

## SYMPOSIUM ON INTERNATIONAL INSTITUTIONAL BYPASS

### THE CONCEPT OF AN INTERNATIONAL INSTITUTIONAL BYPASS

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The rapid proliferation of international institutions has been a defining feature of the postwar international architecture. Since the end of the Second World War, the international system has seen the creation of thousands of international treaties and organizations that have established rules governing a multitude of issues that range from international security to human rights, and from international trade to the environment.

At the same time, many of the institutions created in the postwar era actively overlap in their subject matter, such that multiple institutions may play a governance role with respect to the same individual issue. For instance, the World Health Organization is not the only organization governing global health—others include the Global Fund, the GAVI Alliance, and the Institute for Health Metrics & Evaluation. International security is not just the prerogative of the UN Security Council, but is also governed by the International Civil Aviation Organization, the North Atlantic Treaty Organization, and the European Security and Defense Policy. Functions relating to international refugee protection are performed by the UNCHR, the International Organization for Migration, and the European Convention on Human Rights.

Faced with these related phenomena of institutional proliferation and overlap, scholars have developed a number of concepts such as regime shifting, forum shopping, fragmentation, differentiation, institutional choice/adaptation, and regime complexity. These concepts have undoubtedly advanced our understanding of the current international system. They also help to capture at least part of the motivation states have to establish new regimes: one cannot deny that the rational interests of states and the emergence of new issues will play a role in explaining why particular legal institutions emerge.

That being said, we still believe that there is space for one more concept within this broader literature on institutional proliferation and overlap: the international institutional bypass (IIB). Just like surgeons grafting new pathways around blocked arteries in coronary bypasses, global governors are increasingly responding to clogged international institutions by creating new ones, rather than reforming existing structures.

This concept offers at least one distinct advantage over those already found in the literature on international institutional proliferation and duplication, namely that it focuses on attempts to fix deficiencies in the existing system. In so doing, the IIB concept focuses on a functional yet relational dynamic of institutional innovation, revealing a particular institution's relationship with the dominant institution that performs the same function. This focus on the functional and relational dimensions of reforms could help us better understand the dynamics of global institutional change and the evolution of the international system by allowing the identification of

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<sup>‡</sup> Author's name has been corrected since original publication. Funding information has also been added since original publication. See

commonalities across domains. Going further, it may even provide practical insights for guiding the design of future global governance architecture and international development policy.

To develop this argument, we start by providing a brief discussion of the characteristics of an institutional bypass, and then proceed to distinguish the concept of IIB from similar concepts in the international law and international relations (IR) literature. We conclude the essay by outlining how the IIB concept can help researchers and policymakers alike.

### *What is an International Institutional Bypass?*

According to our definition, the IIB is a type of institutional reform that has the following six characteristics:

- (1) it keeps the dominant institution in place;
- (2) it creates an optional alternative pathway through which to discharge functions performed by the dominant institution;
- (3) it has at least one distinctive feature that aims at addressing a perceived dysfunction in the dominant institution;
- (4) it has effects in the same international regime or domestic legal order of the dominant institution;
- (5) it is compatible with the requirements of the international regime or domestic legal order within which the bypass is operating; and
- (6) it is separated from the dominant institution's governance structure.

As the above requirements make clear, the concept of IIB is relational, i.e., it focuses on the way in which two institutions relate to each other. It assumes the existence of a dominant institution performing a function, but does not try to directly modify, change, or reform that institution. Instead, the IIB is designed independently of and without directly disrupting the operation of the dominant institution, which remains in place. This differentiates the IIB from attempts at directly promoting reforms in international institutions, even as the existence of the IIB may indirectly affect the functions and performance of a dominant institution.

In order to qualify as an IIB, an alternative institution must offer a choice to actors between it and the dominant institution. This means that the IIB must perform at least one of the same functions that the dominant institution still performs, all the while presenting at least one distinctive feature that serves to distinguish it from a mere replica of that institution. Accordingly, the IIB may be either competing with the dominant institution by attempting to sway actors to use it, or collaborating with the said institution by offering a supporting alternative pathway that may reduce overflow and increase overall performance. In either case, the distinctive feature of the IIB must be aimed at resolving one or more perceived dysfunctions in the dominant arrangement.

Going further still, the concept of IIB can be used to describe two distinct ways of actually addressing these perceived dysfunctions. The first is what we call a "horizontal IIB," where an international institution bypasses other international institutions. The second is what we call a "vertical IIB," where an international institution bypasses domestic or regional institutions or vice-versa. In the case of a horizontal IIB, the effects need to be observed within the same international [regime](#).<sup>1</sup> By contrast, a vertical IIB involves at least one international and one domestic institution, with the bypassing institution being either international or domestic. To properly

<sup>1</sup> For a definition of "regime," see Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982) (defining it as "[i]mplicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations").

qualify as a vertical IIB, a domestic bypassing institution must produce effects within the international regime where the bypassed international institution operates. An international institution will qualify as a vertical IIB if it produces effects within the same domestic jurisdiction where the bypassed domestic institution operates.

Neither of these scenarios is meant to encompass those institutional solutions that can serve as alternatives, but at the same time violate rules, norms, and principles of the system in which the IIB is operating. An IIB, as we define it, must comply with such rules, norms, and principles. In defining the concept in this manner, we are cognizant that many international regimes lack an overarching normative system, meaning that a bypass may not need to actually comply with this requirement in practice. However, many IIBs will be housed within or have effects in existing international regimes or domestic legal orders. In such cases, it is a requirement that the IIB not violate any other rules, principles and norms within that regime or legal order.

Finally, another feature of the concept of IIB is that it must be separate from the governance structure of the dominant institution. Arrangements that meet this requirement can take many forms. The creation of a brand-new institution to perform the same function of the dominant institution is perhaps the clearest example. It is possible, however, that the alternative materializes by repurposing another preexisting institution. For instance, a long-existing institution may start to perform a new set of functions that overlap with those already performed by the dominant institution. In this case, the long-existing institution becomes an IIB when actors start to use it as an optional alternative pathway to the dominant system.

#### *Is the Concept of International Institutional Bypass Distinctive?*

As mentioned earlier, many of the existing concepts in the IR and international law literature can be used to describe fragmentation and diversification in international governance. However, we believe that this admittedly densely populated terrain could benefit from at least one more concept, namely the IIB. Not only can this notion be distinguished from existing concepts in the literature, but it also captures a particular dimension of the dynamics of international governance that remains largely untheorized: relational institutional innovation.

This dimension emerges from the focus of IIBs on specific attempts to perfect and correct those existing international mechanisms that were designed to perform certain functions and achieve particular goals. The interaction between IIBs and these dominant institutions may in turn produce a wide range of outcomes that are at least partly dependent on the dominant institution's reactions to the IIB. These outcomes include, but are not limited to, the dominant institution disappearing and being replaced by the IIB, the dominant institution shaping up and making the bypass redundant, and the dominant institution and the IIB continuing to coexist and cooperate with each other in one form or another.

By focusing on the relational outcomes of these functional innovations, the concept of IIB is thus narrower than others like regime complexity and fragmentation, both of which also aim to capture the proliferation of international institutions and regimes. The former is defined as “[an array of partially overlapping and nonhierarchical institutions governing a particular issue area](#),”<sup>2</sup> and results in the latter (fragmentation) where it “[reduces the clarity of legal obligation by introducing overlapping sets of legal rules and jurisdictions governing an issue](#).”<sup>3</sup>

While both of these concepts rightly account for the seemingly ever-increasing number of institutions, rules, and principles that exist at the international level, not everything that contributes to increased complexity or fragmentation is an IIB. Any two international institutions that govern a particular issue may contribute to regime complexity or fragmentation, but one of them must address a perceived dysfunctionality by providing an *alternative* means of performing the same function as the other in order to qualify as an IIB. Thus, the World Trade

<sup>2</sup> Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 279 (2004).

<sup>3</sup> Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. POL. 13, 16 (2009).

Organization (WTO) and the 1992 UN Convention on Biodiversity are not bypasses of one another since they do not allow for alternative pathways through which to deal with plant genetic material, but rather set out ostensibly contradictory norms as to its proprietary nature.<sup>4</sup> By contrast, regional trade agreements may be perceived as increasing complexity and even promoting fragmentation in the international trade system, but some of them could potentially be classified as IIBs of the WTO.

In other words, the IIB concept can be understood as having a more particularized focus than both regime complexity and fragmentation, focusing on the trees rather than the forest.<sup>5</sup> Accordingly, the concept of IIB zooms in on one or more particular institutions and their relationship with what is perceived to be the related dominant arrangement. At least two other concepts in the IR literature have a similar focus, namely institutional adaptation and choice. Adaptation starts from the premise that the decentralization inherent in regime complexity allows for greater adaptability, especially “[when adaptation requires complex changes in norms and behavior](#).”<sup>6</sup> This notion is closely related to regime flexibility, according to which complexity allows rules to be more easily adapted to different conditions and the needs of different actors.<sup>7</sup> An IIB would be used when adaptation has not happened, and the existing institutional arrangement is not adequately performing its function. In this sense, the IIB is a second best, becoming relevant after attempts to reform the dominant institution have failed.

By contrast, the concept of institutional choice is very close to the IIB concept. This is because choice assumes that actors are more likely to work within existing institutions the more suitable they are “for addressing the cooperation problem at hand,” and are increasingly likely to “[choose costlier and riskier strategies that transform the institutional landscape](#)” the more those institutions are deficient.<sup>8</sup> While an IIB assumes the existence of choice, the main difference between the two concepts is the fact that IIB focuses not on cooperation, but on the specific function that institutions perform and the goals they were designed to achieve (e.g., reducing carbon emissions, or providing financial liquidity to sovereign nations in times of crisis). As a result, an IIB may encompass other cooperative solutions, as in the case of horizontal bypasses, but it may also choose domestic or regional solutions that require less or no cooperation (vertical bypasses) to perform the same function. In either case, the IIB assumes the existence of a dominant institution that is not necessarily mandated by institutional choice.

A similar distinction can be made between IIBs and what the literature on regime complexity calls “rivalry” among institutions. This phenomenon can be understood as a form of competition between two or more institutions in which one or more of them attempts to displace the others within a given regime. Beyond assuming the existence of a dominant institution, the concept of IIB may or may not include competition among institutions. Indeed, while some IIBs may attempt to displace the dominant institution, others may act in a complementary or supplementary fashion.

That being said, IIBs should also be distinguished from actor-led attempts to search for more favorable normative systems. The main difference is that the IIB concept is trying to capture institutional innovation and creativity, which sets it apart from other important concepts such as regime shifting and forum shopping. The latter is defined as an activity “where actors select the international venues based on where they are best able to promote specific policy preferences.”<sup>9</sup> By contrast, regime shifting is “designed to reshape the global structure of rules” by

<sup>4</sup> See Raustiala & Victor, [supra note 2](#), at 299–300.

<sup>5</sup> We are grateful to Patrícia Galvão Ferreira for this suggestion.

<sup>6</sup> Robert O. Keohane & David G. Victor, [The Regime Complex for Climate Change](#), 9 PERSP. POL. 7, 16 (2011).

<sup>7</sup> [Id.](#) at 15.

<sup>8</sup> Joseph Jupille & Duncan Snidal, [International Institutional Choice: Cooperation, Alternatives and Strategies](#), in INSTITUTIONAL CHOICE AND GLOBAL COMMERCE 19, 19 (Joseph Jupille et al. eds., 2013).

<sup>9</sup> Alter & Meunier, [supra note 3](#), at 16.

turning to parallel regimes where alternative priorities exist.<sup>10</sup> In practice, the concept of IIB covers situations that fall somewhere in between these two existing concepts: on the one hand, it does not turn to parallel regimes or seek to directly undermine the dominant institution; on the other, the IIB must also ultimately interact with the dominant institution in a manner that goes beyond the particular choices of individual actors.

These differences are made all the more apparent in light of the requirement that an IIB have effects within the same normative order as the dominant institution. On its own, this requirement is sufficient to distinguish IIBs from forum shopping, since the latter relies on an individual actor's choice between two or more separate jurisdictions or regimes. However, this requirement also means that IIBs simply create an optional, alternative pathway that may compete with existing institutions within the same regime rather than effecting a full regime shift in the traditional sense. The IIB can thus be seen as a response to what some authors have termed "[regime viscosity](#)"—that is, the degree of internal friction that exists within a single regime complex and which increases the costs of regime shifting.<sup>11</sup>

#### *Where Can International Institutional Bypasses Take Us?*

As we have attempted to show above, the IIB differs from existing concepts in the literature on international institutional proliferation and duplication in a number of important respects. More broadly, however, the IIB can be distinguished from many of these same concepts on the basis of its underlying objective. Indeed, the IIB does not aim to address one of the most controversial debates in the international governance literature—that is, the question of why proliferation is taking place at all. Instead, the IIB assumes that there is an intention to fix dysfunctions within the existing system, regardless of possible underlying motivations, and adopts a functional view based on performance outcomes once the IIB is in place. Specifically, it focuses on the relational dimension of this functional approach, asking whether there are long-term institutional transformations, changes, or innovations as a result of the complex interactions between the dominant institution and the IIB.

This functional and relational view raises a broad range of descriptive, normative, and policy issues. From a descriptive perspective, many of the constitutive elements of an international institutional bypass need to be fleshed out and more clearly delineated. For instance, it is not clear if the concept of bypass includes what the academic literature describes as instances of legal pluralism. From a normative perspective, it may be important to differentiate desirable from undesirable bypasses, as the version of the concept proposed here is value neutral and descriptive. From a policy perspective, it is not certain that an analysis of the potential consequences of existing IIBs could be credibly translated into guidance for future action and policy decisions.

These and other questions will undoubtedly challenge scholars who decide to engage with IIBs in their own work. While we have not explored them here, we hope that this essay will have enticed readers' curiosity. After introducing the concept of IIB and presenting its constitutive elements, we argued that it is distinguishable from other concepts in the specialized literature on international institutional proliferation and overlap. The remainder of this symposium provides examples that further illustrate how the concept may be useful in the global governance context. These case studies not only nicely complement this framing essay, but also reinforce the idea that this symposium is only a first step in a much larger research project.

<sup>10</sup> *Id.* at 16–17.

<sup>11</sup> Daniel W. Drezner, [The Tragedy of the Global Institutional Commons](#), in *BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD* 280, 281 (Martha Finnemore & Judith Goldstein eds., 2013).