariats typically request bigger budgets than member states are willing to allocate, often call for more powers at the supra-national level than member states want to grant, and even take on projects many member states disagree with. Moreover, as IOs mature, they tend to gain confidence in their ability to self-govern, which leads them to gradually develop their own agendas. As a consequence, their agendas start to diverge from the original purpose underlying the delegation and the IO's existence. Some call this "mission creep," a term used to describe the UN peacekeeping mission in Somalia, which evolved from a small-scale humanitarian mission to a fatal military confrontation and campaign to effect long-term stability in the war-torn country.⁵⁶ The WTO has likewise been accused of straying beyond its

⁵¹ See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union art. 207, Oct. 26, 2012, 2012 O.J. (C 326) 47.

⁵² *Legal Enforcement: The Infringements Procedure*, EUR. COMMISSION, <http://ec.europa.eu/environment/legal/law/procedure.htm> (last updated June 8, 2016).

⁵³ See Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103, 103–05 (2001). This has led some commentators to describe the EU Commission as a "trustee" rather than as an agent as its powers exceed those of a typical agent. See *id.* at 114–15.

⁵⁴ *Understanding the WTO: The Organization*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (last visited Dec. 1, 2017).

⁵⁵ See, e.g., *Canada Awarded Right to \$1B in WTO Trade Sanctions Against U.S. over Meat-Labeling Rules*, CBC NEWS (Dec. 7, 2015, 1:45 PM), <http://www.cbc.ca/news/business/canada-u-s-meat-labelling-wto-1.3354048>.

⁵⁶ Ben Zimmer, *'Mission Creep' Crawls out of the '90s*, WALL ST. J. (June 27, 2014), <http://www.wsj.com/articles/the-long-voyage-of-mission-creep-1403901268>.

original mission, as it has expanded its agenda to areas beyond traditional trade matters, such as intellectual property protection.⁵⁷ Critics can also reasonably characterize many EU actions as mission creep, citing the expansion of its competences from economic to social policies, its recent forays into invasive financial regulation, and its allocation of migrant quotas.⁵⁸ This systematic growth in EU competences and move toward an “even-closer union” was a central concern motivating the U.K. referendum that triggered the country’s impending exit from the EU.⁵⁹

Agency slack does not only come in the form of an IO drifting from its original mission. The agent can also behave opportunistically within the confines of its core policy area. The IMF staff, for example, is accused of pursuing unduly large loans, coupled with excessive conditions.⁶⁰ In doing so, the IMF staff is perceived to engage in rent-seeking in an effort to maximize its power, autonomy and influence, all at the expense of the Fund’s policy objectives and resources.⁶¹

International courts and tribunals can also become wayward agents. Independent tribunals sometimes make decisions that not only displease the losing party, but also the member states that formed the tribunal. For example, Rachel Cichowski, who analyzed ECJ case law in the social policy and environmental area,⁶² found not only that citizen suits challenging national legislation typically succeed, and thus displease the member state being sued, but that other states’ interventions to guide the ECJ are often ignored by the ECJ. Instead of aligning with intervening member states, the ECJ is much more likely to align with the positions of another supranational actor: the EU Commission. This happens in over 90% of cases studied.⁶³ Meanwhile, Eric Posner notes the decline of member states’ use

⁵⁷ THIERRY BAUDET, *THE SIGNIFICANCE OF BORDERS* 136 (2012).

⁵⁸ Arnaldo Abruzzini, *EU Social Dialogue ‘Mission Creep,’* EURACTIV (Mar. 5, 2015), <https://www.euractiv.com/section/social-europe-jobs/opinion/eu-social-dialogue-mission-creep/>; Harry Wilson, *‘Mission Creep’ Fears Surround EU Watchdogs,* TELEGRAPH (Sept. 5, 2010), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/7982936/Mission-creep-fears-surround-EU-watchdogs.html>.

⁵⁹ Palmeri, *supra* note 1.

⁶⁰ EUR. NETWORK ON DEBT & DEV., *WORLD BANK AND IMF CONDITIONALITY: A DEVELOPMENT INJUSTICE* 18–19 (2006), http://www.eurodad.org/uploadedfiles/whats_new/reports/eurodad_world_bank_and_imf_conditional_report.pdf; *China and the World: Yuan for All*, ECONOMIST (Jan. 29, 2015), <http://www.economist.com/news/leaders/21641203-chinas-loans-foundering-governments-may-seem-challenge-imf-biggest-risks-are>; Ian Vásquez, *The International Monetary Fund: Challenges and Contradictions*, CATO INST. (Sept. 28, 1999), <https://www.cato.org/publications/congressional-testimony/international-monetary-fund-challenges-contradictions>.

⁶¹ See Copelovitch, *supra* note 27, at 54.

⁶² See generally CICHOWSKI, *supra* note 9.

⁶³ See *id.* at 137 tbl.4.5, 139 tbl.4.6; Rachel A. Cichowski, *Women’s Rights, the European Court, and Supranational Constitutionalism*, 38 LAW & SOC’Y REV. 489, 495 tbl.1, 497 tbl.2 (2004).

of the International Court of Justice (ICJ) due to this partial track record of judges.⁶⁴

2. *Conditions That Exacerbate Vertical Conflicts*

The severity of vertical conflict varies across different areas of cooperation and strategic situations. Vertical conflicts are prone to be especially acute when the *mission of the IO is broad or loosely defined*. This is because a broad IO mission allows agents to pick and choose among various priorities, where mission creep can set in quickly. Vertical problems are also likely to be acute when the IO is charged with a task requiring specific expertise. In such a context, IO staffs often enjoy significant informational advantages vis-à-vis state-principals, and can use them to pursue agent priorities, like greater internationalization. For example, the European Commission antitrust decisions involve highly technical analysis, making the Commission's antitrust policy less amenable to state control—whether *ex ante* or *ex post*. Accordingly, these types of decisions are often seen as highly intrusive, with wide and troubling consequences for some.

In addition, heterogeneity of preferences among state principals could worsen the vertical conflict. Mark Copelovitch shows empirically how the IMF is able to exploit the divisions among its five most powerful shareholders, engaging in more extensive lending in instances where the “G-5” remain most divided.⁶⁵ In his model, the preferences of the less important IMF shareholders are irrelevant, suggesting that it is the heterogeneity among the key players that matters.

3. *Ways to Mitigate Vertical Conflicts*

Both rationalist and constructivist scholarship explain why delegation entails significant costs. The fear of agency slack may lead principals to confer carefully delineated powers to the agent. Yet such a strategy directly reduces the benefits of delegation. If the WTO's powers were strictly confined to furthering liberalization of trade in goods, all the benefits associated with the conclusion of trade talks on services and intellectual property (IP)—the General Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreements—would be lost. Similarly, budgetary control is often a double-edged sword for member states to use. Curtailing the agent's budget may effectively restrain the agent, but it also denies the agent the requisite

⁶⁴ See Eric A. Posner, *The Decline of the International Court of Justice* (John M. Olin Program in Law & Econ., Working Paper No. 233, 2004).

⁶⁵ Copelovitch, *supra* note 27.

resources to carry out the tasks principals have delegated to it.⁶⁶ If France, for instance, is unhappy with the way the European Commission conducts Common Agricultural Policy, the budget cuts would not only penalize and disempower the Commission, but also stymie the objectives of a policy area that France strongly supports. Thus, budgetary control is only available when principals are willing to accept the incidental adverse effects such budgetary controls cause to the policy objectives they endorse.

While game-theoretic models lend some alternative ways to reduce these agency costs, such as selecting agents with particular traits, monitoring them closely, rewarding compliance and punishing non-compliance, these techniques are very hard to effect without significantly reducing the benefits of delegation.⁶⁷ Yet, any principal-agent model presumes that when delegation takes place, principals must anticipate *ex ante* that the expected benefits of such delegation must outweigh the costs.

We argue that these difficulties, which increase the costs of delegation, are greater in IOs than other bureaucracies, because IOs have multiple principals with competing desires, and because IOs have large and independent bureaucracies with their own institutional cultures. Both of these factors—multiple principals and IO institutional cultures—have been bracketed by the most current research on delegation to IOs, including the 2006 Hawkins et al. edited volume, and the related special issue in IO.⁶⁸ More specifically, Mona Lyne, Daniel Nielson, and Michael Tierney, the foremost authors examining the question of multiple principals, recommend modeling the states constituting IOs as a single collective principal with a single ideal point, rather than as multiple principals with distinct ideal points.⁶⁹ While this approach would simplify formal modeling, it would also set aside some of the key features that make delegation to IOs so challenging. Similarly, these authors—and others in the rationalist tradition more generally—warn against “attributing primary causal weight for IO behavior to organizational culture or charismatic leadership.”⁷⁰ Against these warnings, we intend to develop such arguments below.

⁶⁶ Terry M. Moe, *An Assessment of the Positive Theory of ‘Congressional Dominance,’* 12 LEGIS. STUD. Q. 475, 487 (1987); Mark A. Pollack, *Delegation, Agency, and Agenda Setting in the European Community,* 51 INT’L ORG. 99, 117 (1997).

⁶⁷ See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 25 (1991); *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS*, *supra* note 16, at 25.

⁶⁸ *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS*, *supra* note 16; Simmons, Dobbin & Garrett, *supra* note 16; Elkins, Guzman & Simmons, *supra* note 16; Swank, *supra* note 16; Lee & Strang, *supra* note 16; Gleditsch & Ward, *supra* note 16; Gilligan, *supra* note 16; Pevehouse & Russett, *supra* note 16; Nooruddin & Simmons, *supra* note 16.

⁶⁹ Mona M. Lyne, Daniel L. Nielson & Michael J. Tierney, *Who Delegates? Alternative Models of Principals in Development Aid*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 41–42 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

⁷⁰ *Id.* at 43.

The next section will move beyond examining horizontal and vertical conflicts, either in isolation or relative to each other. Rather, the next section will explain how particular institutional design choices common to IOs—such as super-majority voting rules, international personnel selection and promotion rules, location choices, and the scope of the IO mission—significantly exacerbate the costs of delegation, and hence the vertical conflict. We also explain why these seemingly problematic institutional design features are so common: they were put in place when the IOs were created to resolve what was seen as a more pressing conflict—the horizontal conflict among states.

III. THEORY: HOW HORIZONTAL AND VERTICAL CONFLICTS INTERSECT

A. Institutions That Help Solve Distributional Conflict Worsen Agency Conflict

The following paragraphs discuss some institutional forms that are very common to IOs, such as voting rules, the rules governing IO staff, the location of the IO, and the scope of the IO mandate. For each institutional feature, the discussion aims to establish two points. First, it aims to show how many of these institutional features were erected to help solve the distributional conflicts among states at the time the IO was established. Next, it aims to show how these institutional features can worsen the vertical conflict between member states collectively, and between the IO's independent bodies. We argue this conflict will likely worsen over time as the IO gains stability, develops its own organizational culture, and expands its powers and budget.

1. Voting Rules and IO Decision-Making

Of the many institutional design features of IOs, voting rules are an appropriate place to start, as they clearly reflect individual states' power and control over the organization. Two decision-making rules involving voting are very common to IOs. First, IO decisions are rarely made with simple majorities of states, but typically require super-majorities, and often unanimity. Second is the principle of one-state-one-vote. Both rules, we argue, were initially established to allow states interested in protecting their sovereignty to minimize the horizontal conflicts with other states involved in the international organization. Over time, however, we show how these rules worsen states' collective ability to resolve vertical conflict, and allow wayward secretariats and tribunals to proceed on initiatives that states collectively may not desire.

Historically, unanimity was the default decision-making rule in IOs.⁷¹ While many organizations have relaxed this rule to require only a super-majority, it is still uncommon to find bodies with simple majority voting, the UN General Assembly constituting a notable exception. Moreover, even bodies that formally allow decisions to proceed without unanimous consent of their members, such as the European Union, the World Trade Organization, the IMF and the World Bank, in fact typically try to reach consensus. When IOs are formed, unanimity and super-majority rules give states increased confidence that other states will not easily be able to trample over their national interests. Indeed, the more diverse an international organization's membership, the more likely it is to require all of its decisions to be made unanimously.⁷²

Unanimity also has well-recognized costs. Most notably, it creates biases in favor of the status quo, and frequently leads IOs to inaction. The failure of the League of Nations to stop World War II is a tragic illustration of status quo bias. In recognition of the perils of this bias, UN Security Council rules do not require unanimity, except among the five permanent Council Members. Similarly, a super-majority support among all fifteen Council Members is required. However, even this requirement may be too burdensome. Many critics argue it leaves the Security Council unable to intervene to prevent grave humanitarian catastrophes.⁷³ Moreover, such unanimity rules have deadlocked the WTO negotiations launched back in 2001, leading states to formally abandon trade talks in 2015.⁷⁴ The WTO's established practice is to require consensus despite the existence of super-majority voting rules in the IO's charter, which has all but paralyzed the institution as membership has grown and consensus has become harder to reach.

We acknowledge the costs embedded in the frequent deadlocks and status quo bias that follow from sovereignty-protecting voting rules. At the same time, our critique of super-majority and unanimity requirements is different: we argue these high thresholds empower independent IO secretariats and tribunals, at the expense of the member states of the organization. In other words, once power has been delegated to one of these bodies, it becomes difficult for member states to muster the requisite votes to repudiate a wayward agent. For example, many ECJ decisions have dismayed EU member states by interpreting EU treaties in ways that move

⁷¹ WERNER J. FELF, ROBERT S. JORDAN & LEON HURWITZ, *INTERNATIONAL ORGANIZATIONS: A COMPARATIVE APPROACH* (3d ed. 1994).

⁷² Daniel J. Blake & Autumn Lockwood Payton, *Decision Making in International Organizations: An Interest Based Approach to Voting Rule Selection* 26 (Jan. 9, 2009) (working paper) (on file with author).

⁷³ Borger & Inzaurrealde, *supra* note 29.

⁷⁴ Shawn Donnan, *Trade Talks Lead to 'Death of Doha and Birth of New WTO'*, *FIN. TIMES* (Dec. 20, 2015), <https://www.ft.com/content/97e8525e-a740-11e5-9700-2b669a5acb8>.

power away from national capitals and toward EU institutions.⁷⁵ However, it has been almost impossible for EU governments to correct the ECJ's course, since course-correcting the ECJ would often require legislative action in the form of a treaty change, and hence an extraordinary degree of consensus among member states.⁷⁶

Another peculiar IO decision-making feature is that many IOs couple a one-state-one-vote rule with a rule requiring each state to contribute to the organization's budget roughly in proportion to the state's wealth. The one-state-one-vote principal is common to IOs—each member of the UN General Assembly, the WTO, the World Health Organization's Assembly, and the International Atomic Energy Agency, among other bodies, gets the same voting power.⁷⁷ This allocation is not exactly democratic, as a citizen of the Maldives gets roughly a thousand times more voting power than a citizen of China.⁷⁸ Nevertheless, it is often put in place to guarantee notions of formal sovereign equality, thereby ensuring states joining the organization that their interests will not easily be superseded by those of larger states. After all, if votes were allocated based on population, China and India would control the global IOs, which would dissuade other states from joining such bodies.⁷⁹ That said, in the one IO most closely resembling a federation—the European Union—votes have been accorded in greater proportion to national populations over time.

Importantly, the one-state-one-vote rule (or even voting in proportion to population) is typically combined with a rule calling for richer states to contribute more to the organization's budget. In 2010, for example, the 165 poorest UN members contributed only 7% of the organization's budget, despite having a clear majority of votes in UN bodies.⁸⁰

This mismatch between voting and financing creates another supermajority hurdle: for an IO proposal to go forward, it needs the support of

⁷⁵ For discussion of an activist ECJ, see Rachel A. Cichowski, *Integrating the Environment: The European Court and the Construction of Supranational Policy*, 5 J. EUR. POL'Y 387, 387 (1998); Alter, *supra* note 8; Weiler, *supra* note 8.

⁷⁶ See generally Geoffrey Garrett, R. Daniel Kelemen & Heiner Schultz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998).

⁷⁷ Additional (but obviously non-exhaustive) examples of the one-state-one-vote configuration include the Organization of American States General Assembly, the Congress of the World Meteorological Organization, International Whaling Commission, and the assembly of the International Civil Aviation Organization. See Charter of the Organization of American States art. 34, Apr. 30, 1948, 119 U.N.T.S. 3; Convention of the World Meteorological Organization art. 10, Oct. 11, 1947, 77 U.N.T.S. 143; Convention on International Civil Aviation art. 48(b), Dec. 7, 1944, 15 U.N.T.S. 295; INT'L WHALING COMM'N, RULES OF PROCEDURE AND FINANCIAL REGULATIONS § E(1) (Oct. 10, 2014), <https://archive.iwc.int/pages/view.php?ref=3605&k=>.

⁷⁸ Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. 2, 4 (2001).

⁷⁹ *Id.*

⁸⁰ MARJORIE ANN BROWNE & LUISA BLANCHFIELD, CONG. RESEARCH SERV., RL30605, UNITED NATIONS REGULAR BUDGET CONTRIBUTIONS: MEMBERS COMPARED, 1990–2010 23 (2013).

both the states that formally vote on proposals, and the rich states that effectively control the budget. As with other super-majority requirements, this makes it harder to initially delegate tasks, but also makes it harder to roll back IO efforts that many members do not like. As such, budget negotiations in the United Nations and EU are typically protracted and painful affairs, precisely because major financial contributors leverage budget negotiations as a tool to exercise greater control over the organization, while the IO Secretariat, and sometimes smaller states, resist. Conversely, in IOs where voting and financing are more closely aligned, such as the IMF and World Bank, there are fewer conflicts over the budget.

The mismatch between formal votes and budget negotiations can lead IOs to move forward with policies that many member states oppose. EU budget expenditures toward the Common Agricultural Policy (CAP) is one prominent example. Put in place to support French farmers in 1958, these farming subsidies constitute over 40% of the EU budget today,⁸¹ and have been highly criticized ever since as wasteful and poorly designed agricultural policy.⁸² They have also been criticized as costly to European consumers, unfair to EU states with small agricultural sectors, and detrimental to the developing world.⁸³ While CAP has indeed been slightly modified, it still has a cost exceeding forty billion euro annually, despite the EU only having fourteen million farmers (and a total population of 740 million).⁸⁴ Many member states have tried fighting CAP, both in the Council of Ministers and EU budget negotiations. Margaret Thatcher's 1984 budget negotiations were perhaps the sharpest and most successful, but even Thatcher failed in radically reforming this policy. Instead, she merely succeeded in reducing the U.K.'s contribution to the CAP budget.⁸⁵ The decades-long continuation of controversial policies like CAP underscores how difficult it can be to alter the course of an IO, in part because of voting rules requiring extraordinary consensus among member states, and because of protracted battles over financing the IO's (already disputed) mission.

⁸¹ See *CAP Expenditure in the Total EU Expenditure*, EUR. COMMISSION (Mar. 2017), http://ec.europa.eu/agriculture/cap-post-2013/graphs/graph1_en.pdf; Charlie Dunmore, *Farm Subsidies Still Get Top Share of EU Austerity Budget*, REUTERS, Feb. 8, 2013, <http://www.reuters.com/article/2013/02/08/eu-budget-agriculture-idUSL5N0B82UW20130208>.

⁸² Posner, *supra* note 64.

⁸³ *Common Agricultural Policy*, WIKIPEDIA, http://en.wikipedia.org/wiki/Common_Agricultural_Policy (last updated Nov. 20, 2017).

⁸⁴ *The Common Agricultural Policy (CAP) and Agriculture in Europe—Frequently Asked Questions*, EUR. COMMISSION (June 26, 2013), http://ec.europa.eu/agriculture/faq/index_en.htm.

⁸⁵ See Bruno Waterfield, *EU Tries to Grab £6bn from Britain's EU Rebate*, TELEGRAPH (Nov. 15, 2012), <http://www.telegraph.co.uk/news/worldnews/europe/eu/9679833/EU-tries-to-grab-6bn-from-Britains-EU-rebate.html>.

2. Rules Governing IO Staff and Leaders

Staffing choices are another crucial aspect of IO operations. Modern IO staffing rules are like those of many national bureaucracies, insofar as they involve competitive examinations for entry, and long-term tenure thereafter. In other ways, however, IOs have unique staffing rules, including hiring rules that encourage a nationally diverse staff, privileging of people who speak many of the IO's working languages,⁸⁶ and committing IO staff to be loyal to the IO rather than to their state of nationality.⁸⁷ The UN staff, for example, consists of career civil servants from all of its member states.⁸⁸ The staff generally shares an extensive background in international affairs, and a certain commitment to multinationalism and international order, as evidenced by their career choice. The UN's competitive salary structure and commitment to the so-called "*noblemaire* principle," which sets the UN career civil servants' salaries by reference to the highest-paying national civil services, ensures that it can draw civil servants from all over the world.⁸⁹ UN recruitment further emphasizes the importance of international experience, foreign language skills, and an ability to work on multicultural teams.⁹⁰

Political bargains often determine how IO heads will be selected. These rules, we argue, were designed to help states protect against being placed in a disadvantaged position in subsequent interactions with other states. For example, the U.S. wanted to know in future disputes with France that a neutral arbiter, rather than a French national who was loyal to the French state, would make key decisions that affected all members. Similarly, insofar as IO jobs are plum positions, many states wanted to get their fair share of these rewards. We argue, however, that these rules sharpen the conflict between states collectively, on the one hand, and independent IO bodies, on the other. Over time, IO staffs form a multi-national and multi-lingual community, which orient themselves toward the IO and its supra-national goals, and away from the agendas of national capitals.

IO rules typically specify that personnel must come from many countries, namely because when states form an IO, they anticipate disputes with other member states, and want a neutral body to adjudicate such

⁸⁶ U.N. Charter art. 101; William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 354–359 (2001).

⁸⁷ See generally, JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2006); see also THOMAS FRANCK, *NATION AGAINST NATION: WHAT HAPPENED TO THE UN DREAM AND WHAT THE US CAN DO ABOUT IT* (1985).

⁸⁸ See Secretary-General's Bulletin, *Staff Rules and Staff Regulations of the United Nations* 93, 95, ST/SGB/2014/1 (Jan. 1, 2014).

⁸⁹ *Salaries & Post Adjustment*, UNITED NATIONS, http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm (last visited Dec. 2, 2017).

⁹⁰ As an example for a posting for career opportunities at UN, see *International Professional Staff*, UNHCR, <http://www.unhcr.org/pages/4dca99626.html> (last visited Dec. 2, 1027).

disputes. States may also want the presence of someone from their own state to articulate their national point of view to decision-makers. The rules governing the composition of the International Court of Justice illustrate this concern: each country can have only one judge appointed to the ICJ,⁹¹ and parties to a dispute have the option of appointing a judge from their country to the court, if one is not already present.⁹² Similarly, each EU country gets to appoint one commissioner and one judge to both the ECJ and General Court. The IMF staff consists of 2,400 members representing 143 countries.⁹³ These engrained practices show how many countries see IO appointments as valuable goods to be distributed fairly among member states.

Even IO members that initially seem most loyal to their home jurisdiction may find themselves serving the IO's goals instead of, or in parallel with, the goals of their home constituency. For example, members of the European Parliament—the democratically elected body to which EU member states delegate legislative functions—are chosen as a result of national elections.⁹⁴ French people vote among the French candidates, and Spanish people among the Spanish candidates, both competing for predetermined quotas reserved for France and Spain in the European Parliament.⁹⁵ However, after being elected, important committee assignments and other leadership positions within the European Parliament are chosen by European-level parties, which carry agendas removed from individual national priorities. Accordingly, a French conservative member of the European Parliament (MEP) can no longer maximize his influence by maximizing the French interest at every turn. Instead, he must cater to the preferences of the European People's Party, whose leaders hail from different EU member states. These European-level political organizations will determine the career prospects of this MEP once elected, thus creating incentives for MEPs to substitute their narrow national interests for broader European agendas.

IO personnel are typically career civil-servants within the IO; they are not seconded from national bureaucracies for short stints. This move from multi-national to international staffing was pioneered by the League of Nations and its contemporary institutions—the International Labor

⁹¹ Statute of the International Court of Justice art. 3, June 26, 1945, 59 Stat. 1031.

⁹² *Id.* at art. 31.

⁹³ Copelovitch, *supra* note 27, at 56.

⁹⁴ It is debatable whether the EP can be modeled as an agent of the MSs. The MSs created the institution and delegated powers to it. At the same time, since 1979, the MSs no longer select the members of the EP. Instead, they are elected by national electorate and are hence accountable for the citizens as their principals more directly.

⁹⁵ *Results of the 2014 European Elections*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/elections2014-results/en/seats-member-state-absolut.html> (last visited Dec. 2, 2017).

Organization and Permanent Court of International Justice.⁹⁶ Before that, IO secretariats were generally staffed by temporary secondments from national administrations.⁹⁷ Indeed, in some cases, like in the Universal Postal Union, IO staff is recruited and organized on a national basis under the administrative control of individual governments.⁹⁸ And while selection of IO staff on the basis of competitive examinations is now commonplace, it was controversial at least until the 1970s, as developing countries and countries affiliated with the Soviet Union wanted more freedom to use IO staffing as a way to offer patronage to political allies.⁹⁹

While rules creating a multi-national, independent staff help states ensure the IO is not controlled by a single powerful country, they also weaken the position of states collectively vis-à-vis the IO bureaucracy. Such rules can lead to the selection of persons who have pro-international values, and who are thus presumed to be more effective and successful professionals in the international setting. These individuals, however, often have weaker attachments to the nation state. Also, by interacting primarily with people from foreign nationalities over time, IO personnel might become more internationally-minded than when initially hired. Moreover, once promotion opportunities depend less on political connections at home, and more on integration within a multi-national bureaucracy, IO staff have a natural career incentive to pay less attention to politics at home, and more attention to the organization's internationalist goals. For example, due to selection, socialization, career, and other reasons, personnel from the European Commission are far more likely to feel attached to the European identity than other Europeans.¹⁰⁰ According to Liesbet Hooghe's survey research, while over 40% of Europeans in general felt no attachment to Europe and only felt attached to their nation states, 0% of European Commission staff felt the same absence of attachment.¹⁰¹ To take another example, Antje Wiener conducted wide-ranging interviews in London, Berlin, and Brussels—three prominent political arenas in which IO elites operate.¹⁰² She found that compared to elites stationed in London or Berlin, and controlling for nationality, elites stationed in Brussels made very different associations.¹⁰³ Wiener concluded that this more “diffused” and

⁹⁶ Henri Reymond, *The Staffing of the United Nations Secretariat: A Continuing Discussion*, 21 INT'L. ORG. 751, 753 (1967).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 757–61.

¹⁰⁰ *See supra* note 77.

¹⁰¹ Liesbet Hooghe, *Several Roads Lead to International Norms, but Few Via International Socialization: A Case Study of the European Commission*, 59 INT'L. ORG. 861, 874 (2005).

¹⁰² *See generally* ANTJE WIENER, *THE INVISIBLE CONSTITUTION OF POLITICS: CONTESTED NORMS AND INTERNATIONAL ENCOUNTERS* (2008).

¹⁰³ *Id.* at 192.

“flexible” pattern of associative norms found in Brussels is indicative of the deconstruction of national identities.¹⁰⁴

Several additional IO rules advance this tendency among IO staff to develop an internationalist identity and discard loyalty to their home state. For example, IO hiring typically gives preferences to people who speak multiple languages, especially the working or official languages of the IOs. This helps create internationalist identities. Additionally, many IOs have rules requiring personnel to be loyal to the organization—not to their home country. For example, the ECJ does not issue dissenting opinions, so as to shield the judges from pressures to support their national positions.¹⁰⁵ This enhances neutrality, but reinforces prior tendencies of IOs to develop loyalty to the institution, and away from national capitals. In all, these rules advance IO neutrality and the resolution of distributional conflicts among member states, but worsen states’ collective ability to control the IO.

Some IOs’ hiring rules require both national diversity and professional homogeneity. For example, doctors dominate WHO positions, while economists dominate the World Bank and IMF.¹⁰⁶ In general, professional specialization both increases the advantages of delegation and worsens the agency problem. The more specialized an agent becomes vis-à-vis its principal, the better able it is to control the information reaching the principal and lead politicians monitoring the bodies toward adopting policies preferred by the technical staff. In the IO context in particular, national diversity, combined with professional uniformity, can increase ties among staff of different nationalities, and increase the sense of an internationalist IO mission, separate from the concerns of national leaders.

One way states can maintain control over wayward IO bureaucracies is through control of IO leadership. IO heads are typically picked on the basis of political criteria, and they do not always have long tenures with

¹⁰⁴ *Id.*

¹⁰⁵ Roland Flamini, *Judicial Reach: The Ever-Expanding European Court of Justice*, WORLD AFF. (Nov./Dec. 2012), <http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice>.

¹⁰⁶ *Staff of International Civil Servants*, INT’L MONETARY FUND, <https://www.imf.org/external/about/staff.htm> (last visited Dec. 2, 2017) (“The IMF currently employs about 2,400 staff, half of whom are economists.”); *About WHO: WHO People and Offices*, WHO, <http://www.who.int/about/structure/en/> (last visited Dec. 2, 2017) (“In addition to medical doctors, public health specialists, scientists and epidemiologists, WHO staff include people trained to manage administrative, financial, and information systems, as well as experts in the fields of health statistics, economics and emergency relief.”).

the organization.¹⁰⁷ These appointment rules create incentives for IO heads to pay more heed to the concerns of national capitals, and arguably give IO heads less time to be socialized into internationalist cultures. That said, IO leadership positions, like IO staff positions, are typically allocated on the basis of national bargains. For example, a European typically heads the IMF, while an American typically heads the World Bank.¹⁰⁸ According to scholars of delegation, this means the pool of qualified candidates is shallower than it otherwise would be, so it is hard for states to pick agents that best represent their collective preferences.¹⁰⁹

Moreover, because IOs are highly specialized, it is often the case that IO heads have long prior experiences with the organization and its internationalist tendencies. A recent battle over the head of the European Commission illustrates that the selection of IO heads may not offer powerful states much leeway to select loyal candidates and thus control the organization. Most recently, Jean-Claude Juncker was chosen to head the powerful EU Commission.¹¹⁰ A powerful EU state—the U.K.—opposed his candidacy very publicly and forcefully, threatening to hasten a referendum on exit from the EU should he be selected.¹¹¹ According to then U.K. Prime Minister David Cameron, Juncker’s extensive European experience was not a qualification, but a reason to disqualify him, as it made him more likely to support further EU integration, rather than support the idea of key powers remaining with national capitals.¹¹² Nevertheless, these arguments did not carry the day. Despite a strong crisis of EU legitimacy, a powerful Eurocrat was chosen to lead the Commission. In his first years in office, Juncker has already exhibited inclinations our theory would predict: he is methodically expanding the reach of the European institutions to address both the migration and financial crises, he is acquiring new and controversial powers for the Commission, and he is consequently deepening vertical conflict, much to the dismay of critics within member states.

¹⁰⁷ MILES KAHLER, LEADERSHIP SELECTION IN THE MAJOR MULTINATIONALS 51 (2001); Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AM. J. INT’L L. 209, 209–11 (2009).

¹⁰⁸ KAHLER, *supra* note 107.

¹⁰⁹ Lyne, Nielson & Tierney, *supra* note 69 at 42.

¹¹⁰ Ian Traynor, *Jean-Claude Juncker Confirmed as European Commission President*, GUARDIAN (Jul. 15, 2014, 8:51 AM), <https://www.theguardian.com/world/2014/jul/15/jean-claude-juncker-european-commission-president1>.

¹¹¹ Nicholas Watt & Ian Traynor, *Juncker is Wrong Person for European Commission Job, Says David Cameron*, GUARDIAN (Jun. 27, 2014, 4:41 AM), <https://www.theguardian.com/world/2014/jun/27/juncker-wrong-person-european-commission-leadership-david-cameron>.

¹¹² *Id.*

3. *Physical Locations of IOs*

Another important choice facing states when designing IOs is the location of headquarters. Several governments typically lobby to locate IOs within their home territories, ideally in their capital cities, to ensure the IO most closely aligns with their national interests. However, other governments fear such an arrangement, since it would enable the host country to exercise undue influence over the IO. Consequently, IOs are rarely located in the capital city of its most powerful member. Rather, more remote countries and cities are often chosen because of their expected neutrality. While such a choice may resolve the horizontal distributional conflict at the IO's founding, we argue that it worsens the vertical agency conflict down the line. When IO secretariats are far from key national capitals, they increasingly experience a different daily reality than that of national leaders, and receive less frequent and pressing lobbying from leaders and lobbyists in the national capital. This separation begets the development of an IO-specific subculture. This is especially likely for IOs located in relatively small and remote cities, where international staff constitute a substantial minority and live in a separate bubble, interacting primarily with one another.¹¹³ This argument depends critically on the assumption that IO staff are socialized differently because they interact heavily with other IO staff; this argument should work less well when socialization processes take a different form.

Some examples help illustrate these dynamics. Let us start with perhaps the most integrated international organization today—the European Union. First established in 1952 as the European Coal and Steel Community (ECSC), it consisted of three large member states—Germany, France, and Italy—and three very small ones—the Netherlands, Belgium, and Luxembourg.¹¹⁴ Each jostled for influence, seeking to place the headquarters in its territory, ideally in its capital. German and Italian cities, however, were never serious contenders, in part because the legacy of World War II was still vivid.¹¹⁵ More interestingly, Paris turned out to be equally objectionable, precisely because it was the national capital of a powerful state.¹¹⁶ Luxembourg was chosen as the best location for the ECSC secretariat precisely “because it had nothing of ‘real capital’ about it.”¹¹⁷ At the same time, the European Parliament was placed in Strasbourg “because

¹¹³ See *About UN Environment: Contact Us*, UNITED NATIONS ENV'T PROGRAMME, <http://web.unep.org/about/who-we-are/contact-us> (last visited Dec. 2, 2017) (listing its location as Nairobi, Kenya).

¹¹⁴ Carola Hein, *Choosing a Site for the Capital of Europe*, 51 GEOJOURNAL 83, 86 (2000).

¹¹⁵ DIRK SPIERENBURG & RAYMOND POIDEVIN, *THE HISTORY OF THE HIGH AUTHORITY OF THE EUROPEAN COAL AND STEEL COMMUNITY: SUPRANATIONALITY IN OPERATION* 34 (1994); Hein, *supra* note 114, at 87.

¹¹⁶ Hein, *supra* note 114, at 87.

¹¹⁷ *Id.* at 89.

it was the only city that could house the European Parliament in a non-national building, that of the Council of Europe.”¹¹⁸ Finally, six years later, Brussels—another relatively small capital—was picked to house the European Economic Community (EEC) and Euratom.¹¹⁹ The European Court of Justice was placed in Luxembourg for the same set of reasons.¹²⁰

Today, the European Parliament primarily operates from Brussels, but because of France’s resistance, the Parliament must decamp from Brussels to its original home, Strasbourg, for a week every month.¹²¹ The fact that several thousand politicians and staff, together with truckloads carrying some 2,500 plastic trunks, make the 300-mile journey from Brussels to Strasbourg every month—at a great expense to European taxpayers—reflects the salience of the conflict over the geographic location of IOs.¹²²

Placing IO headquarters at a distance from powerful foreign states’ capitals may seem like a good way to solve the distributional conflict among states and ensure that a foreign state does not get undue influence over the IO. We argue, however, that this may worsen states’ ability collectively to control a wayward IO bureaucracy. Namely, it may allow IO staff to live in their own separate bubble, far from the pressures facing elected leaders in national capitals. This is precisely what many believe has happened in the modern *de facto* EU capital—Brussels.

About 100,000 EU expats live in Brussels, constituting over 10% of the city’s population.¹²³ EU expats often “live among themselves” in “luxury ghettos” around the European district.¹²⁴ Recent surveys confirm that expats interact mostly with other expats—rather than with Belgians—send their children to international schools, and rarely participate in local elections.¹²⁵ Under these conditions, it is no wonder that EU staff develop a strong EU identity, as illustrated in repeated surveys.¹²⁶

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 90–91.

¹²¹ Consolidated Version of the Treaty on the Functioning of the European Union, Protocol 6(a), Oct. 26, 2012, 2012 O.J. (C 326/265); see also *Visit the European Parliament*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/visiting/en/> (last visited Dec. 2, 2017).

¹²² See Robert Mendick, *The Farce of the EU Travelling Circus*, TELEGRAPH (Jan. 11, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/10565686/The-farce-of-the-EU-travelling-circus.html>.

¹²³ Frédéric Simon, *EU Expat Survey Hammers Home “Brussels Bubble” Clichés*, EURACTIV (July 9, 2013), <http://www.euractiv.com/section/languages-culture/news/eu-expat-survey-hammers-home-brussels-bubble-cliches/>.

¹²⁴ *Id.*

¹²⁵ *Id.*; see also EUROPE.BRUSSELS LIAISON OFFICE, SURVEY ABOUT THE LIFE OF THE INTERNATIONAL COMMUNITY IN BRUSSELS 24 (2013), http://aer-www.ameos.net/fileadmin/user_upload/PressComm/Publications/AERNewsletter/2013/Newsletter_Septembre/Europe-Brussels-Brochure-Enquete-EN-03.pdf; *Brussels Expats Seen as “Separate Community”: Study*, EURACTIV (Aug. 31, 2009), <http://www.euractiv.com/pa/brussels-expats-seen-separate-co-news-222468>.

¹²⁶ Hooghe, *supra* note 101.

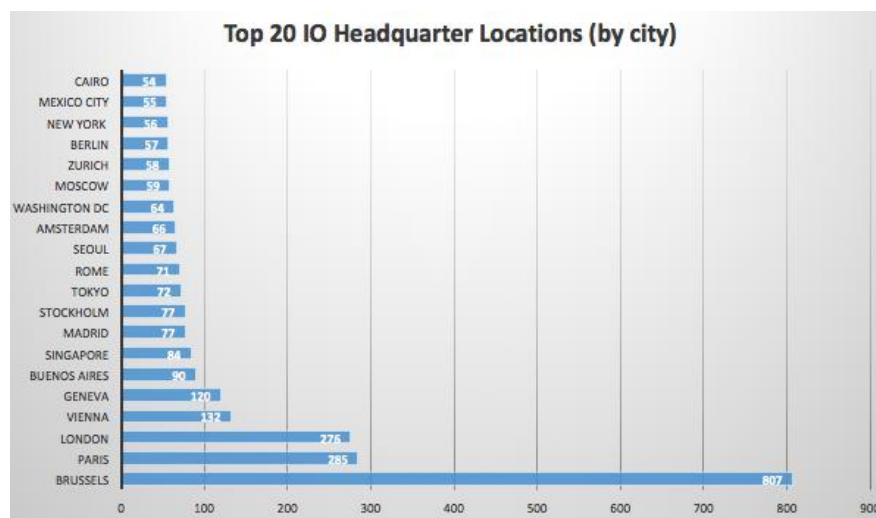


Figure 1¹²⁷

Figure 1 above suggests that while Brussels is by far the city with the most IO headquarters, relatively small and distant European cities, such as Geneva and Vienna, also attract many IOs. This figure is perhaps most striking because Washington and Moscow, capitals of the two most powerful states for much of the post-WWII period, are not in the top ten cities of IO headquarters. This illustrates that neutral locations, far from enemy capitals, are often preferred by negotiating states prioritizing the horizontal conflict. This logic is not unique to IOs—after all, U.S. states forming a federal system chose Washington, D.C. as the location of the new federal state, precisely because it constituted a rural backwater.¹²⁸

That said, while Figure 1 suggests that most IOs are located in relatively remote cities, some IOs are in powerful national capitals. Prominent among them are the International Monetary Fund and the World Bank, both headquartered in Washington, D.C. This decision was made in March 1946, when delegates from thirty-five countries met in Savannah, Georgia.¹²⁹ While most expected the headquarters to be in the U.S., delegates from the U.K. and many other countries argued for the headquarters to be removed from direct D.C. influence to New York City, along with the UN

¹²⁷ 5 Union of Int'l Ass'ns, *Y.B. of Int'l Orgs.*, 143–44 (2015).

¹²⁸ Andrew Glass, *Washington Signs Residence Act July 16, 1790*, POLITICO (Jul. 16, 2008, 4:18 AM), <http://www.politico.com/story/2008/07/washington-signs-residence-act-july-16-1790-011772>.

¹²⁹ See Kevin M. Casey, SAVING INTERNATIONAL CAPITALISM DURING THE EARLY TRUMAN PRESIDENCY: THE NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL PROBLEMS 186 (2001).

headquarters and the big banks.¹³⁰ However, as John Maynard Keynes highlighted, U.S. Treasury Secretary Fred Vinson, head of the U.S. delegation, “had no great difficulty in railroading” the decision to seat these bodies in Washington through the conference.¹³¹ In addition, historiography on the founding of the World Bank and IMF suggests that a different type of isolation was envisioned. U.S. Treasury Secretary Henry Morgenthau argued that new institutions such as the World Bank and IMF should be “instrumentalities of sovereign governments and not of private financial interests.”¹³² This meant that the headquarters of private finance, New York and London, should be avoided.¹³³

Another example of where to situate an international body comes from the most prominent modern IO—the United Nations. While Geneva, Switzerland was an early proposed location for the UN,¹³⁴ delegates from many countries quickly decided the UN would have its seat in the United States, both to reflect the new post-WWII realities, and to distance the body from its discredited predecessor, the League of Nations.¹³⁵ But the question then became: where in the United States? Over forty cities were on an initial list to host the UN, including San Francisco, New York, Boston, Baltimore, Chicago, Philadelphia, and New Orleans.¹³⁶ What was notably missing from this list is the U.S. capital—Washington, D.C.¹³⁷ Indeed, in December 1945, the UN Committee considering the headquarters question also eliminated Philadelphia from an early list, lest it was too close to Washington, enabling the U.S. government to exert undue influence on the UN.¹³⁸ Ultimately, a year later, a dramatic, unexpected, and generous offer from John D. Rockefeller to buy a six-block area along the East River and donate it to the UN resolved the controversy in favor of New York City.¹³⁹ What is important to recall here is that at the peak of U.S. power and legitimacy—the end of World War II—governments lobbied for the UN headquarters not to be built in Washington, D.C., and succeeded.

¹³⁰ *Id.*; see also *The World Bank in Washington's Foggy Bottom?*, THE WORLD BANK, <http://www.worldbank.org/en/about/archives/history/exhibits/the-world-bank-in-washingtons-foggy-bottom> (last visited Dec. 2, 2017); Arvind Subramanian, *The IMF: Keynes' Non-Candidate*, BUS. STANDARD INDIA (May 25, 2011), http://www.business-standard.com/article/opinion/arvind-subramanian-the-imf-keynes-non-candidate-111052500029_1.html.

¹³¹ Casey, *supra* note 129.

¹³² ODETTE LIENAU, *RETHINKING SOVEREIGN DEBT: POLITICS, REPUTATION, AND LEGITIMACY IN MODERN FINANCE* 125 (2014).

¹³³ *Id.*

¹³⁴ Linda S. Phipps, “Constructing” the United Nations Headquarters: Modern Architecture as Public Diplomacy 1-2, Chapters 1-2 (1998) (Ph.D. dissertation, Harvard University) (on file with author).

¹³⁵ See Elton Atwater, *Philadelphia's Quest to Become the Permanent Headquarters of the United Nations*, 100 PA. MAG. HIST. & BIOGRAPHY 243, 246 (1976).

¹³⁶ *Id.*

¹³⁷ *Id.* at 247.

¹³⁸ *Id.*

¹³⁹ *Id.* at 254–56.

4. Broad IO Mandates and Mission Creep

The scope of an IO's mandate is one of the critical decisions states must make when setting up an IO. When states' interests diverge, the easiest way to resolve the disagreement is by broadening the bargaining zone within which a compromise could be identified. Adding new items to the bargaining table, for example, often ensures the diverging interests of various states can be satisfied. When the agenda is broad enough, every state can find something to justify their participation in the IO. The IO mandate can also be left ambiguous so that each state can interpret it in a manner consistent with its interests. Vesting the IO with a broad or flexible mandate is therefore often an effective response to a horizontal conflict. However, vertical conflict looms large every time the IO mission is broadly or loosely defined. Such a structure invites opportunistic behavior by an IO's bureaucracy, and often leads to mission creep, where an IO strays beyond its initial mandate. This is because a broadly defined mandate expands the agent's powers and makes it harder to monitor the agent's performance effectively. Moreover, a loosely defined mandate creates a problem of incomplete contracting, where the agent's mandate is only partially specified *ex ante*, heightening the need for enhanced monitoring *ex post*. Both broad and loose mandates therefore make it easier for the agent to deviate from its mission and behave opportunistically.

Mission creep is largely recognized as a phenomenon that undermines international cooperation.¹⁴⁰ Critics have focused on the problem of legitimacy, as well as the disparity between broad IO mandates and IO resources. These features, critics assert, undermine the IO's ability to carry out even its basic functions effectively. Our criticism is different. We focus on mission creep as a manifestation of a joint problem, portraying the phenomenon as a vertical conflict that is the direct consequence of the states' conscious attempt to overcome their horizontal conflicts in the first place.

The EU offers perhaps the most striking example of broad IO missions and the ensuing mission creep.¹⁴¹ The EU started off as an institution narrowly focused on integrating Western European steel and coal industries. It soon moved to establish a customs union and remove internal trade barriers. Since then, the competences of the EU have grown to embrace issues ranging from environmental and consumer protection to social

¹⁴⁰ See, e.g., MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 2 (2004); Sungjoon Cho, *An International Organization's Identity Crisis*, 34 NW. J. INT'L L. & BUS. 359, 380–81 (2014); Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?*, 50 U. KAN. L. REV. 695, 707 (2002); Jessica Einhorn, *The World Bank's Mission Creep*, 80(5) FOREIGN AFF. 22 (Sept.–Oct. 2001).

¹⁴¹ LORNA WOODS & PHILIPPA WATSON, STEINER & WOODS EU LAW 51 (12th ed. 2014).

policy, transport, public health, privacy, and criminal justice. When the EU started to pursue more extensive economic liberalization, it tried to obtain the cooperation of skeptical member states by balancing its liberal economic agenda with extensive social protections. The point of this balancing act was to offset any adverse effects of rapid economic integration with adequate social protections.¹⁴² Therefore, the broad mandate the EU has today originated from EU member states' disagreements on how to balance various domestic consumer or environmental protection measures with the need to guarantee unrestricted trade within the common market. The easiest way to resolve this horizontal conflict was not to make a choice between an economic and social Europe—inevitably alienating some member states—but to expand the EU's competences to cover both.¹⁴³ This movement toward “an ever-closer union”—an expansion of the EU's mandate well beyond what the U.K. ever intended—was at the heart of the U.K.'s discontent with the EU, driving the EU membership referendum, and thus leading the U.K. to now abandon the EU altogether.¹⁴⁴

The WTO exhibits a similar evolution, where its trade agenda was extended to cover IP back in 1995, with the conclusion of the TRIPS agreement.¹⁴⁵ The expansion to IP would never have occurred in isolation. Instead, it was introduced as part of a “single undertaking” deal across a range of policy areas, which was designed to deliver some gains for all member states.¹⁴⁶ In the case of TRIPS, it was evident that developed countries, where the majority of research and development takes place, were the beneficiaries of enhanced IP protections, and that developing countries, where IP-protected products are mainly consumed or copied, were the losers under the agreement.¹⁴⁷ Thus, the main challenge in the TRIPS negotiations was to overcome this distributional conflict and win the support of developing countries. Developing countries were eventually brought into the agreement by linking the TRIPS negotiations to

¹⁴² See Ian Bain & François Netoux, *Social Protection and Economic Union*, 5 J. EUR. SOC. POL'Y 285 (1995).

¹⁴³ Case C-438/05, *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, 2007 E.C.R. I-10779. See Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 3, 3–38 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006).

¹⁴⁴ Palmeri, *supra* note 1.

¹⁴⁵ See generally Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1 (2010).

¹⁴⁶ Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 360 (2002).

¹⁴⁷ See A. O. Adede, *The Political Economy of the TRIPs Agreement: Origins and History of Negotiations* 4 (July 30, 2001) (unpublished manuscript, presented at the Eastern and Southern Africa Multi-Stakeholder Dialogue on Trade, Intellectual Property and Biological Resources, Nairobi, Kenya).

concessions in other areas, including agriculture and textiles.¹⁴⁸ This strategic linkage of unrelated issues contributed to unlocking the horizontal conflict and paving the way for a compromise. At the same time, however, it empowered the WTO as a multi-issue IO, spurring the call for further expansion of the WTO's mission to include a wide range of trade-related issues, including investment, competition, environment, and labor rights.

The World Bank's mandate has similarly expanded over time. The Bank was created after World War II to provide loans to foster economic development, in particular to fund public infrastructure projects.¹⁴⁹ In the ensuing decades, the Bank adopted a considerably broader view of development, seeking to stimulate development via programs as diverse as the promotion of literacy, entrepreneurship, labor regulations, gender equality, and environmental sustainability.¹⁵⁰ While supporters may commend the Bank's accomplishments, critics are quick to condemn its foray into more controversial domestic policy areas, and characterize its use of conditional lending as oppressive.¹⁵¹ Jessica Einhorn, the former Managing Director of the Bank, has described how the Bank took on a large number of new issues over time that strayed beyond the IO's core mission. She notes how "the bank takes on challenges that lie far beyond any institution's operational capabilities," and that "its mission has become so complex that it strains credulity to portray the bank as a manageable organization."¹⁵² The Bank's new "unachievable mission" is not surprising, given the Bank faces pressure from many different constituencies. She also acknowledges the difficulty of reining back the new agendas because every new program has created its own constituency that resists change.¹⁵³

These examples illustrate a dynamic where vertical conflict stems from the states' deliberate decision to include new issues on the negotiating agenda as a way to secure a buy-in of some initially skeptical states. A broader mandate may successfully alleviate a horizontal conflict by ensuring the IO is vested with the competence to advance something that every key stakeholder benefits from. Expanded IO missions can also be desirable because they reflect the desire of states to pursue scope economies, where various policy issues are closely related and efficiently addressed in conjunction with one another. Many supporters of the EU and the WTO, for instance, would say these institutions have become successful precisely

¹⁴⁸ Within the IP domain, few additional concessions were also given to the developing countries, including promises of technology transfer and transition periods that allow them to delay implementation of the TRIPs Agreement.

¹⁴⁹ Einhorn, *supra* note 140, at 23.

¹⁵⁰ *Id.* at 23–24.

¹⁵¹ *Id.* at 27–29; A SEED EUR., WORLD BANK CONDITIONALITIES: POOR DEAL FOR POOR COUNTRIES 33 (2008), http://www.aseed.net/pdfs/ASEED_Report_on_Worldbank_Conditionalities.pdf.

¹⁵² Einhorn, *supra* note 140.

¹⁵³ *Id.*

because of their ability to form linkages and resolve policy conflicts that span across multiple issue areas.¹⁵⁴ Too narrow IOs with overly constrained mandates would not be able to accomplish the same.

At the same time, vesting the IO with a broad mandate sets the stage for a vertical conflict. It facilitates agency slack because an agent with a flexible and expansive mission is harder to monitor, and almost impossible to rein in as the multiple agendas become entrenched. Principal-agent theory suggests that an effective way to constrain an agent is to empower it with a clear mission and a tightly constrained mandate to carry out that mission.¹⁵⁵ Therefore, if states and principals were initially concerned about a wayward agent, they would delegate only a narrow set of goals for the IO to accomplish. A clearly defined set of narrow goals makes it difficult for the agent to deviate from its task, and easier for the principals to monitor the agent's performance.¹⁵⁶ However, if the IO's mandate is set with the horizontal conflict in mind, states end up with IOs that govern multiple issues with broad and hard-to-control mandates, inadvertently exacerbating the vertical conflict, just as the theory of joint problem would predict.

In this Part, we have identified several ways in which solutions to the horizontal conflict end up worsening the vertical conflict. We have shown how super-majority rules designed to protect the interests of individual states make it difficult to reverse decisions by an independent bureaucracy or tribunal. In addition, the tendency for each country to place its nationals in key IO positions can result in a multi-national bureaucracy, more supportive of further international cooperation than any individual national priority. Similarly, locating an IO in a remote city reinforces the internationalist orientation of the IO staff, and further removes them from concerns in national capitals. Finally, linking multiple issues to bring diverse states to the negotiating table often results in IOs with broad mandates, and their staff become difficult to discipline as a result. While both the vertical and the horizontal conflict have been extensively studied in earlier work, these connections between the two problems have not been previously examined in international law and international relations. To identify some possible ways to resolve these conflicts, we now turn to a literature that has studied these intersections—corporate law literature.

¹⁵⁴ See, e.g., Bradford, *supra* note 145; Christina L. Davis, *International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization*, 98 AM. POL. SCI. REV. 153, 163–65 (2004); James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L ORG. 281, 300 (1983) (noting “cases in which adding issues may be mutually beneficial” to negotiating parties); Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 INT'L ORG. 425, 430–37 (1979) (discussing an economic model of issue linkages).

¹⁵⁵ CARMEN E. PAVEL, DIVIDED SOVEREIGNTY: INTERNATIONAL INSTITUTIONS AND THE LIMITS OF STATE AUTHORITY 45 (2014).

¹⁵⁶ *Id.*

IV. RESOLVING THE JOINT PROBLEM IN OTHER CONTEXTS: IDEAS FROM CORPORATE LAW

We argue above that, in an effort to preempt future conflict, states introduce governance measures that end up tying their own hands, thus boosting the decision-making leeway of international bodies. The trade-off between balanced state influence horizontally, and empowered IO executive bodies vertically, has gone largely unnoticed in the literature on international law and international relations, which treats these two dimensions as distinct. To be sure, leading rational choice theorists recognize that an international organization is an agent of its members.¹⁵⁷ However, they prefer the analytic simplicity of merging all states into a single collective principal, rather than the complicated reality of treating each state as a separate principal with distinct preferences and ideal points.¹⁵⁸ Constructivist scholars highlight that international bureaucracies, like all bureaucracies, take on a distinct identity and may not pursue their goals efficiently.¹⁵⁹ But constructivist scholars have not yet explored how specific balanced governance solutions, which are widespread among IOs, eventually worsen the pathologies of international bureaucracies. Nor do constructivists argue, as we do, that these rules have origins in the horizontal conflicts among states. Unsurprisingly, there have been no serious efforts to address the challenges raised by the interaction between horizontal and vertical conflicts, either in theoretical literature or on the policy ground.

In contrast, the dilemmas facing multiple principals, who must choose between a powerful and potentially self-serving co-principal on the one hand, and an insulated and thus hard-to-control agent on the other, are central to corporate law literature. A key goal of corporate law is to pull together contributions from multiple investors, thereby gathering the resources necessary for the intended business venture.¹⁶⁰ In this sense, investors are not unlike states that combine efforts to accomplish a mission through an IO. And just like states, investors also need reassurance that corporate resources will not be diverted to pernicious uses. A particular worry for minority shareholders is that a majority shareholder can easily take control and run the firm according to her preferences, looting (shared) corporate assets in the process.¹⁶¹ Faced with this horizontal conflict, and seeking to protect minority shareholders in particular, corporate law

¹⁵⁷ Lyne, Nielson & Tierney, *supra* note 69, at 42.

¹⁵⁸ *Id.*; *but see* Copelovitch, *supra* note 27.

¹⁵⁹ *See, e.g.*, Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999).

¹⁶⁰ *See, e.g.*, John Armour, Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, in THE ANATOMY OF CORPORATE LAW 1 (Reinier Kraakman et al. eds., 2d ed. 2009) (describing corporations as the legal entity chosen for large-scale business enterprises with multiple investors).

¹⁶¹ *See* ROBERT C. CLARK, CORPORATE LAW 141–45 (1986).

insulates the board of directors from the majority and requires it to act for the benefit of all shareholders.¹⁶² For example, various corporate law provisions create hurdles for powerful shareholders seeking to fill the board with their representatives. But as many corporate law scholars have recognized, empowering the board may lead to managerial abuses.¹⁶³

Starting from these realizations, corporate lawyers have engaged in a decades-long debate about the optimal level of board independence and shareholder control, and explored mechanisms to ameliorate particularly challenging situations.¹⁶⁴ The shareholder democracy camp points to managers' self-aggrandizing tendencies,¹⁶⁵ while the pro-management group argues that shareholders cannot fully understand the stakes, and may have conflicting interests.¹⁶⁶ More recently, Goshen and Squire have underlined that the division of control between shareholders and managers is a zero-sum proposition.¹⁶⁷ They note that as shareholders claim ever-greater control of the company, they reduce a board's flexibility to exercise its business judgment, which can make the firm worse off if the shareholders lack the skills to effectively manage the company.¹⁶⁸ By analogizing IO member states to shareholders and IO organs to corporate boards, we can tap into the extensive literature in corporate law that studies both the conflict among shareholders, and the conflict between shareholders and managers.¹⁶⁹

The corporate law literature provides three important insights for the study of IO delegation. First, when shareholders face greater coordination problems, corporate law delegates decision-making power to the board as a way of protecting small, passive shareholders from large, active ones.¹⁷⁰

¹⁶² For example, corporate law often casts directors as trustees for shareholders. See Deborah A. DeMott, *Guests at the Table: Independent Directors in Family-Influenced Public Companies*, 33(4) J. CORP. L. 819 (2008). Jeffrey Gordon also remarks that independent directors can better serve a vision of shareholder value maximization tied to stock performance, rather than the goals of insiders. See Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

¹⁶³ See, e.g., Lucian A. Bebchuk & Jesse M. Fried, *Pay Without Performance: Overview of the Issues*, 30 J. CORP. L. 647 (2005).

¹⁶⁴ For an overview of this literature, with a special emphasis on corporate takeovers, see Steven M. Davidoff, *Takeover Theory and the Law and Economics Movement*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW (Claire A. Hill and Brett H. McDonnell eds., 2012).

¹⁶⁵ See, e.g., Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1440-41 (1992).

¹⁶⁶ See Martin Lipton & Paul K. Rowe, *Pills, Polls, and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1, 42-46 (2002).

¹⁶⁷ Zohar Goshen & Richard Squire, *Principal Costs* (2015) (Columbia Law Sch. Pub. Law Research Paper, Paper No. 14-462).

¹⁶⁸ *Id.* at 12-13.

¹⁶⁹ See generally John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 35 (Reinier Kraakman ed., 2d ed. 2009).

¹⁷⁰ Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW 66-67 (1991). Margaret Blair and Lynn Stout view corporate law more generally as a set of rules

Because corporations exist in perpetuity, shareholders cannot accurately predict or dictate actions necessary for the long-term success of the business. As such, the board becomes an attentive, well-informed agent tasked with looking after the interests of shareholders. In firms with a dispersed shareholder base, the board's key task is to monitor the firm's top management. But when a populous group of minority shareholders finds itself coupled with a controlling shareholder, the board undertakes the additional role of protecting the minority from the whims of the controlling shareholder. To do so effectively, the board often receives extensive powers to oppose the will of the majority shareholder.¹⁷¹ Yet, this leads to the second key insight from corporate law: broad powers granted to protect minority shareholders can result in entrenching the board. Predictably, boards may abuse their powers in order to protect either their own interests or the interests of top management. To ensure that, when exercising discretion, boards remain focused on promoting the interests of shareholders rather than engaging in self-serving behavior, corporate boards are subject to fiduciary duties. This broad grant of powers constrained by fiduciary duties has many parallels in the delegation of authority by sovereign states to international organizations, as has been recognized.¹⁷² Third and finally, corporate law provides a series of suggestions about how to ameliorate the joint problem. To preempt harm to minority shareholders, corporate law delineates situations where the board is particularly likely to face conflicts of interest, and recommends special decision-making procedures with higher independence safeguards.¹⁷³ Moreover, corporate law mandates greater transparency and disclosure to shareholders as a way of empowering minorities seeking to discipline the board. Below, we examine these three insights in turn.

Some words of caution are necessary before proceeding. We do not mean to suggest that IO organs and corporate boards are similar in all ways. To start, most corporate boards are free to pursue whatever business goals they choose, while IO organs are limited by their treaty mandates. Corporate boards' almost unbridled flexibility suggests that, in certain circumstances, the vertical conflict might be more intense. On the other hand, corporate boards are single-handedly oriented toward profit-making, while IO organs serve a broader set of often public-minded goals. Profit maximization

created to facilitate a group of stakeholders to relinquish powers to manage assets to a board, given the inherent inability to run a long-term contract. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999).

¹⁷¹ For example, Delaware law provides a board with the power to oppose a bidder seeking to acquire the company by triggering a poison pill, issuing numerous new shares that will dilute the bidder's initial position. *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

¹⁷² See Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103, 117–118 (2001).

¹⁷³ See *infra* Part III.C.

provides a clear yardstick for assessing board performance, while evaluating IOs' actions is not as straightforward. Moreover, some corporations are owned by a single shareholder, and yet boards still have a significant role to play in supervising the day-to-day running of the corporation. Boards often consist of experienced businessmen with superior information about the company's business, and may have better resources to monitor corporate activity.¹⁷⁴ Yet, despite these differences, corporate law envisages boards as especially useful when multiple shareholders come together, providing a governance structure that brings together individuals with different goals and time horizons.¹⁷⁵ In this respect, corporate boards and IO organs are quite similar. This is where our thought experiment begins.

A. Greater Shareholder Coordination Costs Increase Delegation of Powers to Boards

Delegation of decision-making powers to the board of directors, a key feature of corporate law, prevents shareholders from directly proposing and implementing business choices.¹⁷⁶ Since the nineteenth century, courts have ruled that boards should not submit to the will of a shareholder, even if the shareholder controls the majority of the company's share capital.¹⁷⁷ Rather, boards should act as representatives of all shareholders, thinking of the aggregate interests of the corporation rather than the desires of the majority. Thus, corporate law seeks to neutralize the outsized influence of a majority shareholder when the shareholder's preferred course would harm the interests of the corporation, namely the interests of the other shareholders.

Due to board autonomy, shareholders seeking to shape the corporation's business must find indirect ways of influencing the board. Generally, corporate law provides shareholders with two channels of input: the process of electing and removing board members,¹⁷⁸ and through special rights to approve fundamental transactions, such as mergers¹⁷⁹ or charter amendments.¹⁸⁰ However, the extent to which these channels are open to shareholders depends largely on the underlying ownership patterns of the

¹⁷⁴ Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791 (2002).

¹⁷⁵ *Id.*

¹⁷⁶ Luca Enriques, Henry Hansmann & Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, in THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 55, 72–75 (Reinier Kraakman ed., 2d ed. 2009).

¹⁷⁷ See, e.g., *Automatic Self-Cleansing Filter Syndicate Co. Ltd. v. Cuninghame* [1906] 2 Ch 34 (Eng.).

¹⁷⁸ Delaware law requires a shareholder vote for electing directors, DEL. CODE ANN. tit. 8, § 211 (2011), and allows a shareholder majority to remove directors without cause; but cause is required if the board is staggered, DEL. CODE ANN. tit. 8, § 141(k) (2011).

¹⁷⁹ DEL. CODE ANN. tit. 8, § 251(c) (2011).

¹⁸⁰ DEL. CODE ANN. tit. 8, § 242(b)(1) (2011 & Supp. 2016).

corporation, and the resulting costs of coordination. While adhering to the principle of majority voting, corporate law also introduces mechanisms intended to constrain powerful shareholders from steering the corporation in their preferred direction, as the discussion below illustrates. These mechanisms are typically justified as measures to protect the inherent value of the corporation for all shareholders, minority shareholders especially.

Rules for the election and appointment of corporate directors prevent powerful shareholders from dominating the board, particularly if they fall short of a shareholder majority. To start, the board itself nominates candidates for board positions through its proxy materials.¹⁸¹ A shareholder block, typically 1–3%, can use the company's proxy to nominate candidates, if allowed by the charter, but they still have to run against the boards' nominees.¹⁸² In many cases, significant shareholders are content with electing one representative, stopping far short of control. Shareholders may be better able to influence board members if they can not only appoint them, but also threaten to remove them before their tenure expires. In most jurisdictions, including Delaware, only a majority of shareholders has the right to remove directors at will.¹⁸³ But even then, Delaware allows for an important exception from at-will removal of directors by permitting a staggered board. When a board is staggered, with different classes of directors having their tenure expire at different intervals, a shareholder majority can remove directors only for cause.¹⁸⁴ This substantial inroad into shareholder powers is typically justified as a mechanism to promote investment in projects that can produce superior long-term results. However, in the short run, inability to discipline the board can drag the stock price down.¹⁸⁵ In practice, a staggered board can delay even a majority shareholder from taking full control of the corporation for several years.

Takeovers represent a particularly precarious moment for shareholders, and can be fraught with horizontal conflicts.¹⁸⁶ Bidders typically propose a

¹⁸¹ DEL. CODE ANN. tit. 8, § 212(c) (2011).

¹⁸² A federal rule to that effect was adopted by the SEC and then struck down, but some corporations amend their charters to achieve the same result. *See generally* Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. L. 329 (2010) (arguing that this should be a default rule, rather than an opt-in rule in corporate law).

¹⁸³ Enriques, Hansmann & Kraakman, *supra* note 176, at 64–66. In some jurisdictions, there are exceptions for board members appointed to represent specific constituencies, such as labor representatives in Germany.

¹⁸⁴ DEL. CODE ANN. tit. 8, § 141(k) (2011).

¹⁸⁵ *See generally* Stephen P. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010).

¹⁸⁶ For an overview of takeover deal making, see generally STEVEN M. DAVIDOFF, *GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION* (2010) (exploring how legal intricacies affect takeover strategies on the ground).

premium over market price in return for gaining control of the company.¹⁸⁷ Sometimes, bidders already have significant amounts of the company's stock, and may even own a majority. Or, some shareholders may be motivated to sell, while others may prefer to wait until the company's strategy bears fruit. In any event, corporate law requires boards to step in and assess the offer.¹⁸⁸ If a board decides the offer is inadequate, it has broad powers to avert a takeover bid, even if a shareholder majority wishes otherwise.¹⁸⁹ Delaware takeover jurisprudence allows the board to utilize corporate assets to promise alternative pay-outs to shareholders, so as to fend off takeover attempts.¹⁹⁰ Boards can also utilize poison pills, which involve issuing stock or some other assembly of corporate assets to all shareholders except the acquirer, which dilutes the acquirer's existing equity stake in the target and forces it to speak directly to the board.¹⁹¹ With such extensive delegated powers, Delaware law envisions the board as a well-informed decision-maker devised to intervene and protect minorities against a shareholder majority that finds itself in the wrong.

B. Broad Powers Granted to Protect Shareholders Can Entrench the Board

In the conventional account of corporate law, as discussed above, the vertical delegation of powers to the corporate board addresses concerns about potential horizontal conflicts among shareholders. Not only does a powerful board represent a nimble management structure, but it also ensures shareholders, especially minorities, that their investments will not fall prey to incompetent managers or whimsical majorities.¹⁹² Yet, as corporate law scholars have emphasized, neutralizing the influence of powerful shareholders on the board comes at the cost of blunting the traditional mechanisms of disciplining the board.¹⁹³ A board insulated from pressures to yield to shareholders can also develop and pursue its own agenda, regardless of whether that agenda is consistent with shareholder aspirations.¹⁹⁴ As a result, the board can either shirk its fundamental duties to shareholders, or appropriate for itself benefits belonging to shareholders. Thus, the very mechanisms designed to check shareholders' power vis-à-vis other shareholders have the inadvertent effect of permitting a board to abuse its powers.

¹⁸⁷ See, e.g., Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1235 (1990).

¹⁸⁸ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

¹⁸⁹ See, e.g., *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).

¹⁹² See Oliver E. Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1210 (1984).

¹⁹³ See Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 814–15 (2001).

¹⁹⁴ See Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

An extensive literature in corporate law focuses on the vertical conflict between shareholders and managers.¹⁹⁵ It argues that entrenched boards are prone to managerial abuses and likely to choose strategies that serve their own interests instead of those of shareholders. Boards, for example, may approve expensive acquisitions to expand their influence,¹⁹⁶ they may pay themselves and their managers more, even when it is not justified by corporate performance,¹⁹⁷ or they may retain excessive funds in the corporation, rather than distribute dividends to shareholders.¹⁹⁸ Prominent corporate law scholars sensitive to these abuses argue for increasing shareholder power over boards. They find support in many leading economists, who claim companies with more accountable governance structures tend to perform better in the long term.¹⁹⁹ They also found that governance arrangements that entrench boards, such as staggering, were associated with lower valuations.²⁰⁰ This camp has made headway in recent years through shareholder activists, typically hedge funds run by famous investors like Carl Icahn and Bill Ackman,²⁰¹ who typically demand reforms that increase shareholder influence, such as de-staggering boards.²⁰²

Regardless of whether one supports or opposes board entrenchment, one thing is clear: both groups see the interplay between horizontal and vertical conflict as a trade-off. When concerns arise over a powerful shareholder abusing its influence over a corporation, broadening the delegation of decision-making powers to a third body seems a plausible solution. Yet, the more independent this third party becomes, the more likely it will be to advance its own goals over those of its principals. Aware of this trade-off, more corporations choose a different mix of board powers and shareholder influence mechanisms. Some provide the board with

¹⁹⁵ The seminal contribution that began this conversation conceptualized the board as an agent of the shareholders, and explored the associated agency costs. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

¹⁹⁶ WILLIAM J. BAUMOL, BUSINESS BEHAVIOR, VALUE, AND GROWTH (1967); Yakov Amihud & Baruch Lev, *Risk Reduction as a Managerial Motive for Conglomerate Mergers*, 12 BELL J. ECON. 605 (1981); Dennis C. Mueller, *A Theory of Conglomerate Mergers*, 83 Q.J. ECON. 643 (1969).

¹⁹⁷ See generally LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004) (arguing that managers have been able to increase their pay without justification because corporate law does not facilitate effective shareholder supervision).

¹⁹⁸ Andrei Shleifer & Robert W. Vishny, *Management Entrenchment: The Case of Manager-Specific Investments*, 25 J. FIN. ECON. 123 (1989).

¹⁹⁹ See generally Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107 (2003).

²⁰⁰ Lucian A. Bebchuk, John C. Coates, IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002); but see Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 837 (2016).

²⁰¹ See Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51 (2011).

²⁰² See, e.g., Carl Icahn, *Corporate Boards That Do Their Job*, WASH. POST (Feb. 16, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/15/AR2009021501256.html>.

significant leeway, so talented management can pursue its strategies unencumbered, like Apple in the Steve Jobs era.²⁰³ Others adopt devices to ensure control stays with powerful shareholders, such as the dual class structure of Google and the New York Times.²⁰⁴ As Goshen and Squire argue, there is a continuum between complete shareholder control and absolute management discretion,²⁰⁵ and corporations make different choices based on their industry, their needs, and human talent available to them.

C. Lessons for International Law: Ways to Ameliorate the Unintended Consequences of Horizontal and Vertical Interaction

The debate over the intersection of horizontal and vertical conflicts in corporations persists in law reviews, courtrooms, and legislative chambers. While generally upholding the governance choices reflected in corporate charters, courts have intervened when they see an especially grave clash between horizontal and vertical interests.²⁰⁶ For these instances, courts have promulgated doctrines to help protect minority shareholders, who otherwise risk being outflanked by majorities or managers. Legislatures have also established special rules for corporations with publicly traded stock, which protect retail investors who are too small and numerous to actively engage in management. These corporate law remedies, we believe, offer guidance on how to address similar clashes in IOs. Some of the above-mentioned solutions are merely recommended best practices, while others are mandatory law. Regardless, if some of the solutions were adopted voluntarily, they could still improve the position of minorities.

One strategy that has proven particularly useful to small shareholders is disclosure of corporate affairs. Indeed, international organizations have responded to calls for greater transparency in recent years by increasing circulation of annual reports, memoranda, and other materials. However, corporate disclosure goes farther than these practices. In corporate law, disclosure documents are reviewed and amended by third parties, including lawyers, accountants, and investment bankers. Collectively called gatekeepers, these professionals stake their reputation on providing the most accurate account of company affairs as possible, and can face liability if their due diligence is insufficient. Although far from perfect, this system at least ensures managers are not in absolute control of the information

²⁰³ See Joseph A. McCahery & Erik P.M. Vermeulen, *Understanding the Board of Directors After the Financial Crisis: Some Lessons for Europe*, 41 J. L. & SOC'Y 121, 127–29 (2014).

²⁰⁴ See Steven Davidoff Solomon, *Shareholders Vote with Their Dollars to Have Less of a Say*, N.Y. TIMES (Nov. 4, 2015), https://www.nytimes.com/2015/11/05/business/dealbook/shareholders-vote-with-their-dollars-to-have-less-of-a-say.html?_r=0.

²⁰⁵ See Goshen & Squire, *supra* note 167.

²⁰⁶ See John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1620 (1989).

released. Moreover, corporate disclosure is addressed to shareholders (i.e., owners of the corporation), whose support is vital for management. For these reasons, corporate disclosures are not mere marketing materials. Rather, they describe both the achievements and hardships facing the corporation at a given moment. Lastly, corporate disclosures are updated at regular intervals, thus keeping the flow of information ongoing.

Corporate law regards mandatory disclosure as a regulatory technique that serves primarily small shareholders, protecting them against both overreaching majorities and self-serving agents.²⁰⁷ Disclosure requirements can both force managers to submit their actions to scrutiny, and serve as a check on powerful shareholders who want to exert influence behind the scenes.²⁰⁸ Moreover, disclosure of problems makes correction of course easier and more immediate. While these functions are useful to all shareholders, they are particularly valuable to small ones, who otherwise lack the resources and expertise to delve into corporate affairs.²⁰⁹ Through disclosure requirements, minority shareholders offload part of the costs of supervising the corporation on to those who possess the information already, i.e., managers and majority shareholders. In other words, a small shareholder lacks the capacity to supervise every corporation she could own stocks in. As such, mandatory disclosure enables small shareholders to carefully assess company data, rather than collect it.

Disclosure, of course, is not without costs. The management team must spend considerable time and effort gathering information and drafting the disclosure. Moreover, corporate disclosures may help competitors by revealing the company's strategies or plans. To avoid overburdening the corporation, federal law only requires disclosure of events material to the company's financial position.²¹⁰ Traditionally, events were material if their impact on the corporation's annual revenues exceeded a 5% threshold.²¹¹ In recent years, courts and the Securities Exchange Commission (SEC) has moved to a more nuanced approach that combines quantitative and qualitative considerations.²¹² Under this approach, corporations need not reveal every detail of their business. Rather, they must only provide sufficient information for an outsider to understand the company's major goals, strategies, strengths, and weaknesses.

²⁰⁷ See generally Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and The Protection of Investors*, 70 VA. L. REV. 669 (1984) (arguing that the public interest justification for securities laws survives the public choice critique).

²⁰⁸ See Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995).

²⁰⁹ John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 738 (1984).

²¹⁰ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

²¹¹ SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999).

²¹² *Ganino v. Citizens Utilities Co.*, 228 F.3d 154 (2d Cir. 2000).

Just like small shareholders, less powerful states face dynamics that limit their ability to effectively look after their interests in many IOs. Often, smaller states seek to join forces and achieve some level of representation for their region, if not for each state individually. For example, the Group of 77 (G-77) has been lobbying for Brazil to get a seat on the Security Council.²¹³ This effort rests on two assumptions: that Brazil will devote the resources necessary to do all the information gathering and analysis, and that, once it does, its interests will be in line with the remaining G-77. Either of these assumptions, or both, may prove wrong as different issues reach the IO. Instead, we argue, smaller countries would be better served by getting more disclosure from IO secretariats and courts. With more disclosure, smaller states could examine the contours of the IOs' decisions themselves, and form their own alliances on each matter. Moreover, it could empower a broad range of actors, such as multiple states and civil society organizations, to monitor the IOs and call for intervention when necessary. In this way, disclosures will serve as a check on IO decision-making similar to the requirement to provide a reasoned justification for rulemaking in domestic administrative procedures.²¹⁴ A decision's importance in the overall IO scheme could determine whether it needs to be disclosed or not, so that IO staff are not flooded with requests, and so that important issues are flagged for small country missions.

While disclosure could help small shareholders monitor corporate affairs and deter wrongdoing during the firm's ordinary course of business, there are circumstances where small shareholders may need even greater assistance and protection. Specifically, when a proposed business move might benefit both the corporation and the controlling shareholder or the manager, it is hard to distinguish *ex ante* whether a fiduciary duty issue has arisen. For example, the corporation may look into buying a piece of property that belongs to a major shareholder on favorable terms. Depending on the pricing, the transaction may be entirely fair, but may also prove burdensome or unfair to shareholders. If corporate law prohibited such a transaction entirely, it could deprive the corporation from a potentially lucrative business opportunity. After all, the shareholder's property could be particularly appealing.

Instead, corporate law provides a separate governance approach for assessing deals where the corporate entity and key shareholders are counterparties, relying on two mechanisms.²¹⁵ The first mechanism consists of the appointment of independent board members tasked with negotiating

²¹³ See, e.g., Marcello M. Valença & Gustavo Carvalho, *Soft Power, Hard Aspirations: The Shifting Role of Power in Brazilian Foreign Policy*, 8 BRAZ. POL. SCI. REV. 66 (2014).

²¹⁴ See Majone, *supra* note 53, at 118.

²¹⁵ These mechanisms were recommended by the Delaware Supreme Court in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

with the majority shareholder at arm's length.²¹⁶ This mechanism serves to prevent key shareholders from placing undue pressure on the board. But since such pressures cannot be fully prevented *ex ante*, the second procedural mechanism offers an additional safeguard. Under Delaware jurisprudence, the conflicted shareholder must abstain from any vote about her transaction with the corporation. Thus, the proposed transaction must win the support of a majority of minority shareholders in order to shed any taint of a conflict of interest.²¹⁷

IOs often face situations where a proposed move is arguably beneficial to the IO as a whole, but disproportionately beneficial to certain powerful states actively supporting it. For example, IMF lending is sometimes severely criticized for serving the interests of key lender states, at the expense of the IMF's shared goals.²¹⁸ While all IMF members have a shared interest in maintaining global financial stability, in part by lending only to states that can ultimately repay their loans, individual IMF members might want the IMF to extend outside loans to even insolvent states, which protects their private banks' investments.²¹⁹ For example, the IMF's decision to lend forty-eight billion dollars to Greece at a moment when many, including IMF staffers, considered it insolvent, has been widely criticized by large emerging states like Brazil.²²⁰ While a large IMF loan to Greece may have prevented a global financial crisis, it certainly benefited — first and foremost — French and German commercial banks with extensive exposure to Greek sovereign debt.²²¹ The decision to have a former French minister — now head of the IMF — adjudicate the pros and cons of the unusual loan did not appear neutral to many smaller IMF shareholders.²²² Indeed, in the midst of the Greek crisis, Brazil, Russia, China, India, and South Africa created their own competing bank to ensure that a handful of developed countries did not

²¹⁶ DEL. CODE ANN. tit. 8, § 144(a)(1)–(3) (2011). In interpreting this provision, Delaware courts have considered whether the board comprises an adequate number of independent members, or whether a committee of independent board members has been appointed. *See, e.g.*, In re Trados, 73 A.3d 17 (Del. Ch. 2013).

²¹⁷ In re Trados, 73 A.3d 17 (Del. Ch. 2013).

²¹⁸ Lesley Wroughton, Howard Schneider & Dina Kyriakidou, *How the IMF's Misadventure in Greece is Changing the Fund*, REUTERS, Aug. 28, 2015, <http://www.reuters.com/investigates/special-report/imf-greece/>.

²¹⁹ *See* Copelovitch, *supra* note 27, at 53; J. Lawrence Broz & Michael Brewster Hawes, *Congressional Politics of Financing the International Monetary Fund*, 60 INT'L ORG. 367 (2006); J. Lawrence Broz, *Congressional Politics of International Financial Rescues*, 49 AM. J. POL. SCI. 479 (2005); Thomas Oatley & Jason Yackee, *American Interests and IMF Lending*, 41 INT'L POL. 415, 415–17 (2004).

²²⁰ Philip Aldrick, *UK Businesses Demand Return of Powers from Brussels*, TELEGRAPH (July 31, 2013), <http://www.telegraph.co.uk/finance/economics/10212230/UK-businesses-demand-return-of-powers-from-Brussels.html>.

²²¹ Wroughton, Schneider & Kyriakidou, *supra* note 218.

²²² *Id.*

control all major lending decisions by putting undue pressure on IMF staffers.²²³

Corporate law may lend some guidance on how to make critical decisions, such as whether and how to lend to Greece, in a less fraught manner. To start, the above-mentioned doctrines help identify which IO decisions might call for separate decision-making procedures. Notably, it is not the size of a particular deal that triggers special rules, but rather the fact that a major shareholder also stands to benefit in another capacity (e.g., as a counterparty). To take the IMF example above, if the IMF were thinking of extending a loan of unprecedented size to Thailand, and Thai debt was primarily owned by Thai banks, ordinary IMF lending procedures should apply. In contrast, after identifying benefits to major shareholders, the IO can put in place a special procedure along the lines suggested above. It could require independent experts to evaluate and negotiate the proposal, such as the extension of credit to a country in hardship, in the IMF's case. Once finalized, it could require the proposal to win the approval of a majority of the IO's board, excluding the powerful states that stand to directly benefit from it. If a proposal goes through third-party scrutiny and gains the support of members focused on the IO's mission, rather than just side gains, it can enjoy increased acceptance and legitimacy internationally.

Our proposal for increased disclosure and special governance rules can help alleviate the clash between horizontal and vertical conflicts in IOs. Disclosure helps redistribute the costs of IO supervision among member-states, while special governance rules inject a specialized vertical agent with higher independence safeguards in the most critical moments. We do not believe these techniques are infallible, but we do think they offer alternative approaches that are considerably better than current IO governance choices. Especially if adopted *ex ante*, our proposal can help ease the dilemmas many states face when considering joining an IO.

V. WHEN IS THE JOINT PROBLEM MOST ACUTE?

The discussion below seeks to identify when the joint problem is particularly pertinent. It also explores which states have the most to lose and gain from the emergence and persistence of the joint problem. We expect the distributional consequences and intensity of the joint problem to vary with certain state characteristics and features of the IO itself. We argue that small states have the most to gain, and large states the most to lose, from

²²³ See Raj M. Desai & James Raymond Vreeland, *Global Governance in a Multipolar World: The Case for Regional Monetary Funds*, 13 INT'L STUD. REV. 109 (2011); Raj M. Desai & James Raymond Vreeland, *What the New Bank of BRICS Is All About*, WASH. POST (July 17, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/07/17/what-the-new-bank-of-brics-is-all-about/>.

the joint problem. We also discuss how the joint problem is likely more severe in old, established IOs, and less challenging in young IOs. The size of the IO is relevant as well, as we observe the joint problem as more acute in large organizations than small ones. Finally, we predict that the more divided the member states' interests are, the more persistent the joint problem becomes.

A. Small vs. Large States

We assume large states will find the joint problem especially costly and troubling, while small states will likely benefit from it. In a purely political, horizontal negotiation, without an IO, small states tend to lose to large states. Centralized IOs are likely to constrain the power of large states, and small countries may come to benefit from delegation to institutions that trend toward advancing the collective preferences of member states. In other words, small countries expect to lose most horizontal conflicts to large states, while vertical conflicts may enhance their relative standing vis-à-vis large states.

This pattern should manifest differently at different points in time. When setting up an IO—insofar as states anticipate the vertical problem at this stage—we expect large states to prefer to grant more limited powers to the IO, and small states to advocate for more extensive powers for the IO. That said, large states may agree to delegate broader powers to a nascent IO as a way to obtain small-state participation. Just as large shareholders often accept an independent board to attract small shareholders and assure them that their money will be safe, large countries may offer an independent tribunal as a way to entice small-state participation. However, once the organization is in place, we expect independent IO organs to make decisions that are more favorable to small states, relative to decisions made by IO bodies dominated by inter-governmental bargaining.

To illustrate, we can look at the institutional designs of the WTO and the EU. Before the establishment of the WTO dispute settlement mechanism, developing countries were wary of unilateral U.S. retaliation in trade conflicts. For example, in the Uruguay Round negotiations that led to the creation of a binding dispute settlement mechanism and permanent WTO Appellate Body, weaker parties saw the empowered judicial arm of the WTO as a welcome protection against U.S. unilateralism.²²⁴ At that time, and in hindsight, these weak states were likely less concerned about planting the seeds for a vertical conflict. Presumably, weak states knew the WTO could rule against them as well. However, delegation to a neutral agent in Geneva made the trading system better for them relative to the earlier

²²⁴ Amrita Narlikar, *Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO*, 29 *WORLD ECON.* 1005, 1019 (2006).

situation, which was characterized by horizontal conflicts with more powerful trading partners who almost always prevailed. Now, critics would note the ability of powerful states to take advantage of WTO dispute settlement, due to the financial resources and technical expertise that complex trade dispute litigation entails. However, there are examples of important victories small states have secured against their powerful trading partners before the WTO judiciary: Antigua's (population of 90,000) victory over the U.S. in a high-stakes gambling case under the GATS agreement in 2005 is perhaps the most prominent (though certainly not the lone) example.²²⁵

Similarly, small EU states often find European institutions to be their most helpful allies. Relative to large EU member states, small states are less worried about the European Commission occasionally overstepping its mandate. Moreover, even if it did, at least the commissioner from Malta or Luxembourg, for example, has as many votes as the German commissioner in deciding where to take the European project. The Commission and the ECB have also been perceived as Greece's staunchest allies in the Euro crises, defending the integrity of the Eurozone and standing up against the most powerful member state, Germany, in order to keep the Eurozone whole.²²⁶ Similarly, empirical studies on European Court of Justice case law show larger states lost more frequently before the ECJ than small states. In particular, Germany lost more often than any other state.²²⁷

B. *Young vs. Old IOs*

As the continuing battles among states within the UN Security Council and the World Health Assembly show, horizontal conflicts never entirely disappear from IO governance. However, recently established IOs, we argue, typically experience less severe vertical conflicts. The powers IOs acquire through delegation typically become entrenched over time. So, delegation may initially seem efficient, as the costs of horizontal conflict can be contained with delegation—without experiencing a simple substitution with vertical costs—but vertical costs gradually start to rise.

When vertical costs start to emerge, why do states not roll back some of the powers delegated to IOs? Quite simply, initial delegation is difficult

²²⁵ Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005).

²²⁶ Kash Kasmal, *ECB Reaffirms Commitment to Support Greece*, *Sucden Financial* (Jul. 17, 2015), <https://www.sucdenfinancial.com/en/research-resources/market-insights-analysis/ecb-reaffirms-commitment-to-support-greece-7058>; Jan Strupczewski, *Greece Could Not Exit Euro Without Leaving EU*, *REUTERS*, Nov. 3, 2011, <http://www.reuters.com/article/us-greece-eu-eurozone-idUSTRE7A25H820111103>.

²²⁷ Alec Stone Sweet, *THE JUDICIAL CONSTRUCTION OF EUROPE* 129–32 (2004); Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance* 21 (Faculty Scholarship Series Paper No. 70, 2010).

to reverse. This is a well-documented phenomenon.²²⁸ IOs do not rest on nimble and flexible bargains that can be easily renegotiated when vertical conflict deepens. Institutional arrangements are often remarkably persistent, as the theory of path dependence suggests.²²⁹ Moreover, the difficulty of renegotiation is not the only challenge—individual state exits are also rare in most IOs. This contrasts the corporate context, where one can exit by simply selling one's shares. For example, no member state has ever withdrawn from the EU. Despite all the crises and struggles the EU has experienced, together with the surge of various anti-EU sentiments and parties at various points in history, the EU has remained whole and remarkably resilient. The rare exception is Greenland—which holds semiautonomous status as part of Denmark—which departed from the European Economic Community (the EU's predecessor) in 1985.²³⁰ This is why the U.K.'s decision this year to exit from the EU is all the more striking.

Other IOs exhibit a similar stickiness. NATO membership has expanded in the decades since its creation with only rare—and even then, only temporary—exits. France withdrew from NATO's integrated military command structures in 1966, only to resume its full membership in 2009.²³¹ Similarly, Greece briefly withdrew from NATO in 1974, but re-joined in 1980.²³² No member has left the WTO to date.²³³ Venezuela has denounced the American Convention in order to escape the jurisdiction of the Inter-American Court,²³⁴ but perhaps this shows just how far an independent court can deviate from member-state preferences before an exit occurs.

These examples show how engrained initial arrangements become, allowing for agendas and institutional cultures to develop and become entrenched over time. Accordingly, the joint problem is often a dynamic concept in which the IO initially responds to its creators' preferences and

²²⁸ For example, returning to national currencies from the Euro would be catastrophic for the global economy. See Vestert Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, 9 EUR. CONST. L. REV. 7, 11 (2013); see also David McHugh & John Leicester, *End of the Euro? French Candidate Plots Return of the Franc*, CTV NEWS (Feb. 22, 2017, 8:58 AM), <http://www.ctvnews.ca/business/end-of-the-euro-french-candidate-plots-return-of-the-franc-1.3296118; Is This Really The End?>, ECONOMIST (Nov. 26, 2011), <http://www.economist.com/node/21540255>.

²²⁹ See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

²³⁰ *Greenland*, EUR. COMMISSION, https://ec.europa.eu/europeaid/countries/greenland_en (last visited Dec. 3, 2017).

²³¹ Maurice Vaisse, *France and NATO: An History*, 2009/5 POLITIQUE ÉTRANGÈRE, 2009, at 139 (Clémence Sebag trans.), <https://www.cairn.info/revue-politique-etrangere-2009-5-page-139.htm>.

²³² David Fouquet, *Greece's Return to NATO Doesn't End Turkish Feud*, CHRISTIAN SCI. MONITOR (Oct. 23, 1980), <http://www.csmonitor.com/1980/1023/102341.html>.

²³³ Conversely, exits are expected to be more likely outside the club goods. See *infra* discussion on the different dynamics characterizing club good versus public good institutions.

²³⁴ Press Release, Inter-Am. Comm'n H.R., IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention, No. 64/13 (Sept. 10, 2013), http://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp.

allows them to pursue collective gains. Over time, however, IOs trend toward overshadowing or replacing their creators' agendas with their own.

C. *Small vs. Large IOs*

We expect the joint problem to be more common in large IOs. IOs range from universal IOs to small IOs with a closed membership. Universal IOs are common in areas where an IO is created to provide global public goods. In these instances, every state's participation is desirable to avoid free riding. In contrast, small IOs often reflect states' desire to produce "club goods" for a smaller number of states, which agree to undertake certain obligations in return for certain benefits that can be limited to the members of the IO. Small IOs often consist of relatively similar states that share political values, exhibit comparable economic features, or are geographically close. These features allow them to agree on deeper cooperation.

The UN has always relied on the appeal of universal membership as a foundation of an international system consisting of equal, sovereign states.²³⁵ Its pursuit of peace and security, as well as higher levels of global development, are considered global public goods, meant to benefit all states. The Group of 20 (G-20), by definition, is designed to be a club of the twenty wealthiest states, who see themselves as having special responsibilities (and privileges) stemming from their economic and political influence in the world.²³⁶ Similarly, OECD membership is reserved for developed countries exhibiting certain minimum levels of industrialization and GDP, and thus sharing a common interest in certain economic policies.²³⁷ To take another example, EU membership is based on geographic location and commitment to values that all EU members must embrace.

Large IOs are generally more vulnerable to the joint problem because of greater heterogeneity, which grows with increased membership. We therefore expect the design features of large, heterogeneous IOs to reflect a response to a particularly severe horizontal conflict. This might lead such states to delegate little power to IOs. However, if delegation occurs, our

²³⁵ "Membership in the Organization, in accordance with the Charter of the United Nations, 'is open to all peace-loving States that accept the obligations contained in the United Nations Charter and, in the judgment of the Organization, are able to carry out these obligations'. States are admitted to membership in the United Nations by decision of the General Assembly upon the recommendation of the Security Council." *Member States: About UN Membership*, UNITED NATIONS, <http://www.un.org/en/sections/member-states/about-un-membership/index.html> (last visited Dec. 10, 2017).

²³⁶ *G20: Members*, G20, <http://g20.org.tr/about-g20/g20-members/> (last visited Dec. 10, 2017); *About G20*, G20, <http://g20.org.tr/about-g20/> (last visited Dec. 10, 2017).

²³⁷ *OECD and Enlargement*, OECD, <http://www.oecd.org/about/membersandpartners/enlargement.htm> (last visited Apr. 11, 2017); *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/> (last visited Dec. 3, 2017); *The Accession Process*, OECD, <https://www.oecd.org/legal/accession-process.htm> (last visited Apr. 11, 2017).

prediction is that the vertical conflict will ultimately become very large. For example, just as super-majority rules prevent the delegation of sensitive issues to an IO's secretariat, they also prevent censuring of a wayward IO if delegation does in fact happen. This more prevalent horizontal conflict leads states to feel what we believe is at the heart of the joint problem: deep mistrust. Deep mistrust leads states to implement voting rules protecting them from the overreach of their partners, and to make staffing and location decisions that lay the foundation for joint problems to emerge.

Consider the UN, which today has 193 members.²³⁸ Large organizations require large secretariats: the UN's global secretariat consists of 44,000 employees.²³⁹ A secretariat of this size, combined with its deep collective international experience and outlook, allows a deeper institutional culture to develop, and for the power and prestige associated with a high position at the UN to become more penetrating.

We also assume the joint problem to be worse when an IO is located far from the capitals of the great powers that created it. While the UN would seem to be a bad example, since its headquarters is in New York, the expansion of the UN has in fact entailed a substantial move toward governance through field offices scattered across the globe.²⁴⁰ Today, 60% of UN staff works outside its headquarters.²⁴¹ This transformation of the UN into a multifaceted agency complicates the monitoring task of principal states, further entrenching the vertical conflict.

The joint problem being more entrenched in large IOs is compounded by the tendency of IOs to grow over time. For example, the six-member European Coal and Steel Community, founded in 1952, has evolved into the twenty-eight-member EU today.²⁴² The WTO has grown from twenty-three General Agreement on Tariffs and Trade (GATT) members in 1947 to 162 WTO members to date.²⁴³ NATO had twelve members in 1949, but has twenty-eight members today.²⁴⁴ We argue above that the joint problem is worse in old versus new IOs. As such, growing age and IO size tend to

²³⁸ *Overview*, UNITED NATIONS, <http://www.un.org/en/sections/about-un/overview/index.html> (last visited Dec. 3, 2017).

²³⁹ *Where We Are*, UNITED NATIONS, <https://careers.un.org/lbw/home.aspx?viewtype=VD> (last visited Dec. 3, 2017).

²⁴⁰ *See id.* ("Our global Secretariat has offices in Geneva and Vienna as well as in Nairobi, with its economic commissions headquartered in specific capitals around the world addressing the socio-economic and developmental needs of the countries that belong to the five major regions of the world: Africa; Europe; Latin America and the Caribbean; Asia and the Pacific; and Western Asia.")

²⁴¹ *Id.*

²⁴² *Enlargement*, EUR. UNION, http://europa.eu/pol/enlarg/index_en.htm (last visited Dec. 3, 2017).

²⁴³ *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Dec. 3, 2017).

²⁴⁴ *NATO Member Countries*, NATO, http://www.nato.int/cps/en/natolive/nato_countries.htm (last updated Nov. 10, 2017, 11:24 A.M.); *The Founding Treaty*, NATO, http://www.nato.int/cps/en/natohq/topics_67656.htm (last updated Jan. 30, 2017, 1:38 P.M.).

positively correlate: the larger IOs are also typically more mature. In this setting, we argue, the joint problem is almost guaranteed to emerge.

D. Harmonious vs. Divided State Interests

Directly above, we argued that horizontal conflict is typically greater in large IOs because the size of the IO typically correlates with greater heterogeneity. However, a rejoinder to this argument is that size is not directly relevant. Alternatively, one may argue that a better proxy for likely emergence of the joint problem is the degree of disagreement among the most powerful member states. Per this argument, the number of players and their preferences may hardly matter in some IOs.

Mark Copelovitch documents a related point in his work on the IMF that we briefly discussed above. He suggests the IMF staff can better aggrandize its power—by pursuing bigger loans with more conditions—when the five principal IMF lending countries are divided in their preferences.²⁴⁵ The EU literature could be read in a similar vein—the biggest and most controversial ECJ decisions were made in the 1970s and 1980s, a period during which member states were sharply divided on economic policy and whether economic protectionism or liberalization should be pursued.²⁴⁶ In other words, we expect the joint problem to emerge and prevail in settings where key players fail to agree on the powers of the agent and the need and ways to rein in those powers.

To summarize, we present some scope conditions for our argument. We argue that the joint problem is most acute for long-established, large IOs with heterogeneous membership. We also discuss how the joint problem might trouble large countries more than small ones, because in the absence of an IO, large states' interests carry the day. In the next part, we conclude by outlining ways to mitigate the joint problem.

VI. CONCLUSION AND IMPLICATIONS

This Article has identified a major tension IOs face as they grow and expand. When IOs are first established, negotiators are primarily concerned with state-to-state disagreements (horizontal conflicts). States therefore

²⁴⁵ Copelovitch, *supra* note 27.

²⁴⁶ MARK A. POLLACK, THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU 192 (2003); Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L.ORG. 149, 149–50 (1998).

design IOs with features that protect them from other states overreaching and shirking. However, as IOs mature, and separate secretariats and courts acquire power, clashes between states collectively on the one hand, and IOs on the other, begin to emerge (vertical conflicts). We have argued that governance arrangements initially put in place to mitigate the pernicious influence of individual states end up constraining the collective ability of states to steer IOs in their desired direction later on. Thus, states' attempts to mitigate one problem inadvertently cause another.

To illustrate this dynamic, we have focused on specific governance arrangements that are common to many IOs. For example, many IOs operate on the basis of consensus. However, the need to achieve consensus makes it hard to revisit a prior decision, which strengthens the position of IOs established in their wake. Similarly, all member states seek to place some of their nationals in key IO positions. But, as people from many countries staff international courts and bureaucracies, they develop cosmopolitan perspectives and grow more supportive of exercising power at a supra-national level. Moreover, new IOs are often headquartered in locations removed from powerful national capitals, such as Brussels, Luxembourg, Geneva, and The Hague. This built-in isolation cultivates an international mind-set that fosters corresponding loyalties, removing international civil servants from the key concerns of national governments. To demonstrate this, we have drawn examples from prominent international bodies, including the European Union, the United Nations, the International Monetary Fund, and the World Bank. Finally, states often create IOs with broad mandates in an effort to include each individual state's top priorities, and to make sure these issues are linked, so that as many states as possible can participate. However, later on, it becomes challenging to constrain IOs with broad mandates.

The root of the joint problem for IOs is structural, since any IO with an organized bureaucracy is bound to face both vertical and horizontal conflicts. We have suggested the joint problem is here to stay, since retreating from the features that initially created the joint problem is rarely possible. We do not expect states to radically reform IO's voting rules, repatriate the internationally-minded bureaucracy, relocate the headquarters, or streamline the multi-issue agendas in favor of narrow mandates. Less radical reforms—through budget reallocations or resolutions that change the ways IO operate in specific areas—happen a lot more frequently, but these rarely suffice to solve the problem we have identified. Although this quandary is inescapable, its full implications have often taken states and other stakeholders by surprise. In this last section, we begin to outline those implications, focusing on the options available to states at the point when the joint problem becomes unmistakable, and solutions to it unattainable.

To start, our analysis suggests that reforming an IO can be infeasible. Attempts to change the composition of the UN Security Council is perhaps the most well-known example of everyone agreeing on the need for a reform, but where none of the existing veto-holding members are willing to give away the power given to them following World War II.²⁴⁷ That being said, reform is often impossible even when the stakes are lower. Any effort to revisit an IO's constitutive charters would call for a new negotiation process, which would need to involve all members and open up painfully reached compromises. In addition, renegotiations would face resistance from entrenched interests benefiting from the status quo. This is because the IO staff has operationalized the IO's mission in particular ways, creating expectations for stakeholders on the ground. These established practices and precedents are hard to overturn. Moreover, the staff may have developed its own set of values that diverge from the preferences of their reformers. Against these dynamics, achieving reform may be either improbable or highly costly.

The stickiness of IOs has led states to explore alternative solutions with an increased urgency. Exit from the IO might be one such solution for an aggrieved state. The U.K., for example, has initiated the formal process of leaving the European Union, after U.K.'s former Prime Minister Cameron failed to convince U.K. voters that reforming the bureaucracy in Brussels was possible.²⁴⁸ The many existing beneficiaries of European integration, including the U.K. business community, oppose the exit, making exit a costly option for the U.K. domestically.²⁴⁹ European institutions and U.K.'s key European partners similarly resist the idea,²⁵⁰ making it unlikely they would replace the U.K.'s EU membership with a set of specially negotiated agreements that restore the U.K.'s access to the common market. Greece has also been on the verge of exit from key European institutions. At the height of the Greek sovereign crisis, the newly elected radical-left government in Greece was contemplating abandoning the Eurozone overnight.²⁵¹ This literally would have required a heist at their central bank's vaults, since the Greek government faced the opposition of a forceful ECB-approved central banker, shielded under the safeguards of independence

²⁴⁷ See, e.g., Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. Q. 147 (2003).

²⁴⁸ *The Four Key Points from David Cameron's EU Letter*, BBC NEWS (Nov. 10, 2015), <http://www.bbc.com/news/uk-politics-32810887>.

²⁴⁹ Isabelle Bell, *91% of UK's Fastest Growing Businesses Oppose 'Brexit'*, ICAS (Sept. 29, 2015), <https://www.icas.com/ca-today-news/uk-growth-businesses-oppose-britain-leaving-eu>.

²⁵⁰ Ian Traynor, *So What Does Europe Really Think About the Brexit Debate?*, GUARDIAN (Oct. 17, 2015), <http://www.theguardian.com/global/2015/oct/18/brexit-what-european-leaders-think-merkel-hollande>.

²⁵¹ Larry Elliott, Heather Stewart & Helena Smith, *Greece Moves Closer to Eurozone Exit After Delaying €300m Repayment to IMF*, GUARDIAN (June 4, 2015), <http://www.theguardian.com/business/2015/jun/04/greece-delays-300m-payment-to-imf>.

established in the Eurozone treaties.²⁵² For all the talk and almost-cinematic appeal of reasserting national sovereignty, the exit option cannot fail to mask its profound consequences. Exiting states risk losing all the benefits of cooperation, and alienating its hitherto partners.

Given the difficulty of reform and sky-high costs of exit, neither staying nor leaving the IO seems to offer a tenable solution to unhappy members. States may therefore begin looking for ways to sidestep the challenges of the joint problem. This strategy may allow them to continue to reap benefits from institutionalized cooperation, but also to adjust the terms of doing so without the constraints of existing, entrenched arrangements. One such approach calls for creating new IOs to operate alongside, and often in competition with, pre-existing ones. A new IO can overcome horizontal conflicts among members, typical of existing IOs, by gathering only like-minded states that are united in their goals and vision for the organization. Moreover, a new IO requires new staff, and thus does away with the cultural norms and long-established beliefs often underlying vertical conflicts. For example, the BRICS governments, disgruntled with the IMF's failure to implement governance reforms providing a stronger voice to emerging economies, launched an alternative global lender, the New Development Bank, in 2014.²⁵³ In other cases, states turn to regional solutions that operate on the sidelines of formal IOs. The shift to regionalism in international trade liberalization, with the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) being negotiated alongside WTO, betray a frustration with WTO reform.²⁵⁴ Whatever the merits of a competing IO at the time of its creation, it does not guarantee increased cooperation and stability. Our theory predicts that new IOs will inevitably face their own horizontal and vertical challenges, which will only grow with time.

Rather than generating an ever-higher number of formal IOs, states often choose to eschew the IO format altogether. Instead, cooperation takes place through transnational networks, centered on regular meetings among national officials responsible for a certain issue area. For example, instead of expanding the WTO's mandate with respect to international antitrust regulation, as several states suggested, antitrust regulators across the world formed an International Competition Network to facilitate cooperation

²⁵² Landon Thomas Jr. & Peter Eavis, *As Greece Deadline Looms, European Central Bank Plays Key Role*, N.Y. TIMES (Jun. 21, 2015), https://www.nytimes.com/2015/06/22/business/european-central-bank-plays-dual-role-in-greek-crisis.html?_r=0.

²⁵³ *Agreement on the New Development Bank—Fortaleza*, July 15, BRICS, <https://www.ndb.int/wp-content/themes/ndb/pdf/Agreement-on-the-New-Development-Bank.pdf>. (note also that the Asian Infrastructure Investment Bank is also seen to be in competition with the World Bank).

²⁵⁴ See, e.g., Daniel S. Hamilton, *America's Mega-Regional Trade Diplomacy: Comparing TPP and TTIP*, 49 INT'L SPECTATOR 81 (2014).

among them.²⁵⁵ Transnational networks have also become commonplace in international financial regulation.²⁵⁶ While IOs are distinct legal entities with delegated powers separate from national policymakers, networks allow state authorities to participate directly in global dialogue. If they happen to disagree with the dialogue's outcome, governments have no legal obligation to adopt the network's recommended actions, and may choose to comply only in part.²⁵⁷ Thus, when differences of opinion among network members arise, tensions need not be as high. Moreover, networks rely on national authorities to devote personnel time for their various committees, regulatory proposals, and implementation reviews. Without an extensive staff of their own, networks are less likely to develop sclerotic bureaucracies with distinct identities. By lowering the stakes in horizontal conflicts, and leaving vertical implementation to their members, networks offer a viable alternative to states and national authorities. On the other hand, networks lack an administrative arm with power to enforce their policies on the ground. That said, these two limitations also characterize much IO activity. While reputational concerns and peer pressure can encourage compliance, particularly when accompanied by review programs, differences in speed, intensity, and interpretation are highly likely. In other words, while the joint problem may be mitigated, the benefits of cooperation are reduced as well.

The all-too-frequent calls for reforming IOs, exiting from IOs, the creation of competing IOs, and the proliferation of networks, have dominated the global scene in recent years. While prior literature has studied these four phenomena separately, our analytical framework underlines what they have in common. As the discussion above showed, while all approaches seek to address an IO's joint problem, they also entail significant compromises for the member states involved, as well as a significant loss of influence for any existing IO. Thus, we also used our analytical framework to explore governance strategies that IOs can introduce in order to address the joint problem from the inside and contain member state dissatisfaction.

We drew our inspiration from approaches shaped in corporate law, which has helped us sketch out the interaction between horizontal and vertical conflicts. In particular, we focused on two techniques that corporate law has used extensively: the use of disclosure to empower shareholders against management, and the role of independent committees to manage conflicts between minority and controlling shareholders on the one hand, and top management and controlling shareholders on the other. Neither

²⁵⁵ *About, INT'L COMPETITION NETWORK*, <http://www.internationalcompetitionnetwork.org/about.aspx> (last visited Feb. 12, 2016); see generally Anu Piiola (Bradford), *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207 (2003).

²⁵⁶ See generally Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109 AM. J. INT'L L. 1 (2015).

²⁵⁷ *Id.* at 6.

approach is unique to corporate law; indeed, transparency and independence have become buzzwords in international law as well. However, corporate law has honed specific mechanisms that add to the robustness of both strategies. Disclosure has allowed shareholders not only to monitor management more closely, but also to build coalitions with other shareholders and rally the votes necessary to effect change. Thus, disclosure may prove a more powerful weapon to a shareholder than, say, a seat on the board. In the IO context, greater disclosure can help mobilize members that would not have otherwise invested resources in IO reform, helping states collectively rein in or redirect a wayward IO. On the other hand, committees of independent board members are better placed to win the support of minority shareholders in a reform proposal, compared to management appointed by the majority shareholder. Independent members have their own reputations to consider, rely on separate advisors, and tend to do a thorough review of the question at hand. Thus, they offer higher guarantees of legitimacy. Especially when the proposal needs to win approval of the minority, the increased credibility of the committee carries significant weight.

Our recommended approaches are not failsafe. Sometimes disclosure is misleading or “too little, too late.” Sometimes independent board members are handpicked to share management’s viewpoint. Still, both approaches provide shareholders with additional options, particularly when exiting through liquidation of stock is not viable. Time and again, courts have recognized that these mechanisms work to protect less powerful shareholders, and have agreed to limit their scrutiny accordingly. Before incurring the costs of abandoning an IO, states might find it worthwhile to explore whether governance modifications can change long-established dynamics. Similarly, before establishing an IO, states may find it useful to adopt an institutional design that can better manage conflict in the long run.

Even when these options are not available, an enhanced understanding of the joint problem mitigates the extent to which the phenomenon is unintended, unexpected or misunderstood. Recognizing the existing myopia behind the joint problem allows states to better understand the fundamental compromise they are making when delegating powers to an IO. With this insight, they can face the consequences they deliberately put in place, aware of the trade-offs and long-run implications of their own making.