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Informal international lawmaking (IN-LAW) is an important and increasingly common phenomenon of contemporary international life, and the various contributions to this volume explore the variety of IN-LAW procedures, with a focus on the accountability challenges they pose. This chapter is focused on a related question, namely the interaction of formal and informal law and lawmaking procedures, and it is based on a simple empirical observation: IN-LAW has not replaced formal lawmaking, but exists alongside it, with multiple, overlapping formal and informal procedures often addressing the same substantive issues in world affairs. Across a huge range of issues, ranging from genetically modified foods to climate change, cultural diversity, intellectual property rights, nuclear weapons and humanitarian interventions, states have opted to address contemporary challenges through multiple forums which range from classic, formal treaty-making bodies to IN-LAW procedures featuring non-traditional actors, procedures and outputs.

This simple observation, in turn, raises two sets of questions. First, why would states choose to address any given issue in a formal or an informal lawmaking setting – and why might they do both simultaneously? Second, once two or more formal and informal lawmaking processes are underway, how do formal and informal law and lawmaking interact in practice? Do informal lawmaking supplement and elaborate more traditional interstate treaty law, and perhaps eventually become codified into formal law, in what we might call a complementary interaction? Or do informal law and lawmaking processes, with their distinctive memberships and procedures, work against formal laws and practices, in what we would call an antagonistic interaction? Any assessment of accountability of IN-LAW should take account of these interactions between formal and informal lawmaking.

This chapter addresses these two sets of questions, drawing on the framework of the IN-LAW project and also on related literatures on hard and soft law, distributive conflict, regime complexity, and forum-shopping. The paper is arranged in four sections. In the first section, we examine the choice of formal or informal lawmaking practices, elaborating and contrasting a functionalist approach that weighs the problem-solving advantages and disadvantages of formal and informal lawmaking, with a distributive approach that explores conflicting state preferences over the substance and form of international lawmaking. Taken together, we argue, these two approaches help explain not only why states frequently opt for IN-LAW procedures, but also why they might set up multiple, and often overlapping or even conflicting, formal and informal lawmaking procedures in a given issue-area.

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In the second section of the chapter, we theorize about the interactions of these multiple formal and informal laws and lawmaking procedures, with an emphasis on the importance of distributive conflict as an independent variable conditioning this interaction. More specifically, we suggest that formal and informal laws and lawmaking processes are likely to interact in a complementary fashion where distributive conflict is low, while informal and formal laws and lawmaking forums are likely to interact in competitive, antagonistic ways where distributive conflict among states is high.

In the third section, we apply our simple theoretical model to a series of cases, which we divide into three categories, reflecting the importance of distributive conflict and state power, respectively. In the first category, characterized by a number of cases such as the prevention of bribery and the protection of the earth’s ozone layer, distributive conflict is low, and formal and informal lawmaking processes interact in a complementary fashion, each elaborating the other with relatively little conflict. In such circumstances, neither disgruntled states nor the non-state actors who sometimes participate in IN-LAW procedures have an incentive to use IN-LAW networks to undermine or challenge formal treaty law. In the second category, illustrated by cases such as the regulation of genetically modified foods, the protection of cultural diversity, climate change and humanitarian intervention, we find high levels of distributive conflict among powerful states as well as non-state actors (including international organizations and NGOs), and in each of these areas we find formal and informal laws and lawmaking procedures interacting in an antagonistic fashion, each undermining the substantive provisions and the purported advantages of the other, with a final result that is unclear and reflects the stalemate among powerful actors with conflicting interests. In the third and final category, covering cases such as the regulation of intellectual property rights and the legality of nuclear weapons, we find high levels of distributive conflict between strong states on the one hand, and weak states and/or private actors on the other hand, with the latter group generally using informal legal procedures in an effort to undermine the formal rules established and championed by the powerful; here again the effect is antagonistic interaction for formal and informal lawmaking, but outcomes are somewhat clearer, skewing toward the preferences of the great powers.

Finally, a brief fourth section concludes with a discussion of the implications of our findings for the accountability of IN-LAW processes.

1. The Choice of Formal vs. Informal Lawmaking

According to the framework of this volume, informal lawmaking “is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law” in relation to three dimensions: output, process, and the actors involved. In terms of the output dimension, international cooperation may be informal “in the sense that it does not lead to a formal treaty or any other traditional source of international law, but rather to a guideline, standard, declaration or even more informal policy coordination or exchange” (Pauwelyn, this volume). As such, the output dimension corresponds roughly to the commonly used notion of “soft law,” allowing us to draw upon that literature, albeit with caution, for insights about the choice and interaction of formal and informal lawmaking.\(^2\)

Along the second or process dimension, IN-LAW is informal “in the sense that it occurs in a loosely organized network or forum rather than a traditional international organization,” allowing us to draw upon the growing literature in law and political science regarding the characteristics of networks and network governance.\(^3\) The third and final dimension, actor informality, refers to the fact that IN-LAW draws into lawmaking, not the traditional diplomatic actors (heads of state, foreign ministers, or embassies), but other public authorities including “ministries, domestic regulators, independent or semi-independent agencies,... sub-federal entities... or the legislative or judicial branch,” as well as private-actors or international organizations, although purely private efforts fall outside the scope of the volume. This last dimension, therefore, implicates the growing literature on “transgovernmental relations,” exploring the nature, autonomy and accountability of sub-state actors engaging directly in international governance.\(^4\) In practice, most of the contributions to the volume focus on IN-LAW procedures that combine all three of these features (in essence, soft lawmaking by networks of mostly governmental officials) but in this chapter we adopt the project’s broader definition, identifying informal lawmaking as “any activity which is ‘informal’ in any of the above three ways (output, process, or actors involved),” thereby taking in the full range of informal lawmaking activity, including informal outputs by traditional diplomatic negotiations as well as transgovernmental, IO, and public-private networks.

Against this backdrop, the first step in understanding the interaction of formal and informal lawmaking is to first understand how states might choose between formal and informal approaches, and in particular why states might – as they often do – create and participate in multiple, simultaneous formal and informal lawmaking processes. The dominant approach to this question is functionalist, theorizing about the respective advantages and disadvantages of formal and informal approaches in responding to problems of collective action, incomplete contracting, and uncertainty, and making predictions about the conditions under which states might choose formal or informal approaches to lawmaking. This functionalist literature has generated considerable insight into the reasons why states might choose formal or informal means of lawmaking, but it runs into difficulties in explaining why different states might have different preferences over formal or informal approaches, and why states might establish multiple, overlapping and inconsistent formal and informal procedures to govern a single issue in international politics. In this context, we identify a second, distributive, approach, which emphasizes the distributive consequences of international lawmaking, and notes how distributional concerns can explain varying state preferences for formal and informal lawmaking, as


well as the existence of multiple, overlapping regimes. This distributive approach will also, we argue in the next section, help explain why and under what conditions formal and informal lawmaking procedures can interact as antagonists as well as complements. We begin, in the rest of this section, by examining the functionalist and distributive approaches to formal and informal lawmaking, respectively.

1.1. A Functionalist Approach

Within international relations theory, there is a strong tradition, dating back to Robert Keohane’s seminal work, which takes a functional approach, explaining the nature and the specific features of international institutions and international law in terms of the functions that these institutions perform and the types of problems they are designed to solve. Culminating in the so-called “rational design” research program, the functionalist approach seeks to explain a wide variety of design features of international law and institutions, including membership, scope, centralization, control, and flexibility. Within this functionalist tradition, a growing literature has examined the choice of formal vs. informal agreements, and more recently of hard and soft lawmaking processes, identifying the advantages and disadvantages of each in different contexts.

As an institutional form, these scholars argue, formal lawmaking features many advantages. In particular:

- Formal, hard-law instruments allow states to commit themselves more credibly to international agreements. They make state commitments more credible because they increase the cost of reneging, whether on account of legal sanctions or on account of the costs to a state’s reputation where it is found to have violated its legal commitments.

- Formal instruments are more credible because they can have direct legal effects in national jurisdictions (being “self-executing”), or they can require domestic legal enactment. Where treaty obligations are

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6 See Barbara Koremenos, Charles Lipson and Duncan Snidal, ‘The Rational Design of International Institutions’ (2001) 55 Intl Org 761. Of these, perhaps the most active research agendas have centered around the issues of centralization, understood as delegation to international organizations and dispute settlement bodies (Darren G. Hawkins and others (eds), Delegation and Agency in International Organizations (CUP, Cambridge 2006); Curtis A. Bradley and ; Judith G. Kelley, ‘The Concept of International Delegation’ (2008) 71 Law & Contemp Problems 1, and flexibility (L Helfer, ‘Flexibility in International Agreements’ in Jeffrey Dunoff & Mark A. Pollack (eds), International Law and International Relations: Taking Stock (CUP, Cambridge 2012).


9 Andrew T. Guzman, ‘The Design of International Agreements’ (2005) 16 EJIL 579-612. See also Abbott & Snidal, Hard and Soft Law, (n xx); and Lipson (n xx) 508. Recent work, however, has raised doubts about the effectiveness of reputation as a mechanism to promote compliance; see Rachel Brewster, ‘Unpacking the State’s Reputation’ (2009) 50 Harv Intl L J 231.
implemented through domestic legislation, they create new tools that mobilize domestic actors, increasing the audience costs of a violation and thus making their commitments more credible.10

- Formal lawmaking procedures better permit states to monitor and enforce their commitments, including through the use of dispute settlement bodies such as courts. While informal networks can provide a useful forum for exchanging information and best practice in the implementation of commonly agreed rules, treaty-based cooperation can provide more extensive opportunities to monitor compliance, settle disputes over alleged non-compliance, and enforce international judicial decisions.11

States, as well as private actors working with and through state representatives, thus tend to use formal lawmaking procedures where the benefits of cooperation are great and the potential for opportunism and its costs are high.12

Yet formal lawmaking, with its legally binding rules and its formal, diplomatic negotiating procedures, also entails significant costs. It can create formal commitments that restrict the behavior of states, infringing on national sovereignty in potentially sensitive areas. As a result, it can encourage states to bargain fiercely and at length over legally binding commitments. Additionally, formal, hard-law agreements can be more difficult to adapt to changing circumstances.13 Formal legal instruments such as treaties are particularly problematic where it presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment, where it requires uniformity when a tolerance of national diversity is needed, and where it is difficult to change when frequent change may be essential.14

In this context, IN-LAW procedures can offer significant offsetting advantages over formal processes and instruments:

- Informal agreements are easier and less costly to negotiate.

- Informal agreements impose lower “sovereignty costs” on states in sensitive areas.

- Informal lawmaking provides greater flexibility for states to cope with uncertainty and learn over time.

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10 Abbott and Snidal, *Hard and Soft Law* (n xx). This difference should not be overstated, however, since informally produced norms can also be internalized in the form of domestic laws or regulations, as with the Basel standards for bank regulations; see e.g. see David T. Zaring, ‘Informal Procedure, Hard and Soft, in International Administration’ (2005) 5 Chicago J Intl L 547, 559.
11 Abbott and Snidal (n xx) 430.
12 Abbott and Snidal (n xx) 429.
13 Abbott and Snidal (n xx) 433.
• Informal lawmaking allow states to be more ambitious and engage in “deeper” cooperation than they would if they had to worry about enforcement.

• Informal lawmaking may be faster, more efficient, and more flexible than convening formal diplomatic negotiations among the states involved.

• Informal lawmaking may allow states to circumvent difficult ratification procedures to which formal lawmaking is subject, and hence facilitate cooperation in politically charged areas.

• Informal lawmaking procedures are directly accessible to sub-state actors (domestic ministries, independent regulatory agencies, central banks, legislators, judiciaries), international organizations, and non-state actors (firms, NGOs), whose participation may provide needed expertise, accountability, and more efficient implementation by concerned stakeholders.15

More generally, scholars like Lipson and Abbott and Snidal argue, states are likely to turn to informal lawmaking where contracting costs increase, whether because of the number of parties involved, factual uncertainty, domestic ratification challenges, politically charged issue areas, or distributional asymmetries.16 In international relations, both rationalist and constructivist scholars recognize the potential advantages of informal lawmaking, but they do so in different ways. Rationalist-oriented scholars focus on the reduction of contracting and sovereignty costs, while constructivist scholars stress how soft law can “facilitate constitutive processes such as persuasion, learning, argumentation, and socialization.”17

In sum, formal and informal law and lawmaking procedures offer particular functional advantages for different contexts involving a range of factors that actors consider. For these reasons, a growing number of functionalist scholars in law and social science advocate a pragmatic approach, contending that formal and informal approaches should be selected depending on the characteristics of the issue and the negotiating and institutional context in question – and with IN-LAW often emerging as preferable to traditional, formal lawmaking.18


17 Trubek and others, Toward a Theory of Hybridity, (n xx) 75.

1.2. A Distributive Approach

The functionalist approach reviewed above has generated significant insights into the design of international institutions and international law, yet functionalist approaches have been criticized for relying too heavily on the metaphor of the Prisoner’s Dilemma (PD) game in assessing the role of international law\(^\text{19}\), and for ignoring the roles of distributive conflict and power in international law and politics.\(^\text{20}\) The distributive challenge to regime theory calls into question the appropriateness of the PD game as the proper model for most instances of international cooperation because it fails to capture the potential for distributive conflicts among the participants. The classic PD model assumes that states share a common interest in reaching a cooperative outcome, and the primary impediment to successful cooperation is the fear that other states will cheat on their agreements. In PD models of international relations, these problems are typically addressed by creating mechanisms for monitoring state behavior and sanctioning states that violate the terms of the agreement—i.e. international law.

However, the PD game ignores another important obstacle to successful cooperation, namely conflicts among states with different interests over the distribution of the costs and benefits of cooperation. That is to say, when states cooperate in international politics, they do not simply choose between “cooperation” and “defection,” the binary choices available in PD games, but rather they choose specific terms of cooperation, such as the specific level of various tariffs in a trade regime, or the precise levels of greenhouse gas emissions in an environmental regime, and so on. As James Morrow notes, “There is only one way to cooperate in prisoners’ dilemma; there are many ways to cooperate in the real world.”\(^\text{21}\) In game-theoretic terms, there may be multiple equilibria—multiple possible agreements that both sides prefer to the status quo—and states face the challenge of choosing among these many possible agreements. In an international trade agreement, for example, one side may prefer to drastically reduce tariffs on industrial goods, while another may place a stronger emphasis on reducing agricultural tariffs or agricultural subsidies. As a result, states face not only the challenge of monitoring and enforcing compliance with a trade agreement, as in the PD model, but also of deciding on the terms of cooperation, e.g., the mix of industrial and


agricultural tariffs in our example. Yet PD models, with their binary choice of cooperation or defection, fail to capture these elements of international cooperation. 22

In international politics, as Stephen Krasner argues, efforts at cooperation often take the form of a Battle of the Sexes (or Battle) game, in which different states have clear preferences for different international standards. 23 Even if all states benefit from a common standard, raising the prospect of joint gains, the distribution of those gains depends on the specific standard chosen, and the primary question is whether and how states can secure cooperation on their preferred terms. In the Battle game, both states agree on the least preferable outcome or outcomes to be avoided, and both agree to coordinate their behavior to avoid such an outcome, but each one prefers a specific (equilibrium) outcome. The canonical example, from which the Battle game takes its name, is one in which two players (say, a husband and wife) agree that they want to take a vacation together, but disagree on the destination (he prefers the mountains, she the beach). In such a game, the primary challenge is not the threat of cheating (since both players prefer some joint vacation to being alone), but rather of deciding which of two possible equilibrium outcomes (the mountains or the beach) will be selected. Any agreement in Battle is likely to be self-enforcing once adopted, with little need for monitoring or enforcement mechanisms, since both players prefer either cooperative outcome to uncoordinated behavior. By contrast with the PD game, however, the Battle game is characterized by a strong distributive conflict over the terms of cooperation. Put differently, the most important question is not whether to move toward the “Pareto frontier” of mutually beneficial cooperation, but which point on the Pareto frontier will be chosen.

Under such circumstances, Krasner suggests, outcomes are determined primarily by the use of state power, which may be employed in one of three ways: (1) to determine who may play the game (regime membership); (2) to dictate the rules of the game, including the possibility of a single state moving first and imposing a de facto standard on others; and (3) to employ issue-linkages, including through the application of threats and promises in related issue-areas, in order to change the payoff matrix for other states and induce those states to accept one’s preferred standards. 24 Krasner views such coordination regimes as stable and self-enforcing, yet this self-enforcing nature of the regime should not obscure the fact that the regime produces winners (who secure cooperation on terms closer to their preferences) and losers (who are forced to cooperate on terms more favorable to others), and that state power plays a key role in determining the shape of the regime and the standards adopted under the regime.

Looking beyond the specific features of the Battle game, James Fearon has argued that it is misleading to attempt to characterize international cooperation over any given issue as either a Prisoners’ Dilemma or a Battle game. Rather, Fearon maintains, all areas of international cooperation involve both a bargaining stage, in which the actors bargain

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22 See also Richard H. McAdams, ‘Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law’ (2009) 82 Southern Cal L Rev 209 229. As McAdams writes, “But the PD game does not capture these issues of distribution . . . There is no normative complexity and no controversy.” 231.


24 Krasner, Global Communications, (n xx) 340.
to resolve distributive conflicts, and an enforcement stage, in which actors design institutions to monitor and enforce compliance with agreed-upon rules.\(^{25}\)

In sum, states, and other actors, may therefore have very different preferences regarding the substance of international rules, and bargain hard using the power resources at their disposal to secure cooperation on terms most favorable to themselves. The story does not end here, however, for it is also clear that different international lawmaking procedures and forums are likely to influence the terms of cooperation, and hence the distribution of joint gains, in more or less predictable ways. This phenomenon is the subject of a growing literature in international relations, which examines the politics of “regime complexity” and the phenomenon of “forum-shopping.” As theorized by Kal Raustiala and David Victor, a regime complex is “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area.”\(^{26}\) One characteristic feature of such regime complexes is that they provide states, and other actors, with an incentive to engage in “forum shopping,” selecting particular regimes that are most likely to support their preferred outcomes. More specifically, states will select regimes based on characteristics such as their membership (e.g., bilateral, restricted, or universal), voting rules (e.g. one-state-one-vote vs. weighted voting and consensus vs. majority voting), institutional characteristics (e.g., presence or absence of dispute-settlement procedures), substantive focus (e.g. trade finance, environment, or food safety), and predominant functional representation (e.g. by trade, finance, environment, or agricultural ministries), each of which might be expected to influence substantive outcomes in more or less predictable ways.\(^{27}\)

If this analysis is correct, then the choice of formal or informal lawmaking procedures is likely to be a function, not simply of the nature of the cooperation problem or the degree of uncertainty, but also of the varying preferences of states and other actors about the specific terms of cooperation. Hence, states, and other actors, are likely to have conflicting preferences for formal or informal lawmaking procedures in any given issue-area, as a function of their substantive preferences in that issue-area, and therefore champion competing and multiple procedures and forums in practice.\(^{28}\) For example, as we shall see below, the countries of the European Union (EU), concerned about the problem of climate change and already undertaking considerable efforts to reduce their


\(^{28}\) This, to be clear, is where our approach differs from the rational-design approach. The rational design project, unlike most of the functionalist literature, explicitly theorizes about the existence of distributive conflict, and it hypothesizes that distributive problems will lead states collectively to design international institutions with larger memberships, wider scope, and greater flexibility; see Koremenos, Lipson and Snidal (2001) (n xx) 783-97. Our argument, by contrast, is that individual states, and other actors, will have distinct and often conflicting institutional design preferences, including preferences for formal and informal lawmaking, as a function of their substantive preferences.
own greenhouse-gas emissions, evinced an early and strong preference for formal lawmaking procedures within the UN Framework Convention on Climate Change, while, the United States, faced with the same collective action problem and the same degree of uncertainty about the state of the world, sought to avoid the imposition of costly limits on its ever-growing greenhouse-gas emissions, and therefore strongly favored informal lawmaking forums and agreements to deal with the issue. The result, in the climate-change arena as in other areas, has been a proliferation of formal and informal lawmaking forums, each championed by a diverse coalition of states and non-state actors, and each competing to formulate international rules and norms. This last observation, in turn, directs our attention to the second question motivating this chapter: how do these various, overlapping formal and informal lawmaking procedures interact in practice?

2. Formal/Informal Interaction: Complementary or Antagonistic?

Thus far in this chapter, we have examined the choice of formal and informal lawmaking procedures as alternatives, each with their own strengths and weaknesses. However, the distributive approach introduced in the previous section, together with its core insight that actors may pursue multiple and overlapping formal and informal lawmaking efforts in a given issue-area, raises the question of how formal and informal lawmaking interact in practice.

2.1. Formal and Informal Lawmaking as Complements

The dominant approach to this question, building once again upon the functionalist approach and on the legal literature on “soft law,” is that formal and informal laws and lawmaking procedures interact in a complementary, and even harmonious, fashion, in two ways. First, informal law and lawmaking can lead the way to more formal law lawmaking, a possibility widely discussed in the existing literature. For example, Abbott and Snidal have identified various “pathways to cooperation,” several of which explicitly involve the progressive hardening of soft law. They observe, first, how states may sometimes start with a framework convention which subsequently deepens in the precision of its coverage. Second, they note how non-binding soft-law instruments can lead to normative consensus which gives rise to new binding hard-law commitments. Dinah Shelton, in a major study of the American Society of International Law, likewise explains how soft law can be both “elaborative” of hard law by providing guidance to the interpretation of existing hard law, and be subsequently accepted as “emergent hard law,” facilitating the building of hard customary international law. Likewise, David Trubek and his co-authors contend that soft-law instruments can help to generate knowledge, develop shared ideas, build trust, and establish “non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.”

31 Trubek and others, Toward a Theory of Hybridity, (n xx) 32. See also David M. Trubek and Louise G. Trubek, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-
Second, where a body of hard law already exists, informal lawmaking processes are often considered to provide a low-cost and flexible way to elaborate and fill in the gaps that form when a standing body of hard law encounters new and unforeseen circumstances. In this view, formal and informal lawmaking processes serve as complements in dynamic processes of legalization, leading to the progressive development of international law over time.32

2.2. Formal and Informal Lawmaking as Antagonists

This complementary account of the interaction of formal and informal lawmaking is not wrong, we argue, but it relies on a hitherto unspecified scope condition, namely the absence of significant distributive conflicts among the participants. In the case of the interaction of formal and informal lawmaking as complements, the primary scope condition is a low level of distributive conflict among states, and in particular among powerful states. By contrast, where distributive conflict about the terms of cooperation is high, states — and other actors such as IOs, NGOs, and firms — have strong incentives to choose, or indeed create, formal or informal lawmaking processes as a function of their substantive preferences, and they have further incentives to advocate for the primacy of their preferred lawmaking procedures or forums.

Under these conditions, formal and informal laws and lawmaking can interact as antagonists, in two senses. First, from a legal perspective, formal and informal legal norms can be antagonistic in a conflict-of-laws sense; that is, a proliferation of legal norms can and often do lead to inconsistencies and conflicts among norms, creating confusion rather than clarity in a fragmented international legal order.33 Second, from a political perspective, states and non-state actors can strategically create and deploy formal and informal lawmaking procedures in an attempt to undermine, change, and reorient substantive legal provisions with which they disagree, and advocate for legal norms that most closely fit their substantive preferences. In this second, political sense, inconsistency among formal and informal lawmaking procedures is not an unintended consequence of unplanned proliferation of regimes, but rather a deliberate strategy of “strategic inconsistency,” in which, say, a given informal lawmaking procedure may be used to generate legal norms that are inconsistent with, and may thus undermine, norms generated in overlapping or competing informal or formal lawmaking bodies.

At the extreme, we argue further, this antagonistic interaction of formal and informal lawmaking can lead to the “softening” of formal, hard-law processes (which may become less certain or less exclusively dominated by traditional foreign-policy actors) or conversely to the “hardening” of informal, soft-law processes (which may become characterized by hard bargaining, with central foreign-policy actors reasserting...
their dominance over subnational actors). In the process, the antagonistic interaction of formal and informal lawmaking procedures can actually vitiate the purported advantages of each approach. In the first instance, the overlapping and interaction of informal, soft-law instruments may render formal, hard-laws and lawmaking procedures less clear or authoritative, since states and non-state actors can now point to alternative norms articulated in other legal forums. This strategy, we argue below, has been particularly popular among actors wishing to undermine existing hard-law rules: to the extent that formal, treaty-making negotiations to change extant legal rules are blocked, informal lawmaking forums may offer a low-cost path to creating competing legal norms that might, in time, undermine or even replace existing treaty law – particularly for non-state actors who lack any standing to participate in formal law-making forums. Thus, for example, states and non-state actors seeking to champion the prospect of humanitarian intervention, or the “responsibility to protect,” have sought to replace the traditional reading of the UN Charter’s Article 2(4), with its strict protection of national sovereignty, with a new and conditional conception of “sovereignty as responsibility”; however, unable to secure a consensus to amend the Charter accordingly, these actors have sponsored a series of IN-LAW processes, designed to re-interpret sovereignty in less absolute terms. Similar efforts can be found in other areas where various actors have attempted to “soften” WTO legal norms through the introduction of overlapping or competing norms in areas such as intellectual property rights, cultural diversity, the regulation of genetically modified foods, and environmental protection, discussed below. To the extent that such efforts succeed, we argue, the interaction of informal and formal lawmaking can undermine the purported advantages of formality, including the provision of clear and enforceable rules and credible state commitments to cooperation. By the same token, we argue, the antagonistic interaction of formal and informal lawmaking can “harden” informal lawmaking procedures, thereby undermining the purported advantages of informality such as flexibility, depoliticization and deliberation among experts. In the area of GMO regulation, for example, the informal process of standard-setting for food safety in the Codex Alimentarius Commission, a classic informal lawmaking mechanism dominated by non-traditional, technical experts from its various member states, has become linked to the trade regime of the World Trade Organization. Under the terms of WTO’s Sanitary and Phytosanitary Agreement, implementation of a Codex standard creates a presumption of compliance with “harder” WTO law provisions, subject to binding dispute settlement. As a result, the traditionally deliberative Codex has become a forum for hard strategic bargaining among states that recognize that the content of Codex standards on GMOs could someday determine the outcome of formal litigation about the marketing of GM foods and crops. Not


36 The normative implications of such a development, we argue, depend on one’s substantive preferences; for example, the undermining of the absolute-sovereignty norm may undermine the advantages of a clear, bright-line rule, but this loss may be outweighed by the prospect of effective interventions to prevent humanitarian disasters.
surprisingly in this context, Veggeland and Borgen find a “replication of WTO coalition[s] and positioning pattern[s] in the Codex,”37 which has grown increasingly politicized and often deadlocked on the issue of GMO regulation. In short, antagonistic interaction of formal and informal law-making may undermine many of the advantages of IN-LAW spelled out in the introduction to this volume.

3. Formal/Informal Interaction in Practice: Three Sets of Cases

Our point in this chapter is not to suggest that formal and informal lawmaking must invariably interact as antagonists, but rather that the complementary interaction of formal and informal laws and lawmaking depends on a specific set of conditions, including in the first instance the degree of distributive conflict over a given issue in international relations. Ceteris paribus, where distributive conflict is low, we expect formal and informal legal processes to interact in a complementary fashion. By contrast, where distributive conflict is high, we expect states and other actors to champion multiple, overlapping and competing formal and informal lawmaking processes designed to further their specific substantive interests, thereby generating both regime complexity and the antagonistic interaction of formal and informal lawmaking procedures. Following Krasner, we expect the outcomes of such deliberative conflicts to be resolved largely in favor of the interests of the most powerful actors in international society, which in most instances means states with substantial issue-specific resources with respect to the issue in question. Taken together, this leads us to predict three sets of outcomes, reflecting the interaction of distributive conflict and power, respectively (see Table 1).

3.1. Low Distributive Conflict, Complementary Interaction

The first category of cases, and the one that appears to have been most commonly considered in the existing literature, is the set of issues on which distributive conflict about the terms of cooperation is low, particularly among the most powerful actors in a given issue-area. In the field of international economic regulation, for example, it has become commonplace to argue that where powerful economic actors such as the US and the EU agree on a particular policy or standard, that standard is likely to become the global standard around which a general consensus emerges. Daniel Drezner goes further, arguing that, as a general rule, agreement between the US and the EU is both a necessary and sufficient condition for successful international regulation.38 Extending this view, we argue that the interaction of formal and informal lawmaking as complements, presented as a general rule in much or all of the existing literature, in fact operates only under a restrictive set of conditions, namely a broad policy consensus among the most powerful actors within a given issue-area.

Many well-documented examples support this argument. In the area of economic regulation, one side (the US or the EU) may initially be the primary entrepreneur behind the international regulatory initiative, which often begin as informal networks and soft-law norms, which eventually gain more widespread adoption and are formally adopted into national laws and international treaties. The US, for example, has often taken the lead in initiatives that have resulted in successful international regulatory cooperation,

38 Drezner, All Politics is Global (n xx).
including for example the international agreements to protect the ozone layer\textsuperscript{39} and the anti-bribery convention.\textsuperscript{40} In both the ozone protection and anti-bribery cases, the initial instruments were informal, and formal agreements were reached later, once EU members were convinced of the benefits of a hard-law approach. In recent years, with the increased institutionalization and harmonization of European regulation at the EU level, the EU has increasingly played an important entrepreneurial role in global governance, from standard setting to financial regulation, with informal norms once again leading the way and gradually giving way to more formal agreements.\textsuperscript{41}

Generally speaking, the success of both formal and informal lawmaking endeavors in the area of economic regulation, from the Financial Action Task Force (FATF), to the Basel Committee for banking regulation, to export credit soft-law arrangements, depends on the convergence of preferences among the US and the EU or its members.\textsuperscript{42} Private organizations may take the lead in developing self-regulatory \textit{lex mercatoria} regimes. However, where these regimes become codified in formal international agreements, it is likely that private parties have enlisted the support of the US or EU, directly or indirectly.\textsuperscript{43} Indeed, we suggest that much of the existing literature on the complementary interaction of informal, soft-law and formal, hard-law approaches exhibits selection bias by drawing disproportionately from cases in which the most powerful dates agree on the aims and terms of regulation because there are no, or only minimal, distributive conflicts between them.

3.2 High Distributive Conflict among Powerful States, Antagonistic Interaction

If agreement among powerful states is a necessary condition for successful cooperation, then intense distributive conflict among them is likely to inhibit such cooperation, providing incentives for them to either forum shop among existing international institutions, or indeed to create new lawmaking procedures that are more favorable to their substantive interests. This proliferation of overlapping and incompatible regimes, in turn, creates the conditions for strategic, antagonistic use of formal and informal lawmaking procedures, with powerful states using multiple and competing lawmaking forums to press for their preferred terms of cooperation and

\begin{itemize}
  \item \textsuperscript{39} Vienna Convention for the Protection of the Ozone Layer art. 11, 22 March 1985, 1513 UNTS 293.
  \item \textsuperscript{40} Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December, 1997, 37 ILM 1.
  \item \textsuperscript{42} On the FATF, see Máira Rocha Machado, Similar in their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina (forthcoming 2012) Law and Soc Inquiry; on the Basel Committee, see David T. Zaring, ‘Informal Procedure’, supra note xx at 559; on the export credit arrangements, see Janet Levit, ‘The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits’ (2004) 45 Harv Intl L J 65, 141.
\end{itemize}
undermine those preferred by others.\footnote{Even within a single regime such as the UN system, the existence of multiple decision-making forums with different memberships, voting rules and hard- or soft-law characteristics can allow for forum-shopping and for the antagonistic interaction of formal and informal law and lawmakers. See discussion of the responsibility to protect and nuclear weapons cases, below.} We see this phenomenon in many issue-areas of world politics, including the regulation of genetically modified foods and the protection of cultural diversity, where the US and the EU have clashed over the making and application of rules in the WTO and in other, less formal forums; in the international approach to climate change, where states with dramatically different policy preferences have forum-shopped among multiple formal and informal lawmakers forums; and in the security realm where the great powers have advocated competing formal and informal norms regarding humanitarian intervention and the “responsibility to protect” doctrine. With the rise of new and more diverse powers such as China, India, Brazil, and Russia, moreover, there is good reason to expect that great-power stalemate over a number of issues, as in the current Doha Round of WTO negotiations, will only exacerbate such strategic creation and antagonistic use of IN-LAW procedures.\footnote{We are indebted to Joost Pauwelyn for this point.}

Genetically Modified Organisms

A number of cases of antagonistic interaction of formal and informal lawmakers are driven by distributive conflict between the US and the EU, which are the dominant, and roughly equal, players in international economic and environmental regulation. In several of these cases, moreover, the WTO lies at the center of such inter-regime conflicts, given its broad scope of coverage and its dispute settlement system.\footnote{See e.g. Pauwelyn (n xx); and Claire Kelly, ‘Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes’ (2006), 24 Berkeley J Intl L 79.}

For example, the US and the EU have taken distinctive and sharply opposed approaches to the regulation of genetically modified organisms (GMOs), with the US pursuing a more liberal, “science-based” approach to risks from GMOs, while the EU has adopted a more precautionary system requiring an onerous prior approval procedure for each genetically modified food or crop, reflecting prevailing European social norms.\footnote{Pollack and Shaffer, When Cooperation Fails (2009) (n xx); Shaffer & Pollack, Hard vs. Soft Law (2010) (n xx).} Over the past two decades, both sides have attempted to export or “upload” their respective approaches to the global level, and both sides have actively forum-shopped among various formal and informal lawmakers procedures. The United States has favored the formal WTO forum, with its binding rules on non-tariff barriers to trade and its powerful dispute settlement system, which places limits on the ability of states to use national regulations to restrict access to the domestic market. By contrast, the EU, eager to find legal justification for its more precautionary approach to GMO regulation, has favored other regimes, including both the informal Codex Alimentarius Commission, a soft-law body establishing non-binding food-safety standards, and the formal Convention on Biodiversity (CBD), which is empowered to adopt rules relating to the environmental aspects of GMOs. The EU, faced with existing hard-law rules in the WTO that could be changed only by consensus, has attempted to constrain the impact of WTO rules by pressing for the adoption of more precautionary food-safety standards in the Codex Alimentarius Commission, since states whose domestic regulations conform to Codex
standards are generally considered to be in compliance with the WTO’s Sanitary and Phytosanitary Agreement. The result of this interaction has not been a complementary relationship of formal and informal lawmaking, but one in which each side seeks deliberately to upload its own views as international law and to undermine or curtail competing international rules and standards.

This antagonistic interaction has, in turn, affected the purported advantages of the formal and informal legal regimes in question. The informal Codex Alimentarius Commission, for example, normally meets at a technical level to deliberate about non-binding food-safety standards, but it has been politicized as each side has grasped the implications of Codex rules on the application of WTO hard law in WTO litigation. By contrast, there has been pressure on the quintessential hard-law regime of the WTO dispute-settlement system to accommodate the norms set forth in neighboring international regimes. In WTO litigation over the EU’s regulation of GMOs, the EU pressed the WTO panel to take into account the neighboring international regimes. The end result of this interaction was not a gradual clarification and elaboration of international law, as per the existing literature, but a deliberate and persistent muddying of the international legal waters.48

Cultural Diversity

The US and EU have also taken starkly different positions regarding the regulation of trade in cultural products, and in particular films and other media.49 This issue was particularly contentious during the Uruguay Round in which the EU pushed for an express “cultural exception,” while the US pressed for the liberalization of national policies.50 Neither side was fully successful.51 The 1995 WTO General Agreement on Trade in Services (GATS) provides that countries are not bound to open their markets to audiovisual services unless they make express commitments.52 Although the US failed to obtain any EU commitments to open its market to audiovisual services under the GATS, the US set up a framework for future negotiations that could lead to such liberalization, and it was able to obtain commitments from some WTO members.53

The EU then turned to other, more favorable fora to advance its interests, first with a regional, informal instrument, and later with a formal global agreement—both of

52 The GATS commits WTO members to “successive rounds of negotiations… with a view to achieving a progressively higher level of liberalization.” (Article XIX of General Agreement on Trade in Services (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183).
which were devised in large part to obscure and counter the justiciable hard law of the WTO. Hence, in 2000, the EU and other European countries negotiated a Council of Europe declaration on cultural diversity, a soft-law agreement that echoed EU internal law in proclaiming the value of cultural diversity and justifying trade-restrictive practices in the interest of maintaining such diversity.54

This European declaration, in turn, helped to pave the way for the adoption, in 2001, of a global soft-law instrument, the Universal Declaration on Cultural Diversity adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).55 UNESCO members then turned to the drafting of a binding convention, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which 148 countries signed in October 2005.56 Only two countries opposed it, the United States and Israel, the former having rejoined UNESCO after an extended absence in large part to respond to the development of the convention.57 Within UNESCO it then “vehemently opposed” the convention throughout the negotiations, maintaining that it was protectionist and inappropriately implicated UNESCO in trade policy.58

Indeed, one major effect of the UNESCO convention, and the previous, less formal agreements, is to act as a counterpart to the WTO rules, undermining the primacy given to free movement in the WTO and justifying restrictions on trade based on the protection of cultural diversity.59 The EU and other parties to the convention can now refer to an international agreement that expressly proclaims their sovereign rights under international law to take measures, including trade measures, to protect their cultural diversity. As the number of countries ratifying the convention grows, the convention, together with the 2001 UNESCO Universal Declaration,60 could be viewed as emerging customary international law which applies to all nations except those non-signatories who persistently object to it. More generally, absent a clear hierarchy of norms among WTO and UNESCO rules,61 the immediate effect of the interaction of these rules has been to make international law less, rather than more, clear and determinate.

Climate Change

A third instance that can be viewed in terms of an antagonistic interaction of formal and informal lawmaking, highlighted by Andonova and Elsig in this volume, is that of global climate change. The climate change issue is characterized by a formal,
“focal” lawmaking forum, the UN Framework Convention on Climate Change, with its 1997 Kyoto Protocol, as well as by a wide range of other formal and informal forums, in what Keohane and Victor have described as the regime complex for climate change. Within this regime complex, the level of distributive conflict is extremely high and multidimensional, with, for example, the European Union seeking ambitious cuts in greenhouse gas (GHG) emissions among advanced industrial countries; the United States, together with Australia and, increasingly, Japan and Canada, strongly resisting the imposition of costly emissions limits and insisting that any such limits must bind emerging economies as well; and the emerging BASIC (Brazil, South Africa, India and China) and G-77 economies favoring binding limits for advanced industrialized countries but not for themselves. In keeping with its preferences for a formal and binding agreement, the European Union has consistently championed the formal FCCC process, leading the way to the adoption and entry into force of the Kyoto Protocol and more recently advocating strongly for the conclusion of a more ambitious follow-up agreement for the period after 2012. Agreement in the FCCC context, however, has proven elusive, leading both advocates and opponents of strong international rules to pursue efforts in competing – and mostly informal – lawmaking forums.

At the global level, both public and private advocates of vigorous, legally binding commitments to mitigate greenhouse gas emissions have, of course, lobbied their home governments as well as the various conferences and meetings of the FCCC parties. Despite these efforts, however, the 1997 Kyoto Protocol produced a set of binding commitments that were disappointing to advocates of strong action, not least due to the failure of the United States to ratify the agreement. This in turn led a growing number of public and private actors to engage in what Andonova and her colleagues call “transnational private governance,” which are informal across all three dimensions of output (producing only non-binding, soft-law commitments), process (taking the form of networks rather than intergovernmental negotiations) and actors (featuring participation by subnational regional or municipal governments as well as a wide range of private actors). The Regional Greenhouse Gas Initiative, for example, is a network of 10 US states featuring 2 Canadian provinces as observers, which aims to develop a regional cap-and-trade program for carbon dioxide in the absence of binding national commitments; and similar networks of subnational and/or private actors can be identified, including a Cities for Climate Protection network of over 60 local governments in over 30 countries.

62 On “focal” institutions for a given problem in international politics, see Jupille and Snidal 2005, supra note xx, at 7.

63 Robert O. Keohane and David G. Victor, ‘The Regime Complex for Climate Change’ (2011) 9 Perspectives on Politics 7-23. See also Antto Vihma, ‘Friendly Neighbor or Trojan Horse? Assessing the Interaction of Soft Law Initiatives and the UN Climate Regime, 9 Int Environ Agreements 239 (2009) (assessing the impact of other regimes on the UNFCCC negotiations); Harro van Asselt, Francesco Sindico, and Michael A. Mehling, ‘Global Climate Change and the Fragmentation of International Law,’ 30 Law and Policy, 424 (October 2008) (examining the climate-change regime in interaction with the international biodiversity and trade regimes); and Liliana B. Andonova, Michele M. Betsill, and Harriet Bulkeley, ‘Transnational Climate Governance,’ 9 Global Environmental Politics 52 (May 2009) (providing a typology of public, private, and hybrid network governance mechanisms operating across borders on the issue of climate change). See also Liliana Andonova and Manfred Elsig, this volume.

pledged to control greenhouse gas emissions within their respective jurisdictions. While the efforts, and the degree of success, of these networks has been highly variable, in general they aim to move beyond, and compensate for the deficiencies of, the UNFCCC process.

By contrast, a number of other public and private actors, concerned about the cost of binding UN emissions reductions as well as the differentiated approach imposing commitments on industrialized but not on emerging or less-developed economies, have fostered the development of a growing array of competing IN-LAW processes. Among the best known of these are two plurilateral, intergovernmental bodies – the Major Economies Forum (MEF) and the Asia-Pacific Partnership for Clean Development and Climate (APP) – that have sought to bring together many of the most GHG-emitting countries outside the auspices of the formal UNFCCC process. Strategically convened by the Bush Administration in the context of its relative isolation in the UN forum, the MEF and APP forums, like the G-8 meetings that increasingly took up the issue of climate change in the 2000s, share a number of common features:

[T]hey are not legally binding; avoid time-tables and concrete targets; have limited number of participating countries; consider climate change in the context of other concerns; emphasize technological development, and they do not explicitly differentiate between developed and developing countries.

In terms of the language of this volume, both the MEF and APP are informal in terms of output, since, unlike the UNFCCC which has aimed at legally binding emissions limits for at least some subset of its parties, “The APP and MEM both envision the international effort as the aggregation of nationally defined programs put forward by countries on a strictly voluntary basis.”

Not surprisingly, these bodies have been highly controversial, being viewed very differently by their proponents and detractors, respectively. Proponents, including the United States, Canada, and Australia, argue that the MEF and APP complement the formal treaty-making process in the UNFCCC, promoting exchanges of ideas among the primary GHG-emitting economies and fostering bottom-up initiatives to address climate change in more flexible ways than envisaged under the formal UNFCCC process. By contrast, skeptics of these bodies, including the EU, the G77 countries and environmental NGOs, argued that the United States was using a forum-shopping strategy to undermine the negotiation of a new, post-Kyoto legal agreement in the UN, while allowing a recalcitrant United States to present itself as a leader in addressing climate change while preventing agreement on a legally binding agreement in the UN forum. Perhaps for this reason, EU officials made periodic threats to boycott the MEF meetings if no progress

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65 For discussions of these and other efforts, see Andonova et al., ‘Transnational Private Governance,’ supra note xx at 61-67.
68 Vihma, ‘Friendly Neighbor?’, supra note xx, at 243, emphasis in original.
was made in UNFCCC negotiations.\textsuperscript{69}

In any event, negotiations within the UNFCCC since the December 2009 Copenhagen Conference of the Parties have demonstrated a move toward informality on the output dimension. Despite strong demands from the European Union and many developing countries for a strong, legally binding treaty to follow the Kyoto Protocol which expires at the end of 2012, at Copenhagen the leaders of a small but influential group of states – the United States together with the BASIC (Brazil, South Africa, India and China) group of emerging market economies – agreed on a non-binding statement, entitled the “Copenhagen Accord[s],” which called for a legally non-binding, bottom-up approach centered around non-binding national pledges from both developed and developing countries that would subsequently be subject to reporting to the UNFCCC, coupled with a commitment to a scaled-up program of economic assistance to less-developed countries.\textsuperscript{70} Not surprisingly, European countries, less developed countries and environmental groups poured scorn on the non-binding, soft-law approach of the accords, and the assembled states merely “took note” of rather than adopting the agreement.\textsuperscript{71} These same groups remain committed to a formal treaty to follow upon the Kyoto Protocol, yet two years later they have yet to secure agreement from the US or other advanced industrialized countries for a new treaty, and in practice much of the effort within the UNFCCC has gone into the effort to put into operation the soft-law provisions of the Copenhagen Accords, including the submission of a first step of national pledges\textsuperscript{72}, the establishment of a new climate fund, and the operationalization of a system to record and verify compliance with national pledges.\textsuperscript{73}

Global climate change negotiations remain a work in progress, and it is too early to rule out the possibility that soft-law efforts, such as the bottom-up, “pledge and review” process begun at Copenhagen, together with the various transnational efforts focused on exchanges of information, building capacity and setting new informal norms, may in fact engage a growing number of states in individual mitigation efforts that will lay the groundwork for a future formal treaty as a follow-up to Kyoto.\textsuperscript{74} It is, therefore, too early to rule out the possibility that formal and informal lawmaking processes may ultimately interact in a complementary fashion, similar to what scholars have found with respect to


\textsuperscript{72} See ‘Cop 15 – Copenhagen Pledges Reveal Deep Divisions,’ \textit{ENDS Report}, 26 February 2010, p. 53.

\textsuperscript{73} Daniel Bodansky and Elliot Diringer, “The Evolution of Multilateral Regimes: Implications for Climate Change,” Pew Center for Climate Change, December 2010, at 15.

\textsuperscript{74} Alternatively, should a binding agreement remain out of reach given the sharp distributive conflicts, multiple, informal initiatives may remain the most promising approach to promote greenhouse gas mitigation, adaptation, and financial aid in the years to come. For good discussions see e.g. Keohane and Victor, \textit{supra note xx}, and Bodansky and Diringer, \textit{supra note xx}.  

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the ozone regime and other areas of environmental law and policy. Thus far, however, the deep distributive conflicts among the various groups of states and non-state actors has produced a now-familiar pattern of antagonistic interaction, characterized by forum-shopping, strategic inconsistency, and increasing confusion rather than progressive development of law with respect to the fundamental challenge of climate change.

**Humanitarian Intervention**

Finally, as we have argued elsewhere, the antagonistic interaction of formal and informal lawmaking is not limited to areas of economic regulation, but extends to international security issues insofar as those issues are characterized by intense distributive conflict. In this context, one of the most difficult security issues of the past two decades has been the debate over the purported right of states to engage in humanitarian intervention to prevent or respond to humanitarian disasters within the borders of other states – what later emerged as the “responsibility to protect” (R2P) doctrine. The debate over humanitarian intervention over the past two decades has revealed a fundamental conflict between two coalitions of states and non-state actors. One coalition, consisting of mostly Western states, NGOs, and successive UN Secretaries-General, sought explicit and legally binding authorization for and criteria governing humanitarian intervention by the UN or by individual states or regional organizations. The other coalition, consisting of Russia and China within the UN Security Council, supported by a large coalition of mostly non-aligned states in the General Assembly, sought to oppose or at least water down any language on R2P that would imply a weakening of state sovereignty and a right to intervene in their internal affairs.

The debate over the law of humanitarian intervention was, as is well known, provoked by a series of humanitarian crisis during the course of the 1990s, to which the UN Security Council responded fitfully, endorsing through Chapter VII resolutions a number of interventions in conflicts in Somalia, the former Yugoslavia, and Haiti, while failing to act in Rwanda. During this period, the Security Council acted ostensibly to preserve international peace and security, side-stepping the question of national sovereignty and the formal prohibition on intervention in the domestic politics of states in Articles 2(4) and 2(7) of the UN Charter. Fundamental divisions on this issue, however, were brought out clearly in the 1999 debate over Kosovo, when NATO countries intervened collectively in the Yugoslav autonomous region without the authorization of a divided Security Council, prompting an ICJ legal challenge by Yugoslavia.

The Kosovo intervention crystallized the debate over whether states could, individually or collectively, intervene legally for humanitarian purposes, in particular without authorization from the UN Security Council. In the wake of the Kosovo case, UN Secretary-General Kofi Annan called for explicit criteria governing humanitarian intervention, fostering the creation of a series of informal lawmaking procedures and reports from, respectively, the International Committee on Intervention and State

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Sovereignty, or ICISS, in 2001;\textsuperscript{77} the High-Level Panel on Threats, Challenges, and Change in 2004;\textsuperscript{78} and the Secretary-General, whose report \textit{In Larger Freedom} was released in early 2005.\textsuperscript{79} Building from these reports, a coalition of primarily Western states and non-state actors pressed successfully for the endorsement of R2P at the 2005 UN summit as a UN General Assembly Resolution.\textsuperscript{80} Although the advocates of R2P in these forums made a case for the doctrine as an elaboration or progressive development of UN Charter provisions, the conflict between the committee proposals and the black-letter law of the Charter was clear to what might be called the sovereigntist bloc in the UN, who succeeded in watering down the language on R2P in the final declaration, and have since attempted to limit the impact of the doctrine in law and in practice. This is not to say that R2P has been unimportant or a failure, not least given its invocation in the context of the successful, UN-mandated intervention in Libya, and indeed the adoption of R2P can arguably be counted as a success for the diverse coalition of great powers, small democratic states, NGOs and IOs that pressed for its adoption. What is clear, however, is that the informal lawmaking procedures on R2P and the formal, hard-law Charter provisions on state sovereignty both acted as antagonists in legal terms, and were employed strategically as antagonists in political terms by states seeking to advance conflicting conceptions of intervention and state sovereignty.

3.3. High Distributive Conflict Between Strong and Weak States, Antagonistic Interaction

Finally, we can identify a third set of cases in which powerful states agree on the broad outlines of legal norms in a given area, but weaker states and non-state actors that are unhappy with such great-power norms press for changes to international law. In these cases, weaker states and NGOs often confront formal, hard-law rules which they are unable to change over the opposition of more powerful status-quo countries, and they therefore respond by turning to other, and often informal, lawmaking forums, seeking to undermine or call into question formal law using counter-norms. Two prominent examples of this phenomenon include, first, the effort by less developed countries to “shift” the locus of lawmaking from the formal law regime of the WTO to other, more congenial forums in the area of intellectual property rights (IPR); and, second, the effort by a large coalition of non-nuclear weapon states to declare the use or threat of use of nuclear weapons to be illegal. Although very different in subject matter, these two cases demonstrate, once again, the antagonistic interaction of formal and informal lawmaking. In these cases, however, powerful states have enjoyed significant advantages due to their power resources and their position defending existing formal institutions and rules, and outcomes in these cases have therefore been somewhat clearer, and skewed toward the preferences of the powerful.

\textsuperscript{77} International Commission on Intervention and State Sovereignty, The Responsibility to Protect (2001) [hereinafter ICISS].
\textsuperscript{80} 2005 World Summit Outcome, GA Res. 60/1, U.N. Doc. A/RES/60/1 (2005) [hereinafter 2005 World Summit Outcome].
**Intellectual Property Rights**

Powerful states are not the only actors that can engage in the strategic use of formal and informal lawmaking. International law has distributive implications for weak and developing countries as well, and intellectual property law is a prime example. Laurence Helfer has explored how developing countries can “engage in regime shifting,” adopting “the tools of soft lawmaking.” In doing so, they often work with non-governmental groups who serve as allies to help generate “counter norms” that are development-oriented. Helfer showed how developing countries have attempted to counter the creation of formal intellectual property rights rules under the WTO Trade-Related Intellectual TRIPS Agreement and bilateral TRIPS-plus agreements through forum-shifting tactics involving the CBD, World Intellectual Property Organization (WIPO) and the World Health Organization (WHO), among others. They have attempted to do so regarding an array of issues involving biodiversity, plant genetic resources for food and agriculture, public health, and human rights. They aim to generate “new principles, norms and rules of intellectual property” within these institutions which “are more closely aligned with these countries’ interests.” For example, the Conference of the Parties to the CBD has created workshops, established working groups, and developed guidelines regarding compensation for the use of indigenous knowledge and the sharing of benefits from the use of genetic resources. Concurrent efforts within the FAO gave rise to the 2002 Treaty on Plant Genetic Resources (PGR), which recognizes “farmers rights,” “sovereign rights” over plant genetic resources, and equitable “sharing of the benefits arising from commercialization.” Once again, as in the agricultural biotechnology and cultural diversity examples, countries have engaged in strategic ambiguity in defining the PGR Treaty’s relation to the TRIPS Agreement in light of the tension between the regimes.

We see a similar effort in another IPR issue, namely protection of pharmaceutical patents. Here, the United States and other advanced industrialized countries have forcefully asserted their rights under WTO law against countries like South Africa and Brazil, which have in turn attempted to use other, and mostly informal, lawmaking forums to reframe the issue as one of health policy and/or human rights. Developing countries have nonetheless been able to obtain support from many international bodies, not only securing a more flexible reading of the TRIPS agreement in the 2001 Doha Declaration on the TRIPS Agreement and Public Health within the WTO, but also securing the support of various international human rights bodies and the World Health Organization (WHO), using international soft-law instruments to promote the

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81 For excellent discussions of regime-shifting and forum-shopping efforts by less developed countries with respect to IPR, see Helfer, Regime Shifting (2004) (n xx) 17, 32; and Raustiala and Victor (2004) (n xx).
83 Helfer, Regime Shifting (2004) (n xx) 29 (CBD), 63 (WIPO), and 42 (WHO).
88 World Trade Organization, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, 41 ILM 755 (2002) (WTO members “affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all”).
prioritization of human rights and health protection vis-à-vis pharmaceutical patent protection. In doing so, these countries have arguably made WTO law less clear and determinate, prompting the United States to withdraw TRIPS claims against both South Africa and Brazil, undermining the purported advantages of formal lawmaking, namely legal precision backed by judicial enforcement.

Eyal Benvenisti and George Downs nonetheless rightly question the efficacy of these strategies, arguing that powerful countries are best able to make use of fragmented international regimes through forum-shopping strategies and through serial bilateralism to shape international law over time. Braithwaite and Drahos come to a similar conclusion, albeit with greater ambivalence. On the one hand, they write: “Clearly, very few actors in the context of global regulation have the capacity to run strategies of forum-shifting…. Forum-shifting is a strategy that only the powerful and well-resourced can use.” On the other hand, they nonetheless concede that, “in some ways weaker players are better off in a world where there are multiple fora capable of dealing with similar agendas.” Both the promise and limits of this strategy for weaker countries are also illustrated in our final case, regarding the legality of the threat or use of nuclear weapons.

The Legality of Nuclear Weapons

As with the intellectual property case, the question of the legality of nuclear weapons has divided the international community in two, with a powerful coalition of the original nuclear weapons states defending the legality of their nuclear deterrents against a critical mass of mostly smaller and weaker non-nuclear states and anti-nuclear NGOs seeking to challenge it.

In the period immediately following World War II, the international legal approach to nuclear weapons was shaped largely by the small group of nuclear powers, including the United States and Britain (together with their nonnuclear NATO allies) and the Soviet Union (and its successor state, Russia), joined later by France and China. During the first several decades following the war, these powers generally asserted their legal right to create, acquire and possess nuclear weapons, and to threaten their use as part of the policy of deterrence, while at the same time accepting some binding legal limits on their nuclear arsenals through a series of international agreements, including the regime on nuclear testing, a series of primarily bilateral nuclear arms control agreements, and the Nuclear Nonproliferation Treaty (NPT) regime. In the language of this volume, all of these were formal international legal agreements, legally binding and often very precise – yet, reflecting the interests of the nuclear powers that took the lead in drafting them, none of these treaties called into question the fundamental right of states to possess, threaten, or even ultimately use nuclear weapons in self-defense.

From the 1970s through the present day, however, a sizable coalition of primarily smaller and weaker states corresponding roughly with the Non-Aligned Movement

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90 Eyal Benvenisti and George W. Downs, ‘The Empire's New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60 Stan L Rev 595, 611; see also Drezner, All Politics is Global; and Benvenisti, this volume. Helfer acknowledges such concerns as well; see Regime Shifting (2004) (n xx) 56-57.
91 Braithwaite and Drahos (n xx) 565.
92 Braithwaite and Drahos (n xx) 565.
(NAM), joined by a growing number of anti-nuclear non-governmental organizations (NGOs), sought to challenge the legality of the threat or use of nuclear weapons by the nuclear powers. Unable to secure changes to the NPT or to other formal arms-control treaties governing the use of nuclear weapons, these states concentrated much of their effort on other, less formal lawmaking procedures, including in the first instance the UN General Assembly.

In a series of deeply disputed resolutions, often introduced and supported largely by members of the NAM, the General Assembly repeatedly declared the use, or threat of use, of nuclear weapons to be contrary to the principles of the UN Charter and of international humanitarian law. The first of these resolutions, which were to pass regularly though the General Assembly from the late 1970s to the present day, was adopted in December 1978 over the opposition or abstention of the United States, its allies, and the other nuclear powers, and declared unequivocally that “the use of nuclear weapons will be a violation of the Charter of the United Nations and a crime against humanity.”\(^{93}\) Later resolutions repeated this basic legal claim, and called for a formal Convention on the Prohibition of the Use of Nuclear Weapons that would commit its signatories not to use, or threaten to use, nuclear weapons.\(^{94}\)

In the mid-1990s, opponents of nuclear weapons undertook efforts in yet another legal venue, encouraging majorities in both the General Assembly and the Assembly of the World Health Organization (WHO) to request an advisory opinion from the International Court of Justice (ICJ) regarding the legality of nuclear weapons.\(^{95}\) The ICJ declined the WHO request, ruling that it did not relate to an issue within the scope of the WHO’s activities.\(^{96}\) The second, and successful, request for an ICJ opinion came from the UN General Assembly, which on 15 December 1994 adopted – by a vote of 78 in favor to 43 against and 38 abstaining – a resolution requesting an advisory opinion from the International Court of Justice on the question, “Is the threat or use of nuclear weapons in any circumstance permitted in international law?”\(^{97}\)

The case turned out to be one of the most bitterly contested decisions in the history of the ICJ, with 28 states filing written statements and 22 states taking part in oral proceedings before the Court.\(^{98}\) The Court’s advisory opinion was one of the most complex and carefully studied in the history of the Court, and was ultimately equivocal on the central question of the legality of nuclear weapons, and the decision itself was followed by 253 pages of separate and dissenting opinions by all fourteen of the judges in the case.\(^{99}\) Simplifying considerably, the Court ruled that there did not exist, in either

\(^{95}\) For excellent discussions of the case see, see e.g. Michael J. Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’ (1997) 91 AJIL 417; Ved P. Nanda and David Krieger, Nuclear Weapons and the World Court (Transnational Publishers, Ardsley, NY 1998); and the essays in Laurence Boisson de Chazournes and Philippe Sands (eds), Reflections on International Law, the International Court of Justice and Nuclear Weapons (CUP, New York 1999).
\(^{96}\) See M. Bothe, ‘The WHO Request’ in Laurence Boisson de Chazournes and Philippe Sands (eds), Reflections on International Law, the International Court of Justice and Nuclear Weapons (CUP, New York 1999) 103-111.
\(^{97}\) UNGA Res 49/75K (1994).
international customary or treaty law, “any comprehensive and universal prohibition of
the threat or use of nuclear weapons as such,” but that any use of nuclear weapons would
have to conform with the principles of the UN Charter and with international
humanitarian law. Beyond this point, however, the Court was divided as to whether the
threat or use of nuclear weapons could be justified “in any circumstance” under
international law. In the most widely cited paragraph of the decision, decided by a vote of
7-7 with President Bedjaoui casting the deciding vote, the Court found that,

... the threat or use of nuclear weapons would generally be contrary to the rules of
international law applicable in armed conflict, and in particular the principles and
rules of humanitarian law.

However, in view of the current state of international law, and of the elements of
fact at its disposal, the Court cannot conclude definitively whether the threat or
use of nuclear weapons would be lawful or unlawful in an extreme circumstance
of self-defense, in which the very survival of a State would be at stake.

In effect, the Court came very close to the position of abolitionist coalition, holding that
the threat or use of nuclear weapons would “generally” be contrary to established
humanitarian law – but the Court refused to rule out the legality of such threat or use in
“extreme circumstances of self-defense,” as argued by the United States and its allies.

Given the equivocal nature of the decision, and the proliferation of dissents and
separate opinions by the Court’s judges, the decision was a legal “Rorschach test,” open
to multiple interpretations. Among the nuclear powers, the United States, Britain, France
and Russia all interpreted the decision as allowing the threat and use of nuclear weapons
in the cause of self-defense, and as consistent with their ongoing policy of nuclear
deterrence, noting in addition that the ICJ’s advisory opinion was not legally binding on
the UN’s member states.100 By contrast with these positions, non-nuclear states and anti-
nuclear NGOs emphasized the Court’s statement about the “general” illegality of nuclear
weapons, as well as the obligations of nuclear powers to engage in good-faith
negotiations leading to eventual nuclear disarmament.101

The legal dispute over the legality of nuclear threat or use has therefore continued
to the present day in a variety of both formal and informal lawmaking forums, including
the General Assembly, the periodic NPT review conferences, and the negotiation of the
Treaty establishing the International Criminal Court.102 The outcome of this decades-
long legal struggle, far from being clarified or progressively developed by the interaction
of formal and informal lawmaking, remains deeply disputed. As in the IPR case,
however, the power disparity between the two sides has meant that the anti-nuclear
coalition has enjoyed at best limited success against the united and entrenched position of
the nuclear weapons states, which have prevented any effort to declare the illegality of

101 For a review of the reactions of non-nuclear weapon states, NGO, and the World Court Project, see
102 For detailed discussions of these negotiations, see Shaffer and Pollack (2011) (n xx) 1201-1202.
nuclear threat or use in binding treaties, and which have blunted the impact of informal, non-binding declarations in the General Assembly and in the ICJ advisory opinion.

4. Conclusion

States choose informal lawmaking as an alternative to formal lawmaking, not only because of its purported functional benefits, but also because those states are frequently engaged in distributive conflicts in which they seek to promote their preferred interpretation of law in the most propitious forums available. In a setting of distributive conflict, IN-LAW procedures can provide alternative fora within which coalitions of states – and of non-state actors frozen out of participation in formal treaty-making – can advocate for their preferred international norms or counter-norms that would otherwise be out of reach. This distributive conflict, we have argued further, also helps to explain the coexistence and overlap of multiple and often conflicting formal and informal lawmaking procedures, as well as the often antagonistic interaction among them, and we have provided evidence of the antagonistic as well as the complementary interaction of formal and informal lawmaking across a number of issue-areas.

Looking beyond our cases to the broader concerns of this volume, the most obvious implication of our analysis is that IN-LAW procedures do not exist, and should not be studied, in splendid isolation. A scholarly study of the Codex Alimentarius Commission which treated that body in isolation, for example, would miss the connections between that body and the WTO legal system, as well as the rising politicization of the Codex, and its use as a generator of norms and counter-norms in wider struggles over the regulation of genetically modified foods. We suspect, although it remains an empirical question, that a wide variety of other IN-LAW procedures are similarly entangled within regime complexes or “nested games,” which make it impossible to accurately depict or understand such procedures outside of their broader – and often conflict-ridden – context.

Finally, to the extent that IN-LAW procedures are embedded in broader complexes of formal and informal lawmaking procedures interacting in complementary or antagonistic ways, that embeddedness poses additional challenges, yet also holds promise, for the accountability of these bodies. In terms of challenges, the various informal bodies and networks examined in this volume are often far removed from the stakeholders who are affected by their decisions, and to the extent that they are accountable it may be only to a very partial subset of those stakeholders. Indeed, the distributive approach taken in this chapter suggests that this partial or skewed accountability may be very deliberate, seeking to establish a bias in favor of a particular constituency of states and non-state actors, or else counter-balance biases in other lawmaking forums. Furthermore, to the extent that overlapping formal and informal lawmaking processes create conflicting legal norms, or otherwise undermine the clarity

103 See e.g. Berman, this volume, on the use of the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use, designed in part to avoid the broader membership of the World Health Organization; and Benvenisti, this volume, more generally on the use of IN-LAW procedures to exclude third parties whose rights under international law may nevertheless be affected.
of international legal rules, the sociological legitimacy of international law may be subject to challenge.\textsuperscript{104}

On the other hand, however, the proliferation and overlap of formal and informal lawmaking forums may mean that the shortcomings or biases of one IN-LAW mechanism may (although not necessarily) be mirrored or compensated for within other, overlapping or competing mechanisms. Our point here is not that regime complexity ensures that all stakeholder voices are ultimately heard in some formal or informal lawmaking arena, an empirical hypotheses that we find implausible. Nevertheless, even an unplanned and cacophonous collection of formal and informal law-making procedures offers the normative prospect of “global legal pluralism,” increasing the number of voices heard, providing opportunities for dialogue among those voices,\textsuperscript{105} and serving as a crude global system of checks and balances. Regardless of one’s normative evaluation of such a situation, it is clear that any meaningful analysis of IN-LAW processes, whether positive or normative, must examine those processes in the context of their interaction with other formal and informal lawmaking processes in an increasingly fragmented international legal order.

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Table 1: Interaction of Formal and Informal Lawmaking

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<th>Conditions</th>
<th>Interactions/Outcomes</th>
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<td>Low distributive conflict</td>
<td>Complementary interaction</td>
<td>Bribery, ozone</td>
</tr>
<tr>
<td>High distributive conflict, powerful states disagree</td>
<td>Antagonistic interaction; outcomes unclear, reflecting great-power stalemate</td>
<td>GMOs, cultural diversity, R2P, climate change</td>
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<tr>
<td>High distributive conflict, powerful states agree, small states/non-state actors disagree</td>
<td>Antagonistic interaction; outcomes unclear, but lean toward preferences of large states</td>
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