**Climate Change and State Consent**

Thomas Christiano

Climate change poses a fundamental challenge to the international community, possibly greater than any it has faced so far. It is a basic challenge because mitigation of the threat appears to require fundamental changes in the economies of most of the world. The economic systems of the various societies in the international community are run on energy that is mostly based on carbon. Mitigation of the threat of climate change seems to require a significant drop in standards of living or a fairly rapid transformation of these economies from carbon based to some other form of energy source. At the same time the mitigation of the threat of climate change has the strategic structure of a public good. Most societies have incentives, when taking only their own narrow interests into account, to free ride on the sacrifices of others. And those societies that can make a significant difference to climate change can only do so with the cooperation of others whose cooperation is uncertain. But the challenge arises also because there is a great deal of diversity among societies in their relationships to the causes and effects of climate change as well as the burdens of climate change mitigation policies. Climate change does not appear to affect all societies in the same way and societies contribute to it in different ways. Furthermore, mitigation policies impose different burdens on different societies.

At the same time, the decisions about how to mitigate climate change and how to adapt to it must be made primarily by states acting in concert. The fundamental principle of international environmental treaty law must be state consent. States are the primary players in the making of international law. They remain the centers of power and the most basic mechanisms for the accountability of political power to persons. And states are the entities that are most capable of making the significant transformations that are necessary to achieve the goals of climate change mitigation and adaptation to climate change.

The conventional wisdom is that since the problem of climate change is a global one, the only legitimate method for solving this problem is a process that is fully inclusive and fair to all the parties in the international system. This is the thinking behind the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Processes that include only a small number of states are thought of as exclusive and therefore illegitimate. I want to question the conventional wisdom here and suggest how more particular and less inclusive methods of treaty construction may in fact be more legitimate than the universal method of the United Nations Framework.

In this paper I will discuss how state consent can be a genuine basis of legitimacy in the context of decisions about climate change. And I will explore how considerations of legitimacy help us think about some of the different methods of treaty construction in international environmental law particularly as they touch upon the issue of climate change. I will start by explaining the different methods of treaty construction. I will then lay out the objections from legitimacy to what I call the club method. Then I will elaborate and partly defend a democratic and morally bounded concepion of state consent as a basis for the legitimacy of international law. I will then address the main problem of the paper. I will introduce some of the issues of legitimacy that arise when considering the club method and the universal methods of treaty construction. I will challenge the conventional wisdom that the universal method is legitimate while the club method is not by showing under what circumstances the club method may actually be more legitimate than the universal method.

*Two Basic Methods of Treaty Making*

The two basic methods I have in mind are the broad but initially shallow method of treaty construction and the deep but initially narrow method of treaty construction. I will call these respectively the universal method and the club method since this is how they are known by many contemporary commentators. What are these two methods?

The Universal Method

The universal method is illustrated by the current main approach to treaty construction in approaching climate change. It is exemplified in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. The method proceeds by creating a universal or nearly universal agreement among states to a framework convention. The framework convention does not impose any serious demands on societies. It states aspirations and general principles; it defines procedures for making further agreements; it lays out some administrative apparatus and it confirms a scientific process for investigating the vicissitudes of climate change. In this respect the convention is fairly shallow. It doesn’t require much from states as it stands but it announces an intention to find collective solutions to the problem of climate change. At the same time the convention is quite broad: it includes nearly every state in the process. In the case of the UNFCCC, this feature is obvious from the fact that it is a UN based treaty organization. The framework convention provides for procedures for developing further treaties or agreements that may be more demanding. The UNFCCC provides for the regular meetings of the conference of the parties. These conferences can then develop further agreements that impose requirements on states. The procedure of agreement at least for the basic elements of subsequent treaties is usually that of consensus, although we will need to explore this condition a bit more carefully. The Kyoto Protocol is the main product of this process in the case of the UNFCCC. And the protocol itself imposes deeper commitments and it too states further areas in which cooperation is to be deepened. But the Kyoto protocol says little about enforcement. The mechanism of enforcement that is in place is very weak. The parties do intend to develop some mechanism of enforcement as time goes along. But they have left this problem to be solved at a later date. Indeed many problems were left for a later date. This is not necessarily a flaw, it is a crucial feature of the method. The idea is to get everybody on board and then slowly deepen the commitments of each party. The idea is to have an inclusive process of decision-making and then to get each to make greater and greater sacrifices over time.

The Club Method

The club method of treaty making is one which tends to start with deeper commitments among a select group of states.[[1]](#footnote-1) It can then expand outward to include more and more states by means of accession agreements that new states make in order to join the treaty body. The paradigm case of this method is the General Agreement on Trade and Tariffs (GATT). It began as a relatively small group of states agreeing to significant tariff reductions on particular goods and on the basis of basic principles of non-discrimination among states including the principle of most favored nation status, which asserts that a state extends the same trade concessions to every member of the GATT that it agrees on with each member and the national treatment principle which requires that states not impose any burden on imported products that it doesn’t impose on domestically produced items that are similar (that is, in addition to the tariff bindings agreed upon). The GATT started in 1947 with only 23 member states and has now grown to include more than 153 states by means of accession agreements.[[2]](#footnote-2) The GATT in 1947 involved agreements for reducing tariffs among the member states. These agreements were already quite significant so they were relatively deep. The agreements made by the member states grew deeper and deeper over time so that they include more tariff reduction and then other barriers to trade and subsidies and many other issues in international trade. From the GATT also came the World Trade Organization, which included these agreements and then added a more effective enforcement mechanism to the system.

The Club method is the traditional method of creation of treaties in international law at least before the creation of the United Nations. States agree to treaties with particular other states but not with everyone. The international system is at least in part a system of voluntary association in which each state has agreements with some other states and the agreements are regional in character or bilateral or are particularistic in some way. Indeed, most of international treaties still have this particularistic character, even most trade treaties tend to be more often particularistic than universal.

We need to distinguish between three different kinds of club methods of treaty creation, which we can already see from looking at the GATT/WTO and comparing it to regional or bilateral trade agreements. Most club agreements are meant to remain club agreements. The African Union, for example, is meant to be a union of African states, it is not intended to be a universal union. It is an exclusive club. But some club agreements are meant to expand into universal agreements. This seems to have been the intention behind the creation of the GATT in 1947. And this difference between club agreements with essentially particularistic concerns and club agreements which have universalistic aspirations is crucial to understanding the difference between the two different methods in the context of climate change. A third type, which we will be discussing in this paper, is a method of treaty creation that is initially exclusive, in the sense that only some states are invited to join, but that intends gradually to loosen this exclusivity over time to include all or nearly all states.

The problem of climate change appears to require a global solution since the problem seems to involve the existence of a global public bad. The steady accumulation of greenhouse gases in the atmosphere and the long life of many of these gases coupled with the fact that the effects of the accumulation of these gases are likely to bring about general changes in the climate system that will affect nearly everyone suggest that the impact of the behaviours of societies will be quite general. For example sea levels are likely to rise and thus the interests of all states except land locked ones will be affected usually in some negative way. Combine this with the fact that societies will have a hard time making a significant difference to climate change without the participation of many other countries and could conceivably benefit from many other countries undertaking the burdens of reducing their emission of greenhouse gases and you have strategic structure of interaction, which, taking only the aggregate interests of each of these countries into account, looks a lot like a prisoner’s dilemma. A large number of societies, but not all, need to make significant sacrifices to mitigate the threat of global climate change.

At least most countries face what looks like a prisoner’s dilemma with regard to climate change mitigation. It is important to see that not all countries face this. The United States and the European Union probably face a strategic structure that looks a bit more like an assurance game. Without the United States’s participation, the European Union is not willing to make the kinds of sacrifices that it would be willing to make with US participation and the reverse is probably also true, though we cannot be certain of that. The United States seemed unwilling to make the sacrifices required by the Kyoto Protocol without some burdens being imposed on China. This makes some sense since now China is the largest emitter of greenhouse gases ahead of the United States and the European Union. And so in addition to the fact that there is no enforcement in the Kyoto protocol and other design flaws, the protocol was in danger of being ineffective once it was agreed that China was not to have any burdens imposed on it.

The fact that some states face a prisoner’s dilemma situation and others face an assurance game situation does not change the fact that the problem is global. So the problem of climate change seems to require a global solution. But this means that either it will require some kind of universal treaty solution or a club treaty that is meant to grow into a universal treaty.

One final remark on the club method. I do not mean to imply that this method endorses a single track from a particular club to a universal arrangement. The club method is compatible with there being a number of different clubs developing diverse solutions. So we could see a fragmented group of clubs all trying in their way to make a contribution to climate change mitigation and adaptation.[[3]](#footnote-3)

*Legitimacy and the Two Methods*

A number of authors who have discussed these two contrasting methods of international environmental law making have suggested that the universal method is superior from the point of view of legitimacy considerations to the more exclusive club method. For instance, in commenting on the differences between universal and club approaches to climate change policy, David Victor states: “The legitimacy that comes from giving all nations a voice can be important, but it comes at a cost of much more complicated negotiations that are more prone to gridlock.”[[4]](#footnote-4) And Scott Barrett, with specific reference to climate change agreements, says that “ … for reasons of legitimacy, it would be hard to defend an exclusionary treaty [‘agreements involving a smaller number of countries rather than a global treaty.’]”[[5]](#footnote-5) Finally Daniel Bodansky says that “the global character of the UN climate regime, … often seen as crucial to the regime’s procedural legitimacy…”[[6]](#footnote-6)

Hence, the conventional view seems to be that the universal method is legitimate while the club method is not. Victor and Barrett draw opposing conclusions from their observations. Victor argues that the club method is more effective than the universal method for the kind of problem that mitigation of climate change poses. And he thinks that the greater effectiveness of club like treaties is worth the sacrifice of the legitimacy that comes with universal treaties. Victor is thinking here of club treaties that are expected to develop into universal or near universal treaties so the sacrifice of legitimacy is not permanent.[[7]](#footnote-7) Barrett argues that “An effective climate change treaty must be global…”[[8]](#footnote-8) Bodansky, too, though noncommittally, suggests that the global character of the UN climate system, “…may raise transaction costs and make it harder for the regime to achieve results.”[[9]](#footnote-9)

The fundamental problem seems to be that so far the universal method has not produced results and many, including Victor and Barrett are skeptical that it can produce results.[[10]](#footnote-10) The question this raises for a conception of legitimacy is whether a club method, even if it is significantly more effective, must lack in legitimacy. I want to challenge the conventional view here and I want to do it from within a conception of legitimacy that is animated by democratic principles.

I am interested here in examining and comparing the legitimacy making properties of these two different ways of making treaties on climate change mitigation. I will not here try to assess the relative importance of legitimacy considerations so I will not try to assess the dispute between Barrett and Victor. My concern will be to probe the point of agreement between the two authors. I will ask whether it is true that universal treaties are better from the standpoint of legitimacy than club treaties and I will probe the considerations of legitimacy that seem to be in play.

*The Idea of Legitimacy*

I will say that a process of decision making is legitimate, morally speaking, when it can impose content independent moral duties to comply with the decisions on those who are directed by the decisions. Content independent duties are duties an agent acquires by virtue of the source of the duties and not the content of the duties. I have a duty to meet you for lunch on a certain day at a certain place, which I have promised to do, because I promised to do it and not because I have any duty to have lunch with you. To be sure, it is possible to have a content independent duty to do what I have promised in addition to a content dependent duty. The content independence of the duty does not preclude there being other content dependent duties to do the thing that I promised.

In the case of a legitimate decision making process such as a process of treaty making, the legitimacy of the process implies that the decisions create content independent duties in the subjects of the decision making. They have duties to do what they are directed to do because they have been directed by the decision making process.

The basis of the demand for legitimate authority arises when common action among parties is necessary and when there is disagreement among the parties as to how to structure the common action. The common action may be morally necessary as when some group must pursue morally mandatory aims. It may be morally needed because individuals within the group are imposing costs on others and the group needs some way to determine the extent to which this is permissible and the extent to which the imposition of costs ought to be prevented or limited or when compensation is owed the victims from the benefits gained by the perpetrators. Or common action may be necessary to pursue the interests of the members but there are controversial issues about how to divide up the costs and benefits of the common action. The common action for public purposes will often involve imposition of costs and burdens on persons. The appropriate level of costs and burdens and the distribution of benefits and burdens are inevitably controversial. Legitimate institutions provide a morally satisfactory way to resolve disagreement and conflict among different agents. They impose costs and benefits usually by imposing rights, duties and liabilities on the relevant parties. Sometimes legitimate authorities grant permissions to agents to impose costs when normally these agents are not permitted to do so.[[11]](#footnote-11) This converts the imposition of costs into rightful action even when a controversial action is chosen and it implies that sometimes legitimate decision making processes will give reasons for complying with the decisions even when the decisions are in themselves problematic.

There are various different kinds of grounds for attributing legitimacy to institutions. One ground is that the institution is reasonably effective at bringing about morally desirable action and the compliance of subjects with its directives are essential to that effectiveness. This is a results based ground of legitimacy. The two classical bases of legitimacy are democratic legitimacy and consent based legitimacy.

Here is a brief defense of a kind of modified state consent account of the legitimacy of international law. It makes sense, even from the standpoint of a cosmopolitan and broadly democratic conception of legitimacy, to start with state consent. I start with a brief account of why state consent should be the basis of international law and then articulate some modifications of such a view that accommodate cosmopolitan and democratic concerns and that also accommodate recent developments in international administrative law that seem to go against the idea that state consent is central.

The main reason why state consent should still be the principal basis of the moral legitimacy of international law is that the state remains by far the most important institutional mechanism for making large scale political entities directly accountable to people. Other supranational political arrangements may one day have this kind of accountability but at the moment and for the medium term future they will continue to be quite unaccountable directly to ordinary persons. The only accountability they have to persons is through states. Now, accountability to persons is one of the common principles shared by consent and democratic conceptions of legitimacy. They both assert the centrality of the idea that persons have some kind of equal voice in the process of the exercise of legitimate authority.[[12]](#footnote-12) Hence, if there is to be any legitimacy at all that is grounded in the right of persons to have a say in the collective arrangements they live under, state consent will have to play a central role.

In addition, consent can create content independent duties on the part of the consentor. And it creates content independent duties to all the other parties to whom consent is given. In the case of multilateral treaties, the consent of a state creates duties to all the other states in the treaty. It is a clear and public method of creating these duties. I want to argue that the basic ground of the requirement of consent is that it protects the fundamental interests of the prospective consentor. It gives the consentor a voice in the arrangements that regulate its behavior and thus enables the consentor to pursue its aims and its interests in the process of cooperating with others. From these observations, I want to say that if our concern is to construct institutions that advance and protect the interests of human beings generally, our best bet remains state consent.

*State Consent Democratized*

We need to make at least four modifications to the traditional doctrine of state consent to make it live up to the idea that it is a conception of legitimacy grounded in the interests of persons in an equal voice in their shared institutional framework. The first three I will mention only for completeness but I will put aside in the rest of this paper. First, the states that consent must be highly representative of the people in the state. The motivation for state consent is the accountability of states to people. The full realization of this idea involves the consent of reasonably democratic states. In this way individuals participate in the making of international law through participating in the determination of the positions of the state that is negotiating the law. This way the idea that individuals are bound by international law, directly or indirectly, can be vindicated. The second modification is that the process of negotiation by which treaties are created must be a fair process of negotiation in which the parties are treated as equals in the process. Obviously coercion and fraud are normally ruled out by this standard but so are the kinds of pressure that result from very different levels of economic and military power. Without some way to temper the effects of differences in economic and military power the process that produces treaties cannot but be seen as greatly favoring the interests of the more powerful parties.

The third modification needed is that we must make room for the role of expertise in the making of international law. What is known as global administrative law[[13]](#footnote-13) in the making of international law has some independence from states, though ultimately they are responsible for it and bound by it. I think that this can be legitimated from within the idea of state consent in much the same way that expertise in democracy can be accorded a legitimate role in the making of law. It does not need to be directly accountable to persons but it must be constrained so that it genuinely and effectively pursues the aims and realizes the principles of the principal parties.[[14]](#footnote-14)

*The Morally Mandatory Aims of the International Community and the Limits of State Consent*

The fourth modification is more important for this paper and will need a bit more time. The global community is currently facing some fundamental moral challenges, which can be recognized as such on virtually any scheme of morality. The aims of the preservation of international security and the protection of persons against serious and widespread violations of human rights are already recognized in Article One of the *Charter of the* *United Nations*, which lays out the purposes of the United Nations. In addition, there are aims of equally great moral importance that must be pursued by the international system. First, it must pursue the avoidance of global environmental catastrophe. Second, it must pursue the alleviation of severe global poverty. And third, it must establish a decent system of international trade. These challenges will require significant cooperation from most of the world’s states at least.

The morally mandatory character of the aims and the necessity of general cooperation in the pursuit of the aims imply that there are certain tasks that are morally mandatory for states to participate in. This suggests a set of moral imperatives that are not the usual context for voluntary association. The usual context of voluntary association is that the parties are morally at liberty whether to join or not and even if some associations do pursue morally important aims, there are enough of them that one may pick and choose among them without moral cost. But the need for large scale cooperation to pursue morally mandatory aims is what makes the international system a peculiar kind of political system. It relies on consent but cooperation is required to pursue morally mandatory aims.

There may still be room for the moral liberty that state consent protects in such a society but it must be heavily bound by constraints. The justification for the state consent requirement may be grounded in the fact that though we are morally required to cooperate in solving these fundamental moral problems, there is a great deal of uncertainty as to how these problems can be solved. Though there is general agreement among scientists that the earth is warming up due to human activity, there is disagreement as to how much this is happening and how quickly. There is also substantial disagreement about how to mitigate global warming and what a fair and efficient distribution of costs might be. The same uncertainties attend thinking about how to alleviate global poverty, how to create a decent system of international trade and in fact in how to protect persons from widespread human rights abuses.

This kind of uncertainty, together with the centrality of states in making power accountable to persons, provides a reason for supporting a system of state consent with freedom to enter and exit arrangements because it supports a system which allows for a significant amount of experimentation in how to solve the problems. Experimentation within different regional associations as well as within competing global arrangements may be the best way to try to solve many of the problems we are facing. And democratic states are the ideal agents for this kind of experimentation because of their high degrees of accountability and transparency.[[15]](#footnote-15)

But the system of state consent must be heavily bounded given the morally mandatory need for cooperation. In the usual case of treaties, refusal of entry and exit are permissible and require no explanation. In the cases of treaties that attempt to realize a system of cooperation that is necessary to the pursuit of morally mandatory aims, the refusal to enter or exit from it would require an acceptable explanation that lays out the reasons for thinking that the treaty would not contribute to solving the problem and that some alternative might be superior. Exit or withdrawal is permissible but only with an adequate explanation. By “adequate explanation” I mean an explanation that is not irrational, unscrupulous or morally self-defeating and that displays a good faith effort to solve the problem at hand. The explanation must be in terms of the morally mandatory aims or in terms of a crushing or severely unfair cost of cooperation. The explanation need only be adequate not in the sense that it need be the correct explanation, but it must fall within the scope of what reasonable people can disagree on. An irrational explanation goes against the vast majority of scientific opinion. An unscrupulous explanation free rides on others’ contributions to morally mandatory aims or it refuses to shoulder any share in a morally mandatory pursuit. A morally self-defeating explanation is one that insists on a different coordination solution, defeating a coordination solution that in the circumstance advances everyone’s aims.

The justification for these constraints on state consent derive from the need for cooperation on morally mandatory aims together with the need for fairness in the pursuit of these aims. Both these considerations are central to determining the legitimacy of a process of creating international law.

Let me situate this claim within the larger framework of international law. The system already recognizes that states’ agreements are null and void when they consent to something that is in violation of *jus cogens* norms. These pose significant limits to state consent. It seems to me that it is but a short step from these propositions to one that denies states the right to refuse consent to agreements that pursue morally mandatory goals on the basis of the above problematic reasons.

These boundaries of consent pose genuine limits on the sovereignty of states. They authorize other states to come together to pressure unscrupulous states to abandon the strategy of free-riding on the cooperation in pursuit of mandatory aims. Again we see how the international system is a peculiar kind of political system in that states can be authorized to force or pressure other states to cooperate or to provide a reasonable explanation for non-cooperation. These are legitimate and rightful exercises of power on the part of states when in pursuit of morally mandatory aims.[[16]](#footnote-16)

*Is The Club Method of Treaty Making Illegitimate?*

My concern then is to look at the claims above from the standpoint of the different grounds of legitimacy. Some have argued that the club method I sketched above suffers from a lack of legitimacy at least relative to the universal method. They have offered only the barest of clues for why they think this. Victor argues that the club method is unfair because it does not give everyone a voice. And perhaps he means to include in the unfairness that not everyone is given an equal voice. Barrett argues that the club method is exclusionary. But we need to consider different interpretations of these two concerns.

First I want to consider two obvious objections to the idea that the club method is illegitimate. These authors have not considered the purely instrumentalist conception of legitimacy in their remarks. They both contrast legitimacy with effectiveness in the sense that they both seem to accept the idea that if the non-legitimate process could be carried out, it might be more effective. We will consider the arguments for this view in a moment but here I just want to observe that many have accepted that a process can be legitimate because it is effective. And surely there is something to this. It could very well prove to be the case that a process that is not appallingly objectionable could generate duties on the part of all to comply if it is the case that their compliance with these duties would help promote important moral ends that could not otherwise be promoted. This could well generate content independent duties in many or even the vast majority of participants. If a process tends to produce strong coordination points that might not be possible otherwise, participants might have duties to go along with the directives even if they are not sure that the directives identify coordination points. They simply have duties to go along because of the tendency to produce coordination points.

I will put this point aside because I think there is also something intuitive in the concerns of the authors. The way I understand the concern is that there are different kinds of legitimacy and some are of higher worth than others. My thought is that the legitimacy conferred by consent or by democracy tends to be of a higher worth than the legitimacy conferred by purely instrumental concerns. Here is why. The legitimacy conferred by consent or democracy embodies a much higher grade of moral community than the purely instrumental legitimacy. In the case of consent or democracy, legitimacy involves each person having a right against all the others that the person do what the directives tell them to do. This means that each person owes the performance to every other person. Moreover both of these accounts also suggest that legitimate decisions are ones of which one can say that the persons are equal and joint authors of the decision. They consent to the decisions or they participate as equals in the creation of the decisions. Finally, consent and democratic accounts of legitimacy ground a peculialy public conception of legitimacy, such that the parties can see that the legitimate authority is legitimate. In contrast, instrumentally legitimate authorities are such that one does not owe the performance of the duty to them and they are such that their legitimacy is in some sense accidental to the particular powers that have legitimacy. The explanation for their legitimacy is a set of contingent facts that will pass. Furthermore, their legitimacy is not even necessarily something that the participants can see to be in effect. The participants could, at the limit, well regard the instrumentally legitimate power as illegitimate evn though it is in fact legitimate.

These points imply an important moral difference between instrumental and consent or democratic conceptions. They point to an intuitively very different kind of community between legitimate power holders and the subjects of those powers. In one community the subjects and power holders are seen primarily as instruments of moral value and many may be inadvertent instruments. In the second instance they are treating each other as equals in accepting their obligations and they are co-authors of their obligations. Furthermore in democratically or consent based legitimacy, the obligations are generated in a way that all can see that they are generated.

So in response to the first objection, it is certainly true that there can be a kind of legitimacy that is held by a decision making process on account of its effectiveness. Yet, given the high worth of the democratic and consent based conceptions of legitimacy it is worth exploring the extent to which different treaty making methods differ in their realization of these standards.

The second objection arises from the context of the traditional doctrine of legal legitimacy for international law namely the doctrine of state consent. There is a sense in which it is hard to see how the considerations of voice and exclusion are supposed to work against the club method. The basic problem is that where the club method excludes it does not generate any obligations in the excluded participants. And when it does generate obligations it doesn’t exclude. And the same holds for the consideration of voice at least on a reasonable interpretation within the doctrine of state consent. But if the club method does not even purport to generate obligations in excluded parties or parties that have no voice and it only purports to generate obligations in non-excluded participants then it is hard to see how it can suffer from defects of legitimacy or illegitimacy.

Let me explain this a bit more. Let us articulate three different stages of agreement for the club method. The first is the stage of no agreement. The second is the stage of limited agreement among club members. The third is the stage of complete agreement among all potential participants. This sequence is envisioned by the authors. In particular, David Victor says that climate change agreements must start with agreements among a select club of societies that are most enthusiastic or that contribute most to climate change and then subsequent societies may join by means of “climate accession deals.”[[17]](#footnote-17) Ultimately he envisions virtually every society in the world joining either through the initial club or through subsequent accession agreements. The process he envisions is much like the process that led to the creation of and then expansion of the GATT and then the WTO. Except here only a small number of states are permitted to join and at a certain point later in time, almost everybody is a member.

Let us call the second and third stages of agreement the club and universal stages. Initially one might think that there is no danger of illegitimacy at any one of these stages. At the first stage there is no legitimacy but no defect either. No one is obligated to do anything as a result of international law. At the second stage there is no defect either since only those who have joined the club are obligated. Those who have not signed on to the agreements are not obligated. At the third stage nearly everyone is obligated but that is because they have all signed on. So where is the problem?

*Legitimacy and Illegitimacy in International Environmental Law*

In response to this objection, I say the inference from the claim that legitimate authority imposes obligations to the claim that only when someone purports to impose obligations does the issue of legitimacy arise is mistaken. There is another important basis of illegitimacy. A party acts illegitimately even when no obligations are purportedly imposed if the party imposes certain kinds of costs on parties that it may only impose under the condition that the parties consent or have a voice. And the costs imposed need not have any element of obligation in them. We have illegitimacy through costs without voice or consent.

The issue of legitimacy can arise just when one person imposes serious costs on another. The question, by what right do you do this? can arise when one party purposefully makes use of another’s property or imposes a serious cost on it like in cases of eminent domain, quartering soldiers, taxation or pollution. And the answer that it is done for a good public purpose is not sufficient without a claim of legitimacy. To be sure, individuals can make use of other persons’ property in cases of dire necessity or in cases of easement where the damage is very superficial. But we are talking here of making use of property or imposing significant damages merely for the purpose of advancing the public good.[[18]](#footnote-18)

Another case like this occurs in the international community. For instance, when one country imposes significant costs on another through pollution, it is expected that the affected country is to be called in to work out some arrangement for mitigating or compensating for the costs. There is a generally recognized “duty to consult and to negotiate in good faith with neighboring states about possible transboundary pollution.”[[19]](#footnote-19) When acid raid was discovered to be coming from the United States into Canada and from some European states to others, these countries entered into agreements to solve the problem. I think we can make sense of this duty as a way of assuring the legitimacy of decisions regarding how to deal with the costs that societies impose on others in a way that takes into account all of the interests that are at stake.

It is sometimes thought that states merely have duties to prevent such pollution, but it does not seem to me to make sense to say this in all cases. If the pollution is the result of a highly beneficial industrial process, it may be irrational both from the standpoint of the state involved and from the standpoint of the international community to eliminate the process. What may be needed is some mix of prevention and redistribution of costs. What is called for is common action in the sense that the polluting state and the neighboring states ought to negotiate a fair and sensible solution to the problem. The call for common action is accompanied by a call for legitimacy in the decision making behind the common action. Hence, the consent and democratic norms will play a role here in determining what a legitimate way of making the decision should be.

The imposition of pollution by one country on another without consultation or negotiation is akin to a kind of illegitimate exercise of power of one over the other. The imposition of pollution itself certainly cries out for some kind of legitimate way of making decisions about how the costs and benefits of this activity are to be arranged. That this is so is confirmed by the existence of the general principle of international law we cited above. It gives rise to the demand for legitimate decision making. But we can also argue for this more substantively. When one country imposes pollution on another it sets back the interests of the other country for the sake of pursuing its own interests. It, in effect, realizes a certain distribution of burdens and benefits among societies. And it does so unilaterally. This distribution is likely to be quite controversial at best. Each society has a serious interest in having a voice in determining the best way to deal with the pollution. For one country to pollute another country is for it to decide how the distribution of benefits and burdens are to be distributed between them without their having a voice. And this is what legitimate decision making is supposed to deal with. If one country pollutes unilaterally, it simply usurps the legitimate decision making power that should be held by the two countries together. So I think we can correctly say that an institution or decision making process suffers from a defect in legitimacy if it imposes significant costs on others without their consent or voice. What I will try to show eventually is that the club method of making agreements among states suffers from a serious defect of legitimacy if the agreements impose costs on non-participating states.

But how do we avoid the difficulty described by Nozick of implying that the rejected lover has a right to a say in the beloved’s new love life?[[20]](#footnote-20) I am not sure we can answer this question entirely. But it may be that the best way to think of this is that there are certain protected interests that persons have, which are such that they do not owe anything to those who are harmed directly by the satisfaction of those interests. The interests in love, association, conscience, expression of ideas are among these. These are interests such that the realization of these interests in action are protected from many kinds of interference from others. The interests of individuals that I have in mind here are interests in intimate relations with others, friendship, and interests in relationships that touch on one’s most fundamental commitments about what a good life consists in. These interests are protected by stringent rights of conscience, association, expression and privacy, which are such that no democratic legislature may abridge the core of them without extraordinary reason.

Beyond these protected interests, individuals have interests in having a say concerning the social and economic environment they live in. This is what grounds a democratic right to a say in defining property rights and exchange as well as taxation and education. To be sure there are many damages that occur in social life that society chooses to ignore on the grounds that they are part of a scheme of cooperation from which everyone benefits. Some losses that might occur from market competition are among these. So, as Mill says, though there is a demand for legitimate authority in the case of these losses, it may be that the democratic authority deems them acceptable.[[21]](#footnote-21)

Damages to persons can be legitimized through a democratic process in domestic society. The imposition of damage by one person on another can be legitimized by the fact that, as citizens, they have had a say in the democratic process in whether those damages are acceptable parts of social cooperation. For example, individuals do have some say concerning the damages that arise out of market competition. This say is through the democratic process. And some damages are mitigated such as loss of employment through unemployment insurance. Others are normally not mitigated such as loss of market share as a result of one’s competitor making a more desirable product. Each has a say in this process and the outcome is that some losses are blocked, some are mitigated and others are left alone. In these cases individuals do not have a say directly over the damages that might occur and they do not have to consent to the loss of market share or even to unemployment. But they do have a say, through the democratic process, over the rules that regulate the market, which in turn regulates the resulting costs of market interaction. There is a kind of division of labor concerning how to deal with the costs of ordinary interaction.

What is interesting about international environmental law is that this two level structure of interaction does not occur, at least usually. When one state imposes damages on another, there is not a larger political framework that legitimizes it. There is no separate political institution to which states can appeal to determine whether these damages are appropriate or not.[[22]](#footnote-22) In the context of international community, it seems to me that we can make sense of the duty to negotiate in good faith mentioned above as a kind of call for common action to deal with a transboundary pollution problem.

This is, I think, a clear and rightful limitation on the sovereignty of a country. A country may not develop its industry or its physical environment in such a way that benefits itself and pollutes others without consultation and negotiation with those others. This does not require that a country desist with the activity, but it does require good faith negotiation to work out a mutually beneficial and fair arrangement. From this we can see that though there is a limitation on sovereignty here, it is not a simple limitation. A country may exercise its sovereignty by negotiating a good deal with the other affected countries, though it must engage in fair negotiation with them.

The foundation of this requirement, I assert, are the interests of all the people in all the affected countries. A political system of international law that did not assert as a general principle that societies must negotiate mutually agreeable terms with those countries they impose damages on would be a system that failed to take seriously the interests of the people in the victim countries. It would fail in much the same way that a more centralized political system would fail if it were not to give a right to vote to some significant part of its population.

It may be that states have protected interests at least in relation to each other but it is not clear that we are talking about such interests here. The interests at issue are the interests in promoting the realization of a morally mandatory good and in not being taken advantage of by other states in the pursuit of that good. The interests that are set back are the interests in a clean physical environment and, as we will see, in trade with other countries. The treaty we are envisaging is one that sets back these interests in other countries without their having any say in the arrangement or the legal framework that enables these actions. The interests of the persons within those countries are being set back by a set of legal arrangements in which they have no say. The tariffs and other trade barriers impose restrictions on what the members of the excluded society can do with the members of the included society. These restrictions are legally binding ones which the state that imposes them claims to have authority to impose. These interests may be of great significance when these countries are developing countries whose development may be hindered by the trade restrictions.

From these remarks we can see that there can be illegitimacy without the intention to impose obligations as long as external effects are imposed on a society without it having any voice or consent in the process. Now I would want to assert here that there are two kinds of illegitimacy possible in this kind of context. One is the traditional one in which there is common action but it is decided upon in a most unfair way or even a coercive way. There may be a kind of agreement but the agreement lacks legitmacy because the decision is made in a highly problematic way. But there is a second kind of illegitimacy possible here. And that is if the society doing the damage to the other society does so without any effort to consult or negotiate in good faith with the other society. This constitutes another kind of exercise of power without right by the perpertrating society. The perpetrator is benefitting partly by imposing costs on another that has no say in the matter. Now we are in a position to consider in more detail the two possible sources of illegitimacy that attend the club method: external effects without voice and unfairness.

*External Effects without Voice*

There are two distinct problems here that need some discussion. One problem is that the club treaty arrangement may intentionally impose the costs on nonmembers at what I have called the club stage. The second problem is that the club method involves unfairness in the process of making the ultimate agreement at the universal stage.

Many treaties impose external effects on non members so as to ensure that the members receive sufficient benefits to keep the members complying and to encourage non members to join.[[23]](#footnote-23) A prominent example of this kind of external effect is a trade restriction on non members. The Montreal Protocol and a number of other treaties permit members to impose restrictions on trade with nonmembers. In the case of the Montreal Protocol, it permits restrictions on trade of goods that are made with CFCs with countries that are not participating members of the treaties. The purpose of this is to create a benefit for the participating members and to stop leakage of business to countries that do not restrict the production of CFCs.[[24]](#footnote-24) But this does impose a cost on nonparticipating countries.

In the case of the Montreal Protocol, there may be no real problem of legitimacy. There are two reasons why these trade restrictions are not a fundamental problem. First, all states are invited to participate in the treaty, so there is a sense in which a state has a real opportunity to avoid the sanctions. Second, the imposition of the trade restrictions is designed in part to get more states to participate and abandon the strategy of free riding. I have argued above that this is a permissible strategy for states to engage in when it comes to the pursuit of morally mandatory aims. States may impose sanctions on those who free ride on the pursuit of morally mandatory aims. Though the system of international law is a system properly based on the consent of states, that consent may not be withheld for the purpose of free riding or some other strategy obviously inconsistent with the duty of a state to cooperate in the pursuit of morally mandatory aims. States may withhold their consent from a treaty designed to pursue a morally mandatory aim only if its withholding is based on reasonable disagreement with the appropriateness of the design of the treaty in pursuing the aim. Mere free riding is not a permissible basis for withholding consent. And I have argued other states are permitted to impose penalties on states who do merely free ride. The trade restrictions imposed by the Montreal Protocol on non participating states can be justified in this way.

We can see that this claim involves a modification of the proposition I advanced above, which stated that when one state imposes a cost (in terms of non-protected interests) on another state without that other state’s having a voice in the matter, the imposition is an illegitimate exercise of power. The modification is that the exercise of power is illegitimate unless the imposed upon state is unreasonably refusing consent to cooperation in pursuit of a morally mandatory aim and this is designed to get the imposed upon state to consent.

The situation in the case of the club model is a bit more complicated, however, than the case of the Montreal Protocol. The club model endorses an initial exclusivity in the creation of the treaty. Other states are not welcome to join the club in the initial years of the treaty. Or at least this is how advocates think of it. And advocates usually have in mind that some trade restrictions are to be imposed on trade with non participating members in order to avoid undermining the effect of the treaty. Otherwise, greenhouse gas producing industry could simply avoid a tax or a cap on greenhouse gas emissions (imposed by participating states) by moving to another country that does not have the tax or the cap because it does not belong to the treaty. Trade restrictions with such countries give incentives to these firms to stay within the society that is capping emissions. And thus trade restrictions may be essential to the effectiveness of the treaty. But if trade is restricted with a non-participating society, then that society is likely to be harmed as a consequence of not being a member of the treaty. This, coupled with the fact that society is not permitted entry into the treaty, seems to be a defect in the legitimacy of the treaty.

A system that imposes restrictions on states so that they or their members do not engage in such free riding on the pursuit of a morally mandatory aim seems to me not to suffer from any defect of legitimacy. But this is in order to get these states to consent. If however, the treaty is exclusive, there is no effort to get the state to consent. All that is occurs is that the state has a cost impose on it by an arrangement that it does not have the opportunity to consent to. So this case is a kind of intermediate case.

In the extreme case it is permissible for other states to pressure recalcitrant states into participating and cooperating in the treaty making process when it is in pursuit of a mandatory aim and there are no reasonable objections. This gives the recalcitrant state some kind of say although it is limited. The other extreme case is that it is wrong to impose costs on states they do not consent to and that are not for the sake of mandatory aims. In the case we are looking at we are thinking about whether it is permissible to impose restrictions on states for the sake of the pursuit of a mandatory aim but in which we are not asking for the consent and participation of the state in question or its members (indeed we are explicitly excluding it). Despite all these facts we are nevertheless imposing a cost on a state that it is not invited to negotiate about.

I want to remark on the nature of the damage I am describing here. I argued that when one country pollutes another country without consultation and negotiation with that country, that country thereby acts illegitimately. I am now saying the same thing about one country imposing trade restrictions on another country without that country’s consent. To impose trade restrictions on another country without negotiating with that country has a problematic legitimacy. Why? The quick argument for this simply takes the background conditions of the General Agreement on Trade and Tariffs/World Trade Organization for granted and the general norms of very low trade barriers between countries. These norms set the baseline for damages. The trade restrictions are generally a kind of breach of the norms agreed upon by states. And to the extent that they make the restricted country worse off, they are an imposition of burdens on them. And these restrictions are controversial.[[25]](#footnote-25) Hence, unilateral restrictions on trade that are not sanctioned by a regime that both countries agree to,[[26]](#footnote-26) and that are not accompanied by an invitation to participate are illegitimate and problematic.

*Path Dependence and Unfairness in the Club Method*

There is a second possible source of problems for the legitimacy of club like arrangements that are meant to turn into universal arrangements. The second class of problems derives from a standard by product of making decisions in the way the club method envisions. What I have in mind here is that the club method envisions a limited and exclusive set of societies making the initial agreements. After some suitable time, other countries may be invited to join the arrangement by means of accession agreements. The obvious consequence of this arrangement in many cases will be that the earlier societies will normally have a much greater say in the construction of the overall agreement even at the end of the process than the societies that join later. The idea behind this is that the process by which these agreements take place will exhibit a kind of path dependence. The content of the later agreements will be in significant part determined by the earlier agreements. Those who participated in the early stages play a more significant role in the formation of the agreements than those who join later. Now this effect has a problematic legitimacy because the treaty making process is in some sense designed to have this effect. The process is designed to give incentives to the early participants to join early. And others are excluded from this process. This is of course very different than a process in which all are invited to join at the beginning and only some do and in which that small initial number plays a large role in determining the content of subsequent arrangements. In this latter case, though there is path dependence, it is open to all.

In effect the process is set up to give the early joiners more say. And since the others are temporarily excluded, the inequality in say is a part of the design. This may be a problem of legitimacy as well. To the extent that we invoke a democratic conception of legitimacy that values equality of say in the process of collective decision making, and some are given a lesser say by design, there is reason for complaint.

But there are some potential qualifications to this worry. The first one is that the democratic principle does not require equality under all circumstances. And these circumstances may be relevant here. What I have in mind is a principle that requires a say in some collective enterprise that is proportionate to one’s stake in the enterprise. Other things being equal, to the extent that one’s stake in some cooperative arrangement is greater than others’s stakes, one may permissibly have a greater say in the determination of the enterprise.[[27]](#footnote-27) The principle of an equal say is a normal principle in the case of collective decision making in the state because one normally thinks that people have overall roughly equal stakes in the operation of their state. But when one is dealing with particular issues or particular complexes of issues that are separated from other issues, one might think that societies tend not always to have equal stakes in the arrangements. This is true of individuals in political societies as well. They do not have equal stakes in each issue or even each small group of issues; they have equal stakes in the whole complex of issues that face the state. And they can trade off issues in which they have less stake with others who have more stake in them for the sake of issues in which they have more stake.

Climate change is likely to involve a set of issues in which different societies have different stakes. And it is not unlikely that some of these societies have less of a stake in climate change and climate change negotiations than others. Furthermore, there may be some reason to think that the states that must be included in the early negotiations are the ones that are most likely do have the greatest stakes in climate change negotiations. Presumably one of the main reasons it is important for these states to participate is that they each have a significant enough interest in mitigation that they are willing to participate. Furthermore, they are states with sufficient capacity to do something about climate change and that make a sufficient contribution to climate change that their actions will make a significant difference to climate change.

Here is a crude comparison. Let us suppose that the countries that must be included in the initial rounds of negotiations are the United States, Europe, China, Japan, Brazil, Russia, India, Canada and perhaps a few other middle income countries. Africa, much of Asia, do not participate. It may be reasonable to say that the negative effects of climate change are not more heavily distributed on average to the societies that do not participate in the initial rounds of negotiations than to the countries that do participate. We might then think that since the countries that do participate, participate because they each can make much greater contributions through public policy to the mitigation of climate change, their stakes in climate change negotiations may be greater than those of others. They have to make the big investments in changing their energy sectors and/or in limiting consumption. The proportionality principle may then recommend that they have a greater say in the climate change negotiations.

But this would be to ignore some very great differences among the countries that do participate. The United States seems to have less at stake in the effects of climate change than the great majority of other countries. China also has less at stake than Europe and these have less at stake than India and many African societies.[[28]](#footnote-28) So the comparisons are a good deal more difficult to make than the simple comparisons of the previous paragraph. I am not in a position here to evaluate the stakes that different countries have, but my guess is that at least many of the states not included in the original group have greater stakes than many outside the original group. In general it just doesn’t seem plausible to think that the criteria for membership in the original group, which include significant stakes and significant capacity, will generally always put those who have most stake in the original group. Sometimes sheer capacity will outweigh lesser stakes. So it will not be obvious that there is a reason of fairness that favors including only those in the original group. It seems to me that there is at least a prima facie case for the thesis that the greater say given to the earlier participants in the club process does not correspond with fairness considerations. Thus there is at least a prima facie case that there is some defect in legitimacy in this process.

*Assessment of the Legitimacy of the Club Method*

It does seem to me that there is some defect in the legitimacy of these arrangements to the extent that the excluded state and its members are expected to cooperate on terms that they have played no role in elaborating. But the defender of the club arrangement might still be able to salvage the legitimacy of the arrangement in the following way. The defender of the club arrangement might argue that there are really two basic alternatives: a universal system which accomplishes little or nothing and a club arrangement that accomplishes something significant but that does so by giving more say to some states and their members than others. The exclusion of states is temporary so they do eventually have some kind of restricted say in the climate accession agreements by which they join the treaty. The defender of the club arrangement will concede that there is some illegitimacy in this way of solving the climate change problem. But, the defender can also say that there are even greater legitimacy problems with the alternative. In effect the alternative deprives all societies of a say over the problem of climate change (under the assumption that it accomplishes little or nothing). Hence, the comparison might be between a decision making process in which societies and their members have some power over how to solve the climate change problem though a highly unequal power and one in which states and their members have little or no power to solve the problem.

We might then say that what we are faced with in the universal system is a leveling down problem. The consequence of including all states (so the defender of the club method asserts) is that no state has much if any power to deal with the problem. Even the states that have significantly less say in the club method may have more, or at least not less, say than in the universal method.

Now here is the main argument. Legitimacy comes in degrees. It must come in degrees because the grounds of legitimacy come in degrees and the consequences of legitimacy come in degrees. Legitimacy results from a process of voluntary and fair agreement making and issues in reasons for action. But voluntariness comes in degrees in the sense that parties can feel more or less pressured to enter agreements, and they can have varying amounts of understanding of the nature and consequences of the agreements they enter into. In addition, I want to say that legitimacy depends on the fairness of the process in part. But processes of decision making can be more or less fair. Furthermore, legitimacy issues in reasons for action. And reasons for action can come in different weights as well. If the grounds and consequences of legitimacy come in degrees, it is hard to see how legitimacy does not come in degrees. To be sure, there may be a minimum threshold of voluntariness and fairness beneath which there is no legitimacy, but above that threshold there will be differences of degree.

Now fairness in the distribution of power to solve the problem decreases when everyone has less capacity to exert some influence over the outcome. A decision making process is more fair than a second one if everyone has more capacity with respect to solving the collective problem than in the second one. This is based on the desire to avoid leveling down in a conception of fairness. Fairness, after all, matters because the things that are distributed fairly are things that matter to all the participants.[[29]](#footnote-29) The point of the decision making process is to make some progress in mitigating and adapting to climate change. The decision making process gives parties resources with which to influence that outcome. And fairness in the decision making process on these issues requires a fair distribution of resources with which the parties can influence this change. So, a concern for fairness in the distribution of a resource or capacity implies a concern that the parties have more of these resources or capacities rather than less. Hence it makes sense to think that a system that grants greater power to all participants is more fair than a system that gives less to all.[[30]](#footnote-30)

The universal method grants little or no effective power to anyone, while the club method grants at least some effective power to everyone though it grants more to some than to others. Hence, though the club method, with its unconsented to restrictions on others and its designed inequalities of say, is not fully fair, it is not as unfair as the universal system, which grants no effective power.

Now, the legitimacy of a decision making process, I want to say, is a function in part of the fairness of the process. So a decision making process that is more fair is, other things pertaining to legitimacy being equal, more legitimate. So, the legitimacy of the club method is greater than that of the universal method even though it is defective.

Now I want to say here that this result honors the fundamental intuition that there is something problematic with respect to legitimacy in the club method and that is connected with its unfairness and exclusivity. But it also suggests that a more equal but ineffective process may be even less legitimate. And so while honoring the basic intuition it also rejects the conventional view that if we are concerned with legitimacy, we ought to pursue the universal method.

To be sure, all of this depends on the hypothesis, accepted by proponents and opponents of the club method, that the universal method is likely to be fruitless. I am not really in a position to provide an evaluation of this claim. It is not implausible but I cannot demonstrate it. I content myself in this paper with arguing for the claim that if the club method actually succeeds in making some significant difference to the problem of climate change and the universal method continues to make little or no difference, then there are reasons of legitimacy, within the democratic and bounded state consent conception of legitimacy, to favor the club method, despite its drawbacks.

*Conclusion*

I have argued that if the proposition that the club method gets things done and the universal method does not is true, then we may reject the conventional wisdom that the universal method is legitimate while the club method is not. I have argued that under these conditions the club method is more legitimate than the universal method even on the democratic and bounded state consent conception of legitimacy. I have attempted to ground this thesis in an argument about the nature of legitimacy in the international system and some general propositions about fairness and its relation to legitimacy. I have not attempted to evaluate the empirical proposition on which this conditional depends though I think it is at least plausible (certainly in the light of the failures of the universal process so far). Furthermore, I have not said anything about the legitimacy of a process in which the antecedent does not hold. My guess is that an unequal distribution may be more fair than an equal one in which the parties are all or nearly all worse off even if there is some small number of parties that are a bit better off under the equal one. But this requires more space than I have here to elaborate.

1. The term “club” comes from Robert Keohane and Joseph S. Nye Jr., “The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy,” in In this paper, I am exploring only one aspect of this model as it is laid out by Keohane and Nye, namely the fact that agreements are made within small groups of states rather than requiring a universal process of agreement making. [↑](#footnote-ref-1)
2. See Bernard Hoekman and Michel Kosteki, *The Political Economy of the World Trading System: The WTO and Beyond* 3rd edition (Oxford: Oxford University Press, 2009), pp. 49, 1. [↑](#footnote-ref-2)
3. See, for example, Robert Keohane and David Victor, “The Regime Complex for Climate Change,” *Perspectives on Politics* (March 2011), pp. 7-23. [↑](#footnote-ref-3)
4. David Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge: Cambridge University Press, 2011), p. 50. [↑](#footnote-ref-4)
5. Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford: Oxford University Press, 2005), p. 394. [↑](#footnote-ref-5)
6. Daniel Bodansky, “Legitimacy,” in *The Oxford Handbook of International Environmental Law* ed. Daniel Bodansky, Jutta Brunnee and Ellen Hey (Oxford: Oxford University Press, 2007), p. 711-12. [↑](#footnote-ref-6)
7. Victor, ibid. [↑](#footnote-ref-7)
8. Barrett, ibid. [↑](#footnote-ref-8)
9. Bodansky, ibid. [↑](#footnote-ref-9)
10. See, for instance, Dieter Helm, “Climate Change Policy: Why Has So Little Been Achieved? In *The Economics and Politics of Climate Change* ed. Dieter Helm and Cameron Hepburn (Oxford: Oxford University Press, 2011), pp. 9-35 and Victor. [↑](#footnote-ref-10)
11. As the Security Council purports to do when it authorizes humanitarian intervention or as the Dispute Settlement mechanism of the World Trade Organization does when it permits states to impose trade restrictions on other states that have been found in violation of their trade commitments. [↑](#footnote-ref-11)
12. I develop the underlying theory behind democratic legitimacy and the importance of consent in my *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008) chaps. 2 and 3 and in “Equality, Fairness and Agreements,” *Journal of Social Philosophy: Special Issue on New Directions in Egalitarianism* (forthcoming, Fall 2013). [↑](#footnote-ref-12)
13. See Bendict Kingsbury, Nico Krisch and Richard Stewart, “The Emergence of Global Administrative Law,” *Law and Contemporary Problems* Vol 68 n. 3 and 4 (Autumn 2005), pp. 15-62. [↑](#footnote-ref-13)
14. I have tried to lay out a theory of how to make democracy compatible with the need for expertise and specialization in the modern state in my *The Rule of the Many* (Boulder, CO: Westview Press, 1996) chap. 5 and in “Rational Deliberation among Citizens and Experts,” in *Deliberative Systems: Deliberative Democracy at the Large Scale* ed. Jane Mansbridge and John Parkinson (Cambridge: Cambridge University Press, 2012). And Robert Keohane, Stephen Macedo and Andrew Moravscik have argued that significant independence of international institutions from states can be compatible with democracy in their “Democracy Enhancing Multilateralism,” *International Organization* Vol. 63, n. 1 (January 2009), pp. 1-31. [↑](#footnote-ref-14)
15. See, for example, Robert O. Keohane and David G. Victor’s “The Regime Complex for Climate Change,” pp. 9, 12, and 15, for a discussion of how uncertainty plays a role in motivating and perhaps justifying fragmentation of regimes attempting to deal with global problems. [↑](#footnote-ref-15)
16. See my “The Legitimacy of International Institutions,” in *The Routledge Companion to the Philosophy of Law* ed. Andrei Marmor (New York: Routledge, 2012) for further elaboration of these ideas. [↑](#footnote-ref-16)
17. See Victor, p. 24. [↑](#footnote-ref-17)
18. See Hugo Grotius, *The Rights of War and Peace* for this conception of the right of eminent domain. [↑](#footnote-ref-18)
19. See Bodansky, *The Art and Craft of International Environmental Law*, p. 95. [↑](#footnote-ref-19)
20. Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974), p. 189. [↑](#footnote-ref-20)
21. See John Stuart Mill, *On Liberty* (Buffalo, NY: Prometheus Books, 1986), p. 107 [chap. 5]. [↑](#footnote-ref-21)
22. This is a slight overstatement since there is a well-known case (*Trail Smelter* Arbitral Tribunal, 1939) in which an international arbitral tribunal ruled that Canada had a duty to prevent transboundary pollution into the United States. Even here, both states had to agree to arbitration. [↑](#footnote-ref-22)
23. See Scott Barrett, *Environment and Statecraft*, p. 320. [↑](#footnote-ref-23)
24. See Barrett, p. 313. Another example of this is *The North Pacific Fur Seal Treaty* (1911) which forbids the importation of sealskins taken from the North Pacific by non-participating countries into the participating countries (Article III). [↑](#footnote-ref-24)
25. See Bodansky, p. 249, Barrett, p. 322 and Keohane and Victor, p. 18. [↑](#footnote-ref-25)
26. As when the Dispute Settlement mechanism authorizes a state to impose restriction on another state that has violated its agreements. [↑](#footnote-ref-26)
27. See Harry Brighouse and Marc Fleurbaey, “Democracy and Proportionality,” *Journal of Political Philosophy* vol. 18, n. 2 (2010): 137-155 for a discussion of this broader principle. [↑](#footnote-ref-27)
28. I am drawing these rough comparisons from Eric Posner and Cass Sunstein, “Climate Change Justice,” *Georgetown Law Journal* (2008) p. 1580. See also Robert Mendelsohn, Ariel Dinar and Larry Williams, “The Distributional Impact of Climate Change on Rich and Poor Countries,” *Environment and Development Economics* 11: 159–178. [↑](#footnote-ref-28)
29. See Thomas Christiano and Will Braynen, “Inequality, Injustice and Leveling Down,” *Ratio* (December 2008) for a fuller argument for the thesis that the correct understanding of a principle of equality prohibits leveling down. [↑](#footnote-ref-29)
30. An analog of this reasoning applies to the choice between representative democracy and direct democracy. Some may think that direct democracy grants a more equal distribution of ability to influence a decision than representative democracy. But representative democracy, with its division of decision making labor, is far more effective and this is often for everyone involved. Hence I would want to say that representative democracy is more fair than direct democracy. [↑](#footnote-ref-30)