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# 1 (Re)discovering the continent

Every year, states negotiate, conclude, sign, and give effect to hundreds of new international agreements. In 2013, 500 separate agreements officially entered into force;[1] an additional 248 agreements were modified. All told, a substantial body of international law was enacted or changed to adapt to the evolving needs of international cooperation. Adding these new pieces of international law to the body of pre-existing agreements, the total number of international agreements and agreement updates now in force approaches 200,000.[2]

These numbers will surprise many, as most international observers focus on just a small fraction of these agreements. Indeed, the media, the public, and even many international law and relations scholars pay heed to the largest agreements and the major international organizations they create, including the United Nations (UN), the European Union (EU), the International Monetary Fund (IMF), and the World Trade Organization (WTO). But these well-known agreements and their organizations are just the tip of the iceberg: Tens of thousands of agreements actually govern day-to-day international cooperation. All of this law is developed to address the significant problems plaguing the international realm, problems that transcend national borders and whose solutions require joint action by states. The subject matter of all of this law ranges from the most important security issues, like nuclear weapons, to human rights to environmental problems to diverse economic issues – essentially to nearly every facet of international life.

[1] To put that figure in perspective, during the four-year period from 2011 to 2014, the US Congress enacted just under 148 laws per year on average. Available at www.govtrack.us/congress/bills/statistics [Last accessed July 11, 2015].

[2] The data referenced in this paragraph consist of agreements registered with the United Nations Treaty Series and can be accessed here: https://treaties.un.org/pages/Publications.aspx?pathpub=Publication/UNTS/Page1_en.xml [Last accessed July 11, 2015].



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What's more, the success of these tens of thousands of cooperative agreements depends not only on their substantive provisions; their *design/procedural provisions matter*, too. When chosen correctly, the detailed institutional design provisions of international law help states confront harsh international political realities, thereby increasing the incidence and robustness of international cooperation in each of these subject matters. The study of these institutional provisions and why and how they matter is the subject of the Continent of International Law (COIL) research program.

This book maps the *vast and shrewd variation* in international law with respect to design provisions, including those for duration, monitoring, punishment, escape, and withdrawal, and *ultimately shows its order*. While international law develops under anarchy, states design this body of law rationally, in ways that make sense *only if* they are seeking to solve their joint problems and to stabilize these solutions. They do not neglect its details as they would if law did not matter in their calculus. Nor do they simply follow a uniform normative template because it is the "correct" way to make law. They astutely tailor the law to their cooperation problems. The design of law is consistent with the goal of effectiveness in the face of harsh political realities.

Furthermore, I explain law covering diverse issue areas (economics, environment, human rights, and security) with varying membership (bilateral and multilateral), including differentiated regime types over various geographic regions under one theoretical framework. In other words, there is a strong underlying logic unifying these seemingly diverse instances of law. In this sense, bilateral investment agreements and multilateral human rights agreements are on the same *continent of international law*. Through the theory put forth in this book, I explain the variation we see in details like the kind of monitoring provisions incorporated or the notice period stipulated in a withdrawal clause. Scientific testing confirms the theory.

What does this variation look like? If one examines the random sample of United Nations Treaty Series (UNTS) agreements across the issue areas of economics, environment, human rights, and security that is featured in this book, about half of the agreements have dispute resolution provisions, while the other half are silent on the issue. And while less than a third of environmental agreements have dispute resolution provisions, about twice as many human rights agreements do. Moreover, there is great variation regarding the form of dispute

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resolution within the half of agreements that mention it, ranging from the friendly negotiations encouraged by some agreements to the mandatory adjudication stipulated by other agreements.

In this same random sample, the typical agreement has a finite duration, a statistic that seems to fly in the face of the conventional wisdom in international relations that tying one's hands leads to credible commitments.[3] The issue area variation is also impressive, with just over half of environmental agreements calling for a finite duration, whereas over 80 percent of economic agreements consciously give a termination date to the cooperative endeavor.

Monitoring and punishment provisions also display variation both across and within issue areas. Just over half of the agreements have monitoring provisions, ranging from self-reporting to delegated monitoring or even both. For instance, 63 percent of disarmament agreements formally involve intergovernmental organizations (IGOs) in the monitoring process, a finding that contrasts markedly with other security agreements, less than a quarter of which rely on IGOs. Regarding punishment, although at times the provisions call on member states to handle noncompliance, punishment is usually delegated to a pre-existing IGO. Almost half of the agreements in the issue areas of economics and human rights contain formal punishment provisions, whereas the share is much lower for environmental and security agreements.

While the average international agreement is somewhat precise,[4] the average economics agreement is far more precise than the average human rights agreement. Likewise, while the average agreement had no reservations added to it at the time of entry into force,[5] only 1 percent of economics agreements had reservations attached at that

[3] Such duration provisions could also be viewed as deliberate modifications of the default indefinite duration of international law implied by Customary International Law (CIL) as codified in the Vienna Convention on the Law of Treaties (VCLT) (UNTS Reg. No. 18232). VCLT Article 56 (1) codifies a presumption against the right to withdraw or denounce a treaty that contains no clause regarding termination, denunciation, or withdrawal. (See both Christakis 2006: 1958f. 1973 and Giegerich 2012: 986 for arguments that VCLT Article 56 (1) is indeed CIL.)

[4] Details regarding the coding of this variable are found in Chapters 3 and 6.

[5] A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (VCLT Article 2 [1] [d]).

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time, while an astounding 32 percent of human rights agreements had them attached.

Such interesting and often surprising descriptive statistics are practically endless: For instance, the average agreement contains a withdrawal provision, does not contain an escape clause, and does not call for the creation of an intergovernmental body.

I argue that all this variation in the design provisions of international law matters. In fact, the variation we see is a sign that *states* care, which is why they take the time and effort to negotiate specific treaty provisions that fit the demands of the situation. Because the set of *cooperation problems states are attempting to solve* with their international agreements vary in interesting and important ways and because the *characteristics of the states* solving these problems also vary greatly, the design of international law is characterized by considerable and meaningful variation, a glimpse of which was showcased above.

This book accordingly makes two distinct contributions. First, I present a positive theory of international law design, explaining differences across the multiple dimensions of international law highlighted above, like the rules governing duration, monitoring, punishments, disputes, and even withdrawal. I do so in terms of a set of logically derived and empirically testable hypotheses.

Second, I present a data set featuring a random sample of agreements across the issue areas of economics, environment, human rights, and security. This data set, because it is a random sample, lends itself to testing both my theory of international law design as well as other theories that focus on international cooperation and institutional design.

## The central thesis

There are a multitude of opportunities and problems in every issue area that transcend national borders and require some sort of joint action by states to realize or solve. States attempting to cooperate to realize joint interests or solve problems often face a set of common and persistent obstacles. These obstacles to cooperation, which I call "cooperation problems," can make otherwise beneficial agreements difficult to achieve. For instance, fears that one's partner in cooperation might cheat on an agreement might make certain states unwilling to go forward with cooperation, despite the gains that could potentially be

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realized. Likewise, uncertainty about whether cooperation will be beneficial in all possible future conditions might make states forego current cooperation and the long-term gains it could bring. These obstacles or cooperation problems often transcend issue area and the particulars of the states involved. Although these obstacles are present in varying degrees and combinations, these "cooperation problems" are general, recurrent, and challenging.

The COIL theoretical framework starts from a very basic premise: *The underlying cooperation problems states are facing and characteristics of those states in the aggregate* (e.g., their number, heterogeneity, and power asymmetries) *are fundamental to understanding international institutional design.* This does not mean that other factors are irrelevant.[6] It does imply, however, that any analysis that does not start with or least pay significant attention to cooperation problems and state characteristics, like relative power, is problematic.

Drawing on contract theory and game theory, I link *cooperation problems*, like uncertainty about the future or uncertainty about behavior, to *dependent variables of institutional design*, like finite durations or centralized monitoring provisions, through a series of *hypotheses*.[7] Consider the following examples: When there are incentives to defect from an agreement, as in particular environmental agreements for which free-riding off of others' cooperation is the dominant strategy, one can imagine that a third party could play a useful role in arbitrating disputes and setting punishments. *Ex ante*, all parties would agree to such centralization or delegation in the face of the enforcement problem since that is one way to ensure Pareto-superior[8] mutual cooperation rather than mutual defection. In contrast, if the issue addresses technical standards, there is likely a distribution problem over which standards to choose, but once resolved, parties do not face incentives to defect. Therefore, we would expect centralized punishment provisions to feature in agreements designed to address enforcement problems, but not distribution problems.

[6] Cooperation problems themselves can and should capture factors ranging from historical relations to the institutional context, if any, under which the international agreement is being negotiated.

[7] Many of these conjectures are found in the "Rational Design of International Institutions" (Koremenos, Lipson, and Snidal 2001b), discussed later.

[8] If an outcome makes at least one actor better off and no actor worse off relative to the status quo, it is considered Pareto superior.

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I also link *characteristics of states in the aggregate*, like whether there are power asymmetries among the actors or whether the set of potential cooperators is characterized by great regime or interest heterogeneity or even by large numbers, to dependent variables of institutional design, like voting rules, precision, and centralization. For example, in a cooperative endeavor that relies on the resources or power of large states but that includes small states as well, it is not surprising that powerful states would require asymmetric procedural rights before they were willing to disproportionately fund or otherwise implement the cooperative mandate. Likewise, large numbers of states that wish to cooperate will often find it cost-effective to rely on some kind of centralization to coordinate their exchanges in place of a large set of bilateral exchanges.

Thus, self-interested states, while not wanting to give up control for no reason at all, will usually impose mutual self-constraints through international law when it helps them solve their problems. If creating and then delegating to an international organization helps states realize their goals, they are likely to do so. At the same time, they tend not to lose themselves in these institutions, but rather they incorporate provisions that insure themselves against unwelcome outcomes. If they are among the most powerful in the subject matter being covered, they might give themselves weighted voting to better control institutional outcomes or impose one-sided monitoring. If they fear uncertain outcomes, more often than not they leave open the possibility of renegotiating, escaping, and/or completely withdrawing from their agreements, depending on the specifics of the outcomes they fear. And if they are worried about states failing to comply with or opportunistically interpreting international law, they tend to design delegated monitoring and/or dispute settlement mechanisms.

## Why international law?

As recently as a decade-and-a-half ago, the thesis that the design provisions of international *law* matter tremendously by helping states confront harsh international political realities would have seemed provocative at best, and downright ill-advised at worst. International relations (IR) scholarship had "evolved" to the point where international law was foreign! As Stein (2008: 202) states: "Ironically, the key victim of the [postwar] realist shellacking of idealism was not the study

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of international organizations, but rather the study of international law. What had been part of the core curriculum in international relations before the Second World War, the study of international law, was relegated to law schools and was systematically ignored by political scientists for more than half a century."

Likewise, Dunoff and Pollack, who themselves have bridged the international law–international relations divide both individually and collaboratively, state: "Legal scholars sought to emphasize law's autonomy from politics, and focused on identifying, criticizing, or justifying specific legal rules and decision-making processes. For their part, political scientists seldom referenced international law as such, even when their topics of interest, such as international cooperation and international regimes, overlapped in clear ways with international law" (2013: 3).

One reason that IR ignored international law for so many decades is that considerable attention was given to what is truly distinct about IR, at least compared with the fields of American politics, comparative politics, and law: anarchy. Indeed, the significance of anarchy has been trumpeted to such a degree that IR is (to a great extent voluntarily) isolated from these other fields.[9]

This view of IR, however, ignores the vast array of international agreements I call attention to in the first paragraph of this book that prescribe, proscribe, and/or authorize specific behavior and sometimes impose sanctions for deviant behavior (just like domestic law). Moreover, the institutional variation among the separate pieces of international law is tremendous, as the statistics above showcased, with differences ranging across multiple dimensions, including the rules governing membership, voting, disputes, and escape. Hence, as the title of this chapter signals, it is imperative to (re)discover this enormous and interesting continent.

This variation, and the hard inter-state bargaining that leads to it, cries out for explanation, particularly among those who assign international law no causal force. I therefore ask the following: How can we explain the variation in state choices about international law? Does anything on this continent resemble the landscape in other fields? Other fields find institutions worthy of study and have developed a set of tools, mostly rooted in economics, to explain them. If we want to

[9] See Lake (2010) for a compatible view.

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understand the institutional realm of IR, is a paradigmatic shift necessary (because no overarching, authoritative international government exists as in the domestic sphere), or can we be creative in applying the rational choice paradigm already proven in these other fields?

As this book demonstrates, states typically behave rationally when they design international law. International agreements therefore obey *law-like* regularities and are designed to regulate international interactions in lasting and successful ways, just as institutions and laws do in other realms of study.

I also zero in on international *law* as opposed to international cooperation more generally, or even international institutions as manifested in IGOs, because the conventional focus on IGOs is too narrow, as I elaborate in Chapter 3. At the same time, a focus on the concept of regimes is too broad. "Regime" provided a valuable catchall concept in the 1980s when scholars were first theorizing and examining the general role of international institutional arrangements – and trying to escape the confining conception of formal international organizations prevalent in law scholarship and prior IR research.[10] However, such a broad concept that includes "implicit or explicit principles, norms, rules and decision-making procedures" (Krasner 1983) also provides little specific guidance for theoretical or empirical work; it seemed that almost anything could be and was called a regime. A focus on international *law* introduces the greater specificity essential for tight theorizing and rigorous empirical work.[11]

In legal scholarship, international law is composed of treaty law, customary international law (CIL), and "general principles." I focus on treaty law in great part because, as articulated above, the systematic testing of hypotheses is central to this research, and it is very difficult to disaggregate CIL or general principles into the measurable dimensions

[10] Interestingly, as Chapter 3 demonstrates, in the study of IGOs many scholars have gone back to a very restricted definition of "international institution."

[11] Regarding the latter, Lake (2002: 141) finds the failure to "operationalize our variables" one of the key impediments to progress in many areas of IR. He cites the problems of measuring "cooperation" as an example. Lake argues that, although Keohane's (1984) definition of cooperation as "mutual adjustment in policy" was reasonable at the time, "the concept of 'adjustment' remains ambiguous." Lake (2002: 142) states: "How much cooperation occurs? How has the level evolved over time? How does it vary across issue areas? Without answering such basic questions, most theories of cooperation cannot be tested."

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required for comparative institutional analyses.[12] At the same time, theorizing and quantifying the design of international treaty law provides a useful baseline for those who want to study the relationship between custom and treaty or even the relative importance of one over the other depending on the issue area.[13]

## *COIL's broad foundations*

A focus on international *law* also makes sense given the evolution of IR scholarship over the past fifteen years. In the early 2000s, attention was shifted from the possibility of cooperation to an examination of specific institutional details: Why are agreements designed the way they are? The Goldstein et al. (2000a) special issue of *International Organization*, entitled *Legalization and World Politics* (Legalization), identifies Legalization as a particular kind of institutional design – one that imposes international legal constraints on states.[14] The authors make great advances in variable conceptualization, defining three dimensions of Legalization – precision, obligation, and delegation – and make these dimensions come to life by giving numerous empirical examples from well-known agreements.

Another *International Organization* special issue by Koremenos, Lipson, and Snidal (2001a), *The Rational Design of International Institutions* (Rational Design), also appeared around the same time, building directly on the early institutionalist literature (e.g., Keohane 1984; Oye 1986).[15] The theoretical framework is grounded in a game-theoretic perspective, and states are thus assumed to behave rationally as they pursue joint gains from cooperation. However, unlike the earlier institutionalist literature, which focuses on whether cooperation is possible or whether institutions matter, Rational Design asks what

[12] As Goldsmith and Posner (1999: 1114) state: "It is unclear which state acts count as evidence of a custom, or how broad or consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists."

[13] For a creative, game-theoretic based analysis of CIL regarding immunity, see Verdier and Voeten (2015).

[14] The special issue article, "The Concept of Legalization," by Abbott et al. (2000) provides a detailed definition of the concept and its components.

[15] The introductory article by Koremenos, Lipson, and Snidal (2001b) lays out the general framework of this special issue of *International Organization*.

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forms of institutionalized cooperation emerge to help states solve problems. In other words, institutions and their specific attributes become part of the game, and Rational Design sets out to explain why states choose a specific design among the many options they have available. Thus, by deriving the design of international institutions from underlying cooperation problems, Rational Design moves away from the abstract nature of the early institutionalist literature. Both Legalization and Rational Design bring international *law* into the mainstream IR literature. Interestingly, a full decade earlier Abbott (1989) called on international law (IL) scholars to take a more IR approach to their subject.

Raustiala (2005), coming from both the IR and IL perspective, can be viewed as a complement to both the Legalization and the Rational Design frameworks. Raustiala distinguishes between legality (whether an agreement is legally binding), substance (the degree to which an agreement deviates from the status quo), and structure (monitoring and punishment provisions). In particular, Raustiala considers how these three categories relate to each other, and assesses the implications for the effectiveness of international institutions.

The COIL research program builds on Rational Design but extends and refines it substantially both theoretically and empirically. In doing so, COIL trades some parsimony for more accuracy. First, there is a refinement and unpacking of the relatively broad dimensions of design in the original Rational Design formulation: In particular, centralization and flexibility, and to a smaller extent control and scope, are carefully disaggregated, as elaborated in Chapter 2. This disaggregation is important because, for example, as Part II on flexibility mechanisms makes clear, each separate flexibility mechanism considered is driven by a unique set of underlying cooperation problems. The mechanisms are not substitutes for each other; rather, they solve different problems and are analytically distinct. I also leverage the COIL framework to begin the investigation of what might be best left informal – that is, it might be optimal to leave some provisions implicit within formal international law.

Additionally, COIL features a broader set of cooperation problems than did Rational Design. Specifically, commitment/time inconsistency problems, coordination (which too often has been conflated with distribution problems), and norm exportation are added. Many of the broad conjectures of Rational Design are also refined or even

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