

# BERKELEY JOURNAL OF INTERNATIONAL LAW

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“Organized Armed Group” Membership in the Age of ISIS

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# Tethering the Law of Armed Conflict to Operational Practice: “Organized Armed Group” Membership in the Age of ISIS

E. Corrie Westbrook Mack\* & Shane R. Reeves\*\*

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The views expressed here are personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government. The analysis presented stems from academic research of publicly available resources, not from protected operational information.

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## INTRODUCTION

It is mid-June 2017 and the United States continues its long campaign in Syria and Iraq against the powerful non-State actor known as ISIS.<sup>1</sup> The war is going badly for ISIS as their greatest prize in Iraq, the large city of Mosul, is on the verge of being re-taken by the Iraqi military.<sup>2</sup> In an attempt to escape being trapped in Mosul, ISIS members are fleeing west towards Raqqa, Syria—the *de facto* capital of their so-called “caliphate.”<sup>3</sup>

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<sup>1</sup> The fact that the United States is currently involved in combat in Syria against ISIS is indisputable. See Christopher M. Blanchard and Carla E. Humud, *The Islamic State and U.S. Policy*, CRS REPORT 7-5700, R43612, 2 (Feb. 2017), <https://fas.org/sgp/crs/mideast/R43612.pdf>. Noting:

the Islamic State (IS, aka the Islamic State of Iraq and the Levant, ISIL/ISIS, or the Arabic acronym Da’esh) is a transnational Sunni Islamist insurgent and terrorist group that controls large areas of Iraq and Syria, has affiliates in several other countries, has attracted a network of global supporters, and disrupts international security with its campaigns of violence and terrorism.

*Id.*

<sup>2</sup> Mosul was re-taken by Iraqi forces on 10 July 2017. See John Bacon, *Iraqi forces have fully retaken Mosul, U.S. backed coalition confirms*, USA TODAY (July 10, 2017), <https://www.usatoday.com/story/news/world/2017/07/10/iraqi-forces-have-retaken-mosul-u-s-backed-coalition-confirms/465022001/>.

<sup>3</sup> See, e.g., Owen Holdaway, *On the Ground in Raqqa, Capital of Islamic State’s Caliphate*, THE JERUSALEM POST (Oct. 9, 2017), <http://www.jpost.com/Middle-East/ISIS-Threat/On-the-ground-in-Raqqa-capital-of-Islamic-States-caliphate-507014>.

The following hypothetical is illustrative of a likely scenario faced by the United States and coalition forces. As the ISIS exodus towards Raqqa is ongoing, the United States receives intelligence that a senior ISIS Military Commander, one they have been pursuing for the last two years, will be traveling the next day in a white car from Mosul to Raqqa. This ISIS Commander is known to be actively directing combat actions against the U.S. and Coalition Forces, Iraqi and Syrian government officials, and most troubling, at civilians who show resistance to ISIS. The source of the intelligence, who has proven to be extremely reliable in the past, has also shared that the ISIS Commander severely limits his travel in vehicles to minimize his risk of being targeted by U.S. aircraft. Additionally, tracking the ISIS Commander has become difficult as he has taken to giving orders to his subordinates in clandestine ways, primarily through encrypted phone messages which the U.S. has not yet unlocked. Thus, the ISIS Commander's decision to travel presents an extraordinary opportunity for the U.S. and Coalition Forces.<sup>4</sup>

But there is a complication. During the planning process, the U.S. receives additional intelligence that there will be a second white car traveling with the ISIS Commander driven by his brother. While the U.S. does not have extensive information on the brother, they do know that he identifies himself on social media as an ISIS member who has pledged an oath of loyalty to the group and its leader, Abu Bakr al Baghdadi. Further, he is known as one of the "public faces" of ISIS as he regularly makes videos advertising the group's violent efforts to establish the caliphate and highlighting their most recent military exploits. However, aside from this information, there are no indications that the brother actually carries out hostile activities in support of ISIS. With the window for a strike approaching, and with no way of knowing who is in each car, the planning cell must quickly decide whether to call off the strike or target both vehicles.

Although the above scenario is fictional,<sup>5</sup> the targeting dilemma presented is real. While most agree that status-based targeting of organized armed groups (OAG) in a non-international armed conflict (NIAC) is permissible,<sup>6</sup> what

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<sup>4</sup> On September 10th, 2014, President Obama announced that combat efforts in Iraq and Syria would be joined by a Coalition of over 60 nations, providing various means of support to the combat effort. See Kathleen McNinis, *Coalition Contributions to Countering the Islamic State*, CRS REPORT R44135, 24 (Aug. 2016), <https://fas.org/sgp/crs/natsec/R44135.pdf>.

<sup>5</sup> If there are any similarities between this scenario and actual operations in Syria, they are coincidental.

<sup>6</sup> See, e.g., U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 5.8.3 (2016) [hereinafter DOD LAW OF WAR MANUAL] ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent" (citing *Al-Adahi v. Obama*, 613 F. 3d 1102, 1108 (D.C. Cir. 2010)); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 7, at 27–28 (Nils Melzer ed., 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE] (discussing how members of organized armed groups in a non-international armed conflict lose protections against direct attack); see also Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT'L L. STUD. 119, 137 (2012) ("there is no LOAC prohibition on attacking members of organized armed groups at any time. . . .").



remains unsettled is when an individual is a targetable member of such a group. Thus, in the hypothetical vignette, the difficulty is not in deciding whether the U.S. can target the ISIS Commander, but rather whether the brother is also a targetable member of ISIS. Answering this question is important for ensuring State actors, engaged in hostilities with non-State armed groups during a NIAC, are capable of complying with the principle of distinction<sup>7</sup> as well as with their general obligation to protect civilians in the area of hostilities.<sup>8</sup>

There are various legally defensible views on how best to answer this question. Yet, in determining which approach is most reasonable, it is worth noting that the "challenging and complex circumstances of contemporary warfare"<sup>9</sup> require targeting guidance that is easily communicated to the State's armed forces. An approach that is impractical in application will not foster compliance and will create greater risk for the civilian population in these conflicts.

Therefore, in order to strengthen "the implementation of the principle of distinction"<sup>10</sup> in an era of increasingly powerful non-State actors and concomitant violent NIACs,<sup>11</sup> this article seeks to find a targeting approach that is both legal and practical to implement.

The article begins with a background section discussing OAGs, such as ISIS, and the consequences of membership in such a group. A survey of the various methods of determining OAG membership, and the practical applicability of each approach to ISIS, follows. Based upon this comparison, the article concludes that more restrictive membership criteria create an unworkable paradigm that does not match the realities of the modern battlefield. Instead, an expansive understanding of who qualifies as a member of an OAG is not only practical, but necessary for providing underlying support for the principle of distinction in non-international armed conflicts.

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<sup>7</sup> See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (stating that parties to the conflict must "distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.").

<sup>8</sup> See *id.* art. 51(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] ("Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.").

While the United States has not ratified AP I or AP II, many portions of the protocol are considered customary international law, including the protection of civilians during conflict and the principle of distinction. See generally Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987).

<sup>9</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 6.

<sup>10</sup> *Id.* at 6.

<sup>11</sup> See, e.g., Shane Reeves, *What Happens When States No Longer Govern?*, LAWFARE (Feb. 13, 2017), <https://www.lawfareblog.com/what-happens-when-states-no-longer-govern>.

## I.

## STATUS-BASED TARGETING OF “OTHER” ORGANIZED ARMED GROUPS IN A NON-INTERNATIONAL ARMED CONFLICT

A. *What is an “Organized Armed Group” (OAG)?*

During a NIAC, Common Article 3 to the 1949 Geneva Conventions<sup>12</sup> is applicable to “each Party to the conflict.”<sup>13</sup> Common Article 3 provides no further guidance on party status, only distinguishing between individuals who are taking an “active part in hostilities” and those who are not.<sup>14</sup> Clarification on who qualifies as a “Party to the conflict” in a NIAC is provided by Article 1(1) of the 1977 Additional Protocol II,<sup>15</sup> which states:

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<sup>12</sup> There are roughly twelve “common” articles found in the Geneva Conventions. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR*, 84–85 (2010). Common Article 3, which is repeated verbatim in all four Geneva Conventions, establishes the “law trigger for application of all treaty and customary international law related to” non-international armed conflicts. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC I]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also GEOFFREY S. CORN, *Legal Classification of Military Operations*, in *U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE* 74 (Geoffrey S. Corn, et al. eds. 2016).

<sup>13</sup> See GC III, *supra* note 12, art. 3 (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . .”).

<sup>14</sup> See *id.* (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . .”).

<sup>15</sup> Again, while the U.S. has not ratified Additional Protocol II many of its provisions are considered customary international law. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79, 82 (July 8); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 54, ¶ 218 (June 27); Schmitt, *supra* note 6, at 119 (noting that certain individual provisions of Additional Protocol II are customary); ICRC, *Non-international armed conflict*, in *How Does Law Protect in War?*, [https:// casebook.icrc.org/law/non-international-armed-conflict](https://casebook.icrc.org/law/non-international-armed-conflict) (last visited Oct. 30, 2017) (“The ICRC Study on customary international humanitarian law has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflicts (Art. 3 common to the Conventions and Protocol II in particular).”).

[t]his Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>16</sup>

Thus, Additional Protocol II clearly anticipates non-State groups acting as a party to a NIAC.<sup>17</sup> In particular, the text specifies that, in addition to a State party, other parties to the conflict could include "dissident armed forces" or "other organized armed groups."<sup>18</sup> While it is outside the scope of this article to analyze the "dissident armed forces" language of this provision, it is enough to note this is "the most straightforward category of opposition forces" in a NIAC.<sup>19</sup>

In contrast, "other organized armed groups" only qualify as a "Party to the conflict" if they are "under responsible command" and exercising territorial control such that they can "carry out sustained and concerted military operations."<sup>20</sup> Providing further granularity on what characterizes "sustained and concerted military operations," Article 1(2) makes Additional Protocol II inapplicable to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."<sup>21</sup> Relying on this language, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined a NIAC as "protracted armed violence between governmental authorities and organized armed groups."<sup>22</sup> Assuming the conflict meets the requisite

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<sup>16</sup> AP II, *supra* note 8, at art. 1(1).

<sup>17</sup> Additional Protocol II is not as widely applicable as Common Article 3 since it is only triggered if there is involvement of a State armed group (versus a non-international armed conflict exclusively between non-State actors) and the group opposed to the government controls territory. *Compare* GC III, *supra* note 12, art. 3 with AP II, *supra* note 8, art. 1(1). *See also* YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4447 (1987) [hereinafter COMMENTARY] ("In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict."). While these differences "bear on the law that applies to a conflict" it does not alter the status of the participants. Schmitt, *supra* note 6, at 120.

<sup>18</sup> AP II, *supra* note 8, at art. 1(1).

<sup>19</sup> Schmitt, *supra* note 6, at 124. *See id.* 124-26 for an explanation on why "dissident armed forces" are easy to identify. It is also important to note that a civilian that directly participates in the hostilities will forego the protections typically afforded them in a NIAC. *See* AP II, *supra* note 8, at art. 13.3 (noting that civilians are protected "unless and for such time as they take a direct part in hostilities."). *See also* ICRC INTERPRETIVE GUIDANCE, *supra* note 6 at 25 (describing this category as those "who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis").

<sup>20</sup> AP II, *supra* note 8, at art. 1(1).

<sup>21</sup> *Id.* at art. 1(2).

<sup>22</sup> Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Professor Schmitt notes

intensity,<sup>23</sup> the question then becomes under what conditions a collection of fighters can be labeled an “organized armed group” (OAG)?

There appears to be great flexibility in this determination, as the law of armed conflict (LOAC) accepts a broad definition of an OAG.<sup>24</sup> As noted above, Additional Protocol II, Article 1(1) requires the group to be “under responsible command,”<sup>25</sup> a phrase “explicatory of the notion of organization.”<sup>26</sup> An OAG, according to the Commentary to the Article, should be an “organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.”<sup>27</sup> Yet, this does not mean “that there is a hierarchical system of military organization similar to that of regular armed forces.”<sup>28</sup> In fact, the International Committee of the Red Cross (ICRC) notes that only minimal organization is necessary.<sup>29</sup>

While there may not be a “rigid, itemized checklist” of criteria that qualifies a group as an OAG,<sup>30</sup> the ICTY does offer helpful factors for making this determination. In the 2005 case of *Limaj*,<sup>31</sup> the ICTY specifically identified the following factors of the Kosovo Liberation Army as persuasive in determining its status as an OAG: the existence of a general staff and headquarters, designated military zones, adoption of internal regulations, the appointment of a spokesperson, coordinated military actions, recruitment activities, the wearing of uniforms and negotiations with the other side.<sup>32</sup> Similarly, in the case of

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that the ICTY definition of a NIAC thus “created a test combining intensity and organization which has been adopted in the Rome Statute of the International Criminal Court.” Schmitt, *supra* note 6, at 127 (citing Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90) (defining a NIAC as taking “place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”). The Tadic definition of a NIAC is generally considered customary international law. *See, e.g.*, International Committee of the Red Cross (ICRC) Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 5 Mar. 2008.

<sup>23</sup> *See* Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining “Organized Armed Groups,”* 89 INT’L L. STUD. 54, 65 (2013) (offering an excellent discussion on how to best interpret the ICTY’s use of the term “protracted armed violence.”).

<sup>24</sup> *Id.* at 62.

<sup>25</sup> AP II, *supra* note 8, art 1(1).

<sup>26</sup> Schmitt, *supra* note 6, at 128.

<sup>27</sup> COMMENTARY, *supra* note 17, at 1352, ¶ 4463.

<sup>28</sup> *Id.*

<sup>29</sup> *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, *HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW?* 5 Mar. 2008, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (stating “as to the insurgents, the hostilities are meant to be of a collective character, [i.e.] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation.”).

<sup>30</sup> Margulies, *supra* note 233, at 62.

<sup>31</sup> Prosecutor v. *Limaj*, Case No. IT-03-66-T, Judgment, 1 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj*] at 37, ¶ 90.

<sup>32</sup> Schmitt, *supra* note 6, at 129 (citing *Limaj*).

*Haradinaj*,<sup>33</sup> the ICTY again looked at various factors to determine the existence of an organized armed group. These factors included:

the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>34</sup>

An analysis of these two ICTY cases indicate that an OAG, at minimum, should exhibit a degree of structure and be able to act in a coordinated fashion.<sup>35</sup> More specifically, "a group that is transitory or ad hoc in nature does not qualify; in other words, an organized armed group can never simply consist of those who are engaged in hostilities against the State, *sans plus*. It must be a distinct entity that the other side can label the 'enemy' . . . ."<sup>36</sup> However, it is worth highlighting again that the ICTY did not consider any "single factor [as] necessarily determinative" of a group being organized.<sup>37</sup>

A group that is sufficiently "organized" must also be "armed" to qualify as an OAG. "Logically, a group is armed when it has the capacity to carry out 'attacks'"<sup>38</sup> which are defined as "acts of violence against the adversary, whether in offence or in defence."<sup>39</sup> Professor Schmitt notes that "[s]uch acts must be based on the *group's* intentions, not those of individual members. This conclusion derives from the fact that while many members of the armed forces have no violent function, the armed forces as a whole are nevertheless 'armed' as a matter of LOAC."<sup>40</sup> In situations where a group is not directly conducting an attack, but takes action that would be construed as directly participating in hostilities, "it is a reasonable extrapolation to conclude" that the group meets the criteria for being "armed."<sup>41</sup> Examples may include those who collect tactical intelligence to be

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<sup>33</sup> Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), surveying Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also Schmitt, *supra* note 6, at 129.

<sup>34</sup> Prosecutor v. Haradinaj, *supra* note 33, at ¶ 60.

<sup>35</sup> See Schmitt, *supra* note 6, at 129–30.

<sup>36</sup> *Id.* at 129.

<sup>37</sup> *Id.* at 129 (citing *Haradinaj*).

<sup>38</sup> *Id.* at 131.

<sup>39</sup> AP I, *supra* note 7, at art. 49(1).

<sup>40</sup> See Schmitt, *supra* note 6, at 131. To support this proposition Professor Schmitt draws an analogy to Additional Protocol I Article 43.2 which categorizes "member of the armed forces" as "combatants . . . [who] have the right to participate directly in hostilities," AP I, *supra* note 7, at art. 43.2, "not as individuals who do so participate." Schmitt, *supra* note 6, at n.72. Therefore, it is the group's activities that matter, "not those of select members." *Id.*

<sup>41</sup> Schmitt, *supra* note 6, at 131 (explaining that "to the extent that acts constituting direct participation render individual civilians subject to attack" it can be concluded that "a group with a purpose of directly participating in hostilities" is also armed).

used by another group in carrying out an attack<sup>42</sup> or those who provide weapons for use in an immediate attack.<sup>43</sup> Thus, similar to the term “organized,” the definition of “armed” does not appear to be narrowly construed.

Applying the “organized” and “armed” criteria to a contemporary organization is helpful for illustrating the parameters of an OAG. Perhaps no current non-State actor is more relevant to this exercise than ISIS. Therefore, an application of the OAG criteria to ISIS follows.

### *B. Contemporary Example of an OAG: ISIS*

ISIS’s ideological and organizational roots are traced to disenfranchised Sunnis who, led by Abu Musab al Zarqawi, grouped together to fight the U.S. and the newly established Iraqi government from 2002-2006.<sup>44</sup> Though Zarqawi was killed by U.S. forces in 2006, the group continued their violent activities, eventually evolving into ISIS.<sup>45</sup> “By early 2013, the group was conducting dozens of deadly attacks a month inside Iraq and had begun operations in neighboring Syria.”<sup>46</sup> In June 2014, ISIS declared their intent to re-form a caliphate across large swaths of land in the Middle East, claimed Raqqa, Syria as their capital, and named Abu Bakr al Baghdadi (a former U.S. detainee) as caliph and imam.<sup>47</sup> Heavily armed—as evidenced by their ability to conduct sustained military operations against the U.S. and Coalition partners<sup>48</sup>—ISIS has gone about establishing their caliphate through force, abductions, sexual slavery, beheadings, and public executions.<sup>49</sup> While recent battlefield losses have significantly shrunk

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<sup>42</sup> *See id.*

<sup>43</sup> *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 55–56 (stating that “[t]he delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities” (citation omitted)).

<sup>44</sup> Blanchard & Humud, *supra* note 1, at 18.

<sup>45</sup> *Id.* *See also* Howard Shatz and Erin-Elizabeth Johnson, *The Islamic State We Knew: Insights Before the Resurgence and Their Implications*, RAND CORPORATION, 5–6 (2015), [https://www.rand.org/pubs/research\\_reports/RR1267.html](https://www.rand.org/pubs/research_reports/RR1267.html).

<sup>46</sup> Blanchard & Humud, *supra* note 1, at 18.

<sup>47</sup> *See id.*

<sup>48</sup> *See, e.g.*, Tom O’Connor, *War in Iraq: Islamic State Collapses as Military Kills ISIS Commander in West Mosul*, NEWSWEEK (May 10, 2017), <http://www.newsweek.com/war-iraq-islamic-state-military-kill-isis-commander-mosul-607055> (discussing a recent combat operation where ISIS used suicide bombers and sniper fire against the U.S. and its coalition partners); Jeremy Wilson, Jeremy Bender & Armin Rosen, *These are the weapons Islamic State fighters are using to terrify the Middle East*, BUSINESS INSIDER (Jan. 17, 2016), <http://www.businessinsider.com/isis-military-equipment-arsenal-2016> (discussing heavy weaponry possessed by ISIS including tanks, armored vehicle, self-propelled artillery, rocket launchers, as well as other equipment).

<sup>49</sup> Office of the UN High Comm’r for Human Rights (OHCHR) and UN Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015, at 8-20 (Jan. 19, 2016), <http://reliefweb.int/report/iraq/report-protection-civilians-armed-conflict-iraq-1-may-31-october-2015-enar> [hereinafter Report on the Protection of Civilians in the Armed Conflict in Iraq]. *See also* Shatz & Johnson, *supra* note 455, at 3.

the area under ISIS dominance,<sup>50</sup> the group continues to control territory and govern a small group of civilians under a strict version of Sharia law.<sup>51</sup>

The ISIS organizational structure is built around five main pillars: security, sharia, military, administration, and media.<sup>52</sup> Emphasis on each of these pillars allows ISIS to gain, and then maintain, control of territory.<sup>53</sup> In describing the sophisticated organization of ISIS, a RAND study notes that “[t]he group was (and is) bureaucratic and hierarchical. Lower-level units reported to upper-level units, and units shared a basic structure in which upper-level emirs were responsible for security, sharia, military, and administration in a particular geographic area.”<sup>54</sup> Further, “[t]hese emirs worked with departments or committees and managed a layer of sector emirs and specialized emirs at lower levels. This structure created a bench of personnel knowledgeable about managing a terrorist group that intended to become a State.”<sup>55</sup>

As part of this organizational structure, individuals pledge an oath to ISIS and specifically to its leader, Abu Bakr al Baghdadi.<sup>56</sup> The oath of allegiance, called *bay’ah*, is common to the Islamic world. This “[o]ath of allegiance to a leader,” is an “[u]nwritten pact given on behalf of the subjects by leading members of the tribe with the understanding that, as long as the leader abides by certain

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<sup>50</sup> For a map of the areas within Iraq and Syria controlled by ISIS at the time of writing, see Blanchard & Humud, *supra* note 1, at Fig. 1.

<sup>51</sup> *See, e.g., id.* at 26 (“The ideology of the Islamic State organization can be described as a uniquely hardline version of violent jihadist-Salafism—the group and its supporters are willing to use violence in an armed struggle to establish what they view as an ideal society based on their understanding of Sunni Islam.”); Shatz & Johnson, *supra* note 45, at 2 (“Clandestine campaigns of assassination and intimidation have been part of the group’s playbook for more than a decade.”).

<sup>52</sup> *See* Blanchard & Humud, *supra* note 1, at 10.

<sup>53</sup> For example, the RAND report describes the methodical process ISIS follows to gain control of territory:

establish an intelligence and security apparatus, target key opponents, and establish extortion and other criminal revenue-raising practices; establish administrative and finance functions and lay the foundation for command and control, recruiting, and logistics; establish a sharia network, building relations with local religious leaders; establish a media and information function; [and] establish military cells to conduct attacks.

Shatz & Johnson, *supra* note 45, at 10 (citing Pat Ryan, *AQI in Mosul: Don’t Count Them Out*, AL SAHWA (Dec. 15, 2009)).

<sup>54</sup> Shatz & Johnson, *supra* note 45, at 2.

<sup>55</sup> *Id.*

<sup>56</sup> *See* Reem Makhoul & Mark Scheffler, *Pledging Allegiance to ISIS: Real Oath or Empty Symbolism?*, WALL ST. J. (Nov. 13, 2014), <http://www.wsj.com/video/pledging-allegiance-to-isis-real-oath-or-empty-symbolism/7B2650B8-A534-4E97-B59F-0BF57BBB7AE9.html>; *see also* Blanchard & Humud, *supra* note 1, at 21 (“Since 2014, some armed groups have recognized the Islamic State caliphate and pledged loyalty to Abu Bakr al Baghdadi.”), and Priyanka Boghani, *What a Pledge of Allegiance to ISIS Means*, FRONTLINE (Nov. 12, 2014), <https://www.pbs.org/wgbh/frontline/article/what-a-pledge-of-allegiance-to-isis-means/> (discussing various terrorists groups from outside of Iraq and Syria pledging allegiance to ISIS and al-Baghdadi).

responsibilities towards his subjects, they are to maintain their allegiance to him.”<sup>57</sup> In the case of ISIS, when individuals and groups pledge *bay’ah* to the terrorist group, they are pledging an allegiance to the claim by ISIS that it can use any means necessary to reestablish the caliphate and that Abu Bakr al Baghdadi is “the caliph and imam (leader of the world’s Muslims).”<sup>58</sup> To dishonor the oath to ISIS and al Baghdadi will result in punishment.<sup>59</sup>

ISIS membership also requires vetting and mentoring from an established member.<sup>60</sup> During this vetting and indoctrination process, aspiring members are required to study selected books, publications, and fatwas provided by ISIS.<sup>61</sup> Upon completion of this initial phase, all potential members must attend Sharia Camp, followed later by military camp.<sup>62</sup> ISIS then assigns its members to various roles, all contributing to the overall mission of the group to establish their caliphate by whatever means necessary. If accepted into ISIS, members are expected to plan, coordinate, and carry out military actions against all those outside of the group including State military forces, State government officials and civilians.<sup>63</sup> As the excerpts from the RAND article evidence, even if an ISIS member operates in a seemingly non-military role, their actions contribute to the overall violent and combative nature of the organization which, again, has the ultimate goal to take over territory through any means.

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<sup>57</sup> Oxford Islamic Studies Online, Oxford University Press, at <http://www.oxfordislamicstudies.com/article/opr/t125/e316>.

<sup>58</sup> Blanchard & Humud, *supra* note 1, at 18 (“In June 2014, Islamic State leaders declared their reestablishment of the caliphate . . . demanded the support of believing Muslims, and named Abu Bakr al Baghdadi as caliph and imam . . .”). See also Thomas Joscelyn & Caleb Weiss, *Islamic State recognizes oath of allegiance from jihadists in Mali*, FDD’S LONG WAR JOURNAL (Oct. 31, 2016), <https://www.longwarjournal.org/archives/2016/10/islamic-state-recognizes-oath-of-allegiance-from-jihadists-in-west-africa.php>.

<sup>59</sup> Makhoul & Scheffler, *supra* note 566 (“Breaking a pledge is a considered a great sin and even if ISIS doesn’t punish you, God will.”).

<sup>60</sup> See generally Wissam Abdallah, *What it takes to join the Islamic State*, AL-MONITOR (Aug. 6, 2015), <http://www.al-monitor.com/pulse/politics/2015/08/syria-fighters-join-isis-apply-training-requirements.html> (articulating the intense, detailed and long process for joining ISIS including military training for all members of ISIS, even those who do not ultimately conduct direct attacks); John Graham, *Who Joins ISIS and Why?*, HUFFINGTON POST BLOG, [http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why\\_b\\_8881810.html](http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why_b_8881810.html) (addressing the “great lengths” that ISIS has gone to “to demonstrate to its members and recruits that the world of radical Islam is not just death and destruction but a 24/7 total support structure” as part of the continuing indoctrination of ISIS members); Alessandria Masi, *ISIS Recruiting Westerners: How the “Islamic State” Goes After Non-Muslims and Recent Converts in the West*, IB TIMES (Sept. 8, 2014), <http://www.ibtimes.com/isis-recruiting-westerners-how-islamic-state-goes-after-non-muslims-recent-converts-west-1680076> (describing how ISIS requires the establishment of an in-depth mentor-mentor relationship as part of the vetting process for Westerners who want to join ISIS).

<sup>61</sup> See Abdallah, *supra* note 600.

<sup>62</sup> *Id.*

<sup>63</sup> See generally Blanchard & Humud, *supra* note 1, at 21–25 (describing the various ISIS attacks around the world). See also Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49.



Based on the above information, ISIS is a hierarchical organization that is well-armed and qualifies as an OAG. Further, the group is currently participating in a number of NIACs<sup>64</sup> and is thus a "Party to the conflict." Accordingly, membership in ISIS, if established, results in the adverse consequences described below.

### C. Consequence of Being a Member of an OAG

In a NIAC an individual may be a civilian, part of the government's armed forces,<sup>65</sup> or a member of an OAG.<sup>66</sup> These are mutually exclusive categories, meaning members of an OAG are obviously not civilians.<sup>67</sup> This distinction is not unimportant as the protections extended to civilians by the LOAC will not apply to OAG members.<sup>68</sup> In particular, whereas civilians are only targetable "for such time as they take a direct part in hostilities,"<sup>69</sup> OAG members are "analogous to members of the armed forces, and thereby remain targetable even when not participating" in the hostilities.<sup>70</sup> In other words, a civilian's *conduct* determines whether they are targetable, whereas a member of an OAG is targetable "at any

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<sup>64</sup> See generally David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict*, 25 MICH. ST. INT'L L. REV. 555 (2017).

<sup>65</sup> See generally Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT'L L. STUD. 145 (2012) (discussing this particular battlefield status).

<sup>66</sup> See DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1 (citing Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INT'L L. STUD. 188, 193 n.22 (2012)).

The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as "civilians" to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.

*Id.* For a detailed discussion on whether "organized armed groups other than the dissident armed forces comprise groups who are directly participating in hostilities or constitute a separate category of 'non-civilians,'" see also ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 28; Schmitt, *supra* note 6, at 127.

<sup>67</sup> See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1.

<sup>68</sup> See Schmitt, *supra* note 6, at 128 ("for if members of an organized armed group are not civilians, the LOAC extending protection to civilians is inapplicable to them.").

<sup>69</sup> AP II, *supra* note 8, at art. 13(3).

<sup>70</sup> Schmitt, *supra* note 6, at 127. See DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent."); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20 (Dec. 2016) [hereinafter REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE] (discussing the U.S. approach to targeting individuals in a NIAC).

time during the period of their membership,”<sup>71</sup> and thus is vulnerable to attack due to their status as a member of the group.<sup>72</sup>

Additionally, as there is no prisoner of war regime or concept of “combatant immunity” in a NIAC,<sup>73</sup> an OAG member upon capture “may be put on trial for treason or other crimes, and heavily punished.”<sup>74</sup> These prosecutions are not restricted to only violations of the LOAC or war crimes, but also “for any acts that violate domestic law” including “attacking members of the armed forces.”<sup>75</sup> Of course basic rights, such as due process and protection from summary execution, apply to these proceedings,<sup>76</sup> as an OAG member is treated as any other domestic criminal for their participation in the NIAC.

The consequences of being a member of ISIS, particularly exposure to status-based targeting and prosecution for engaging in combat operations, are significant. But what makes an individual a targetable member of ISIS? For example, is swearing an oath of loyalty to al Baghdadi, being listed on an

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<sup>71</sup> Schmitt, *supra* note 6, at 132.

<sup>72</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.1 stating:

Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities . . . This is because the *organization’s hostile intent may be imputed to an individual through his or her association with the organization*. Moreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group. Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack. For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.

*See also* Rachel E. VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 105 (2013) (“[B]ecause the belligerent is presumptively hostile at all times, this allows the direct attack of fighters, *once properly identified as such*, at any time during an armed conflict, whether or not they are doing anything related to hostilities at the time. . .”).

<sup>73</sup> *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.6.1 (2004) [hereinafter UK MANUAL] (“The law relating to internal armed conflict does not deal specifically with combatant status. . .”); DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing how members of a non-State armed group are not afforded combatant immunity).

<sup>74</sup> Michael N. Schmitt, Charles H.B. Garraway, & Yoram Dinstein, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 41 (International Institute of Humanitarian Law, 2006) [hereinafter NIAC MANUAL] (noting “[i]t should be understood, however, that trial and punishment must be based on due process of law”).

<sup>75</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing a State’s power to prosecute non-State actors in a NIAC for their actions under domestic law); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (stating “[a] captured member of dissident fighting forces is not legally entitled to prisoner of war status”); *see also* Schmitt, *supra* note 6, at 121 (“[T]here is no prisoner of war regime in the context of a non-international armed conflict.”).

<sup>76</sup> *See* UK MANUAL, *supra* note 733, at ¶ 15.6.4 (“Nevertheless, the law of non-international armed conflict clearly requires that any person . . . detained by either dissident or government forces must be treated humanely”); NIAC MANUAL, *supra* note 744, at 41; *see also* GC III, *supra* note 122, at art. 3.

authenticated ISIS membership roster, or enforcing the group’s strict form of sharia law in captured territory evidence enough for status-based targeting?<sup>77</sup> More broadly, what qualifies an individual as a member of an OAG versus simply being affiliated with such a group? There are a number of proposed answers to this question which are discussed in the following section.

## II.

### SURVEYING THE FIELD: APPROACHES TO DETERMINING MEMBERSHIP IN AN OAG

Again, membership in an OAG makes an individual vulnerable to the consequences associated with such a status.<sup>78</sup> The LOAC provides minimal guidance on who qualifies as a member of an OAG,<sup>79</sup> leaving much discretion to States’ armed forces when making these decisions.<sup>80</sup> In an effort to address this ambiguity, and to clarify the line separating civilian and conflict participant, various approaches to determining OAG membership have emerged.

#### A. Continuous Combat Function (CCF)

The ICRC’s *Interpretive Guidance* offers a narrow interpretation of who qualifies as a member of an OAG. The *Guidance* provides that a non-State party involved in a NIAC, similar to the State party, may have a component that is separate and distinct from the armed faction “such as political and humanitarian wings.”<sup>81</sup> Only those acting as the fighting forces or armed wing of the non-State party are potentially considered members of the OAG and therefore non-civilians.<sup>82</sup> Furthermore, there “may be various degrees of affiliation with [the non-State] group that do not necessarily amount to ‘membership’ within the meaning of [International Humanitarian Law] IHL.”<sup>83</sup> Affiliation may turn on “individual choice . . . involuntary recruitment . . . [or] on more traditional notions of clan or family.”<sup>84</sup> Thus, according to the *Guidance*, there are a number of

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<sup>77</sup> See generally Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49, at 5-20.

<sup>78</sup> See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1; ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22 (explaining why individual members of an OAG should not be considered civilians); Schmitt, *supra* note 6, at 127-28 (supporting the Interpretive Guidance’s distinction between civilians and members of an OAG).

<sup>79</sup> See COMMENTARY, *supra* note 177, at 512 ¶ 1672 (“The term ‘organized’ . . . should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.”).

<sup>80</sup> See VanLandingham, *supra* note 72, at 117.

<sup>81</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 32.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 33.

<sup>84</sup> *Id.*

individuals affiliated in some capacity with the non-State party that are not members of the OAG.<sup>85</sup>

To help make this nuanced distinction, the *Guidance* notes that the “decisive criteria . . . is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”<sup>86</sup> More specifically, an individual must demonstrate a “continuous combat function” (CCF) to qualify as a member of an OAG.<sup>87</sup> In outlining the parameters of the concept the *Guidance* states: “[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.”<sup>88</sup>

“Lasting integration” through a CCF does not include those “persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life.”<sup>89</sup> Additionally, those who “continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities” are also not in a CCF.<sup>90</sup> These individuals, while clearly contributing to the OAG’s efforts, are considered civilians.<sup>91</sup> “As civilians, they benefit from protection

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<sup>85</sup> *Id.* at 34 (stating “[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL”).

<sup>86</sup> *Id.* What qualifies as “direct participation in hostilities” is debatable and outside the scope of this article. Compare ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 5-6 (“The Interpretive Guidance provides a legal reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle distinction.”) with Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 N.Y.U.J. INT’L L. & POL. 641, 646 (No. 3, 2010) and Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT. SEC. J. 1, 5 (May 2010) (criticizing the Interpretive Guidance legal reading of the term).

<sup>87</sup> See Schmitt, *supra* note 6, at 132 (“[B]y the *Guidance* standard only those with a continuous combat function may be treated as members of an organized armed group and therefore attackable at any time during the period of their membership.”).

<sup>88</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 34. Further clarifying what qualifies as a CCF, the *Guidance* states:

Individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

*Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* More specifically, according to the *Guidance*, these individuals:

against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury."<sup>92</sup>

### B. Conduct-Link-Intent Test

Finding the ICRC's *Interpretive Guidance* test too restrictive, but recognizing that "today's enemy groups lack obvious indicia of targetable membership, and the LOAC provides no methodology for its ascertainment,"<sup>93</sup> Professor VanLandingham offers an alternative analysis. Making an analogy to criminal law statutes, Professor VanLandingham develops three criteria that an individual must satisfy to qualify for OAG membership.<sup>94</sup> First, the conduct exhibited by the individual must fall within an express listing of categories of eligible conduct.<sup>95</sup> This categorization would "help standardize and clarify the identification process, using behavior that has been shown to indicate membership as an analytical start point."<sup>96</sup> The list of conduct, akin to that provided in a U.S. criminal statute, would "force decision-makers to use a defensible, objective template."<sup>97</sup>

Second, an express associative link between the individual's conduct and the OAG is required.<sup>98</sup> While requiring identification of the conduct-associate link may seem inherent in the eligible conduct list, "carving it out as an express element ensures that purely independent action is not mistakenly included."<sup>99</sup> Further, an associative link "challenges assumptions that may be present in the

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remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.

*Id.*

<sup>92</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 35.

<sup>93</sup> VanLandingham, *supra* note 72, at 137.

<sup>94</sup> *Id.* at 125–28.

<sup>95</sup> *See id.* at 136 ("For example, staying in a known Al-Qaeda guesthouse has been viewed as conduct that indicates Al-Qaeda membership").

<sup>96</sup> *Id.* at 137.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* ("For example, the associative link in staying in an Al-Qaeda guesthouse is the assessment that it is indeed such a guesthouse").

<sup>99</sup> *Id.* at 137.

type of conduct being analyzed”<sup>100</sup> by requiring decision-makers to explain why the activity has been so labeled. Third, the individual must have the specific intent to further the group’s violent ends via group orders, which can be inferred from particular types of conduct.<sup>101</sup> Therefore, it is not enough to passively support the OAG, but rather, there must be a willingness to carry out the group’s commands.<sup>102</sup>

Application of this conduct-link-intent test would most likely increase the number of individuals considered members of an OAG and, consequently, broaden the population exposed to the consequences of such membership. However, an elements-based analysis of OAG membership that resembles a criminal statute reduces flexibility in making these determinations, particularly for commanders making real-time targeting decisions. Another approach for determining OAG membership, discussed next, is to “treat all armed forces the same.”<sup>103</sup>

### C. Structural Membership

As both States and non-State actors execute warfare through “the exercise of command, planning, intelligence, and even logistics functions,” a structural membership approach argues that there is no reason to distinguish between a State’s regular armed forces and “irregular” armed forces.<sup>104</sup> In fact, OAGs typically “have a membership structure based on more than mere function”<sup>105</sup> as “it is [the] organization which fights as a group.”<sup>106</sup> Therefore, “individuals are simply members of armed forces regardless of which party to a conflict they fight for, the domestic law basis of their enrollment, or whether they wear a uniform.”<sup>107</sup> All that is necessary for the consequences of OAG membership to attach to an

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<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 137-38. This criteria therefore

requires an inquiry into why the individual acted the way he did; for example, why the individual planted an IED, provided transportation, or provided lodging. Was he paid to do so, and therefore the answer is for financial gain to feed his family? Or did he do so out of the desire to see the group achieves its objectives via violent means and because he was asked or told to do so by others in the group.

*Id.* at 138.

<sup>102</sup> *Id.* (noting that those unwilling to carry out the OAG’s command do “not symbolically represent the group.”).

<sup>103</sup> *See generally* Watkin, *supra* note 866, at 690. Brigadier General Watkin retired as the Judge Advocate General of the Canadian Forces in 2010 and wrote his article in response to the ICRC’s Interpretive Guidance.

<sup>104</sup> *Id.*

<sup>105</sup> Schmitt, *supra* note 6, at 132.

<sup>106</sup> Watkin, *supra* note 866, at 691.

<sup>107</sup> *Id.* at 690–691.

individual is whether they are “a member of an organization under a command structure.”<sup>108</sup>

Of course, not all individuals sympathetic or affiliated with the group are subject to status-based targeting.<sup>109</sup> One who generically creates propaganda or broadly finances the OAG, without more, is not under command or filling a traditional military role.<sup>110</sup> The assumption is, therefore, they are not part of the OAG and are civilians. Again, the key factor “in determining if a person can be attacked is whether the individual is a member of the armed forces . . . under a command responsible for the conduct of its subordinates.”<sup>111</sup> It is also important to note, from an operational perspective, the Rules of Engagement (ROE) establish left and right parameters on who is within the OAG.<sup>112</sup>

There may also be individuals, in the command structure, not subject to the adverse consequences of their membership. For example, those who are exclusively in the role of a spiritual leader or doctor would be comparable to chaplains or medical personnel in a State’s armed forces and therefore not targetable.<sup>113</sup> Finally, protections extend to those civilians who “provide services

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<sup>108</sup> *Id.* at 691.

<sup>109</sup> For example, the Israeli Defense Force (IDF) agrees that members of an OAG are subject to status-based targeting and also recognizes that there may be military and non-military wings of a non-State actor. *See* Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 55, 113 (2017). Those who are part of the non-military branch are subject to targeting if they directly participate in hostilities. *See id.* at 113–14. To help clarify what “direct participation in hostilities” includes the IDF maintains a list of activities that meet this definition. *See id.* Of course it is “impossible for the list to contain all possible forms of direct participation. . . . Therefore, if a commander of an Attack Cell believes an individual is directly participating but the activity concerned does not appear on the list, the commander may elevate the matter to higher authorities for authorization to strike.” *Id.*

<sup>110</sup> *See id.* at 107 (discussing why the IDF has taken the position that having a role in generating propaganda or promoting morale does not deprive an individual of civilian status).

<sup>111</sup> *See* Watkin, *supra* note 866, at 691.

<sup>112</sup> Rules of engagement are defined as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” JOINT CHIEFS OF STAFF, JOINT PUB’N 1-02, DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 472 (2001). In particular, the ROE “establish fundamental policies and procedures governing the actions to be taken by US commanders” during a military operation. JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A, at 95 (2005). Combining operational requirements, policy, and international law therefore make the ROE more restrictive than the law of armed conflict. Supplemental measures, which “enable commanders to tailor ROE for specific missions,” are the recognized tool to implement restrictions on the use of force for particular “political and military goals that are often unique to the situation.” *Id.* app. A, at 99.

<sup>113</sup> *See* GC I, *supra* note 12, at art. 24.

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

such as selling food under contract or otherwise much like civilian contractors working with regular State armed forces” unless “and for such time as they participate directly in hostilities.”<sup>114</sup>

Focusing on the membership structure is therefore like other targeting principles in that it provides a definitional framework allowing for command discretion. For example, Additional Protocol I, Article 52(2), in regards to targeting military objectives, States “[a]ttacks shall be limited strictly to military objectives.”<sup>115</sup> The protocol goes on to give broad contours of what is considered a military objective without attempting to provide specific examples.<sup>116</sup> Similarly, under this approach, OAG membership, like an individual’s status in a regular State armed force, is possible to confirm in a number of ways. Indicia of membership would include “carrying out a combat function” such as being involved in “combat, combat support, and combat service support functions, carrying arms openly, exercising command over the armed group, [or] carrying out planning related to the conduct of hostilities.”<sup>117</sup> However, “the combat function is not a definitive determinant of whether a person is a member of an armed group, but rather one of a number of factors that can be taken into consideration.”<sup>118</sup>

The *Department of Defense Law of War Manual* provides guidance for U.S. forces to determine membership by offering non-exhaustive lists of both “formal” and “informal” indicators. Formal indicators, also called “direct information” include: “rank, title, style of communication; taking an oath of loyalty to the group or the group’s leader; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents issued or belonging to the group that identify the person as a member... .”<sup>119</sup> Informal factors that help determine OAG membership include:

acting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State’s armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or

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*Id.* While Article 24 is only applicable in an IAC it is valuable for this discussion as it helps establish the status parameters of OAG members.

<sup>114</sup> Watkin, *supra* note 86, at 692.

<sup>115</sup> AP I, *supra* note 7, at art. 52(2).

<sup>116</sup> *See id.* (“In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”).

<sup>117</sup> Watkin, *supra* note 86, at 691.

<sup>118</sup> *Id.*

<sup>119</sup> DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3.1. The first set of factors focus on documents illustrating membership, while the second set focuses on direct observation of certain activities that may indicate membership. The Manual makes clear that these lists provide illustrative examples and are not exhaustive.



bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; or traveling with members of the group in remote locations or while the group conducts operations.<sup>120</sup>

Membership, therefore, includes more than just those engaging in an attack or carrying out a combat function.<sup>121</sup> Rather, what is important is whether the individual is “carrying out substantial and continual integrated support functions.”<sup>122</sup> Or, to put it more simply, an individual who is under command, acting in a traditional military role, is subject to the adverse consequences of being an OAG member—in particular, status-based targeting.<sup>123</sup> Recognizing a member of an OAG is often not difficult as these groups consistently distinguish themselves from the civilian population.<sup>124</sup> However, in more difficult situations,

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<sup>120</sup> *Id.*

<sup>121</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3 (“individuals who are formally or functionally part of a non-State armed group” are subject to attack); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 700, at 20. *See also* Watkin, *supra* note 86, at 691–92 (“Someone who provides logistics support as a member of an organized armed group, including cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces.”)

<sup>122</sup> *Id.* at 644.

<sup>123</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 700, at 29.

To determine whether an individual is “part of” an enemy force, the United States may rely on either a formal or function analysis of the individual’s role in that enemy force (citation omitted). . . . [S]uch a functional analysis may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

*Id.* ISIS members, for example, who recruit or are involved in logistics are comparable to military recruiters and logisticians and would therefore be considered targetable by the United States. *See* DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 (“Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent (citation omitted).”)

<sup>124</sup> *See generally* Simon Tomlinson, *From the ‘Afghani robe’ to the suicide bomber’s all-black uniform, how ISIS differentiates between ranks and various outfits*, DAILYMAIL.COM (Sept. 29, 2015, 10:14 AM), <http://www.dailymail.co.uk/news/article-3253113/From-Afghani-robe-suicide-bomber-s-black-uniform-ISIS-differentiates-ranks-various-outfits.html> (explaining how ISIS has corresponding uniforms for each of its units and describing the various outfits). These groups are often in a command structure, have a “fixed distinctive sign recognizable at a distance,” and carry their arms openly. In an international armed conflict these are all indications of a militia which, if belonging to a Party to the conflict, have met three of the four criteria to be considered combatants. *See* GC III, *supra* note 12, at art. 4(A)(2). However, rarely, if ever, do these groups comply with the four criteria which is to “conduct their operations in accordance with the laws and customs of war.” *Id.* Regardless, these groups show many characteristics of a State’s regular armed forces. *See* Schmitt, *supra* note 6, at 132 (“For example, the Red Army, Hamas, Hezbollah, FARC, Tamil Tigers and Kosovo Liberation Army were often distinguishable from the civilian population and operated in a manner not unlike the regular armed forces.”)

intelligence may confirm membership.<sup>125</sup> Confirmation methods may include human sources, communications intercepts, captured documents, interrogations, as well as a myriad of other available tools.<sup>126</sup> If it is not possible to make such a determination than that person “shall be considered to be a civilian” and afforded the appropriate protections.<sup>127</sup>

### III.

#### WHAT OAG MEMBERSHIP DETERMINATION APPROACH BEST WORKS ON THE CONTEMPORARY NIAC BATTLEFIELD

This section is not intended to re-hash the debates that immediately followed the 2009 release of the ICRC’s *Interpretive Guidance*.<sup>128</sup> Instead, the following analysis is offered to illustrate which of the above described approaches best addresses the realities of a contemporary NIAC. In doing so, the hope is to provide clarity as to where the line lies between a civilian and a member of an OAG, therefore decreasing mistakes as to an individual’s battlefield status. Again, applying facts from the current conflicts involving ISIS is illustrative.

##### A. *The CCF and the Danger of Good Intentions*

The CCF criteria, which sets “a high bar for membership,” appears “to afford the civilian population enhanced protection from mistaken attacks” by narrowly interpreting who is an OAG member.<sup>129</sup> This restrictive interpretation would thus seem to result in additional protections for civilians by severely limiting those who have met membership criteria. However, in fact, the CCF approach potentially puts civilians at greater risk. By contrasting those who serve in combat functions against others closely aligned with the OAG, the CCF criteria creates a category of “members of an organized armed group who do not directly

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<sup>125</sup> See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3–4; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 70, at 20; Watkin, *supra* note 86, at 692.

<sup>126</sup> See, e.g., REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 700, at 20 (“the United States considers all available information about a potential target’s current and historical activities to inform an assessment of whether the individual is a lawful target”); Schmitt, *supra* note 6, at 132.

<sup>127</sup> AP I, *supra* note 7, at art. 50(1). The rule is generally considered customary in both an IAC and NIAC. See Schmitt, *supra* note 6, at 133 (citing 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 23-24 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005.)) However, the United States rejects the Additional Protocol definition of “combatant” as it is viewed as relaxing “the requirements for obtaining the privilege of combatant status” thus undercutting the principle of distinction. DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 4.6.1.2, 4.8.1.4.

<sup>128</sup> See generally Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637, 637–640 (2010) (introducing a number of articles written by prominent LOAC and military experts that are critical of the *Interpretive Guidance*).

<sup>129</sup> See Schmitt, *supra* note 6, at 132.

participate in hostilities."<sup>130</sup> These individuals, in effect, "allow the entire civilian population to become conflated with the enemy, and exposes all civilians to greater risk."<sup>131</sup>

A short discussion on the evolution of the definition of "protracted armed violence" illustrates the danger of a narrow view on who qualifies as an OAG member. In the *Haradinaj* case the ICTY found that "protracted armed violence," as used in *Tadić*, was "interpreted in practice... as referring more to the intensity of the armed violence than to its duration."<sup>132</sup> This interpretation supported an earlier finding that the brief duration of an attack did not preclude a conflict from being characterized as non-international.<sup>133</sup> Professor Peter Margulies notes that the ICTY referring "generally to the intensity of the violence, not its timing per se" was a pragmatic decision to avoid creating perverse incentives.<sup>134</sup> Otherwise, if "violent non-State actors could strike first and then claim that the conflict was not yet a protracted one" States would be precluded "from utilizing the full range of responses permissible under LOAC" limited instead "to the far narrower repertoire of force permissible under a law enforcement paradigm."<sup>135</sup> Thus, to avoid encouraging this bad behavior, the ICTY adopted a broad interpretation of "protracted armed violence."

Similarly, a narrow notion of what makes an individual a targetable member of an OAG creates perverse incentives. By granting "protected civilian status to persons who are an integral part of the combat effectiveness of an OAG,"<sup>136</sup> individuals are encouraged to straddle the line between civilian and non-civilian. What is the status of an ISIS fighter who transitions for a period of time into a cook?<sup>137</sup> It is unclear when this individual ceases their combat function and assumes their non-combat function. Of course, if only members of an OAG who perform a CCF are targeted, much of this confusion may disappear. However, this

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<sup>130</sup> VanLandingham, *supra* note 722, at 126.

In other words, the ICRC's position is that instead of analogizing to the entire composition of a state's military, which includes members who rarely, if ever, fire weapons (such as legal advisors and public affairs officers), its 'continuous combat function' test for belligerent membership in a non-state armed group focuses exclusively on those who engage in either actual combat or in sufficiently hostile activity.

*Id.*

<sup>131</sup> *Id.* at 131–32.

<sup>132</sup> See Prosecutor v. Haradinaj, *supra* note 33, at ¶ 49.

<sup>133</sup> See Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, ¶ 152 (1997).

<sup>134</sup> Margulies, *supra* note 23, at 65.

<sup>135</sup> *Id.*

<sup>136</sup> Watkin, *supra* note 86, at 675.

<sup>137</sup> For a similar example, see generally *id.* at 676.

restrictive approach ignores the organizational aspect of an OAG and the inherent agency relationship of these groups with their members.<sup>138</sup>

For example, the nature of ISIS is that the entire organization is a non-State “organized” and “armed” group.<sup>139</sup> While individuals may join ISIS for any number of reasons,<sup>140</sup> when joining a group whose objectives are to use any level of violence to effectuate their vision, those individuals demonstrate intent to use violent means to assist the group in meeting its objectives.<sup>141</sup> ISIS membership thus evidences what VanLandingham defines as an “inherent agency relationship of command [that] demonstrates a submission of self to the central, overarching, violent purpose of the group.”<sup>142</sup> In other words, even those ISIS members not directly involved in combat remain part of the OAG.<sup>143</sup> Requiring an application of the CCF criteria to every individual ISIS member thus ignores the reality that these individuals are fighting under the command structure of a cohesive group.

Finally, the CCF approach creates an inequity between ISIS members and the State’s armed forces by providing protections for the former that are not available to the latter.<sup>144</sup> Professor Schmitt notes that, in application, a direct attack on a member “of an organized armed group without a continuous combat function is prohibited (indeed, such an attack would be a war crime since the individual qualifies as a civilian), but a member of the State’s armed forces who performs no combat-related duties may be attacked at any time.”<sup>145</sup> The ICRC comments on a similar inequity in an international armed conflict (IAC) are analogous:

it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that

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<sup>138</sup> See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.1 (“the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.”); *Gherbi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C.) (stating “many members of the armed forces who, under different circumstances, would be ‘fighters’ may be assigned to non-combat roles at the time of their apprehension” and that “[t]hese individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure.”). See also VanLandingham, *supra* note 72, at 126. Again, ISIS is a helpful example as that group ensures all members receive military training as they are all expected to be fighters. See *supra* text accompanying notes 60–64.

<sup>139</sup> See *supra* text accompanying notes 44–64.

<sup>140</sup> See Patrick Tucker, *Why Join ISIS? How Fighters Respond When You Ask Them: A Study Finds that Motivations Vary Widely*, THE ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/international/archive/2015/12/why-people-join-isis/419685/> (discussing a study conducted on a non-random sample of ISIS fighters that found that some members join ISIS for status, some for identity or revenge, and some for the thrill of it, among other motivations).

<sup>141</sup> VanLandingham, *supra* note 72, at 108.

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., *supra* text accompanying notes 44–64.

<sup>144</sup> See Watkin, *supra* note 866, at 693 (“The Interpretive Guidance also adopts a position which clearly disadvantages States in relation to organized armed groups against which they are engaged in armed conflict.”).

<sup>145</sup> Schmitt, *supra* note 6, at 132 (discussing how this approach skews the balance between military necessity and humanitarian considerations that undergirds all of LOAC.).

population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.<sup>146</sup>

Likewise, it makes little sense for an ISIS member to receive protections that are not afforded to the military members of, say the Iraqi or U.S. military, who are not serving in a combat function during a NIAC.

Admittedly, this imbalance is not unique. In a NIAC, a State’s armed forces will have a form of combatant immunity while the members of an OAG will not.<sup>147</sup> The United States expressly notes that “the non-State status of the armed group would not render inapplicable the privileges and immunities afforded lawful combatants and other State officials.”<sup>148</sup> This difference is a result of the State being a sovereign while a non-State armed group, obviously, is not.<sup>149</sup> The inequity created by the CCF approach, though unfair to a State’s armed forces, is therefore not without precedent. However, in contrast to the combatant immunity imbalance, which only adversely affects conflict participants, the CCF approach dangerously blurs the already murky line between civilians and fighters in a NIAC.<sup>150</sup> Both civilians and State armed forces are therefore disadvantaged by the narrow interpretation of OAG membership promoted by the CCF approach.

Applying the CCF approach to ISIS thus has a number of dangerous consequences. In particular, it diminishes the protections for civilians and promotes inequality between ISIS’s members and State armed forces. While the CCF concept was clearly developed with good intentions to avoid interpretations of OAG membership by “abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse,”<sup>151</sup> in practice it fails to safeguard civilians.<sup>152</sup> As a

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<sup>146</sup> ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22. Although this interpretation represents the prevailing opinion of ICRC experts some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV *Id.* at 22 fn 17.

<sup>147</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (“persons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group”); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (discussing consequences for a captured member of a dissident fighting force versus a member of the State’s armed forces).

<sup>148</sup> DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1.

<sup>149</sup> *Id.* at ¶ 17.4.1 (“the principle of the sovereign equality of States is not applicable in armed conflicts between a State and a non-State armed group.”). *See also* Schmitt, *supra* note 6, at 133 (noting “the organized armed group lacks any domestic or international legal basis for participation in the conflict.”).

<sup>150</sup> *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.5.1.1. (highlighting the difficulty in identifying OAG members during a NIAC); Watkin, *supra* note 86, at 667 (noting that “it is difficult to see how allowing those providing direct support within an organized armed group to be protected by civilian status will actually operate to limit the conflict.”).

<sup>151</sup> *See e.g.*, ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 33 (reasoning that establishing a continuous combat function is necessary due to the difficulty of distinguishing civilians in a NIAC); Schmitt, *supra* note 6, at 132 (noting that the CCF approach is theoretically justified).

<sup>152</sup> *See e.g.*, Watkin, *supra* note 86, at 675 (“A significant danger is presented to uninvolved civilians

result, it becomes apparent that a broader approach to determining OAG membership is necessary.

*B. The Need for Targeting Flexibility*

The conduct-link-intent test recognizes, and attempts to address, the problems resulting from the CCF approach to determining OAG membership. Unlike the CCF methodology, when applied to ISIS, this test would easily find that membership alone demonstrates intent to support the group's violent objectives. Both the first and second factors—tests of eligible conduct and associative links to the OAG—are theoretically possible to analyze by those conducting targeting activities against ISIS and could be described in appropriate ROE. Further, satisfying the third criteria—requiring an express finding of an individual's specific intent—is arguably already part of ISIS's strategy. The group often claims or endorses attacks by its "soldiers" "whether or not the individuals in question have been publicly shown to have a demonstrable operational link to, or history with, the organization."<sup>153</sup>

However, this novel approach presents two irreconcilable problems when applied on the modern battlefield. First, creating a criminal law statute-like list of qualifying conduct for OAG membership is inflexible and legalistic. Professor VanLandingham pre-emptively addresses this critique and argues that such "perceived loss of flexibility is ...a needed phenomenon to ensure appropriate breadth of membership."<sup>154</sup> Further, she notes that "surely no decision-maker today, when approving the addition of a new name to a targeting list based on the person's actions in relation to a particular group," would refute that the "individual in question does not possess a specific intent to further his terrorist group's violent means and ends by carrying out or giving group orders regarding the same."<sup>155</sup>

Yet, in the effort to expand OAG membership by arguing for an express list, targeting decisions are delayed. For example, ISIS consistently changes their

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by an interpretation that would grant protected civilian status to persons who are an integral part of the combat effectiveness of an organized armed group when their regular force counterparts performing exactly the same function can be targeted."); VanLandingham, *supra* note 72, at 131–32. See generally YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT I (2004).

Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.

*Id.*

<sup>153</sup> Blanchard & Humud, *supra* note 1, at 7.

<sup>154</sup> VanLandingham, *supra* note 72, at 138.

<sup>155</sup> *Id.*

routine behavior or conduct specifically to avoid being targeted by an opposing State actor, and issues guidance to its members on how to do so.<sup>156</sup> This behavior would undoubtedly require continual editing of both the categories of eligible conduct as well as any resultant individual targeting lists. These lists are a policy construct, not required by the LOAC, and would act as a limiting factor in the best of circumstances. Further, with ISIS at its peak in 2015 having tens of thousands of fighters,<sup>157</sup> and thousands more coming every month,<sup>158</sup> an element-based approach to targeting, in practical application, is unwieldy. While much of the territory ISIS held is now liberated, and its membership drastically decreased,<sup>159</sup> using an element-based approach to determining OAG membership remains impractical in both the contemporary<sup>160</sup> and future security environment.

The second problem with the conduct-link-intent test is found in the third criteria. Though not nearly as inequitable as the results from the CCF methodology, requiring a finding that an individual has the specific intent to further a group’s violent ends provides additional protections for OAG members in comparison to a State’s armed forces. Again, a member of a State armed force is targetable by virtue of their status. In comparison, the conduct-link-intent test requires an additional analytical step before targeting of an OAG member. As a result, an OAG member is treated more favorably than a member of a State’s armed forces through the requirement for establishing specific intent.

### C. *If You Play the Game . . . Live With the Consequences*

In comparison to the CCF approach, in our opinion the conduct-link-intent test better comports with the realities of the modern battlefield. Yet, as noted above, we consider this approach unnecessarily bureaucratic. What becomes apparent is that the broad approach to OAG membership allowed for by the conduct-link-intent test is appropriate as it is “unrealistic to expect government troops not to take measures against rebels simply because they are not involved in an attack.”<sup>161</sup> However, what is also obvious is that this formalistic test is burdensome for commanders to implement. The best approach to determining

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<sup>156</sup> See Keligh Baker, *Shave your beard, encrypt your phones and wear western clothes: ISIS issues booklet advising would-be terrorists how to avoid being spotted by Western security agencies*, DAILYMAIL.COM (Jan. 13, 2016, 6:24 PM), <http://www.dailymail.co.uk/news/article-3398424/ISIS-issues-booklet-advising-terrorists-avoid-spotted.html>.

<sup>157</sup> See Daveed Gartenstein-Ross, *How Many Fighters Does the Islamic State Really Have?*, WAR ON THE ROCKS (Feb. 9, 2015), <https://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/> (estimating the number of ISIS fighters as being closer to 100,000 than 30,000).

<sup>158</sup> See *Flow of foreign ISIS recruits much slower now, U.S. says*, CBS NEWS (Apr. 26, 2016, 1:02 PM), <https://www.cbsnews.com/news/less-foreign-isis-recruits/> (reporting that approximately 1,500 foreign fighters came to Iraq and Syria a month in 2015 with the number decreasing to 200 a month in 2016).

<sup>159</sup> See Saphora Smith & Michele Neubert, *ISIS Will Remain A Threat in 2018, Experts Warn*, NBC News (Dec. 27, 2017, 3:17 AM), <https://www.nbcnews.com/storyline/isis-terror/isis-will-remain-threat-2018-experts-warn-n828146>.

<sup>160</sup> *Id.* (noting that ISIS is “far from defeated.”).

<sup>161</sup> LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 59 (2002).

OAG membership is therefore one that has the broad applicability of the conduct-link-intent test, but is also more operationally practical.

Simply treating organized armed groups and a State's armed forces the same accomplishes these goals.<sup>162</sup> First, this approach resolves the inequity and under-inclusivity issues presented by the CCF methodology and, in doing so, "not only reinforces the distinction principle but also recognizes that true civilian participation has to be limited in time and frequency so as not to undermine the protection associated with civilian status."<sup>163</sup> Second, it avoids mechanical, and consequently, restrictive tests for OAG membership. With the rise of powerful non-State actors, like ISIS, this straightforward and clear approach addresses the challenges of fighting in a contemporary NIAC by empowering commanders while also protecting civilians.

ISIS—organized, well-financed, and heavily armed—clearly acts and fights like a traditional military organization.<sup>164</sup> Again, not all that are affiliated with ISIS, or sympathetic to their cause, are part of the OAG. But those who are filling traditional military roles in ISIS should be subject to "attack so long as they remain active members of the group, regardless of their function."<sup>165</sup> Attaching the consequences of OAG membership to some of those in ISIS, and not others, ignores the realities of the modern battlefield.

#### CONCLUSION

So, again, is the brother of the ISIS Commander described in the opening hypothetical vignette targetable? Yes. He has affirmatively proclaimed his loyalty to the group, and his actions as the "public face" of ISIS are arguably no different than those of a Public Affairs Officer serving in a State's armed forces.<sup>166</sup> Clearly, he is under command serving in a traditional military role making him a member of the group. Consequently, he is subject to the adverse consequences of his status, including being a lawful target.

One of the greatest attributes of the LOAC is its "emphasis on being applied equally to all participants."<sup>167</sup> Focusing on the membership structure of an OAG reinforces this aspect of the law. Doing otherwise "creates a bias against

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<sup>162</sup> Schmitt, *supra* note 6, at 133.

<sup>163</sup> Watkin, *supra* note 866, at 693.

<sup>164</sup> See *supra* text accompanying notes 44–64.

<sup>165</sup> Schmitt, *supra* note 6, at 133. See also VanLandingham, *supra* note 72, at 109 ("armed group membership, typically in a state military, produces a presumption of hostility, thereby making one a lawful target for elimination by opposing forces, even if one is not actually fighting. But this LOAC targeting axiom is not limited to state militaries. It extends to non-state armed groups as well . . .")

<sup>166</sup> See U.S. Army, *Careers & Jobs Public Affairs Officer (46A)*, GoArmy.com, <https://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/arts-and-media/public-affairs-officer.html> (last visited Mar. 13, 2018) (describing some of the responsibilities of a Public Affairs Officer as "gain[ing] the support of the American public," "respond to media queries," "develop and execute communication plans," as well as other internal and external communication activities.)

<sup>167</sup> Watkin, *supra* note 86, at 695.



State armed forces, making its members much easier to target while imposing on them more exacting criteria when targeting opponents."<sup>168</sup> Additionally, protection of civilians is "one of the main goals of international humanitarian law."<sup>169</sup> Emphasizing function over membership also dangerously blurs the line between civilians and fighters, undercutting this principle. Both of these are untenable results. Of course, any approach to determining membership must also be practical. An expansive understanding of who qualifies as a member of an OAG resolves these outstanding concerns and is necessary in the current conflict environment.

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<sup>168</sup> *Id.* at 688, 694 ("In many circumstances, waiting for an act to be carried out may leave security forces with insufficient time to react, thereby actually increasing the risk to civilians . . . .")

<sup>169</sup> *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 4 ("The protection of civilians is one of the main goals of international humanitarian law.")

# The South China Sea as a Challenge to International Law and to International Legal Scholarship

Lorenz Langer\*

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## INTRODUCTION

Times Square in New York City is an unusual venue to expound complex international legal issues. The countless illuminated billboards of this tourist spot usually advertise Broadway productions, sugary soft drinks, or the latest must-have smartphone. Between July 23 and August 3, 2016, however, a three-minute clip by Xinhua, the Chinese State news agency, was shown 120 times a day on one of the giant screens of 2 Times Square.<sup>1</sup> Picturesque images of

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<sup>1</sup> Niu Yue, *South China Sea Plays in Times Square*, CHINA DAILY (July 27, 2016),

fishing boats and islets were captioned with commentary describing the Chinese discovery of the South China Sea Islands over two millennia ago, and their subsequent exclusive exploration and exploitation.<sup>2</sup> Rather abruptly, however, the subject changed. The video denounced the vain attempts “of the Arbitral Tribunal ... to deny China's territorial sovereignty and maritime rights and interests”.<sup>3</sup> China, it stated, “did not participate in the illegal South China Sea arbitration, nor accepts the Award so as to defend the solemnity of international law.”<sup>4</sup> Chinese officials and foreign politicians, diplomats, and observers then elaborated upon these statements, stressing that China was the “only true owner” of the South China Sea Islands, and advocating for a grown-up approach to dialogue by pressing for negotiations between the States directly concerned.<sup>5</sup>

If passing tourists noticed the display at all, the historical résumé presumably left most of them perplexed—Chinese assurances to the contrary notwithstanding.<sup>6</sup> Nor is it likely that the vague allusions to an unspecified arbitral award were readily grasped by visitors hunting for discounted musical tickets. Still, Chinese spectators in particular might have understood the reference to the final award in the South China Sea Arbitration between the Philippines and China before a tribunal established at the Permanent Court of Arbitration in The Hague (the Award). Two weeks previously, on July 12, 2016, this tribunal adopted the Award, ruling unanimously that the conduct of China in the South China Sea was incompatible with several provisions of the United Nations Convention on the Law of the Sea (UNCLOS, or, the Convention).<sup>7</sup> The arbitration proceedings were initiated in 2013 by the Philippines under the compulsory dispute settlement procedure provided for by the Convention.<sup>8</sup> The Philippines had submitted, *inter alia*, that the seabed and the maritime features of the South China Sea were governed by UNCLOS and that, as a consequence, Chinese claims based on “historic rights” within the area encompassed by the

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[http://usa.chinadaily.com.cn/china/2016-07/27/content\\_26246467.htm](http://usa.chinadaily.com.cn/china/2016-07/27/content_26246467.htm).

<sup>2</sup> China Review Studio, *A Short Video on Times Square*, YOUTUBE (July 27, 2016), <https://www.youtube.com/watch?v=XI2s-2vjr7o>. The video is also available, *inter alia*, at <http://www.cantab.net/users/langer/SCS.mp4>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *South China Sea Video Draws Huge Response in Times Square*, CHINA DAILY (July 27, 2016), [http://www.chinadaily.com.cn/world/2016-07/27/content\\_26239494.htm](http://www.chinadaily.com.cn/world/2016-07/27/content_26239494.htm); cf. Stuart Leavenworth, *China's Times Square Propaganda Video Accused of Skewing Views of British MP*, THE GUARDIAN (July 31, 2016), <https://www.theguardian.com/world/2016/jul/31/chinas-times-square-propaganda-video-accused-of-skewing-views-of-british-mp> (reporting that Catherine West, the MP in question, had not been informed about the use of her statements in the film, and that she was in fact concerned about Chinese policies in the South China Sea; also, she had been identified incorrectly as “Shadow Secretary of State for Foreign Affairs of the British Labour Party” (*supra* note 3)).

<sup>6</sup> See *South China Sea Video Draws Huge Response in Times Square*, *supra* note 5 (claiming that the video “has appealed to a massive number of people who stop by and watch”).

<sup>7</sup> South China Sea Arbitration Award (Phil. v. China), 2013-19 (Perm. Ct. Arb. 2016) [hereinafter South China Sea Arbitration (Award)].

<sup>8</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, arts. 286–287, Annex VII art. 1, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

so-called “nine-dash line” were invalid.<sup>9</sup> In addition, the Philippines had argued that certain maritime features in the South China Sea were mere rocks or low-tide elevations and therefore not entitled to an exclusive economic zone (EEZ) or to territorial waters respectively.<sup>10</sup> The Philippines also claimed that its own EEZ had been violated, and that Chinese reclamation and construction activities on some reefs violated UNCLOS provisions on artificial islands and on the protection and preservation of the marine environment.<sup>11</sup> China, which had neither recognized the Tribunal’s jurisdiction nor participated in the proceedings, rejected the ruling as “null and void.”<sup>12</sup>

The South China Sea Arbitration has set out the maritime legal questions in the South China Sea in great detail—combined, the Awards on jurisdiction and the merits run to over 650 pages.<sup>13</sup> The technicalities of these questions have also been extensively analyzed by legal scholars, both prior to the final Award and in its wake.<sup>14</sup> In this paper, however, the arbitration proceedings provide merely a starting point; rather than focusing on jurisdictional intricacies, maritime zones, or low-tide elevations, I intend to use the South China Sea as a paradigm for the challenges that face not only international law as a normative order, but also international legal scholarship.

While the arbitral Award itself will not be analyzed in this article, Part II illustrates that the Award’s aftermath provides insights into the respective attitudes of the States involved with regard to dispute settlement. The conflict in

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<sup>9</sup> South China Sea Arbitration (Award), *supra* note 7, ¶¶ 112(B)(2) and 192. On the nine-dash line, see *infra*, note 22 and accompanying text.

<sup>10</sup> South China Sea Arbitration (Award), *supra* note 7, at ¶¶ 112(B)(3,4,6-7), 291–297 and 408–445; cf. UNCLOS arts. 121(3) and 13(2).

<sup>11</sup> For the final submissions, see South China Sea Arbitration (Award), *supra* note 7, ¶ 112.

<sup>12</sup> Ministry of Foreign Affairs, People’s Republic of China, *Statement on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines* (July 12, 2016), [http://www.fmprc.gov.cn/nanhai/eng/snhwtlclwj\\_1/t1379492.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlclwj_1/t1379492.htm).

<sup>13</sup> S. China Sea Arbitration (Phil. v. China) – Award on Jurisdiction and Admissibility, 2013-19 (Perm. Ct. Arb. 2015) [hereinafter South China Sea Arbitration (Jurisdiction)]; South China Sea Arbitration (Award), *supra* note 7.

<sup>14</sup> On jurisdiction, see 1/2013 AM. J. INT’L. L. and 2/2016 CHIN. J. INT’L. L. (*infra* notes 223 & 224); Robert Beckman, *UNCLOS Part XV and the South China Sea*, in *THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA* 229–64 (Shunmugam Jayakumar, Tommy Koh & Robert Beckman eds., 2014); *THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE* (Stefan Talmon & Bing Bing Jia eds., 2014); Diane A. Desierto, *The Jurisdictional Rubicon: Scrutinizing China’s Position Paper on the South China Sea Arbitration – Part I*, BLOG EUR. J. INT’L L. (Jan. 29, 2015), <https://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration/>; *The Jurisdictional Rubicon: Scrutinizing China’s Position Paper on the South China Sea Arbitration – Part II*, BLOG EUR. J. INT’L L. (Jan. 30, 2015), <https://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration-part-ii/>; John E. Noyes, *In re Arbitration Between the Philippines and China*, 110 AM. J. INT’L L. 102–08 (2016); Anthony Carty, *The South China Sea Disputes Are Not Yet Justiciable*, in *ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA*, 23–54 (Shicun Wu & Keyuan Zou eds., 2016). On the merits, see Lucy Reed & Kenneth Wong, *Marine Entitlements in the South China Sea: The Arbitration between the Philippines and China*, 110 AM. J. INT’L L. 152–58 (2016); French Duncan, *In the Matter of the South China Sea Arbitration*, 19 ENVTL L. REV. 48–56 (2017).

the South China Sea also has considerable implications for the law of the sea, positing demands for traditional freedom of navigation against more recent efforts to establish sovereign rights over ever larger maritime areas, as demonstrated in Part III.A. More importantly, and beyond the law of the sea, Part III.B sets out how the conflict in the South China Sea threatens the safeguarding of peace as one of the main tasks of international law. In Part IV, I argue that these developments should serve as a cautionary contrast to the prevailing narrative of international law as a progressively successful normative order. According to that narrative, international law is overcoming its traditional limitations and the primacy of State sovereignty. I will analyze two such claims of progress in some detail: in Part IV.A, the gradual process of deterritorialization will be addressed, while Part IV.B considers the advancing constitutionalization of international law. While such concepts have their merits, the South China Sea exposes the (considerable) limitations that they are still subject to. Finally, the conflict over shoals, rocks, and reefs also serves as a reminder of the important, yet rarely impugned role(s) that individual scholars of international law play—not only as proponents of legal theories or participants in abstract scholarly discourse, but also as active advocates of parochial national interests. In Part V, we will see that such advocacy is not restricted to the *forum*, but extends well into supposedly impartial scholarly output.

## I.

### THE ARBITRATION AWARD AND ITS AFTERMATH

The South China Sea encompasses an area of circa 3.5 million square kilometers, or 648,000 square nautical miles; it abuts on the coasts of China, Taiwan, Vietnam, Malaysia, Brunei, the Philippines, and Indonesia.<sup>15</sup> These waters are of eminent strategic and economic importance. Some of the busiest international sea lanes pass through the Sea, carrying approximately 5 trillion USD worth of shipping trade each year—more than half the world's annual merchant fleet tonnage.<sup>16</sup> Its grounds account for 10 percent of the global annual fishing catch and are thought to contain considerable oil and natural gas reserves.<sup>17</sup>

Competition for control of these assets has already resulted in armed clashes between some of the coastal States, mostly over control of the islands, islets, reefs, atolls, and sandbanks that are scattered throughout the South China

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<sup>15</sup> See John R. V. Prescott & Clive H. Schofield, *The Maritime Political Boundaries of the World* 429 (2d ed. 2005). An illustrative map is provided by the South China Sea Arbitration (Jurisdiction), *supra* note 13, at 3, Figure 1.

<sup>16</sup> "You May Have Incidents": Singapore's Defence Minister Warns Non-military Vessels in South China Sea Create "Uncertainty", S. CHINA MORNING POST, (Oct. 3, 2016) <http://www.scmp.com/news/asia/diplomacy/article/2024548/you-may-have-incidents-singapores-defence-minister-warns-non>; C. J. Jenner & Tran Truong Thuy, *Introduction*, in *The South China Sea*, 1, 1 (C. J. Jenner & Tran Truong Thuy eds., 2016).

<sup>17</sup> INT'L CRISIS GROUP, *Stirring up the South China Sea (I)* (Apr. 23, 2012).

Sea, and over the Spratly and Paracel Islands in particular.<sup>18</sup> Under the regime provided for by UNCLOS, the coastal States have submitted extensive claims to these riches as territorial or archipelagic waters, EEZs, as well as continental shelves.<sup>19</sup> Claims to a continental shelf beyond 200 nautical miles have to be submitted to the Commission on the Limits of the Continental Shelf established under UNCLOS, which will then issue recommendations; the limits of the shelf that are subsequently established by the coastal State on the basis of the Commission's recommendations are final and binding.<sup>20</sup> In response to Vietnamese and Malaysian claims submitted to the Commission, the People's Republic of China (PRC, or, China) invoked the so-called nine-dash line for the first time on the international level.<sup>21</sup> This line was conceived in 1936 and thus predates Communist rule in China.<sup>22</sup> The area enclosed encompasses approximately 2 million square kilometers, or the equivalent of 22 percent of China's land area; it includes the Spratly and Paracel Islands as well as Scarborough Shoal.<sup>23</sup> Originally, the various rocks, islets, and shoals comprised circa 15 square kilometers of dry land.<sup>24</sup> Starting in 2012, however, the PRC embarked on a large-scale reclamation project, which has almost doubled the land area in the South China Sea.<sup>25</sup>

As mentioned above, the Philippines contested the legality of both the extensive claims under the nine-dash line and the land reclamation before the arbitral tribunal.<sup>26</sup> China officially refused to participate in the arbitral proceedings, but nevertheless went to great lengths to make sure its position and its arguments were known. First, China used academic surrogates to advance its legal arguments indirectly.<sup>27</sup> Second, it published an official position paper on

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<sup>18</sup> Armed skirmishes between the PRC and Vietnam took place in 1974 in the Paracel Islands; in 1988 a naval battle in the Spratly Islands was sparked by the Chinese construction of a maritime station on Fiery Cross Reef. Tensions between the PRC and the Philippines persist over Scarborough Shoal and on Second Thomas Shoal. BILL HAYTON, *THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA* 73–78, 81–84, 103–104, 160 (2014).

<sup>19</sup> Cf. UNCLOS arts. 3, 47, 55–75, 76–85.

<sup>20</sup> UNCLOS art. 76(8), Annex II. Claims have to be submitted within ten years of the entry into force of the Convention for the respective State. UNCLOS art. 4, Annex II.

<sup>21</sup> Permanent Mission of the People's Republic of China, Note Verbale, U.N. Doc. CML/17/2009 (May 7, 2009); Permanent Mission of the People's Republic of China, Note Verbale, U.N. Doc. CML/18/2009 (May 7, 2009).

<sup>22</sup> Hayton, *supra* note 18, at 55. The number of dashes varies between nine and eleven. U.S. Dep't of State, Bureau of Oceans and Int'l Envtl & Sci. Affairs, China: Maritime Claims in the South China Sea 3 (Dec. 5, 2014) [hereinafter Bureau of Oceans].

<sup>23</sup> Bureau of Oceans, *supra* note 22, at 4.

<sup>24</sup> *Id.*, at 4 (observing that all islands excluding Taiwan and Pratas Island encompass circa thirteen square kilometres). The Pratas Island encompasses circa two square kilometres. See Robert C. Beckman & Clive H. Schofield, Defining EEZ Claims from Islands: A Potential South China Sea Change, *INT'L J. MARINE & COASTAL L.* 224 (2014).

<sup>25</sup> South China Sea Arbitration (Award), *supra* note 7, ¶ 854. A striking visualization of the reclamation work is available at <https://anti.csis.org/island-tracker/>.

<sup>26</sup> South China Sea Arbitration (Award), *supra* note 7.

<sup>27</sup> *Infra* Part V.

the arbitration panel's jurisdiction in December 2014.<sup>28</sup> Third, through its ambassador to the Netherlands, the PRC also sent letters to the individual members of the arbitral tribunal.<sup>29</sup> Despite these missives, China questioned the legitimacy of the arbitral tribunal: the involvement of the Japanese President of the International Tribunal of the Law of the Sea (ITLOS) in the establishment of the tribunal allegedly affected its impartiality.<sup>30</sup> China also censured the arbitral tribunal for its composition<sup>31</sup> and its alleged lack of independence, since the arbitrators “were taking money from the Philippines” and possibly “from others.”<sup>32</sup>

The stark response to the Award itself has been alluded to above.<sup>33</sup> The Chinese Foreign Ministry further claimed that Philippine actions in the South China Sea “grossly violated China’s territorial sovereignty, the Charter of the United Nations and fundamental principles of international law”; in the course of the arbitral proceedings, the Philippines had “distorted facts, misinterpreted laws and concocted a pack of lies,” and its claims were “a preposterous and deliberate distortion of international law.”<sup>34</sup>

Yet the Chinese reaction was not limited to statements by State organs. As illustrated by the quixotic video-clip in Times Square, efforts were also made to sway international public opinion, although with rather mixed results.<sup>35</sup> With its

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<sup>28</sup> Government of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (Dec. 7, 2014), reprinted in 15 CHIN. J. INT'L L., 431–55 (2016).

<sup>29</sup> South China Sea Arbitration (Award), *supra* note 7, ¶¶ 42, 51, 96, 97, 100, 102–104.

<sup>30</sup> Bethany Allen-Ebrahimian, *Beijing: Japanese Judge Means South China Sea Tribunal Is Biased*, FOREIGN POL'Y (June 21, 2016), <http://foreignpolicy.com/2016/06/21/beijing-japanese-judge-means-south-china-sea-tribunal-is-biased-china-philippines-maritime-claims/>. Under articles 3(c), (d) and (e) Annex VII of UNCLOS, the President of ITLOS is responsible for appointing the remaining panel members if the parties cannot reach an agreement.

<sup>31</sup> Although Thomas A. Mensah, a Ghanaian national, was the tribunal's president, China alleged that he is a long-term EU resident and criticised that the four remaining arbitrators were all European. Kor Kian Beng, *China Insists on Right to Declare Air Defence Zone*, STRAIT TIMES (July 13, 2016), <http://www.straitstimes.com/asia/china-insists-on-right-to-declare-air-defence-zone> (quoting Vice-Foreign Minister Liu Zhenmin); Sienho Yee, *The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns*, 15 CHIN. J. INT'L L. 219, 222–23 (2016). Originally, a Sri Lankan president had been selected: South China Sea Arbitration (Jurisdiction), *supra* note 13, ¶ 30.

<sup>32</sup> Beng, *supra* note 31. The Philippine claim was frequently presented as a U.S. plot. *See, e.g., Chinese Foreign Minister Says South China Sea Arbitration a Political Farce*, XINHUANET (July 12, 2016) [http://news.xinhuanet.com/english/2016-07/13/c\\_135508275.htm](http://news.xinhuanet.com/english/2016-07/13/c_135508275.htm). It should be noted, however, that Chinese non-participation in the arbitral proceedings was not a foregone conclusion: reportedly, several government lawyers argued for accepting the legal challenge. Wim Mueller, *China's Missed Opportunity in South China Sea Arbitration*, CHATHAM HOUSE (Mar. 19, 2015), <https://www.chathamhouse.org/expert/comment/china-s-missed-opportunity-south-china-sea-arbitration>.

<sup>33</sup> Ministry of Foreign Affairs, People's Republic of China, *supra* note 12.

<sup>34</sup> Ministry of Foreign Affairs, People's Republic of China, *China Adheres to the Position of Settling Through Negotiation the Relevant Disputes Between China and the Philippines in the South China Sea*, ¶¶ 114, 119 (July 13, 2016), [http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1380615.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1380615.htm).

<sup>35</sup> International support for China's position actually decreased between the arbitral rulings on jurisdiction (31 States publicly opposing the tribunal) and on the merits (six States publicly opposing

eclectic choice of individual statements, the clip itself already illustrates China's difficulties in finding immediate and weighty international support for its position.<sup>36</sup>

In addition, the Award elicited a plethora of patriotic outbursts on the home front. On social media, calls for a trade boycott or even war against the Philippines abounded;<sup>37</sup> celebrities who did not post the image of a map with the nine-dash line on Weibo—the Chinese social media platform—were severely chastised.<sup>38</sup> Presumably, public anger was also aimed at international institutions that were mistakenly assumed to be involved in the ruling: for several months after the ruling, a disclaimer on the International Court of Justice (ICJ) homepage pointed out that the ICJ “had no involvement” in the arbitration proceedings and was a “totally distinct institution” from the Permanent Court of Arbitration.<sup>39</sup>

Clearly, China is unwilling to accept compulsory dispute settlement, at least on matters that are perceived to touch on its (extensively construed) sovereignty.<sup>40</sup> Yet its absence before the arbitral tribunal does not necessarily

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its ruling). *Who Is Taking Sides After the South China Sea Ruling?*, ASIA MARITIME TRANSPARENCY INITIATIVE (Aug. 15, 2016), <https://amti.csis.org/sides-in-south-china-sea/>.

<sup>36</sup> Cf. China Review Studio, *supra* note 3. Apart from Ms. West, the video featured a Chinese official, the Pakistani Ambassador to China, and a former London Economic and Business Policy Director (whose current position as a commentator for a Chinese government portal and Senior Fellow at Renmin University is not disclosed). Cf. John Ross, *Columnists*, CHINA.ORG (Mar. 20, 2018),

<http://china.org.cn/opinion/johnross.htm>. See also *South China Sea Tribunal Ruling "Politicized": Syrian Analysts*, XINHUANET (July 13, 2016), [http://news.xinhuanet.com/english/2016-07/13/c\\_135508479.htm](http://news.xinhuanet.com/english/2016-07/13/c_135508479.htm); *No Reason for China to Accept South China Sea Arbitration Award: Bangladeshi Experts*, XINHUANET (July 13, 2016), [http://news.xinhuanet.com/english/2016-07/13/c\\_135508299.htm](http://news.xinhuanet.com/english/2016-07/13/c_135508299.htm). On the role of domestic or mandated academics, see Part V, *infra*.

<sup>37</sup> Zheping Huang & Echo Huang, *China's Citizens Are Livid at the South China Sea Ruling Because They've Always Been Taught It Is Theirs*, QUARTZ (July 13, 2016), <https://qq.com/730669/chinas-citizens-are-livid-at-the-south-china-sea-ruling-because-theyve-always-been-taught-it-is-theirs/>.

<sup>38</sup> The map was accompanied by the slogan “China cannot lose even one bit of itself.” Gene Lin, *Hong Kong Celebrities Defend China's Claims in South China Sea After Int'l Court Ruling*, HONG KONG FREE PRESS (July 14, 2016), <https://www.hongkongfp.com/2016/07/14/hong-kong-celebrities-defend-chinas-claims-in-south-china-sea-after-intl-court-ruling/>. For (semi-)official praise for “patriotic stars,” see Wu Xinyuan (吳心遠), *Mingxing da Vmen zai “Nanhai Yulun Zhan” Zhong de Biaoxian* (明星大V們在“南海輿論戰”中的表現), RENMIN WANG (人民網) (July 15, 2016), <http://yuqing.people.com.cn/BIG5/n1/2016/0715/c209043-28558600.html>. For the repercussions for performers who have a Mainland following and who failed to post the map, see *Taiwan Yiren “Bu Zhichi” Nanhai, Zaoshou Fensi Kuang Hong Luan Zha!* (台灣藝人「不支持」南海，遭受粉絲狂轟亂炸!), MEI RI TOUTIAO (每日頭條) (July 13, 2016), <https://kknews.cc/entertainment/pxeon2.html> (discussing a Taiwanese celebrity posting her own photo instead of the 9-dash map and receiving over 100,000 complaints on her Weibo account). Weibo is the Chinese equivalent of Twitter.

<sup>39</sup> The disclaimer was first printed in Chinese, which is not an official language of the Court. INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/homepage/index.php> (last visited July 20, 2016). A screenshot is available at <http://www.cantab.net/users/langer/ICJ.jpg>.

<sup>40</sup> Trade issues, on the other hand, are not considered “that sensitive.” *International Law Programme Roundtable Meeting Summary: Exploring Public International Law and the Rights of*



amount to a repudiation of the UNCLOS regime, and the option of denouncing the Convention seems to have been dismissed.<sup>41</sup> After the ruling, there were also some signs of *détente* between the parties, and in the region more generally.<sup>42</sup> It remains to be seen whether these overtures herald a less confrontational approach, or whether they are primarily tactical in nature and merely serve to gloss over what has been called China's "salami slicing" approach: the accumulation of small actions, such as island fortification, that do not provide a *casus belli* but over time add up to a major strategic shift.<sup>43</sup> References to the nine-dash line may have become less frequent.<sup>44</sup> Yet China has not made any material concessions; it still seeks to deal with other States in the South China Sea bilaterally, pushing for joint developments that would entail, at least, implicit recognition of its extensive claims.<sup>45</sup> On balance, it seems rather unlikely that China's attitude will change substantially.

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*Individuals with Chinese Scholars – Part 3*, Mar. 5-6, 2016, CHATHAM HOUSE, at 5 (comment by a Chinese roundtable participant), <https://www.chathamhouse.org/sites/files/chathamhouse/events/2016-03-05-exploring-public-international-law-rights-individuals-part-3-meeting-summary.pdf>. On Chinese participation in the WTO, see Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 959–60 (2016).

<sup>41</sup> This option was aired through semi-official channels after the Philippines had initiated proceedings. See Ellen Tordesillas, *Will China Withdraw From UNCLOS if UN Court Decides in Favor of PH?*, YAHOO! PHILIPPINES (Dec. 10, 2013), <https://ph.news.yahoo.com/blogs/the-inbox/china-withdraw-unclos-un-court-decides-favor-ph-153936547.html>. It was also discussed in the run-up to the Award. See Tara Davenport, *Why China Shouldn't Denounce UNCLOS*, DIPLOMAT (Mar. 24, 2016), <http://thediplomat.com/2016/03/why-china-shouldnt-denounce-unclos/> (rejecting denunciation); Stefan Talmon, *Denouncing UNCLOS Remains Option for China After Tribunal Ruling*, GLOBAL TIMES (July 6, 2016), <http://www.globaltimes.cn/content/971707.shtml> (arguing that denunciation should depend on a "legal and political cost-benefit analysis"). An official statement after the Award does not elaborate the point, but emphasizes that China has so far faithfully implemented and

upheld UNCLOS. Ministry of Foreign Affairs, People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on July 12, 2016*, (July 12, 2016), [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2511\\_665403/t1380374.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1380374.shtml).

<sup>42</sup> Benjamin Kang Lim & Ben Blanchard, *China May Give Filipino Fishermen Access to Scarborough*, REUTERS (Oct. 18, 2016), <http://www.reuters.com/article/us-china-philippines-exclusive/exclusive-china-may-give-filipino-fishermen-access-to-scarborough-sources-idUSKCN12I19I>; Raul Dancel, *Deal on Framework of South China Sea Code*, THE STRAIT TIMES (Aug. 7, 2017), <http://www.straittimes.com/asia/se-asia/deal-on-framework-of-s-china-sea-code>. Overall, this strategy has worked well so far. See *A Chinese Lake*, ECONOMIST, June 23, 2018, at 48.

<sup>43</sup> Robert Haddick, *Salami Slicing in the South China Sea*, FOREIGN POL'Y (Aug. 3, 2012), <http://foreignpolicy.com/2012/08/03/salami-slicing-in-the-south-china-sea/>. See SCOTT SNYDER, *THE SOUTH CHINA SEA DISPUTE: PROSPECTS FOR PREVENTIVE DIPLOMACY* 8 (U.S. Institute for Peace ed. Special Report No. 18, 1996) (referring to such actions as "salami tactics").

<sup>44</sup> Chesterman, *supra* note 40, at 973.

<sup>45</sup> Cf. Ministry of Foreign Affairs, People's Republic of China, "Set Aside Dispute and Pursue Joint Development", [http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18023.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml) (last visited Sept. 22, 2017). The application to the South China Sea of the principle of "setting aside disputes," which dates back to Deng Xiaoping, is also advocated by Chinese scholars. See, e.g., Zhang Xinjun, "Setting Aside Disputes and Pursuing Joint Development" at *Crossroads in South China Sea*, in *TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS* 39–

Compared to the reaction of the PRC, the Philippines' response to its success before the arbitral tribunal has been much more measured. Shortly before the tribunal issued its Award, the term of the Philippine president who had initiated the proceedings, Benigno Aquino, ended. He was succeeded by Rodrigo Duterte. While campaigning, Duterte had promised to ride a Jet Ski to plant the Philippine flag on islands that it claims, and that he would willingly sacrifice his own life doing so.<sup>46</sup> After assuming office on June 30, 2016, the new president promised to accept the tribunal's verdict regardless of the outcome, but expressed optimism for a ruling favorable to the Philippines.<sup>47</sup> The immediate Philippine reaction to the Award was very cautious, with the foreign secretary appealing for "restraint and sobriety."<sup>48</sup> The new president at first stressed the relevance of the arbitral Award for the peaceful resolution of the disputes in the "West Philippine Sea, otherwise known as (the South) China Sea."<sup>49</sup> He also threatened retaliation for any territorial infringement and promised to work with other East Asian leaders towards the implementation of the arbitral Award.<sup>50</sup>

At the East Asia Summit in Laos in September 2016, however, the president eventually chose not to call publicly on China to respect the ruling, although a corresponding statement had already been prepared.<sup>51</sup> The omission was apparently prompted by irritation over U.S. criticism of human rights violations in the Philippines,<sup>52</sup> and it was followed by an abrupt policy change. Declaring that China now had military superiority in the region, the president of the Philippines announced a "separation" from its long-time ally and called for an end of U.S. military assistance.<sup>53</sup> He expressed doubts as to whether the United States would be willing to provide effective support should an armed

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53 (Jing Huang & Andrew Billo eds., 2015). For a critical outlook, see Prashanth Parameswaran, *Beware the Illusion of China-ASEAN South China Sea Breakthroughs*, DIPLOMAT (Aug. 17, 2016), <https://thediplomat.com/2016/08/beware-the-illusion-of-china-asean-south-china-sea-breakthroughs/>.

<sup>46</sup> *Talk Duterte to Me*, ECONOMIST, July 9, 2016, at 43.

<sup>47</sup> Frances Mangosing, *Duterte Optimistic of Favorable Sea Ruling*, PHILIPPINES DAILY INQUIRER, July 5, 2016.

<sup>48</sup> Melba Maggay, *Taking on the Dragon*, PHILIPPINES DAILY INQUIRER (July 26, 2016), <http://opinion.inquirer.net/95950/taking-on-the-dragon>.

<sup>49</sup> *Philippines' Duterte Insists on Using Arbitral Ruling vs. China*, JAPAN ECON. NEWSWIRE, July 25, 2016.

<sup>50</sup> Bullit Marquez, *Duterte Toughens anti-China Rhetoric - There Will Be Blood if Philippine Territory Breached*, MACAU DAILY TIMES (Aug. 26, 2016), <https://macaudailytimes.com.mo/duterte-toughens-anti-china-rhetoric-will-blood-philippine-territory-breached.html>.

<sup>51</sup> Minoru Satake, *ASEAN Takes a Diffident Stance on the South China Sea*, NIKKEI ASIA REVIEW (Sept. 15, 2016), <https://asia.nikkei.com/Politics/ASEAN-takes-a-diffident-stance-on-the-South-China-Sea>.

<sup>52</sup> *Id.*

<sup>53</sup> Mark Landler, *Philippines 'Separation' From U.S. Jilts Clinton, Too*, N.Y. TIMES, Oct. 22, 2016, at 3.

conflict break out over the contested islands;<sup>54</sup> in October, joint military maneuvers and patrols in the South China Sea were put on hold.<sup>55</sup>

While the change in government has made Philippine politics more unpredictable, it is far from certain that its traditional alliance with the United States or its erstwhile stance on the dispute in the South China Sea will change significantly.<sup>56</sup> First, cooperation between U.S. and Philippine armed forces is deeply entrenched; most senior officers of the Armed Forces of the Philippines have completed part of their training in the United States.<sup>57</sup> Also, the temporary realignment with China seems to have been triggered primarily by personal animosity between the newly elected president and his then-American counterpart. More importantly, no Philippine leader could risk making any concessions on sovereignty issues in the South China Sea. Accordingly, the president's statements on the dispute have become more bellicose again, and military cooperation with U.S. naval forces has continued.<sup>58</sup>

The United States has largely refrained from commenting on the recent shifting of Philippine policies, although it threatens an important element of the so-called "pivot" to Asia.<sup>59</sup> With regard to the arbitral Award, the United States did not—in line with its official practice—take a position on individual claims or the merits of the case, although the United States emphasized that the ruling invalidated China's nine-dash line claim, ruled out an EEZ for most of the contested maritime features, and found Chinese fishing and reclamation to be violations of Philippine rights.<sup>60</sup> More generally, the United States reiterated its strong support for the rule of law and for "efforts to resolve territorial and

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<sup>54</sup> Jane Perlez, *Philippines May 'Pivot' Away From the U.S. on China Visit This Week*, N.Y. TIMES, Oct. 18, 2016, at A4. The Mutual Defense Treaty Between the United States and the Republic of the Philippines, U.S.-Phil., Aug. 30, 1951, 177 U.N.T.S. 133, provides for mutual support in case of an armed attack on islands, yet it is unclear whether that provision also applies to contested territory. Catherine Wong, *Duterte's Tilt Towards China Set to 'Test US Pivot to Asia'*, S. CHINA MORNING POST, Oct. 22, 2016.

<sup>55</sup> Felipe Villamor, *Philippine President Raises Doubts About U.S. Military Ties*, N.Y. TIMES, Sept. 30, 2016, at 5. Under Duterte's predecessor, cooperation had just been deepened. See Agreement between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, U.S.-Phil., Apr. 28, 2014, T.I.A.S. No. 14-0625.

<sup>56</sup> *Pivot or Pirouette?*, ECONOMIST, Feb. 25, 2017, at 46.

<sup>57</sup> Richard C. Paddock, *Rodrigo Duterte, Pushing Split With U.S., Counters Philippines' Deep Ties*, N.Y. TIMES (Oct. 26, 2016), <https://www.nytimes.com/2016/10/27/world/asia/philippines-duterte- united-states-alliance.html>. See also ALFRED W. MCCOY, CLOSER THAN BROTHERS: MANHOOD AT THE PHILIPPINE MILITARY ACADEMY 20 (1999).

<sup>58</sup> *Duterte Orders Military to Occupy South China Sea Areas*, PHILIPPINE STAR, Apr. 6, 2017; *US Guided-missile Destroyer now in Subic*, PHILIPPINE STAR, Apr. 2, 2017. President Duterte also invoked the arbitral award in bilateral meetings with the Chinese president. *Xi Threatened to Start War Over S China Sea: Duterte*, TAIPEI TIMES, May 21, 2017, at 1.

<sup>59</sup> See THOMAS LUM & BEN DOLVEN, CONG. RESEARCH SERV., R43498, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS (May 2014). On the U.S. pivot to Asia, see MARK E. MANYIN ET AL., CONG. RESEARCH SERV., R42448, PIVOT TO THE PACIFIC? THE OBAMA ADMINISTRATION'S "REBALANCING" TOWARD ASIA, (March 2012).

<sup>60</sup> Dep't of State, Office of the Spokesperson, Background Briefing on South China Sea Arbitration, (July 12, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259976.htm>.

maritime disputes in the South China Sea peacefully, including through arbitration.”<sup>61</sup> It stressed that the parties to UNCLOS had also agreed to the Convention’s compulsory dispute settlement process to resolve disputes, and pointed out that the tribunal had unanimously found that the Philippines was acting within its rights under the Convention in initiating arbitration proceedings.<sup>62</sup> The tribunal’s decision was “final and legally binding on both China and the Philippines,” and the United States expressed “its hope and expectation that both parties will comply with their obligations,” encouraging the claimants “to clarify their maritime claims in accordance with international law—as reflected in the Law of the Sea Convention.”<sup>63</sup>

This response was a continuation of the U.S. government’s general approach prior to the arbitral Award, which focused on the international rule of law.<sup>64</sup> It also emphasizes the global dimension of the dispute in the South China Sea.<sup>65</sup> In 2010 already, Secretary of State Clinton underlined that the United States had—“like every nation”—a “national interest in freedom of navigation, open access to Asia’s maritime commons, and respect for international law in the South China Sea.”<sup>66</sup> In international fora, President Obama subsequently reiterated on numerous occasions the importance of maintaining “a rules-based order in the maritime domain based on the principles of international law, in particular as reflected in the United Nations Convention on the Law of the Sea.”<sup>67</sup> Before the UN General Assembly, he stressed the United States’ “interest in upholding the basic principles of freedom of navigation and the free flow of commerce and in resolving disputes through international law, not the law of force.”<sup>68</sup> In meetings with regional leaders prior to and after the arbitral Award, President Obama emphasized the “imperative of upholding the internationally-recognized freedoms of navigation and overflight”;<sup>69</sup> at the same

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<sup>61</sup> U.S. Dep’t of State, Bureau of Public Affairs, Decision in the Philippines-China Arbitration: Press Statement,(July 12, 2016), <https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Cf., e.g.*, Bureau of Oceans, *supra* note 22, at 8 (defining the international law of the sea as the applicable legal framework and as its basis of analysis).

<sup>65</sup> Geoffrey Till, *The Global Significance of the South China Sea Disputes*, in *THE SOUTH CHINA SEA* 13, 13-14 (C. J. Jenner & Tran Truong Thuy eds. 2016).

<sup>66</sup> Secretary of State, Remarks at Press Availability, Vietnam (July 23, 2010).

<sup>67</sup> Joint Statement: Group of Seven Leaders' Declaration, DAILY COMPILATION OF PRESIDENTIAL DOCUMENTS (DCPD) DCPD-201500422 (June 8, 2015); *see also* The President's News Conference in Kuala Lumpur, Malaysia, DCPD-201500836 (Nov. 22, 2015); Joint Statement of the United States-Association of Southeast Asian Nations Special Leaders Summit (Sunnylands Declaration), DCPD-201600082 (Feb. 12, 2016); Remarks Prior to a Meeting With Association of Southeast Asian Nations Leaders in Vientiane, Laos, DCPD-201600557 (Sept. 8, 2016); The President's News Conference in Vientiane, Laos, DCPD-201600570 (Sept. 8, 2016).

<sup>68</sup> Remarks to the United Nations General Assembly in New York City, DCPD-201500657 (Sept. 28, 2015); Remarks to the United Nations General Assembly in New York City, DCPD-201600612 (Sept. 20, 2016).

<sup>69</sup> United States-Vietnam Joint Vision Statement, DCPD-201500482 (July 7, 2015); *see also* Joint Statement by President Obama and President Joko "Jokowi" Widodo of Indonesia, DCPD-

time, he asserted that U.S. interests were limited to protecting these principles, and to making sure that “the rules of the road” were upheld.<sup>70</sup>

Had she been elected, Hillary Clinton—a vocal advocate of the “pivot” to Asia—would presumably have continued this policy, albeit perhaps more aggressively.<sup>71</sup> However, the arbitral Award on the South China Sea (as well as the emphasis on international law) clearly enjoyed bipartisan support.<sup>72</sup> And while Donald Trump’s position on the South China Sea remained vague during his campaign, he chided China for “totally disregarding” the United States by building “a military fortress the likes of which perhaps the world has not seen.”<sup>73</sup> He also refused to rule out an armed response.<sup>74</sup> His campaign platform advocated “bolstering the U.S. military presence in the East and South China Seas to discourage Chinese adventurism.”<sup>75</sup> But his campaign team also maintained the emphasis on freedom of navigation and overflight as “a key principle of the international rules-based order.”<sup>76</sup>

After the election, there have been indications that the fundamentals of U.S. policy towards the South China Sea have not changed, and in fact may even have become more assertive. In his confirmation hearings, the new Secretary of State, Rex Tillerson, held that China’s island-building in the South China Sea was “an illegal taking of disputed areas without regard for international

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201500756 (October 26, 2015), Remarks Following a Tour of the Philippine Navy Frigate BRP Gregorio del Pilar in Manila, Philippines, DCPD-201500816 (Nov. 17, 2015), Remarks Following a Meeting With Communist Party General Secretary Nguyen Phi Trong of Vietnam (July 7, 2015), Joint Statement by President Obama and President Trn Dai Quang of Vietnam, DCPD-201600345 (May 23, 2016), Remarks in Vientiane, Laos, DCPD-201600563 (Sept. 6, 2016).

<sup>70</sup> The President’s News Conference With President Xi Jinping of China, DCPD-201500646 (Sept. 25, 2015).

<sup>71</sup> In her platform, she promised to “press China to play by the rules” with regard to, *inter alia*, territorial disputes in Asia, “and hold [China] accountable if it does not”: *Hillary for President: National Security* (2016), <https://www.hillaryclinton.com/issues/national-security/>. See also *Why China May Favor Donald Trump Over Hillary Clinton*, NEWSWEEK (July 7, 2016), <http://www.newsweek.com/china-donald-trump-hillary-clinton-south-china-sea-beijing-xi-jinping-479536>.

<sup>72</sup> Cf. Statement by Senators McCain and Sullivan on South China Sea Arbitration Award (July 12, 2016), <https://www.mccain.senate.gov/public/index.cfm/2016/7/statement-by-senators-mccain-and-sullivan-on-south-china-sea-arbitration-award> (“With today’s award, China faces a choice. China can choose to be guided by international law, institutions, and norms. Or it can choose to reject them and pursue the path of intimidation and coercion.”) See also South China Sea and East China Sea Sanctions Act, S. 695, 115th Cong. (2017).

<sup>73</sup> Maggie Haberman & David A. Sanger, *Transcript: Donald Trump Expounds on His Foreign Policy Views*, N.Y. TIMES (Mar. 27, 2016), [https://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html?\\_r=2](https://www.nytimes.com/2016/03/27/us/politics/donald-trump-transcript.html?_r=2).

<sup>74</sup> *Id.* (“Would I go to war? Look, let me just tell you. There’s a question I wouldn’t want to answer. [...] I don’t want to say what I’d do because, again, we need unpredictability. [...] I wouldn’t want them to know what my real thinking is.”).

<sup>75</sup> Trump Campaign, *US-China Trade Reform*, 2 (2016), [https://assets.donaldjtrump.com/U.S.-China\\_Trade\\_Reform.pdf](https://assets.donaldjtrump.com/U.S.-China_Trade_Reform.pdf).

<sup>76</sup> David Brunnstrom & Jeff Mason, *U.S. Urges All Countries to Adhere to South China Sea Ruling*, REUTERS (July 12, 2016), <https://www.reuters.com/article/us-southchinasea-ruling-usa-idUSKCN0ZSIHZ>.

norms,”<sup>77</sup> and he went as far as to suggest that Chinese access to the artificial islands should be prevented.<sup>78</sup> President Trump has also underscored “the importance of maintaining a maritime order based on international law, including freedom of navigation and overflight and other lawful uses of the sea,” indirectly calling on China to “act in accordance with international law” in the South China Sea.<sup>79</sup>

## II.

### THE SOUTH CHINA SEA AND THE INTERNATIONAL LEGAL ORDER

#### A. *Historical and Political Contingencies of the Law of the Sea*

Both China and the United States insist on safeguarding the “fundamental principles of international law” in the South China Sea.<sup>80</sup> Yet they come to diametrically opposed conclusions as to what these principles are. While they both invoke the law of the sea, their claims illustrate that maritime law has served very different purposes in different contexts.

The United States’ constant insistence on free navigation harkens back to the principle of the freedom of the open sea, or *mare liberum*, according to which no nation could appropriate the oceans or prevent other States’ ships from crossing them.<sup>81</sup> That principle, however, did not always apply; it originated from specific historical circumstances.

The concept of *mare liberum* dates back to the eponymous pamphlet that Hugo Grotius published (anonymously) in 1609.<sup>82</sup> His polemic was aimed against Portugal and Spain: when extending their rule to Africa, Asia, and America, they had claimed ownership not only of the newly discovered lands, but also of the sea that they had crossed—a claim that was corroborated repeatedly by the Papacy.<sup>83</sup> Writing at the behest of the Dutch East India Company, Grotius’ primary aim was to “demonstrate briefly and clearly that the

<sup>77</sup> *Secretary of State Designate Senate Confirmation Hearing Before the S. Comm. on Foreign Rel.*, 115th Cong. (2017) (opening statement of nominee Rex Wayne Tillerson).

<sup>78</sup> *Secretary of State Confirmation Hearing Before the S. Comm. on Foreign Rel.*, 115th Cong. (2017) (statement of nominee Rex Wayne Tillerson), <https://www.c-span.org/video/?421335-4/secretary-state-confirmation-hearing-part-3>.

<sup>79</sup> Joint Statement by President Trump and Prime Minister Shinzo Abe of Japan, DCPD-201700112 (Feb. 10, 2017). See also Dep’t of State, Office of the Spokesperson, *Secretary Pompeo’s Meeting With Chinese Officials Including President Xi Jinping, Politburo Member Yang Jiechi, State Councilor and Foreign Minister Wang Yi* (June 14, 2018), <https://www.state.gov/r/pa/prs/ps/2018/06/283236.htm>.

<sup>80</sup> Government of the People’s Republic of China, *supra* note 28; for the U.S. position see the statements and declarations *supra* note 69.

<sup>81</sup> ROBERT Y. JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW VOLUME I: PEACE* §§ 278–279 (9th ed. 1996).

<sup>82</sup> HUGO GROTIUS, *MARE LIBERUM* (Robert Feenstra ed., Brill 2009) (1609).

<sup>83</sup> WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 257–58 (Michael Byers ed., trans., 2000).

Dutch . . . have the right to sail to the Indians as they are now doing and to engage in trade with them.”<sup>84</sup> But relying on natural law considerations, he also made the more general claim that “occupation of the sea is impermissible both in the natural order and for reasons of public utility”;<sup>85</sup> hence, “*no part* of the sea may be regarded as pertaining to the domain of any given nation,”<sup>86</sup> nor could historic claims based on prior exploration (*ante alios navigare*) preclude other seafarers:<sup>87</sup> by perpetual law, the sea was dedicated to common use.<sup>88</sup> Foreshadowing today’s conflicts, Grotius also recalled that “in ancient times. . . it was held to be the greatest of all crimes” to oppose those “who were willing to submit to arbitration the settlement of their difficulties.”<sup>89</sup>

But as indicated by its sponsors, although Grotius’ pamphlet may have purported to further the “common benefit of mankind,”<sup>90</sup> it also served the very concrete trading interests of the *Staten-Generaal*, the States General of the Netherlands, as an emerging economic power.<sup>91</sup> The freedom of the seas as advocated by Grotius was an essential precondition for the subsequent economic and political dominance of Western States and their colonial and imperialistic expansion.<sup>92</sup>

Just as international legal norms in general do, the law of the sea reflects and underpins the power structure of the respective era. Western insistence on the freedom of the seas thus also aims to preserve an order that has served European powers and the United States particularly well. Numerous non-Western nations, on the other hand, experienced the vaunted *mare liberum* primarily as a means for the West to capitalize on its maritime superiority, both militarily and economically. Gunboat diplomacy or the display of naval superiority became an important means of coercion.<sup>93</sup>

Chinese preoccupation about controlling access to the South China Sea should be considered in this light as well: starting with the first Opium War,

<sup>84</sup> GROTIUS, *supra* note 82, ch. i, p. 1 (the page numbers refer to the facsimile).

<sup>85</sup> *Id.* at ch. v, p. 28.

<sup>86</sup> *Id.* at ch. v, p. 26 (emphasis added).

<sup>87</sup> *Id.* at ch. v, p. 31.

<sup>88</sup> *Id.* at ch. vii p. 43 (“*Est autem lex illa perpetua ut Mare omnibus usu commune sit*” (But that law is perpetual that the use of the sea should be common to all)).

<sup>89</sup> *Id.* at Fol. 6 *recto*.

<sup>90</sup> *Id.* at ch. xiii, p. 66.

<sup>91</sup> Cf. Peter Borschberg, *Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting Mare Liberum (1609)*, 29 *ITINERARIO* 31, 36 (2005).

<sup>92</sup> See Martine Julia Van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in De Jure Praedae (1604-1606)*, 31 *ASIAN J. SOC. SCI.* 511, 535 (2003) and more generally EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* 60 (2002).

<sup>93</sup> The “black ships” of Commodore Perry provide perhaps the starkest example of the pivotal role that naval superiority played in furthering Western interests in the Far East, cf. MATTHEW CALBRAITH PERRY, *NARRATIVE OF THE EXPEDITION OF AN AMERICAN SQUADRON TO THE CHINA SEAS AND JAPAN* (Francis L. Hawks ed., 1856).

naval superiority was instrumental in imposing a series of unequal treaties.<sup>94</sup> The cession of Hong Kong, for instance, provided the British with an additional trading post and a base for their fleet.<sup>95</sup> As a latecomer to the modern international legal order, China has first-hand experience of its vagaries, such as the imposition of consular jurisdiction in the nineteenth, or the fiction of the Republic of China's seat on the UN Security Council in the twentieth century. If life punishes latecomers, international law does so with a vengeance, and the freedom of the seas is an example of a universalized concept that was put forward by, and has long served the exclusive interests of, Western powers. This background might also contribute to Chinese distrust of arbitral proceedings and their alleged restriction of sovereignty.<sup>96</sup>

Yet as a mirror to the relative power of States, the law of the seas is also susceptible to changes in the fabric of the international community. In the days of British naval superiority, the territorial waters were defined as narrowly as possible, for the benefit of British control of the oceans.<sup>97</sup> The established sea powers successfully resisted any extension to their detriment at the Hague Conference (1930) and the Second United Nations Convention on the Law of the Sea in Geneva (1960).<sup>98</sup> But the extended discussion in The Hague and Geneva already heralded change. Several States—particularly newly independent ones—extended their territorial waters to twelve nautical miles.<sup>99</sup> Yet even for the established sea powers, the freedom of the seas was not a matter of principle, but of convenience. If it suited their interests, they did not hesitate to raise claims to exclusiveness, as evidenced by the Truman Proclamation of 1945.<sup>100</sup> The continental shelf that the Proclamation established was “tailored to the need of the United States,” allowing for the exclusive exploitation of hydrocarbon resources in the Gulf of Mexico while preserving U.S. fisheries’ interests off the shores of other States.<sup>101</sup> Numerous States

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<sup>94</sup> For an overview, see IMMANUEL CHUNG-YUEH HSÜ, *THE RISE OF MODERN CHINA 168–220* (6th ed. 2000).

<sup>95</sup> STEVE TSANG, *A MODERN HISTORY OF HONG KONG 20–21* (2004).

<sup>96</sup> Beng, *supra* note 31; Yee *supra* note 31; *Chinese Foreign Minister Says South China Sea Arbitration a Political Farce*, *supra* note 32.

<sup>97</sup> See Andree Kirchner, *Law of the Sea, History of*, MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW [hereinafter MPEPIL] ¶¶ 16–19 (2007), www.mpepil.com.

<sup>98</sup> YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA 21* (2d ed. 2015); D.W. Bowett, *The Second United Nations Conference on the Law of the Sea* 9 INT'L & COMP. L.Q. 415, 416 (1960). On the conferences, see also Shabtai Rosenne & Julia Gebhard, *Conferences on the Law of the Sea*, MPEPIL ¶¶ 9, 19–21 (2008).

<sup>99</sup> Sarah Wolf, *Territorial Sea*, MPEPIL, ¶ 6 (2011).

<sup>100</sup> Harry S. Truman, *Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Proclamation 2667, Sept. 28 1945, 10 Federal Register 12303, 59 U.S. Stat. 884. For the expeditious codification of the new zone, see UN Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311.

<sup>101</sup> Tullio Treves, *Historical Development of the Law of the Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1, 11 (Donald R. Rothwell et al. eds., 2015); TANAKA, *supra* note 98, at 137.



emulated the United States and claimed exclusive rights to the “natural prolongation of [their] land territory into and under the sea.”<sup>102</sup>

Subsequently, the selective approach reflecting the needs of the major seafaring nations came under increasing pressure, as evidenced by the prolonged discussions between developing and industrialized States, and the Third UN Conference on the Law of the Sea (1974-1982). The developing countries aimed to establish extensive exclusive economic zones to safeguard against technically advanced competition; the industrialized States insisted on freedom of navigation and free exploitation of the resources of the high seas and the deep seabed.<sup>103</sup> With the introduction in UNCLOS of an EEZ, the extension of the territorial sea to twelve nautical miles, and the designation of the deep sea as the “common heritage of mankind,”<sup>104</sup> the developing countries appeared to have carried the day on most contentious issues. As a result, the United States called for a vote on the Convention at the final session and voted against it. Several industrialized nations abstained.<sup>105</sup> Only after the revision of UNCLOS by a 1994 agreement did the Convention eventually enter into force.<sup>106</sup>

The United States was mainly concerned about the regime of seabed mining<sup>107</sup> (most other parts of the Convention were considered customary international law by the United States).<sup>108</sup> These concerns were instrumental in drafting the 1994 Agreement. Yet the United States still has not ratified the Convention. Consecutive U.S. administrations have subsequently pressed for ratification, and the detrimental effects of U.S. non-participation have been widely acknowledged,<sup>109</sup> specifically in the context of the South China Sea.<sup>110</sup> Yet Senate consent has remained elusive. Opposition has been primarily based

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<sup>102</sup> North Sea Continental Shelf Cases (F.R.G. v. Neth.), 1969 I.C.J. Rep. 22 (Feb. 20). See TANAKA, *supra* note 98, at 137.

<sup>103</sup> For an overview, see Rosenne & Gebhard, *supra* note 98, ¶¶ 22–37.

<sup>104</sup> UNCLOS arts. 55, 3, 136.

<sup>105</sup> Third United Nations Conference on the Law of the Sea, 11th Sess., 182nd plen. mtg. ¶ 28, U.N. Doc. A/CONF.62/SR.182 (April 30, 1982).

<sup>106</sup> UNCLOS entered into force on Nov. 16, 1994. 1833 U.N.T.S. 396; *cf.* Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, G.A. Res. 48/236, Annex, U.N. Doc. A/Res/48/236/Annex (July 28, 1994). On the process, see Stefan Talmon, *Seerecht*, in LEXIKON DER VEREINTEN NATIONEN 455, 459–60 (Helmut Volger ed., 2000).

<sup>107</sup> See Doug Bandow, *UNCLOS III: A Flawed Treaty*, 19 SAN DIEGO L. REV. 475, 477 (1982).

<sup>108</sup> Third United Nations Conference on the Law of the Sea, 11th Sess., 192nd plen. mtg. ¶¶ 3, 8, U.N. Doc. A/CONF.62/SR.192 (Dec. 9, 1982).

<sup>109</sup> Elliot Richardson, *Treasure Beneath the Sea*, N. Y. TIMES, July 30, 1994, at 19; Vern Clark & Thomas R. Pickering, *A Treaty That Lifts All Boats*, N. Y. TIMES, July 14, 2007, at A11; see generally *Military Implications of the United Nations Convention on the Law of the Sea: Hearing Before the S. Comm. on Armed Services*, 108th Cong. (2004).

<sup>110</sup> *Calling upon the United States Senate to give its advice and consent to the ratification of the United Nations Convention on the Law of the Sea (Draft)*, H.R. Res. 631, 114th Cong. (2016) (“... the House of Representatives . . . recommends the ratification of UNCLOS remain a top priority for the administration, . . . having most recently been underscored by the strategic challenges the United States faces in the Asia-Pacific region and more specifically in the South China Sea.”).

on vague concerns over the loss of (extensively construed) sovereignty.<sup>111</sup> Objections have been voiced against multilateral fora, where U.S. influence is not untrammelled,<sup>112</sup> when the benefits of UNCLOS could also be achieved “through bilateral and regional agreements.”<sup>113</sup> In addition, security concerns persist;<sup>114</sup> so do concerns over “creeping jurisdiction” of international courts<sup>115</sup> which would “not have the heritage and the clarity of understanding of the jurisdiction question” relating to international disputes, leading to the risks of compulsory adjudication or arbitration.<sup>116</sup>

This attitude contrasts sharply with constant U.S. insistence on the paramount importance of UNCLOS and peaceful dispute settlement for the conflicts in the South China Sea. As set out above, the United States emphasizes that adherence to the rules laid down in UNCLOS and respect for its dispute settlement procedures are pivotal for the maintenance of “peace, security, and stability” in the region.<sup>117</sup> Yet the United States raises reservations that are not very different from Chinese objections to compulsory jurisdiction.

### *B. Implications for the Maintenance of International Peace & Security*

One of the purposes of UNCLOS was to establish “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans.”<sup>118</sup> The conflict in the South China Sea is now testing that legal order, and hence the maintenance of international peace and security as envisaged in Article 1, Section 1 of the United Nations Charter. Tensions in the South China Sea could easily escalate. Armed conflicts have repeatedly flared up in the region.<sup>119</sup> Over the past years, some coastal States have embarked on significant naval armament, most notably China.<sup>120</sup> The stark imbalance between the armed forces of the PRC and its neighbor makes a military confrontation, at least in the South China Sea, less

<sup>111</sup> Cf. Baker Spring, *All Conservatives Should Oppose UNCLOS*, 12 TEX. REV. L. & POL. 453–58 (2008).

<sup>112</sup> *Military Implications*, *supra* note 109, at 59–60 (Statement of Jeane J. Kirkpatrick).

<sup>113</sup> *Id.* at 57 (Statement of Jeane J. Kirkpatrick).

<sup>114</sup> *Id.* at 67 (Sen. Inhofe).

<sup>115</sup> *Id.* at 52 (Sen. Ensign).

<sup>116</sup> *Id.* at 53 (Sen. Sessions). Specific concerns were also voiced over the possibility of China instigating arbitral proceedings against the United States. *Id.* at 49 (Sen. Inhofe).

<sup>117</sup> United States-Vietnam Joint Vision Statement, *supra* note 69; Joint Statement of the United States-Association of Southeast Asian Nations Special Leaders Summit, *supra* note 67.

<sup>118</sup> UNCLOS pmb. at 4.

<sup>119</sup> HAYTON, *supra* note 18.

<sup>120</sup> While these efforts may still primarily be aimed at *modernising* national navies, they also carry “potential arms race implications”. Bernard F. W. Loo, *Naval Modernisation in South-east Asia: Modernisation versus Arms Race*, NAVAL MODERNISATION IN SOUTH-EAST ASIA 283, 283 (G. Till & J. Chan eds., 2014). The build-up of air forces is even more conspicuous, *see* Ryosuke Hanafusa, *China's Dismissal of Maritime Ruling Could Accelerate Asia's Arms Race*, NIKKEI ASIAN REVIEW (July 28, 2016), <http://asia.nikkei.com/magazine/20160728-GENERATION-CHANGE/Politics-Economy/China-s-dismissal-of-maritime-ruling-could-accelerate-Asia-s-arms-race>.

likely—although nationalist *furor* (stoked, for instance, by the stationing of a Chinese oil rig in contested waters)<sup>121</sup> could still lead to unforeseen outcomes. Even such quixotic enterprises as the Philippine outpost on the Second Thomas Shoal in the Spratly Islands may well result in sudden clashes.<sup>122</sup>

By far greater—and more consequential—is the risk of a conflict between the United States and China over the South China Sea. The United States has projected naval power worldwide, starting with the voyage of the “Great White Fleet” in 1907–1909.<sup>123</sup> Since the late 1970s the United States has been systematically conducting freedom of navigation operations in an effort to counter allegedly excessive claims by coastal States and to bolster its understanding of the freedom of the seas as set out in the previous Part.<sup>124</sup> In the South China Sea such operations have led to immediate tensions with China. For example, the United States considered the transit of the destroyer U.S.S. *Larsen* within 12 nautical miles of an artificial structure on Subi Reef in October 2015 a routine freedom of navigation exercise; China, instead, called it a serious provocation and a threat to China’s sovereignty and security interests, and warned that such “dangerous, provocative acts” could eventually spark a war.<sup>125</sup> Several similar operations have since been conducted, each time with a corresponding reaction from China<sup>126</sup> and U.S. insistence that such missions merely asserted “the principle of freedom of navigation in international waters ... on behalf of states all around the world, including China.”<sup>127</sup> More recently, China seized a U.S. underwater drone near Subic Bay on the Philippines,<sup>128</sup> and a U.S. carrier group started patrolling the South China Sea.<sup>129</sup> After some

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<sup>121</sup> *Hot Oil on Troubled Water*, *ECONOMIST*, May 18, 2014; Mike Ives, *Vietnam Assails China in Sea Dispute*, *N.Y. TIMES* (Jan. 21, 2016), at A4.

<sup>122</sup> The Philippine landing ship BRP *Sierra Madre* (originally built in the United States during the Second World War) was run aground in 1999 on Second Thomas Shoal to maintain Philippine claims; for a graphic depiction of the situation aboard, see Jeff Himmelman, *A Game of Shark and Minnow*, *N.Y. TIMES MAG.* (Oct. 27, 2013), <http://www.nytimes.com/newsgraphics/2013/10/27/south-china-sea/>.

<sup>123</sup> Cf. JAMES R. RECKNER, *TEDDY ROOSEVELT'S GREAT WHITE FLEET* (1988) (recounting the circumnavigation of the world by sixteen battleships of the US Atlantic Fleet, dispatched by President Roosevelt to display the United States’ new status as a naval power).

<sup>124</sup> Dale Stephens & Tristan Skousgaard, *Naval Demonstrations and Manoeuvres*, *MPEPIL* para. 14 (2009). The U.S. Department of Defence issues annual reports on such operations. See DoD Annual Freedom of Navigation (FON) Reports, <http://policy.defense.gov/OUSDP-Offices/FON/>.

<sup>125</sup> Kristina Daugirdas & Julian Davis Mortenson, *United States Conducts Naval Operation Within Twelve Nautical Miles of Spratly Islands in the South China Sea, Prompting Protests from China*, 110 *AM. J. INT’L. L.* 120, 122 (2016).

<sup>126</sup> Kristina Daugirdas & Julian Davis Mortenson, *United States Continues to Challenge Chinese Claims in South China Sea; Law of the Sea Tribunal Issues Award Against China in Philippines-China Arbitration*, 110 *AM. J. INT’L. L.* 795, 795–98 (2016).

<sup>127</sup> Office of the Press Secretary, *Press Briefing by Press Secretary Josh Earnest*, *THE WHITE HOUSE* (Oct. 21, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/10/21/press-briefing-press-secretary-josh-earnest-10212016>.

<sup>128</sup> *China Seizes an Underwater Drone and Sends a Signal to Donald Trump*, *ECONOMIST* (Dec. 24, 2016).

<sup>129</sup> Xu Lushan, *US Resumes Its Provocative Actions in Sea*, *CHINA DAILY* (Feb. 22, 2017).

hesitation, the new administration has also resumed freedom of navigation operations.<sup>130</sup>

Air incidents provide even more potential for uncontrollable consequences and may require momentous decisions within minutes.<sup>131</sup> Such incidents would multiply were China to declare, as threatened in the wake of the Hague ruling, an Air Defence and Identification Zone (ADIZ) over the South China Sea,<sup>132</sup> following the precedent it set when establishing an ADIZ over the East China Sea in 2013.<sup>133</sup> States have a right to establish such zones and to require entering airplanes to identify themselves—yet under international customary law, that right has been limited to civil airplanes intending to enter the respective national airspace.<sup>134</sup> However, in the East China Sea, China has tried to enforce a much more aggressive regime that is not limited to civilian airplanes on their way to Chinese airspace, and has threatened to use "defensive emergency measures" against non-cooperating planes.<sup>135</sup>

Such idiosyncrasy in interpretation not only applies to no-fly zones, but also to the Chinese understanding of free navigation. After some disagreements during the Cold War, the right of innocent passage has generally been construed broadly (and in line with U.S. exigencies). Under the currently prevailing view, that right presumably includes the passage of warships through the territorial sea.<sup>136</sup> China, on the other hand, has put forward a much more restricted interpretation that limits any military presence not only in territorial waters, but even in the EEZ.<sup>137</sup> Such a restricted view reflects the painful historical experiences mentioned above;<sup>138</sup> conversely, the U.S. position mirrors its need to

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<sup>130</sup> *US Navigation Game not Good for Better Relations*, CHINA DAILY (May 26, 2017) (regarding the U.S.S. Dewey bypassing Mischief Reef); *US Missile Destroyer Trespassing Territorial Waters 'Serious Provocation'*, CHINA DAILY (July 3, 2017) (regarding the U.S.S. Stethem bypassing Triton Island).

<sup>131</sup> Cf. Jane Perlez, *Chinese Fighters Flew Too Close, U.S. Says*, N.Y. TIMES, A6 (May 20, 2017).

<sup>132</sup> An Baije, *Air Defense Zone Called Option*, CHINA DAILY (July 14, 2016).

<sup>133</sup> J. Ashley Roach, *Air Defence Identification Zones*, MPEPIL para. 14 (2015).

<sup>134</sup> *Id.* at para. 6.

<sup>135</sup> *Id.* at para. 14. The U.S. has indicated that an ADIZ over the South China Sea would be ignored. See Missy Ryan, *U.S. Plans to Stick to its Script in the Pacific - Cautiously*, WASHINGTON POST, A12 (July 13, 2016).

<sup>136</sup> Cf. *Innocent Passage: U.S.-USSR Uniform Interpretation*, 84 AM. J. INT'L. L. 239-42 (1990). This view is opposed by some forty, mainly developing countries, including China. See Yoshifumi Tanaka, *Navigational Rights and Freedoms*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 536, 546 (Donald R. Rothwell et al. eds., 2015).

<sup>137</sup> The PRC considers such a presence incompatible with the peaceful use of the sea prescribed by Art. 310 UNCLOS. See Till, *supra* note 65, at 23-24; see also Xinjun Zhang, *The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance*, 9 J. E. ASIA & INT'L. L. 167, 167-82 (2016).

<sup>138</sup> See *supra* note 94 and accompanying text. China had already opposed innocent passage for warships at the Third UN Conference on the Law of the Sea. See 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 155, para. 19.1 (Satya N. Nandan & Shabtai Rosenne eds., 1993). Chinese attitudes may change, however, as a consequence of China's increasing naval power; the Chinese Navy has not only made significant contributions to counter-piracy efforts at the Horn of Africa, but also conducted surveillance operations in the EEZ of Hawaii and Guam. See

secure navigation lanes for its carrier groups, to support its allies in the Pacific region, and to secure access to its military bases.

Since World War II, U.S. carrier groups have allowed the United States to provide the military support necessary for its domination of the global commons.<sup>139</sup> The first deployment of the first Chinese carrier, the Liaoning, to the South China Sea in 2013 was therefore highly symbolic, and it was symptomatic that a serious incident with a U.S. destroyer ensued.<sup>140</sup> An equally clear signal was sent by the drills that the Liaoning held in the South China Sea after the arbitral ruling.<sup>141</sup> The ultimate aims of such endeavors are clear: to restrict U.S. access to its regional allies, to supplant the United States as regional hegemon, and to establish an exclusive Chinese sphere of influence. And in this undertaking, China will not be deterred by the ruling of an arbitral tribunal or concerns over UNCLOS provisions.

Such behavior is not without precedent. The United States also refused, at first, to participate in most of the proceedings in the *Nicaragua* case and then to heed the judgement of the ICJ.<sup>142</sup> The Chinese aim to establish an exclusive sphere of influence also follows previous examples, most notably the Monroe Doctrine, which was granted precedence even under the League of Nations Covenant.<sup>143</sup> But there are more worrisome and more fundamental historical parallels. In the context of the South China Sea, where the prospect of conflict between the United States and China evokes the rivalry between Sparta and Athens, the so-called Thucydides trap serves as a warning.<sup>144</sup>

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Andrew Poulin, *Going Blue: The Transformation of China's Navy*, THE DIPLOMAT (Aug. 16, 2016), <http://thediplomat.com/2016/04/going-blue-the-transformation-of-chinas-navy/>; Till, *supra* note 66, at 25.

<sup>139</sup> Cf. Andrew F. Hart & Bruce D. Jones, *How Do Rising Powers Rise?*, 52 SURVIVAL 63, 79 (2010).

<sup>140</sup> Mark J. Valencia, *The South China Sea and the "Thucydides Trap"*, THE SOUTH CHINA SEA 59, 67 (C. J. Jenner & Tran Truong Thuy eds., 2016).

<sup>141</sup> Cf. Ministry of Defence, People's Republic of China, China Aircraft Carrier Conducts Drill in S. China Sea (Jan. 3, 2017), [http://eng.mod.gov.cn/TopNews/2017-01/03/content\\_4769023.htm](http://eng.mod.gov.cn/TopNews/2017-01/03/content_4769023.htm).

<sup>142</sup> Cf. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Judgement of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and Against Nicaragua, G.A. Res. 44/43, U.N. Doc. A/Res/44/43 (Dec. 7, 1989). It may be argued that by now the U.S. has substantially implemented the judgement, but it would have done so on its own terms and at its own convenience. The same holds true, *mutatis mutandis*, for Russia in the *Arctic Sunrise* case (in re Arctic Sunrise (Neth. v. Russ.) Case No. 2014-02 (Perm. Ct. Arb. 2015).

<sup>143</sup> Cf. Covenant of the League of Nations, 225 C.T.S. 195, Art. 21 (June 28, 1919). The U.S. already reserved the Monroe Doctrine for the 1899 Hague Conventions. Heinrich Pohl, *Der Monroe-Vorbehalt*, in FESTGABE FÜR PAUL KRÜGER 447, 447-72 (1911). This is presumably the case for the 1928 Briand-Kellog Pact as well. See CARL SCHMITT, VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM REICHSBEGRIFF IM VÖLKERRECHT 28 (1939). For Schmitt, the Monroe Doctrine provided the most eminent example for a "greater area with a mutual prohibition of intervention" (*Großraum mit gegenseitigem Interventionsverbot*). See also *infra*, IV.A.

<sup>144</sup> *Small Reefs, Big Problems*, ECONOMIST (July 25, 2015); Valencia, *supra* note 140; GRAHAM T. ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP? (2017). The sense of inevitability of war that guided Athenian and Spartan decision-making processes is

Another historical analogy, however, is more pertinent. We see an established naval power bent on defending the status quo and invoking international law as justification. And we see a rising power which, resurfacing after an extended period of weakness—even humiliation—questions this very status quo. Parallels to the developments preceding World War I are evident, when the German Empire challenged British hegemony, particularly through its naval build-up. The impact of these similarities is not limited to the geopolitical situation, or the importance of navies and waterways. More importantly, these similarities also extend to the role played by international law.

Since international law did not prevent the outbreak of World War I, it is often assumed to have been of marginal importance.<sup>145</sup> This assumption overlooks two important aspects. *First*, the period before World War I witnessed important progress in the codification of international law. While international humanitarian law was of particular prominence in this regard,<sup>146</sup> the institutionalization of the peaceful settlement of disputes also took great strides. The Permanent Court of Arbitration was established in 1899;<sup>147</sup> efforts to transform it into a truly permanent court with compulsory jurisdiction failed mainly due to German opposition. It is noteworthy that during negotiations, Germany had initially opposed *any* institutionalized arbitration as incompatible with State sovereignty, presaging Chinese refutation of any judicial proceedings.<sup>148</sup>

*Second*, and more importantly, the defense of the international legal order was also a primary reason for the Allied Powers Britain and France to enter the war in 1914. They considered themselves "engaged in the defence of international law and justice,"<sup>149</sup> affirming "the sanctities of treaties" against the "dangerous challenge to the fundamental principles of public law" posed by Germany, which argued that international law had to cede to military necessity and national self-preservation.<sup>150</sup>

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striking. See THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR, bk. I, 23, 33 and 44 (Loeb Classical Library No. 108, 1962). Evidence of such a sense is present today as well. See, e.g., Benjamin Haas, *Steve Bannon: 'We're Going to War in the South China Sea ... no Doubt'*, THE GUARDIAN (Feb. 2, 2017), <https://www.theguardian.com/us-news/2017/feb/02/steve-bannon-donald-trump-war-south-china-sea-no-doubt>; Joshua Rovner, *Two Kinds of Catastrophe: Nuclear Escalation and Protracted War in Asia*, 40 J. STRATEGIC STUD. 696, 697 (2017).

<sup>145</sup>See ISABEL V. HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR 3 (2014) (providing a revision of the traditional view); Oliver Diggelmann, *Beyond the Myth of a Non-relationship: International Law and World War*, 19 J. HIST. INT'L. L. 93, 93-95 (2017) (also questioning the traditional view).

<sup>146</sup> On the respective Hague Conventions of 1899 and 1907, see Betsy Baker, *Hague Peace Conferences (1899 and 1907)*, MPEPIL (2009).

<sup>147</sup> Convention for the Pacific Settlement of International Disputes, 187 C.T.S. 410 (July 29, 1899).

<sup>148</sup> J.P.A. François, *La Cour permanente d'arbitrage: Son origine, sa jurisprudence, son avenir*, 87 RECUEIL DES COURS 461, 470 (1955).

<sup>149</sup> HULL, *supra* note 145, at 1 (citing Sir Graham Bower, a former British colonial official).

<sup>150</sup> See *id.* at notes 3&4 (reproducing the quotes); similarly, in 1917 President Wilson, in his message to Congress, stressed that German warfare violated the law of nations: Woodrow Wilson, Address delivered at Joint Session of the Two Houses of Congress, 65th Cong., 1st Sess. S. Doc. No. 5, at 3

Nor are the similarities limited to the role of international law. They also extend to the parameters of decision-making processes. In *The Sleepwalkers*, Christopher Clark described the "mental maps" that underlay the actions of Serbian decision-makers in July 1914.<sup>151</sup> Such maps often deviate from geographical reality – on the Serbian mental map for instance, Bosnia-Montenegro was part and parcel of Serbia.<sup>152</sup> Similarly entrenched mental maps may be observed with regard to the South China Sea. Since 2012, Chinese passports have been embossed with the nine-dash line<sup>153</sup> – suggesting that Chinese citizenship is now inherently linked to the belief that the South China Sea is part of China. In the same vein, the exam question "What is the southernmost point of China?" is common in Chinese schools.<sup>154</sup> Students learn that this is James Shoal in the South China Sea: 107 km from the Malaysian coast, and 1500 km from Mainland China.<sup>155</sup> Yet James Shoal is indeed a shoal and lies 22 m *below* sea level—and its status as China's southern vertex is based on a translation error from the 1930s.<sup>156</sup>

### III.

#### THE SOUTH CHINA SEA AND INTERNATIONAL LEGAL SCHOLARSHIP

In 1914, international law could not prevent the outbreak of the First World War. Is the international legal order of today more robust? Is the prohibition on the use of force sufficiently entrenched to prevent the outbreak of armed hostilities in the South China Sea on a large scale, the numerous parallels to the pre-World War I period notwithstanding? These should be questions of central importance to international legal scholarship—or so one would think. Yet the scholarly discourse rarely touches on such mundane matters. Instead, international law is often construed as a story of success and a narrative of continuous progress.<sup>157</sup> Two examples—both pertinent to the South China Sea—illustrate this propensity: the posit of the gradual *de-territorialization* and the concept of an increasing *constitutionalization* of international law. Neither of

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(1917). *Cf. also* Treaty of Peace between the Allied and Associated Powers and Germany, 225 C.T.S. 188, art. 227 (June 28, 1919) (providing for the arraignment of Emperor Wilhelm II "for a supreme offence against international morality and the sanctity of treaties.").

<sup>151</sup> CHRISTOPHER CLARK, *THE SLEEPWALKERS: HOW EUROPE WENT TO WAR IN 1914*, 20 *et seq.* (Penguin Books 2013) (2012). See David Ley, *Mental Maps / Cognitive Maps*, in *THE DICTIONARY OF HUMAN GEOGRAPHY*, 455, 455 (Derek Gregory ed., 5th ed., 2009) (providing a general overview of the concept).

<sup>152</sup> CLARK, *supra* note 151, 34-35.

<sup>153</sup> Mark McDonald, *A New Map in Chinese Passports Stirs Anger Across the Region*, N.Y. IMES, (Nov. 25, 2012), <https://rendezvous.blogs.nytimes.com/2012/11/25/a-map-in-chinas-new-passports-stirs-anger/>.

<sup>154</sup> Huang & Huang, *supra* note 37.

<sup>155</sup> Huang & Huang, *supra* note 37; HAYTON, *supra* note 18, at 116.

<sup>156</sup> HAYTON, *supra* note 18, at 56.

<sup>157</sup> For a thoughtful analysis, see Tilmann Altwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship?* 25 EUR. J. INT'L. L. 425, 425-44 (2014).

these theories will be comprehensively expounded and evaluated here; they merely juxtapose the sometimes far-reaching claims made under these headings with the dispute in the South China Sea.

#### A. *De-territorialization*

For several years now, scholars have considered traditional, State-centered international law along Westphalian lines to be increasingly obsolete, or at least increasingly inadequate.<sup>158</sup> In several areas, such developments may well apply to a certain degree. For instance, a "sense of de-territorialisation"<sup>159</sup> is discernible in certain technological and economic areas: the internet is not bound to the physical sphere in the way that traditional means of communication once were. Even international humanitarian law, which tended to be closely related to territorial matters, now has to deal with more ephemeral means of attack.<sup>160</sup> In commercial law, the liberalization of trade has also somewhat diminished the role of borders.<sup>161</sup> The process of European unification has been considered a prominent example of continuous de-territorialization as well.<sup>162</sup> Similar claims have been made in numerous other fields of international law, arguing that law is increasingly detached from territory.<sup>163</sup>

As a result, it is argued that contemporary international law must not return "to a territorial order serving the interests of a group of States and of their elites," but should instead "pursue a functional, global order, which, on the one hand, protects and promotes basic public goods and fundamental human values, on the other, accommodates constitutional pluralism and cultural diversity."<sup>164</sup> This is certainly a laudable goal. It is, however, questionable whether these developments amount to a decline "of the role of territory as a parameter in international law,"<sup>165</sup> or have resulted in a "crisis of the territory as a central

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<sup>158</sup> See, e.g., Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUR. J. INT'L L. 9 (2014).

<sup>159</sup> Frédéric Mégret, *Globalisation*, MPEPIL para. 11 (2009).

<sup>160</sup> See, e.g., Karl Zemanek, *War Crimes in Modern Warfare*, 24 SWISS REV. INT'L & EUR. L. 206, 225 (2014) (discussing computer network attacks).

<sup>161</sup> Jean-Philippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order*, in GLOBAL LAW WITHOUT A STATE 46 (Gunther Teubner ed., 1997).

<sup>162</sup> See, e.g., Samantha Besson, *Deliberative Democracy in the European Union: Towards the Deterritorialization of Democracy*, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 181 (Samantha Besson & José Luis Martí eds., 2006).

<sup>163</sup> A search for "de(-)territorialisation" and "de(-)territorialization" yields 459 contributions on HeinOnline. Incidentally, the term does not originate in a philosophical context in the 1970s. *Contra* Catherine Brölmann, *Deterritorialization in International Law: Moving Away from the Divide Between National and International Law*, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 84, 90 n. 28 (Janne Nijman & André Nollkaemper eds., 2007); its German equivalent (*Entterritorialisierung*) was already used by Carl Schmitt in a derogatory and strongly anti-Semitic context. See SCHMITT, *supra* note 143, at 12.

<sup>164</sup> Enrico Milano, *The Deterritorialization of International Law*, 2 ESIL REFLECTION (2013).

<sup>165</sup> Brölmann, *supra* note 163, at 84.



concept in international law.”<sup>166</sup> Even without applying a narrow realist perspective, the normative emergence of the prohibition of the use of force does not mean that international law no longer has to address the acquisition of territory by force.<sup>167</sup> And even if international institutional regimes are proliferating, their effectiveness often remains too limited to make territoriality less relevant.<sup>168</sup> "Drawing lines on the ground" may indeed not be the "ultimate response" to the challenges that an "ever-more interdependent humankind" is facing.<sup>169</sup> The South China Sea dispute, however, is a potent portent that reports of the demise of territoriality in international law have been somewhat exaggerated.<sup>170</sup>

Further, the law of the sea should have provided a powerful argument in favor of de-territorialization. The Third UN Conference on the Law of Sea was meant to collectivize and internationalize the sea, to establish a “common heritage of mankind” and to foster a sense of solidarity between developing and industrialized nations. The opposite has ensued. We observe an increasing “zonification,” with the corresponding drawing of lines. At the expense of the high sea, States claim sovereignty or sovereign rights over ever more maritime areas,<sup>171</sup> and the result is a *mare clausum* rather than a *mare liberum*. The ten-year period provided for extended continental shelf claims has led to a race for (underwater) territory;<sup>172</sup> instead of an "end of geography," there is a relapse to an age when flags were once planted to mark territorial claims. This development is particularly stark in the Arctic, where the seabed is being territorialized as extensions of the respective coastal States,<sup>173</sup> and where a

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<sup>166</sup> Milano, *supra* note 164.

<sup>167</sup> See *id.* (“Pace Schmitt, territory is no more up for grabs in contemporary international law due to the emergence of peremptory norms, such as the prohibition to use force to acquire territory and the principle of self-determination.”).

<sup>168</sup> Cf. Brölmann, *supra* note 163, at 92 (naming global health monitoring by the WHO as an example); cf. also Bethlehem, *supra* note 158, at 2. But the prescriptive power of the WHO is limited. See Lorenz Langer, *Impfung und Impfwang zwischen persönlicher Freiheit und Schutz der öffentlichen Gesundheit*, 136 I ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 87, 96 (2017). For a more cautious analysis of institutionalisation, see Andreas L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 59, 75-88 (Ige F. Dekker & Wouter G. Werner eds., 2004).

<sup>169</sup> See Daniel-Erasmus Khan, *Territory and Boundaries*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 170, 247 (Bardo Fassbender & Anne Peters eds., 2012).

<sup>170</sup> It is rather ironic that China is now putting so much emphasis on clearly drawn lines. Clear-cut borderlines, just as insistence on territorial sovereignty, is a concept that China was forced to accept by imperial powers. Cf. *The Green Borderlands: Treaties and Maps that Defined the Qing's Southwest Boundaries* 23 (National Palace Museum ed., 2016), and on sovereignty Lorenz Langer, *Out of Joint? - Hong Kong's International Status from the Sino-British Joint Declaration to the Present*, 46 ARCHIV DES VÖLKERRECHTS 309, 313 n. 20 (2008).

<sup>171</sup> Talmon, *supra* note 106, at 465. National jurisdiction by coastal States now encompasses approximately 36% of the total seabed. See TANAKA, *supra* note 98, at 139.

<sup>172</sup> See *supra* note 20; Ted L. McDorman, *The Continental Shelf*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 181, 197 *et seq.* (D. R. Rothwell et al. eds., 2015).

<sup>173</sup> The carving-up of the seabed is illustrated by the map prepared by the International Boundary Research Unit at Durham University, <https://www.dur.ac.uk/resources/ibru/resources/Arcticmap04->

Russian submarine planted a Russian flag on the ocean floor at the North Pole in 2009.<sup>174</sup> The Arctic should have been a prime example of the concept of a common heritage of mankind introduced by UNCLOS.<sup>175</sup> Instead, the seabed is being appropriated by coastal States, and political considerations determine as a matter of course the fate of geographical features.<sup>176</sup>

In the South China Sea, Chinese ships have repeatedly dropped "sovereignty steles" over James Shoal.<sup>177</sup> In this region, we may even witness a "re-territorialization": with highly detrimental consequences to the environment, large areas of land are being reclaimed.<sup>178</sup> At the same time, territory also gains additional relevance through the apparent revival of exclusive spheres of interest. For the nine-dash line may also be understood as the proclamation of such a sphere—just as the United States did when adopting the Monroe Doctrine in 1823.<sup>179</sup> At that time, the United States refused to tolerate European interference with its hegemonic relations to Latin America; today, China insists on bilateral negotiations with its South-East Asian neighbors from a position of strength. As a consequence, we might face a return to a Schmittian world with entrenched spheres of interests, rather than the hoped-for and bright future of de-territorialized and universalist international law.<sup>180</sup>

### B. Constitutionalization

The South China Sea gives rise to similar reservations with regard to the oft-invoked "constitutionalization" of international law.<sup>181</sup> Again, this concept

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<sup>174</sup> MICHAEL BYERS & JAMES BAKER, *INTERNATIONAL LAW AND THE ARCTIC* 92 (2013). Two years earlier, Canadian soldiers had planted a flag on Hans Island.

<sup>175</sup> Georg Witschel, *New Chances and New Responsibilities in the Arctic Region: An Introduction*, 69 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 529, 530 (2009).

<sup>176</sup> Thus, Russia considers the Lomonosov Ridge close to the North Pole an extension of the "Russian" landmass. See BYERS & BAKER, *supra* note 175, at 107. Yet the extension below surface of the State established above surface is of course a fiction; the State is construed as a *physical* reality, immanent in the ground.

<sup>177</sup> Zheng Wang, *The Nine-Dashed Line: 'Engraved in Our Hearts'*, *THE DIPLOMAT* (Aug. 25, 2014), <http://thediplomat.com/2014/08/the-nine-dashed-line-engraved-in-our-hearts/>; HAYTON, *supra* note 18, at 116. On the Shoal, see *supra* note 156.

<sup>178</sup> *Supra* note 25.

<sup>179</sup> See SCHMITT, *supra* note 143, at 23 *et seq.*

<sup>180</sup> Such a *caveat* is in order not only with regard to the South China Sea: even in the European Union, the refugee crisis of 2016 has led to national borders quickly re-emerging.

<sup>181</sup> See, e.g., THE CONSTITUTIONALISATION OF INTERNATIONAL LAW (Jan Klabbers, Anne Peters & Geir Ulfstein eds., 2009); Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 231, 2012); SUPRASTAATLICHE KONSTITUTIONALISIERUNG: PERSPEKTIVEN AUF DIE LEGITIMITÄT, KOHÄRENZ UND EFFEKTIVITÄT DES VÖLKERRECHTS (Bardo Fassbender & Angelika Siehr eds., 2012). On the persisting lack of terminological accuracy in this context see Bardo Fassbender, 'We the Peoples of the United Nations': *Constituent Power and Constitutional Form in International Law*, THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 269, 276 (M. Loughlin ed., 2008)

accurately reflects some important developments in international law. But has it become a dogma or credo, rather than a realistic description of actual developments? The transformative process of constitutionalization is supposed to result—or to have resulted—in an international order with constitutional characteristics, which include, *inter alia*, “rules on how laws ought to be made, how disputes ought to be settled, and which institutions shall exist, and [...] the sort of basic values [...] that no official action may encroach upon.”<sup>182</sup> Institutionalization and judicialization are held to be central aspects of such a development, accompanied by a “fundamental shift” in dispute settlement from the traditional consensual paradigm to a new compulsory paradigm, where ratification of a treaty implies acceptance of certain adjudication procedures.<sup>183</sup> Indeed, examples for such a shift abound, ranging from dispute settlement at the World Trade Organization (WTO), to the International Tribunal of the Law of the Sea, and most prominently, to the International Criminal Court (ICC).

Another important facet of constitutionalization is the international protection of human rights and, as a corollary, a reassessment and, eventually, a restriction of traditional notions of sovereignty. This qualification of sovereignty is most obvious in the conceptualization of the Responsibility to Protect, which requires the international community to intervene in internal matters of States “when decisive action is required on human protection grounds.”<sup>184</sup> Under such proposals, it would potentially be the Security Council’s “duty” to take action under Chapter VII of the UN Charter to prevent genocide or massive crimes against humanity.<sup>185</sup>

Scholars also argue, however, that the protection of human rights is not only an *obligation* of the international community; it is a *precondition* to be part of that community. According to such views, gross and manifest human rights violation lead to the “suspension” of the respective State’s sovereignty.<sup>186</sup> Sovereignty has “a legal value only to the extent that it respects human rights, interests, and needs,”<sup>187</sup> and only States able and willing to protect their own citizens qualify as “legitimate and respected members of international

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<sup>182</sup> Jan Klabbers, *Setting the Scene*, THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 1, 9 (Jan Klabbers et al. eds., 2009).

<sup>183</sup> Cesare P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L. L. & POL’Y 791, 794-95 (2007); see also Geir Ulfstein, *Institutions and Competences*, in THE CONSTITUTIONALISATION OF INTERNATIONAL LAW 45-80 (Jan Klabbers et al. eds., 2009) (providing a discussion on institutionalisation).

<sup>184</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 2.27 (International Development Research Centre ed., 2001).

<sup>185</sup> See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L. L. 513, 539 (2009); see also Daniel Moeckli & Raffael N. Fasel, *A Duty to Give Reasons in the Security Council*, 14 INT’L. ORG. L. REV. 1, 44 (2017) (providing a more cautious account).

<sup>186</sup> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT para. 5.26 (2001).

<sup>187</sup> Peters, *supra* note 185, at 513–14.

society.”<sup>188</sup> Underpinned by notions such as *jus cogens*, a “constitution of the international community” is construed,<sup>189</sup> with community interests that differ from the egoistic interests of States.<sup>190</sup> Eventually, and as an (ideal) vanishing point, under a Kantian perspective such a community would become a peoples’ State (*Völkerstaat*) or a world republic.<sup>191</sup>

The conflict in the South China Sea offers a reality check, and a powerful antidote to overly optimistic claims. This is again illustrated by UNCLOS, the legal regime underlying the conflict. The Convention should have provided a persuasive example for the progressive constitutionalization of international law. At its adoption, the Convention was hailed as a “constitution for the oceans,” as a “monumental achievement of the international community, second only to the Charter of the United Nations.”<sup>192</sup> The number of signatures on the first day may have been “a new record in juridical history.”<sup>193</sup> However, as set out above, the simmering disagreement between developing and industrialized nations resulted in the emergence of separate regimes and, after the 1994 Agreement, in the segmentation and appropriation of large swathes of the high sea.<sup>194</sup> With regard to *institutionalization*, UNCLOS established several new bodies: the Commission on the Limits of the Continental Shelf, the International Seabed Authority, and ITLOS, which was to play an important role in compulsory dispute settlement. Therefore, UNCLOS should also have entrenched important advances in the *judicialization* of the law of the sea. Part XV and Annexes VII and VIII of the Convention contain detailed rules for judicial and arbitral dispute settlement. In some cases, these mechanisms have indeed offered solutions to complex conflicts.<sup>195</sup> However, as the South China Sea arbitration illustrates, not every new convention or institution is tantamount to an increase in effective international governance.

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<sup>188</sup> Francis Mading Deng, *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, 2 GLOBAL RESPONSIBILITY TO PROTECT 353, 354 (2010).

<sup>189</sup> CHRISTIAN TOMUSCHAT, INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY 87 (Recueil des Cours vol. 281, 1999).

<sup>190</sup> Bruno Simma & Andreas L. Paulus, *The 'International Community': Facing the Challenge of Globalization*, 9 EUR. J. INT’L. L. 266, 266–77 (1998).

<sup>191</sup> 8 IMMANUEL KANT, *Zum ewigen Frieden. Ein philosophischer Entwurf*, in KANT’S GESAMMELTE SCHRIFTEN, 341, 360 (Königlich Preussische Akademie der Wissenschaften ed., 1912) (1795). Cf. Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance*, in DER GESPALTENE WESTEN 113–94 (2004).

<sup>192</sup> Third United Nations Conference on the Law of the Sea, Statement by the President, 11th Sess., 185th mtg., U.N. Doc. A/CONF.62/SR.185, ¶ 52 (Dec. 6, 1982), and Closing Statement by the President, 11th Sess., 185th mtg., U.N. Doc. A/CONF.62/SR.193 ¶ 46 (Dec. 10, 1982); see also Tommy T.B. Koh, *A Constitution for the Oceans: Remarks by the President of the Third United Nations Conference on the Law of the Sea*, UNCLOS 1982, 11–17 (Myron H. Nordquist ed., 1984).

<sup>193</sup> Closing Statement by the President, *supra* note 192, at ¶ 44.

<sup>194</sup> *Supra* III.A and Talmon, *supra* note 106, at 459–60.

<sup>195</sup> See, e.g., Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), Case no. 2010-16 (Perm. Ct. Arb. 2014).

The aftermath of the arbitral Award, as set out above, should also caution against too far-reaching claims of an international community united by shared values. Instead of a relativization of sovereignty, we see its absolutization. After the adoption of the Award, China has declared sovereignty a red line, and reiterated that the South China Sea was a "core interest" of its sovereignty,<sup>196</sup> a sovereignty that is presumably not contingent on respect for human rights or other community values such as ecological responsibility.<sup>197</sup> China's refusal to participate in the proceedings weakens institutionalized dispute-settlement. Nor is it an isolated case. The ICC, which has been identified as a pivotal element of a "truly public international order,"<sup>198</sup> has also experienced several setbacks. Gambia may have rescinded its withdrawal from the Court, but Burundi has left the Rome Statute and South Africa is still intent on doing so.<sup>199</sup>

This indicates that international dispute settlement is still not by definition peaceful. Powerful States can afford to ignore the judgements of international tribunals with little consequence, indifferent to the damage that their international reputation allegedly suffers. In particular, the constitutionalization of international law reaches its factual limit as soon as a permanent member of the Security Council is involved, even in times when the Responsibility to Protect is touted as an established principle. What exactly does it mean, for instance, when the veto of a permanent Security Council member is considered "illegal" or an "*abus de droit*"?<sup>200</sup> Several vetoes in the context of the Syrian civil war might thus be considered illegal, yet they nevertheless precluded any action endorsed by the Security Council and hence in conformity with the UN Charter.<sup>201</sup> While it may well be that such inaction entails international responsibility either of the UN or a Security Council Member State, it is difficult to conceive of circumstances where such a responsibility could be successfully enforced.<sup>202</sup>

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<sup>196</sup> *State Councilor's Interview on the So-called Award by the Arbitral Tribunal for South China Sea Arbitration*, CHINA DAILY (July 16, 2016); see also Edward Wong, *Security Law Suggests Beijing Is Broadening Its Definition of 'Core Interests'*, N. Y. TIMES, A10 (July 4, 2015).

<sup>197</sup> See *supra* note 187 and accompanying text.

<sup>198</sup> Armin von Bogdandy & Sergio Dellavalle, *The Paradigms of Universalism and Particularism in the Age of Globalisation: Western Perspectives on the Premises and Finality of International Law*, 2 COLLECTED COURSES OF THE XIAMEN ACADEMY OF INT'L L. 45, 55 (2009).

<sup>199</sup> *ASP President Welcomes Gambia's Decision not to Withdraw from the Rome Statute (Press Release)*, ICC-ASP-20170217-PR1274 (Feb. 2, 2017); *Statement of the President of the Assembly of States Parties on the Process of Withdrawal from the Rome Statute by Burundi (Press Release)*, ICC-CPI-20161014-PR1244 (Oct. 18, 2016). South Africa's withdrawal was ruled unconstitutional by its High Court: Christopher Torchia, *South African Court Blocks Zuma's Bid to Leave Criminal Court at The Hague*, INDEPENDENT, 27 (Feb. 23, 2017).

<sup>200</sup> Peters, *supra* note 185, at 539.

<sup>201</sup> Cf. S/2017/315 (vetoed by Russia). Lacking Security Council support, the U.S. missile strike in retaliation for the use of chemical weapons was illegal. See Mika Hayashi, *The U.S. Airstrike After the Use of Chemical Weapons in Syria: National Interest, Humanitarian Intervention, or Enforcement Against War Crimes?* 21 ASIL INSIGHTS (2017).

<sup>202</sup> Karin Oellers-Frahm, *From Humanitarian Intervention to the Responsibility to Protect, in RESPONSIBILITY TO PROTECT (R2P)* 184, 196–203 (Peter Hilpold ed., 2015).

As part of an idealistic discourse or an argument *de lege ferenda*, postulates of constitutionalization and communitarization do play an important role in international legal scholarship. For such scholarship should be more than mere positivism and must not be limited to an anodyne restatement of the *lex lata*—it should also point the way to a better future. But at the same time, it has to be more than a discursive exercise.<sup>203</sup> The prolific postulation of "emerging" rules or rights should not be mistaken for a description of the *lex lata*.<sup>204</sup> Auspicious yet adumbrated trends leading to a brighter tomorrow have to be clearly distinguished from the effectively enforced or protected rules and rights of today. Perhaps due to a lingering urge for self-justification, international legal scholars tend to oversell such trends as facts.<sup>205</sup> But if "almost anything is presented as 'progress'", it is indeed the "system of international law that will become the loser."<sup>206</sup>

Academic discourse is becoming increasingly detached from legal practice,<sup>207</sup> to the extent that the output of international legal scholarship is considered by practitioners "not terribly helpful."<sup>208</sup> Naturally, legal scholars are more than the handmaidens of practicing lawyers.<sup>209</sup> International legal scholarship should indeed be an "engaged constructor of social reality."<sup>210</sup> Nevertheless, it still needs to be grounded in a reality that is not experienced exclusively by a small circle of the initiated. Otherwise, our discipline will become an esoteric or even eschatological enterprise.

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<sup>203</sup> The Responsibility to Protect, for instance, seems to be primarily about a semantic change, as admitted by its proponents. INTERNATIONAL COMMISSION, *supra* note 184, at paras. 2.4, 2.5; it might therefore be criticised with some justification as a mere rebranding exercise. Cf. WILLIAM MICHAEL REISMAN, THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT 433 (Pocketbooks of the Hague Academy of Int'l L. No. 16, 2012).

<sup>204</sup> See, e.g., Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L. L. 46, 46-91 (1992); Erika De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L. L. 611, 611-32 (2006).

<sup>205</sup> Persistent self-doubts are evident in some of the themes of major international law conferences. See, e.g., "International Law: Do We Need It?" (2<sup>nd</sup> ESIL Biennial Conference, Paris, May 18-20, 2006); "International Law as Law" (103<sup>rd</sup> ASIL Annual Meeting, Washington D.C. Mar. 25-28, 2009); see also REISMAN, *supra* note 203, at 433: "International law is so often criticized, indeed even derided, that international lawyers feel an almost professional obligation not only to defend the entire enterprise, but also to see "major" advances in in tiny and often ambiguous 'baby steps' . . . ."

<sup>206</sup> REISMAN, *supra* note 203, at 433.

<sup>207</sup> Anne Peters, *Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht*, 105, 145, PARADIGMEN IM INTERNATIONALEN RECHT 105, 145 (Deutsche Gesellschaft für Völkerrecht ed., 2012).

<sup>208</sup> *An Interview with John B. Bellinger III*, 52 HARV. INT'L. L.J. ONLINE 33 (2010), [http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online\\_52\\_Profile\\_Bellinger1.pdf](http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online_52_Profile_Bellinger1.pdf).

<sup>209</sup> Thus, merely providing "exhaustive surveys" of the *lex lata* would be a very anaemic form of scholarship indeed. *Contra id.* at 33.

<sup>210</sup> Altwicker & Diggelmann, *supra* note 157, at 427.

## IV.

## LAST BUT NOT LEAST: THE ROLE OF LEGAL SCHOLARS – CALLING THE TUNE?

If developments in the South China Sea ought to dampen overly ambitious scholarly claims about the progress of international law, they should also serve as a reminder of the role that legal scholars play in such disputes. In the previous Part, I referred to the tension between international legal scholarship and international legal practice. In international law in particular, this tension exists not only in an interpersonal, but also in an intrapersonal way. In her study on the role of legal thinkers and practitioners, Anne Peters interviewed 17 eminent international law practitioners. Combined, these 17 individuals concurrently exercised 45 functions, such as legal adviser, counsel, arbitrators, judges and, predominantly, academic teachers.<sup>211</sup> Obviously, these different roles might influence each other: a counsel for a government is unlikely to publish an academic paper undermining his client's position. But to what extent may scholarship be instrumentalized to further the principal's cause?

One notable aspect of the academic fall-out of the Hague arbitral Award has been the clear partisanship of commentators. This is particularly evident with regard to the Chinese side. I have not found a single contribution by a Chinese scholar working in China that is critical of the PRC's position. Although the arbitral Award has evidently been scrutinized with great care,<sup>212</sup> for Chinese scholars, the motto apparently has to be: my country, right or wrong, my country.<sup>213</sup> It has been suggested that the boycott of the proceedings in The Hague might, in part, have been due to a lack of confidence in China's

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<sup>211</sup> Peters, *supra* note 207, at 108. Fourteen individuals were law professors.

<sup>212</sup> Mueller, *supra* note 32.

<sup>213</sup> With this justification, British Attorney-General Sir Hartley Shawcross eventually connived in withholding documentary evidence from the ICJ in the *Corfu Channel Case*. See REISMAN, *supra* note 203, at 458. The expression was originally coined by US Navy Commodore Stephan Decatur in 1816. See CONGRESSIONAL RESEARCH SERVICE, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 70 (2010). For the concerted positioning of Chinese scholars, see e.g. Jennifer Lo, *Chinese Legal Scholars Escalate Offensive on South China Sea Ruling*, NIKKEI ASIA REV. (2016), <https://asia.nikkei.com/Politics-Economy/International-Relations/Chinese-legal-scholars-escalate-offensive-on-South-China-Sea-ruling>. Most unusually for an international magistrate, even Xue Hanqin, the Chinese ICJ Judge since 2010, has criticized the Award. *South China Sea "Award" Pours Fuel on Flame in Dispute: ICJ Judge*, CHINA DAILY (July 17, 2016), [http://www.chinadaily.com.cn/world/2016-07/17/content\\_26116756.htm](http://www.chinadaily.com.cn/world/2016-07/17/content_26116756.htm). Already in November 2013, at the 4th Asian Soc. Int'l L. Biennial Conference in New Delhi, Judge Xue gave an extensive extemporaneous defence of the Chinese position on the arbitral proceedings. See Julian Ku, *China's ICJ Judge Xue Hanqin Publicly Defends China's Non-Participation in UNCLOS Arbitration (Updated)*, OPINIO JURIS (Nov. 20, 2013), <http://opiniojuris.org/2013/11/20/chinas-icj-judge-xue-hanqin-publicly-defends-chinas-non-participation-unclos-arbitration/>. Not sitting on the panel, she apparently justified her 20-minute intervention with the fact that she was "the only Chinese present in the audience." She was responding to a paper that Harry Roque, a Philippine law professor, had presented at the Conference. See Harry Roque, *A Judge from China Speaks Up on Our Arbitral Claim on the West Philippine Sea*, GMA NEWS ONLINE (Nov. 22, 2013), <http://www.gmanetwork.com/news/opinion/content/336686/a-judge-from-china-speaks-up-on-our-arbitral-claim-on-the-west-philippine-sea/story/>.

autochthonous legal expertise.<sup>214</sup> Be that as it may, it is hardly a coincidence that the Chinese leadership in 2014 decided that the PRC should “vigorously participate in the formulation of international norms and strengthen our country’s discourse power and influence in international legal affairs, and use legal methods to safeguard our country’s sovereignty, security and development interests.”<sup>215</sup> This refers to government strategy, but it also includes academic discourse: there has been a significant push to strengthen China’s practical as well as its academic international law capacities.<sup>216</sup> One example for this two-pronged approach is provided by the Xiamen Academy of International Law, which aims for its summer programs “to be both practical and highly scholarly.”<sup>217</sup> For the time being, such efforts rely to a considerable degree on extrinsic expertise.<sup>218</sup> However, the younger generation of Chinese international lawyers is increasingly expected “to develop distinctively Chinese theories of international law.”<sup>219</sup>

Such ambitions are to be welcomed if they result in a broadening of legal discourse and the inclusion of new perspectives. However, given the multitude of roles of legal experts and given the prominent role that such experts play in international law,<sup>220</sup> it is also important that certain rules are observed so that

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<sup>214</sup> Sonya Sceats, *China’s Fury Over South China Sea Belies Its Legal Insecurities*, CHATHAM HOUSE, (July 4, 2016), <https://www.chathamhouse.org/expert/comment/chinas-fury-over-south-china-sea-belies-its-legal-insecurities>.

<sup>215</sup> *Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CCP Central Committee, (Oct. 23, 2014), <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>. While the party aims to “foster rule of law talents and reserve forces who are well acquainted with and persist in the Socialist rule of law system with Chinese characteristics,” it also aims to “establish foreign-oriented rule of law talent teams who thoroughly understand international legal rules and are good at dealing with foreign-oriented legal affairs.”

<sup>216</sup> Bill Hayton, Rod Wye & Wim Mueller, *China’s Changing Approach to International Law* (Chatham House, Podcast, Mar. 30, 2017), <https://www.chathamhouse.org/file/china-s-changing-approach-international-law>.

<sup>217</sup> *See About Us: Introduction*, XIANACADEMY.ORG, <http://www.xiamenacademy.org/aboutus.aspx?BaseInfoCateId=75&CateID=75&CurrCateID=75&showCateID=75>.

<sup>218</sup> While the Academy’s Administrative Council consists exclusively of Chinese scholars, as of summer 2018, non-Chinese members constitute a majority on its Curatorium. *About Us: Curatorium*, XIANACADEMY.ORG, <http://www.xiamenacademy.org/aboutus.aspx?BaseInfoCateId=76&CateID=76&CurrCateID=76&showCateID=76>.

<sup>219</sup> This challenge was reportedly issued by the late Wang Tiewa at the first meeting of the Chinese Society of International Law. *See Roundtable Meeting Summary: Exploring Public International Law and the Rights of Individuals with Chinese Scholars*, CHATHAM HOUSE, 3 (April 14-17, 2014), [https://www.chathamhouse.org/sites/default/files/field/field\\_document/20140414PublicInternationalLawChina.pdf](https://www.chathamhouse.org/sites/default/files/field/field_document/20140414PublicInternationalLawChina.pdf). In this context, it is worth noting that after reaching 50% in 2011, the percentage of Chinese professors teaching at the Xiamen Academy has significantly decreased in recent years (with no Chinese teaching in 2012 and 2016). Professors, [Xiamenacademy.org, http://www.xiamenacademy.org/products.aspx](http://www.xiamenacademy.org/products.aspx).

<sup>220</sup> See Oliver Diggelmann, *Anmerkungen zu den Unschärfen des völkerrechtlichen Rechtsbegriffs*, 26 SWISS REV. INT’L & EUR. L. 381, 384 (2016).



scholarship can provide added value beyond mere partisanship. Western scholars promote views that serve their clients as well, and it is also fairly common for scholarly publication to render such views. But if a forum is provided for partisan scholarship, transparency is of central importance, as is the principle *audiatur et altera pars*.<sup>221</sup> An example for such even-handedness is provided by the Agora on the South China Sea in the American Journal of International Law in 2013.<sup>222</sup> Issue 2/2016 of the Chinese Journal of International Law, on the other hand, dealt with the jurisdiction of the arbitral tribunal in The Hague, yet contained only contributions supporting China's position,<sup>223</sup> including, for good measure, the PRC Government position paper and a statement by the Chinese Society of International Law.<sup>224</sup> Other academic publications, though purportedly published only "to serve the administration of justice and to strengthen the rule of law,"<sup>225</sup> were of a similarly one-sided nature. Such publications apparently served as a surrogate, compensating for China's non-appearance in The Hague and aiming to disseminate the Chinese point of view.<sup>226</sup>

<sup>221</sup> Cf. COMMITTEE ON PUBLICATION ETHICS, CODE OF CONDUCT AND BEST PRACTICE GUIDELINES FOR JOURNAL EDITORS Addendum 1 (2013) (2011), [https://publicationethics.org/files/Code%20of%20Conduct\\_2.pdf](https://publicationethics.org/files/Code%20of%20Conduct_2.pdf) (observing that the content of academic journals "should not be determined by the policies of governments.").

<sup>222</sup> See Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The South China Sea: Editors' Introduction*, 107 AM. J. INT'L. L. 95, 95–97 (2013); Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT'L. L. 98, 98–124 (2013); Florian Dupuy & Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, 107 AM. J. INT'L. L. 124, 124–41 (2013).

<sup>223</sup> See Yee, *supra* note 31; Chris Whomersley, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China: A Critique*, 15 CHIN. J. INT'L. L. 219, 239–64 (2016); Sreenivasa Rao Pemmaraju, *The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility*, 15 CHIN. J. INT'L. L. 217, 265–307 (2016); Stefan Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHIN. J. INT'L. L. 217, 309–91 (2016); Abraham D. Sofaer, *The Philippine Law of the Sea Action Against China: Relearning the Limits of International Adjudication*, 15 CHIN. J. INT'L. L. 217, 393–40 (2016); Natalie Klein, *Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions*, 15 CHIN. J. INT'L. L. 217, 403–15 (2016); Michael Sheng-ti Gau, *The Agreements and Disputes Crystallized by the 2009–2011 Sino-Philippine Exchange of Notes Verbales and their Relevance to the Jurisdiction and Admissibility Phase of the South China Sea Arbitration*, 15 CHIN. J. INT'L. L. 217, 417–30 (2016). The special issue was addressed to "those who are interested in serious work and the rule of law in this area." See *Special Issue on Jurisdiction and Admissibility in the South China Sea Arbitration: Foreword*, 15 CHIN. J. INT'L. L. 217, 217 (2016).

<sup>224</sup> *Supra* note 28; Chinese Society of International Law, *The Tribunal's Award in the "South China Sea Arbitration" Initiated by the Philippines Is Null and Void*, 15 CHIN. J. INT'L. L. 217, 457–87 (2016).

<sup>225</sup> Stefan Talmon & Bing Bing Jia, *Preface to THE SOUTH CHINA SEA ARBITRATION*, *supra* note 14, at vi.

<sup>226</sup> See *id.* at i. ("The book [is] to serve as a kind of *amicus curiae* brief advancing possible legal arguments on behalf of the absent respondent."); see also Gao & Jia, *supra* note 222; Zhang Xinjun, "Setting Aside Disputes and Pursuing Joint Development" at *Crossroads in South China Sea, TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: NAVIGATING ROUGH WATERS* 39–53 (Seain J. Huang & A. Billo eds., 2015); Shicun Wu, *Competing Claims over the South China Sea Islands and*

In international disputes, it is a time-honored task of international lawyers to represent the interest of one party. One of the foundational texts of the law of the sea, Hugo Grotius' *Mare liberum*, was written on behalf of the Dutch East India Company and exclusively served to push its agenda.<sup>227</sup> Partisanship, however, should be openly declared, particularly if based on a government mandate and professed by academics who teach and conduct research at public universities.<sup>228</sup> Otherwise, the academy risks being (ab)used, willingly or unwillingly, for government policy. As with numerous aspects of the South China Sea dispute, there is also a historical precedent for such developments: in the *post*-World War I period, German legal scholarship was systematically instrumentalized by the German Foreign Ministry, or *Auswärtiges Amt*, to criticize the Versailles Treaty regime.<sup>229</sup>

#### CONCLUSION

It is a long way from Times Square to the South China Sea. But the short propaganda clip displayed in Manhattan in 2016 illustrates that this regional conflict over some small islands has worldwide repercussions. It also shows that the international legal order is still struggling to assert itself when challenged by a major power. The Award in the South China Sea Arbitration was carefully worded and extensively argued. It prompted strong Chinese reactions, yet it is unlikely to be implemented any time soon.

If considered from a meta-perspective, however, the arbitration yields important insights on the state both of the law of the sea and of international law more generally. A short overview of Chinese and U.S. reactions shows that both powers invoke international law to bolster their mutually exclusive positions. These differences mirror the development of the law of the sea. Historically, the Western sea-faring nations have, since Grotius' *mare liberum*, pushed for a liberal regime of the sea, but just as that seminal text was meant to further Dutch trade interests, so did the concept of the freedom of the sea serve primarily its Western proponents. By contrast, the second half of the 20<sup>th</sup> century has seen a proliferation of sovereign rights over certain zones of the sea, and extensive State claims to these zones. The 2016 Award shows that there are limits to such rights and claims, but also that these limits may not be universally accepted. As a result, political and military tensions in the Asian-Pacific region are rising.

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*the Way Forward: A Chinese Perspective on the Philippine-China Arbitration Case*, ARBITRATION CONCERNING THE SOUTH CHINA SEA (PHILIPPINES VERSUS CHINA) 13–23 (S. Wu & K. Zou eds., 2016); see *supra* note 223 for additional examples.

<sup>227</sup> See *supra* note 82. The influence of the mandatary on the content of *mare liberum* becomes obvious when compared to Grotius' views on the sea in *De iure belli ac pacis*. See, e.g., HUGO GROTIUS, *DE IURE BELLI AC PACIS LIBRI TRES I*, ch. 8, paras. 7 & 13 (The Classics of International Law, photo. reprint 1913) (1646).

<sup>228</sup> See, e.g., *Interview: 'Die großen Fragen bleiben unberücksichtigt'*, DEUTSCHE WELLE (Aug. 18, 2015), <http://www.dw.com/de/die-gro%C3%9Fen-fragen-bleiben-unber%C3%BCcksichtigt/a-18654977>; see also Talmon, *supra* note 41.

<sup>229</sup> HULL, *supra* note 145, at 8.

Historical parallels between the early 20<sup>th</sup> century and the rise of China and its challenge to the hegemonic position of the United States have been drawn before. However, these parallels are not limited to political or military aspects. The period before World War I saw significant progress in the codification of international law and in the institutionalization of dispute settlement. And yet, war broke out. When it did, the Allied Powers named the defense of international law as one of the main purposes of their fight. Today, the arbitral proceedings provided for by UNCLOS have not led to a peaceful settlement, and the United States similarly insists that its presence in the South China Sea aims to protect the freedom of the sea, and international law more broadly.

These developments should give the scholarly community pause. That community has construed the development of international law as steady progress towards an increasingly institutionalized and judicialized normative order with constitutional characteristics, in which once-omnipresent considerations of territoriality are slightly *démodé*. Such a grand narrative is an important element of international legal scholarship. Mere descriptive analysis of a somewhat somber present does not further a peaceful international community, which is the goal that international law is meant to serve. That goal, however, is not furthered by disregarding the considerable challenges posed by trouble spots such as the South China Sea, or by considering such challenges mere temporary distractions from a near-perfect world republic.

The so-called "Chinese curse" aims to condemn its victims "to live in interesting times."<sup>230</sup> Today's international lawyers live in interesting times indeed. Transnational legal regimes are spreading, and more and more aspects of our individual lives are affected by international law. At the same time, the fundamental tenets of international law—its binding nature, its ability to protect peace and enable the enjoyment of basic rights—keep being questioned. This tension should not be brushed over or covered up with well-intentioned utopias. It poses a challenge that should be acknowledged—and accepted.

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<sup>230</sup> There is no Chinese equivalent for this "curse." Fittingly for our context, it seems to be a Western expression, apocryphally ascribed to the Chinese. See Fred R. Shapiro, *THE YALE BOOK OF QUOTATIONS* 669 (2006).

# When Some Are More Equal than Others: Unconscionability Doctrine in the Treaty Context

Britta Redwood

*In recent years, many countries have begun to pull out of bilateral investment treaties signed in previous decades, dismayed by the extent to which the provisions of the treaties serve to protect the interests of investors even as they frustrate the prerogatives of government. The countries seeking to exit these agreements were often less politically sophisticated than their treaty partners at the time of signing. Often, these countries relied on external guidance from IGOs or even indirect advice from the very countries they were negotiating with in deciding whether to sign these treaties. While unconscionability doctrine in contract law allows courts to deem contracts between unequal parties partially or totally unenforceable, international law treats sovereigns as equal parties and offers no such protection to weaker states. Historical discussions show, however, that less powerful states have long been concerned about the ability of more powerful states to coerce or otherwise pressure them into unfavorable treaties, and have sought unsuccessfully to introduce protections against the enforcement of unequal treaties in international law. This Article proposes a method for incorporating the kinds of equitable remedies pursued by courts in contract unconscionability cases into the decision-making framework of arbitral tribunals faced with interpreting bilateral treaties in the context of investment disputes.*

Even after you give a squirrel a certificate which says he is quite as big as any elephant, he is still going to be smaller, and all the squirrels will know it and all the elephants will know it.

--Samuel Grafton<sup>1</sup>

All animals are equal, but some animals are more equal than others.

--George Orwell, *Animal Farm*<sup>2</sup>

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<sup>1</sup> William T. R. Fox, *The Superpowers: Then and Now*, 35 INT'L J. 417, 418 (1980).

<sup>2</sup> GEORGE ORWELL, *ANIMAL FARM* 192 (1945).

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## INTRODUCTION

In autumn of 2001, the Attorney General of Pakistan received a phone call from the Secretary of Law. The Washington, D.C.-based International Center for the Settlement of Investment Disputes (ICSID) had contacted the Secretary, informing him that a Swiss company, Société Générale de Surveillance (SGS), was claiming \$110 million in compensation based on an alleged violation of a bilateral investment treaty (BIT) concluded between Pakistan and Switzerland.<sup>3</sup> The Attorney General was aware of an ongoing contractual dispute between SGS and his government, but neither he nor the Secretary knew what a BIT was. Neither had heard of ICSID. After a phone conversation in which two of the most expert individuals on public international and commercial law in Pakistan were forced to reveal to one another that neither had the slightest clue what agreements SGS was relying upon, the Attorney General turned on his computer. He had two questions for Google: “What is ICSID?” and “What is a BIT?”<sup>4</sup>

The Attorney General continued doing his homework. He quickly understood how serious SGS’s claim was, and he understood that Pakistan’s reliance on financial assistance from abroad would make ignoring the issue impossible. He began inquiring at different government ministries, trying to ascertain the reasons that Pakistan had decided to sign the BIT six years before. There were no records. There were no records showing the negotiation had occurred in Switzerland. There were no records showing that the treaty had been discussed in Parliament. There was not even a copy of the treaty itself. Later, the Attorney General would learn that this was not only the case with the Switzerland-Pakistan BIT, but with many of Pakistan’s other BITs, as well.

How was it that treaties that were now having such an impact on the country went practically unnoticed in the political, bureaucratic, and legislative spheres? It was not because documenting the negotiating process was considered too sensitive. It was because signing these treaties had been a nonevent for the government.<sup>5</sup> Pakistani officials were eager to sign the treaties because they believed that they could increase foreign investment, but they were ignorant to the liabilities and regulatory restraints that the treaties brought with them.<sup>6</sup>

Pakistan was not alone. An official in South Africa, a country that has begun to exit some of its BITs,<sup>7</sup> also echoed the conclusions of the Pakistani Attorney

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<sup>3</sup> SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, (Aug. 6, 2003).

<sup>4</sup> This episode is related in some detail in LAUGE POULSEN, *BOUNDED RATIONALITY AND ECONOMIC DIPLOMACY*, at xiii (2015).

<sup>5</sup> A signatory to a treaty thereby demonstrates his consent to be bound by it. Depending on domestic law, a treaty may need to be ratified by a legislature or other State organ, but once it is confirmed by such an organ, it is binding upon the parties.

<sup>6</sup> See POULSEN, *supra* note 4, at xv.

<sup>7</sup> Adam Green, *South Africa: BITs in pieces*, FINANCIAL TIMES (Oct. 19, 2012), <https://www.ft.com/content/b0eec497-5123-3939-92f7-a5fbc73dd33> (stating that South Africa had terminated a BIT with Belgium and Luxembourg, and had further plans to exit agreements made in

General: “We had signed on BITs without proper analysis, the more the merrier, part of the global trend of signing BITs without understanding the implications.”<sup>8</sup> Just as BITs proliferated in the 1990s and early 2000s, so has the skepticism toward them grown in recent years. Indonesia has announced its intention to terminate a BIT with the Netherlands, and eventually to terminate all sixty-seven of its agreements.<sup>9</sup> Bolivia, Ecuador, and Venezuela have withdrawn from ICSID.<sup>10</sup>

But it is not only the bare language of the BITs that may be leading countries to withdraw from them. It is the sense that even if they had properly examined the treaties they had hurried to sign, the cards would still have been stacked against them because the dispute settlement mechanisms included in these agreements unfairly privilege investors. While not all investment arbitration claims have to be made public, of the cases that have been made public, most are brought against countries with developing or transition countries.<sup>11</sup> Investors win or settle most of the time.<sup>12</sup> One arbitrator, Johnny Veeder, spoke plainly about how unpopular international arbitration had become around the world:

It’s an issue of trust... [and] there isn’t a trust that the words of the treaties will be respected by claimants and by arbitration tribunals... However you draft it, [there is the feeling that] these bad guys are going to find a way ‘round it and make a decision for the arbitration tribunal to which the state has not consented.... The more [people] find out about what we do... the more appalled they are.”<sup>13</sup>

The fact that South Africa, Pakistan, and developing countries around the world can enter into treaties that the international community is bound to honor and enforce is based on the notion that sovereigns are equal. The principal of sovereign equality is fundamental to international law. It is asserted by small states and large states, weak states and strong states, and democratic and nondemocratic states. The United Nations and its Charter are based upon “the

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the years directly following apartheid).

<sup>8</sup> Mohammed Mossallam, *Process Matters: South Africa’s Experience Exiting its BITs* 9 (Global Economic Governance Programme, Working Paper No. 2015/97, 2015).

<sup>9</sup> Philippa Maister, *Breaking BITs: why are countries withdrawing from bilateral investment treaties*, FDI INTELLIGENCE (Feb. 12, 2012), <http://www.fdiintelligence.com/Companies/Breaking-BITs-why-are-countries-withdrawing-from-bilateral-investment-treaties>.

<sup>10</sup> *Id.*

<sup>11</sup> According to a UNCTAD report, from 1987-2015, the most frequent respondent States in the known investor-State disputes were Argentina, the Bolivarian Republic of Venezuela, the Czech Republic, Spain, Egypt, Canada, Mexico, the Russian Federation, Ecuador, Poland, India and Ukraine. UNCTAD, *WORLD INVESTMENT REPORT 2017: INVESTMENT AND THE DIGITAL ECONOMY* 115 (2017).

<sup>12</sup> Fifty-two percent of documented cases have been decided against the host State or settled, usually on unknown terms. *Id.* at 117.

<sup>13</sup> Comments by Johnny Veeder QC at Wilmer Hale seminar on international arbitration, Apr. 23, 2014, recording available at <https://www.youtube.com/watch?v=fQPllmURi24>.

principle of the sovereign equality of all its Members.”<sup>14</sup> Under the umbrella of the United Nations, each State is accorded exactly one vote in the general assembly<sup>15</sup>—sovereigns are equals and the mutually-agreed Charter enforces and maintains this equality. A sovereign State, if it is to be recognized as such, must possess internal and external sovereignty.<sup>16</sup> That is, its government must be able to plausibly claim habitual obedience from most of its population and it must be independent of other states.<sup>17</sup> In the traditional consent-based view of international law, sovereignty is not bestowed by international law; international law derives its authority from the power of sovereigns.<sup>18</sup> Sovereigns are equal in their ability to create and maintain international law, and sovereign States are equals under international law.

Of course, sovereign equality is a legal fiction. Pakistan is not an equal of Switzerland, just as the United States is not an equal of Grenada. Economic and military power, size, alliances, and location all converge to create a situation in which all States are equal, but some states are more equal than others.<sup>19</sup> To declare States equal as a matter of international law only means to declare a law that will be implicitly or explicitly violated. Even at the United Nations, which is ostensibly based on the principle of sovereign equality, great powers can assert their domination in myriad ways. While all States may be equal in a legal sense, tradition, financial and economic power, commerce, and raw ability to protect their own interests determine how much practical influence one State enjoys over others. States with a weak influence are keen to assert the fiction of equality because it puts them on a par with powerful, influential States. For powerful States, Professor Percy Corbett wrote that the idea of equality is “a plume which the great Powers allow the weak to wear as a sop to their vanity, calm in the assurance that it adds nothing appreciable to their weight....”<sup>20</sup> It is an appeasing concession in the form of an idea, but it concedes nothing in practice.

Contrary to what some scholars have argued, the concept of sovereign equality is beginning to have practical significance, and this trend should be encouraged and supported. While sovereign equality may now be a fiction, it can also be a reality to aspire to. However, true sovereign equality can only be realized if it is recognized not as an objective legal fact but as a value judgment—one that must itself be defended through law. This essay offers one small way to do that.

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<sup>14</sup> U.N. Charter art. 2(1).

<sup>15</sup> *Id.* art. 18(1).

<sup>16</sup> R.P. Anand, *Sovereign Equality of States and International Law* 8 INT’L STUDIES 386, 20 (1966).

<sup>17</sup> *Id.* at 21.

<sup>18</sup> For one of the most classic accounts of this view, see EMER DE Vattel, *THE LAW OF NATIONS* 17 (1797) (“There is another kind of law of nations, which . . . proceeds from the will or consent of nations. States, as well as individuals, may acquire rights and contract obligations . . . hence results a conventional law of nations, peculiar to the contracting powers.”).

<sup>19</sup> See ORWELL, *supra* note 2, at 192.

<sup>20</sup> P.E. Corbett, *Social basis of a law of nations*, 85 RECUEIL DES COURS 467, 509 (1954).



The idea of sovereign equality animates international law and international relations, but it was borrowed from political thinkers who were primarily concerned with domestic power.<sup>21</sup> In this Article, I propose borrowing even more from domestic legal thinking. Domestic law, which is constantly being rearticulated and revised by courts, often has doctrines that are more nuanced than those of international law.

How should we think about the BIT concluded between Pakistan and Switzerland? Just as countries are unequal, so too are persons within a State. Stronger, better-resourced, more sophisticated parties can use their power to oppress, constrain, and coerce weaker parties. Most domestic legal systems have implemented legal doctrines that both address and combat this natural trend. While sometimes criticized as paternalistic, these doctrines ultimately constrain action in order to promote equality so that parties may interact on more equal footing. A domestic court, when presented with an unfair contract, can refuse to enforce some or all of it. The court's discretion to do so is based on the court's ability to provide equitable remedies and to promote justice by protecting weaker contracting parties. International legal tribunals, I argue, can and should also promote justice in this manner. If we can admit that sovereign equality constitutes not *lex lata* but *lex feranda*, we can begin to ask ourselves how to place it on more stable ground. Domestic law can begin to show us how. Indeed, Pakistan seems just as worthy of protection and access to equitable remedies as do domestic plaintiffs who mistakenly sign substantively flawed contracts or are duped into an agreement that harms them.

## I.

### SOVEREIGN EQUALITY

#### A. *Sovereign Equality as an Idea in History*

In his historical account of the notion of sovereign equality, Professor Robert A. Klein asserts that the notion of the equality of States within the international community is rooted in the older notion of the equality of persons within the polity.<sup>22</sup> Both are, of course, myths. Any casual observer can see that members of a State do not enjoy perfect political or legal equality, often because they have differing levels of access to resources, education, and privilege. However, the principle of individual equality undergirds democratic society. By the same token, it is overwhelmingly clear that States are not equal in their power, influence, or wealth. Nevertheless, a true international legal order depends on the notion of equality before the law. What role does the principle of sovereign equality play in the international legal order?

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<sup>21</sup> See *infra* Section I(A) for a discussion of the idea.

<sup>22</sup> See ROBERT A. KLEIN, SOVEREIGN EQUALITY AMONG STATES: THE HISTORY OF AN IDEA, Foreword (1974).

In this section, I examine two instances in which weaker States have somewhat paradoxically but understandably used their status as sovereign equals to advocate for themselves as disadvantaged states. In both examples, weaker States rely on the forum provided by United Nations—which was founded on the principle of sovereign equality—to argue for recognition of their own sovereignty, which they see as inherently tenuous. I first examine the disagreement over the scope of the notion of “coercion” in the Vienna Convention on the Law of Treaties. In this case, a number of States asserted that what seemed to be sovereign decisions to sign treaties may actually have been the result of coercion. By admitting that they were especially vulnerable to coercion, they acknowledged that the notion of sovereign equality is flawed because the power to coerce persists between *unequal* parties, not equal ones. At the same time, in negotiating the Vienna Convention on the Law of Treaties at an international conference, these countries rely on their position as sovereign equals to argue that treaties resulting from coercion should be invalid.

The discussion about the Calvo Doctrine represents an instance in which some States asserted sovereignty over their natural resources even as they were signing away aspects of that sovereignty under BITs. The legitimacy of these treaties is rooted in the notion of sovereign equality—all agents properly acting on behalf of the State have the authority to sign treaties.<sup>23</sup> Here, I argue (as some countries have) that there may be at least some instances in which the negotiation or interpretation of those treaties offends the notion of sovereign equality, and the State parties should therefore be released from performance. In these examples, weaker States act as both idealists and realists—relying on the notion of sovereign equality to ask for justice after their sovereign equality has been trampled on by stronger States.

*B. The Vienna Convention on the Law of Treaties: The Fight Over and the Meaning of ‘Coercion’*

In 1947, the United Nations General Assembly established the International Law Commission (ILC) in order to codify treaty laws.<sup>24</sup> Before the work of the ILC, treaties were often concluded through gunboat diplomacy—foreign policy buttressed by the immediate threat of military force. There were no prohibitions on using force to conclude treaties before the Second World War,<sup>25</sup> and

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<sup>23</sup> Vienna Convention on the Law of Treaties, art. 7, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter VCLT].

<sup>24</sup> Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 22 (1955).

<sup>25</sup> Article 2(4) of the United Nations Charter, signed in June 1945, prohibits the use of force in international relations. U.N. Charter art. 2(4). Although the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes provided that signatories commit “to use their best efforts to ensure the pacific settlement of international differences,” both the U.S. and European signatories to the agreements regularly used threats of force to enforce foreign policy priorities in what were ultimately commercial disputes. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 9 (2009).

unsurprisingly, many treaties favored countries with the biggest gunboats. China was one of the first countries to officially demand the abolition of some treaties in international forums, arguing that the treaties were unjustly concluded.<sup>26</sup> But explicit reference to inequality generally went nowhere. The draft articles and reports written by the ILC did not include the term “unequal” or “unjust treaties,”<sup>27</sup> and neither did the Vienna Convention on the Law of Treaties (VCLT), an agreement that eventually emerged from the draft articles. However, the text of what would eventually become Article 52 of the Vienna Convention offers protection against certain procedural inequalities (such as the one created when one country makes a show of greater force against another). It states:

A treaty is void if its conclusion has been procured by the threat of use of force in violation of the principles of international law embodied in the Charter of the United Nations.

With the text of Article 52 on the table, the debate became more focused and heated. The heart of the disagreement was the proper scope of the phrase “threat or use of force”—and with it the *kinds* of procedural inequality that could be considered. Government statements recorded in the 1966 Yearbook of the ILC show that a country’s global influence and historical position vis-à-vis other powers was a strong predictor of what its ultimate opinion on the scope of the word “force” would be. The Polish government considered that “‘coercion’ for the purposes of this article should include not only the threat or use of force but also some other forms of pressure, in particular, economic pressure. In its view the latter represents a typical kind of coercion sometimes exercised in the conclusion of treaties.”<sup>28</sup> Czechoslovakia was even more precise, stating that “unequal treaties... constitute a serious obstacle to the attainment of complete independence and sovereignty by a number of developing countries... Article 36<sup>29</sup> should explicitly prescribe the invalidity of treaties imposed by such forms of coercion as, for example, economic pressure.”<sup>30</sup>

The Algerian government was also very specific:

...[E]conomic pressure may sometimes be more effective in reducing the power of self-determination of a country, above all in the case of a country with single-crop

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<sup>26</sup> Anne Peters, *Treaties, Unequal* ¶ 7 (2007), Max Planck Encyclopedia of International Law.

<sup>27</sup> See Kirsten Schmalenbach, *Treaties conflicting with a peremptory norm of general international law (“jus cogens”)*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, at 897, 903–04 (2013).

<sup>28</sup> Sir Humphrey Waldock (Special Rapporteur of the International Law Commission), Fifth Report on the Law of Treaties, at 15, U.N. Doc. A/CN.4/183 and Add.1-4 (Jan. 18, 1966) [hereinafter Fifth Report on the Law of Treaties].

<sup>29</sup> The text of what would eventually become Article 52 of the finalized VCLT was referred to as Article 36 at the time of these negotiations.

<sup>30</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 15–16.

farming or whose economy depends on the export of one product only. In [Algeria's] view, recognition that economic pressure is a cause of nullity of treaties is not a threat to their stability but increases the confidence of newly independent States in international law.<sup>31</sup>

Byelorussia pointed a finger at former colonialist States, saying that it considered “the principle of the nullity of leonine treaties<sup>32</sup> to be of great contemporary importance from the point of view of the eradication of colonialism in all its forms and the protection of new States from unequal treaties.... [C]olonialist Powers are now resorting to more subtle forms of coercion, for example, under the guise of economic assistance.”<sup>33</sup> Iraq, Ghana, Colombia, Ecuador, Morocco, Nigeria, the Philippines, Uruguay, Venezuela, and Yugoslavia all voiced similar concerns.<sup>34</sup> The U.S.S.R.—not a traditional colonial power but a rising political one—condemned leonine treaties, while refraining from mentioning economic or political coercion explicitly.

Unsurprisingly, many of the Great Powers and former imperial States took a different view. The United States argued that Article 2, paragraph 4 of the U.N. Charter mentioned only threat or physical force, so the scope of Article 52 should be limited to actual or threatened violence.<sup>35</sup> The United Kingdom echoed the United States' concern, adding that widening the notion of coercion “might lessen the effectiveness of the article and give rise to pretexts for the evasion of treaty obligations.”<sup>36</sup> The United Kingdom also stipulated that challenges to treaties on the basis of alleged coercion should be adjudicated independently.<sup>37</sup> Interestingly, China, a country that only decades before had zealously accused many Western powers of concluding leonine treaties in the late nineteenth and early twentieth centuries, did not unequivocally condemn such treaties in the ILC discussions.<sup>38</sup> Instead, it shared the concerns of the United Kingdom: “difficulties may arise in [the application of the Article] unless the Commission solves the question of determining the presence of the threat or use of force at the time of the conclusion of a treaty, and works out safeguards to ensure that ‘coercion’ is not used as a pretext for violating a treaty.”<sup>39</sup> In the few decades between China's condemnation of unequal treaties and the 1966 ILC meeting, much had changed. Instead of being the victim of unfair trade practices enforced at the tip of a sword, it had gained a

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<sup>31</sup> *Id.*

<sup>32</sup> Leonine treaties are treaties forced upon a weaker state by a stronger one.

<sup>33</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 17.

<sup>34</sup> *Id.* at 15–18.

<sup>35</sup> *Id.* at 18.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 17. For a thorough examination of the so-called “Unequal Treaties,” a set of treaties signed by China between 1842 and 1946, as well as China's efforts to annul them, see DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY (2005).

<sup>39</sup> Fifth Report on the Law of Treaties, *supra* note 28, art. 36., at 17.

permanent seat at the table of the United Nations Security Council.<sup>40</sup> It had become a great power in its own right.

The number of countries in support of expanding the scope of “coercion” to include economic or political pressure was certainly greater than the number of those opposed. However, the compromise articulated by the Commission seems to best embody the more limited use of the term “coercion,” while still leaving the door of interpretation open to the majority view:

Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a ‘threat or use of force in violation of the principles of the Charter,’ and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.<sup>41</sup>

The Special Rapporteur decided to stay silent on the scope of Article 2(4) of the U.N. Charter, inviting the international community to try to resolve the debate in another context. And try they did. In 1966, Resolution 18 established a “Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.”<sup>42</sup> The Special Committee was tasked with the development and potential codification of “the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>43</sup> In short, the Special Committee was tasked with making the text of what would eventually become Article 52 more robust. However, the deliberations of the Special Committee were inconclusive as to whether the term “force” embraced economic and political pressures.<sup>44</sup> Given the lack of a conclusion, the Special Rapporteur reported that he did not feel justified in elaborating the principle independently.<sup>45</sup> The reluctance of the Special Rapporteur and the intractability of the issue in the Special Committee did not put it to rest. The discussion and disagreement continued for years; it was still ongoing during the thirty-fourth session of the ILC in 1982. Some countries maintained their position even as they signed the treaty.

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<sup>40</sup> See U.N. Charter art. 23(1).

<sup>41</sup> Report of the International Law Commission on the work of its eighteenth session, Geneva, 4 May – 19 July 1966, art. 49 ¶ 3.

<sup>42</sup> G.A. Res. 1966 (XVIII), *Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations*, at 70 (Dec. 16, 1963).

<sup>43</sup> Fifth Report on the Law of Treaties, *supra* note 28, at 19.

<sup>44</sup> *Id.*, citing U.N. Doc. A/5746, ¶ 47 (Nov. 16, 1964).

<sup>45</sup> *Id.*

For example, the Syrian Arab Republic stipulated that it read Article 52 broadly in its reservation to the VCLT.<sup>46</sup>

*C. Hull vs. Calvo: The Fight Over the Meaning of Expropriation*

Just as many newly independent or weaker States were keen to subject treaties that had been politically or economically coerced to greater scrutiny, there was also a desire to increase internal sovereignty through a new articulation of the expropriation power. Prior to the rapid decolonization that followed the Second World War, many of the most powerful countries in the world shared the view that international law protected investor property.<sup>47</sup> If investor property was taken by a host country, “prompt and adequate” compensation was due to the investor.<sup>48</sup> This principle came under scrutiny during a long-standing dispute between Mexico and the United States, lasting from 1915 until 1940.<sup>49</sup> During those years, the government of Mexico confiscated private agrarian and oil properties, some of which belonged to Americans. The United States argued that the expropriations were illegal and demanded compensation for the affected U.S. citizens. So began a diplomatic exchange of letters between the American Secretary of State, Cordell Hull, and his Mexican counterpart. Hull penned what has since become the leading formulation of the full compensation standard: “[N]o government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.”<sup>50</sup> It was this requirement of “prompt, adequate, and effective compensation” that has become known as the “Hull Rule.”<sup>51</sup>

Newly independent States in the post-war years were, by and large, not proponents of the Hull Rule. Although Mexico had articulated its disagreement with the Hull Rule during its dispute with the United States, it was not until after the Second World War that expropriation—and the attendant conflict about its scope and meaning—became frequent enough to warrant extra attention. Nationalizations and expropriations increased as more countries became independent for two primary reasons. First, former colonies were interested in flexing their new independence, sometimes in retribution, by seizing assets from foreigners who had been granted property rights under the colonial regime.<sup>52</sup> Second, Communism began gaining ground in Eastern Europe, Cuba and China,

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<sup>46</sup> VCLT, *supra* note 23, at 506. Syria signed the VCLT on October 2, 1970.

<sup>47</sup> Notes exchanged between the United States and Mexico during the 1938 dispute are reprinted in GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 653–65 (1942).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 658–59.

<sup>51</sup> *Id.*

<sup>52</sup> For a detailed discussion of this historical trend, see Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639 (1997).

and these governments began to nationalize private property, seizing it from citizens and foreigners alike.<sup>53</sup>

In the decades following the Second World War, much of the developing world threw its weight behind efforts to dial back the Hull Rule's "prompt, adequate, and effective" standard. Developed countries and former colonial powers continued to argue that the Hull Rule was customary international law, and developing countries argued the opposite.<sup>54</sup> Both sides appealed to customary international law, but the persistence of the very ideological tension they were interested in resolving undermined their appeals. Finally, many less developed countries and recently emancipated colonies channeled their collective energy into an effort to bring a number of resolutions before the newly-created United Nations General Assembly.

Resolution 1803, for example, provided that in cases of expropriation, "appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law" must be granted.<sup>55</sup> This resolution allowed for compensation but also consistently emphasized the necessity of preserving sovereignty and its prerogatives. Paragraph 2 provides a representative example of this balancing act. It reads: "The exploration, development and disposition of such resources, as well as the import of foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable..."<sup>56</sup> In the same vein, Resolution 3171 gave some nuance to the otherwise ambiguous term "appropriate compensation." Giving a wide margin of discretion to the sovereign power, it stated that:

...[T]he application of the principle of nationalization carried out by States, as an expression of their sovereignty in order to safeguard their natural resources, implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any dispute which may arise should be settled in accordance with the national legislation of each State carrying out such measures.<sup>57</sup>

One-hundred and eight countries voted in favor of Resolution 3171, sixteen abstained, and one voted against it.<sup>58</sup> While these resolutions did not constitute a codification of international law, their existence certainly frustrated the ability of the developed nations to argue that the Hull Rule was well-established international custom.<sup>59</sup> Further, they are a powerful reminder of how a majority

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<sup>53</sup> *Id.* at 647.

<sup>54</sup> *Id.* at 647–48.

<sup>55</sup> G.A. Res. 1803 (XVII), *Permanent sovereignty over natural resources*, ¶ 4 (Dec. 14, 1962).

<sup>56</sup> *Id.* ¶ 2.

<sup>57</sup> G.A. Res. 3171 (XXVIII), *Permanent sovereignty over natural resources*, ¶ 4 (Dec. 17, 1973).

<sup>58</sup> The vote on Resolution 3171 (XXVIII) is recorded at A/PV.2203 in U.N. Doc. A/9400 (Dec. 17, 1973), available at [http://www.un.org/depts/dhl/resguide/r28\\_resolutions\\_table\\_eng.htm](http://www.un.org/depts/dhl/resguide/r28_resolutions_table_eng.htm).

<sup>59</sup> *Id.*

of U.N. Member States remained concerned about the scope of their sovereign power.

## II.

### THE EMERGENCE OF THE BIT REGIME

While weak and newly independent States were trying to buttress their newly acquired sovereignty at the United Nations, bilateral investment treaties (BITs) like the one between Pakistan and Switzerland were being signed around the globe. A BIT is a legal instrument that sets out the legal rules and procedures that will govern investment disputes between countries. The text of these treaties, often rather vague on its face, typically provides extremely potent protections to foreign investors in a given country, sometimes pitting investor interests against the interests of the people.<sup>60</sup> Under a BIT, suits are brought by the investors of one country against the government of another. The first BIT was signed in 1959, and these instruments have only grown in popularity since then.<sup>61</sup> There are currently 2,033 international investment treaties in force in the world.<sup>62</sup> In the latter half of the 20<sup>th</sup> century, foreign direct investment boomed, with a growth rate that outstripped international trade, reaching 1.75 trillion dollars by the year 2016.<sup>63</sup>

BITs have generally codified the Hull Rule, which many countries tried so hard to reject in the context of the treaties negotiated at the United Nations in the post-colonial era. A BIT will also establish minimum standards of treatment of the investor required from the host country. Most BITs require that foreign investors be accorded “fair and equitable treatment and full protection and security” and shall in no case be accorded treatment less than that required by international law.<sup>64</sup> It is often further required that unreasonable or discriminatory measures that impair the management, conduct, operation, and sale or other disposition of investments be prohibited.<sup>65</sup> As will become important later in the Article, BITs also establish a mechanism for resolving investment disputes that does not rely on local law or the law of the investor-state.<sup>66</sup>

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<sup>60</sup> See *infra* Section II(B)(3)(b) for a discussion of arbitration cases that have arguably interfered with the ability of governments to create or enforce laws protecting the environment, public health, or democratic values.

<sup>61</sup> See Jeswald W. Salacuse, *Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 THE INT'L LAW. 655, 655 (1990).

<sup>62</sup> Investment Policy Hub, *International Investment Agreements Navigator*, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> [hereinafter UNCTAD, *International Investment Agreements*]. Of these, 2,008 are bilateral and 25 are treaties with investment provisions.

<sup>63</sup> UNCTAD, *supra* note 11, at iii.

<sup>64</sup> See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2012 U.S. MODEL BILATERAL INVESTMENT TREATY 7–8 (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>65</sup> Only one-third of the investment treaties currently in force lack such a provision. UNCTAD, *International Investment Agreements*, *supra* note 62.

<sup>66</sup> Less than five percent of the investment treaties currently in force lack such a provision. *Id.*



Authors Jeswald W. Salacuse and Nicholas P. Sullivan explain the “grand bargain” involved in BITs. Treaties, like contracts, are characterized by a bargaining process from which both parties will benefit. Bilateral investment treaties grant the same rights to both parties, but because citizens of developing countries rarely invest in developed countries, the rights afforded under the treaty typically flow in one direction only. The “bargain” that a BIT promises is not to be found within the document itself, according to Jeswald and Salacuse. It represents the promise a developing country makes to protect capital and potentially relinquish aspects of its own regulatory power in the present in return for the prospect of more capital—and ultimately economic development—in the future.<sup>67</sup> In a few cases, this expectation is represented in the preamble of the agreement, but often it is not.<sup>68</sup>

It is worth noting that other lawyers and scholars have taken a slightly more expansive view of what is entailed by “the grand bargain” of BITs. While there are plenty of cynics who would disagree, the general consensus is that BITs exist to promote the free flow of capital across borders. Their protections are designed to provide reliable commitments to foreign investors that their investments will not be subject to unjust government action or indirect interference. In the event that such action or interference does occur, moreover, the arbitration clause typically contained in a BIT provides the investor with the ability to have the resulting dispute arbitrated by a dedicated tribunal. In disputes against a State, a foreign investor may understandably be leery of submitting its investments to adjudication in local courts. A BIT’s arbitration clause can provide credible assurance to a reluctant investor considering investment in a country that may have experienced a recent regime change or be plagued by political or judicial instability. Large scale investment projects, like those associated with extractive industries, may take years to build and require millions of dollars of construction and labor before any resources can be extracted. Not only do proponents of the BIT regime rightfully assert that investors deserve to reap the benefits of their investments, but it is true that—in some cases at least—the political realities of a given country may not inspire the confidence of foreign investors. An enormous amount of institutional integrity is required for a domestic legal system to make a judicial finding that runs contrary to or implicitly criticizes a legislative decision or a Presidential decree. Foreign investors are taking a real risk in undertaking their projects. BITs play a crucial role in safeguarding their legitimate expectations. BITs are unique, however, in that they are signed between

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<sup>67</sup> Jeswald W. Salacuse & Nicolas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT’L L. J. 67, 77 (2005).

<sup>68</sup> See Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L. J. 491, 508 (2009); see generally OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 U.S. MODEL BILATERAL INVESTMENT TREATY (2004), <https://www.state.gov/documents/organization/117601.pdf>; Luke Eric Peterson notes that references to development are rare in treaties signed by the United Kingdom, Canada, and Switzerland. LUKE ERIC PETERSON, *BILATERAL INVESTMENT TREATIES AND DEVELOPMENT POLICY-MAKING 4* (2004), [http://www.iisd.org/pdf/2004/trade\\_bits.pdf](http://www.iisd.org/pdf/2004/trade_bits.pdf).

countries, but their most concrete protections and benefits flow to *individuals*. Moreover, those individuals are overwhelmingly likely to come from only one of the States party to a given BIT. It is this tension that sets the backdrop for how we should think of the “grand bargain” the BITs entail.

The protection of private property that a capital-importing country offers under a BIT is concrete and immediate. By contrast, the benefits it stands to obtain—increased flows of FDI and economic development—are theoretical and potentially distant, especially as the majority of the profits from such investments flow across the border and back to the investors.<sup>69</sup> Even as early as the 1990s, however, the benefits assumed to flow to the capital-importing country were called into question.<sup>70</sup> Some critics maintain that the legal and institutional climate of a capital-importing country is what ultimately protects investor rights. On this view, BITs are no substitute for strong domestic institutions; instead, they act as complements to processes characterized by strong institutions and respect for property rights.<sup>71</sup> Several studies performed by multilateral institutions further frustrate the assertion that BITs are firmly correlated to an increase in FDI flows.<sup>72</sup> Data comparing the robustness of investment flows into a given country against the number of BITs it has concluded further supports this notion. Japan, one of the world’s top recipients of FDI, has only concluded a handful of BITs.<sup>73</sup> The United States is still working on a BIT with China, but China has long been the primary recipient of US investment outflows.<sup>74</sup>

But the “bargain” as conceived by Salacuse and Sullivan—the one in which a developing country sacrifices some of its regulatory power in exchange

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<sup>69</sup> See, e.g., Salacuse & Sullivan, *supra* note 67, at 77; see also Kaushal, *supra* note 68, at 508.

<sup>70</sup> See UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, U.N. Doc. UNCTAD/ITE/IIT/7 (1998), which is one of the few early economic analyses of the effects of BITs on investment flows. The book looks at the impact of 200 BITs on foreign direct investment and found a weak correlation between BITs and investment flows. Critics have argued that this study failed to control for the strong upward trend in FDI during this time.

<sup>71</sup> Mary Hallward-Driemeier, *Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit... And They Could Bite* 2-3 (World Bank, Policy Research Working Paper No. 3132, 2003).

<sup>72</sup> See Kaushal, *supra* note 68, at 508; see also

UNCTAD, *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, *supra* note 70, at 122; UNCTAD, *TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT: TRENDS AND PROSPECTS*, at 337; WORLD BANK, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES*, at xvii (2003).

<sup>73</sup> As of 2016, Japan had concluded 28 BITs (one being inactive). UNCTAD, *International Investment Agreements*, *supra* note 62 (search or click on “Japan”). The same year, Japan received FDI inflows of nearly 35 billion. World Bank Data, Foreign direct investment, net inflows, <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>. By comparison, France, which received a similar amount of FDI inflow that year, had concluded 104 BITs. UNCTAD INVESTMENT POLICY HUB, *supra* note 62 (search or click on “France”).

<sup>74</sup> See James T. Areddy, *U.S.-China Investment Flows Bigger Than Thought*, WALL STREET JOURNAL (Nov. 17, 2016), <https://blogs.wsj.com/chinarealtime/2016/11/17/u-s-china-investment-flows-bigger-than-thought/> (discussing the extent of U.S. investments in China); Ian Talley, U.S. Treasury Secretary Mnuchin: *China Bilateral Investment Treaty ‘On Our Agenda,’* WALL STREET JOURNAL (June 6, 2017), <https://www.wsj.com/articles/u-s-treasury-secretary-mnuchin-china-bilateral-investment-treaty-on-our-agenda-1496774628> (indicating that as of Summer 2017, a U.S.–China BIT was still being discussed).

for the promise of increased economic development—has gone awry in other ways, as well. Not only has the promise of increased FDI flows been cast into doubt, the trajectory of BIT interpretation by arbitration tribunals has often meant that the regulatory and legislative rights of capital-importing countries have been severely curtailed.

#### A. Procedural Concerns

BITs are treaties signed between countries and as such they provide reciprocal rights between countries. However, capital flows generally only occur in one direction, and claims are made in one direction—investors bringing claims against countries. For this reason, then, BITs represent a regime of protection for investors from one country while imposing restrictions on the other country. Furthermore, the countries from which investments are most likely to flow—the developed countries—are almost always the *drafters* of BIT agreements.<sup>75</sup> Developing countries are overwhelming host countries for these investments, and show up to sign treaties that have already been written. Often, there is shockingly little negotiation involved. The wealthier and more influential country, the more success it may have in shaping the outcome of the treaty negotiations.

Researchers interested in discerning broad trends in the thousands of international investment treaties in force have had some success examining treaty text as data.<sup>76</sup> Looking only at treaties drafted in English, they measured the degree to which States sign internally consistent treaties. To do so, they pioneered a text-as-data approach and measured the similarity between the texts—or the Jaccard coefficient—in order to generate a “consistency score” for each of the countries in their dataset. They deemed countries with BIT networks that are almost completely internally coherent as “rule makers.”<sup>77</sup> On the other hand, internal inconsistency in BIT networks suggests that the country has largely signed the model treaties of other countries. Most countries fall somewhere in the middle. When the researchers mapped the Jaccard coefficients against World Bank data indicating each country’s income, they found that low-income countries have BIT networks that are 20% less internally consistent than the

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<sup>75</sup> Wolfgang Alschner, an empirical legal scholar and a former UNCTAD employee, has used the text of 1,628 BITs and applied sophisticated data processing methods to map similarities and dissimilarities of the language used in them. This has allowed him to measure the so-called “treaty coherence” of a particular country, meaning the similarity between its BITs. I share Alschner’s hypothesis that the higher a given country’s treaty coherence (or the more similar its BITs to each other), the more likely it is that that country was able to exert its bargaining power to advocate for its own interests in drafting the BIT. A country with lower treaty coherence (or mostly dissimilar BITs) likely had, by contrast, less influence over treaty drafting. His research shows that wealthier more developed countries consistently have a higher treaty coherence than less wealthy, less developed ones. Mapping BITs, <http://mappinginvestmenttreaties.com>.

<sup>76</sup> *See id.*

<sup>77</sup> Wolfgang Alschner, *Rule-Takers and Rule-Makers in the BIT Universe: Empirical Evidence of a North-South Divide*, MAPPING BITS BLOG (Jul. 28, 2016), <http://mappinginvestmenttreaties.com/blog/2016/07/rule-takers%20and%20rule-makers>.

networks of OECD member countries.<sup>78</sup> This method allowed the researchers to prove what most observers may have guessed—that a North-South divide distinguishes so-called rule-makers from rule-takers in the sphere of international investment.

Bilateral treaties amplify the negotiating power of countries with more geopolitical influence. The same is not true of multilateral negotiation settings, like in the U.N. This is because asymmetric power relations are emphasized in a bilateral setting. Multilateral negotiations allow developing countries to pool resources and gain strength through numbers, while low bureaucratic capacity, insufficient expertise, and economic and political dependencies make a single developing country less able to assert its preferences in a bilateral negotiation.<sup>79</sup>

Curiously, just as many developing countries were beginning to realize they had common interests that could give them strength in multilateral fora,<sup>80</sup> the number of BITs that these countries collectively signed was beginning to increase. In 1974, the year in which Resolution 3201 came before the General Assembly, the International Centre for Settlement of Disputes (ICSID) recorded the signature of eleven BITs.<sup>81</sup> That is one more treaty than the number signed in the year before, and six more than the number signed in 1970.<sup>82</sup> Ten years after Resolution 3201 was proposed, in 1984, ICSID recorded the signature of 19 treaties.<sup>83</sup> Today, more than two thousand are in force around the world.<sup>84</sup> I will argue that developing countries were forced by asymmetric power relationships to sign treaties that went against their national interest and their understanding of international law. I attempt to explain the contours of that asymmetry below.

In many cases, weak bargaining partners were not looking to the text of the BIT itself in deciding to sign. BITs were often part of a much larger constellation of multilateral financial institutional trends. Weaker countries would often be subjected to the fall-out from trends in the larger economic system, or overwhelmed with policy advice from the very governments they were negotiating against. While weak and newly independent states were able to insist upon and begin to defend certain aspects of their sovereignty in the multilateral fora like the General Assembly, this was not the case for multilateral financial institutions. Multilateral financial institutions like the World Bank or the International Monetary Fund (IMF) are not characterized by equality principles—donation determines the amount of influence. The IMF and the World Bank see themselves as agents of the international community, but are actually governed

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Such as, for example, the United Nations, an institution in which these countries were beginning to articulate their vision of the scope of State sovereignty.

<sup>81</sup> For year-over-year information about treaty signatures, see UNCTAD, *International Investment Agreements*, *supra* note 62.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

much more like private corporations, with votes distributed to governments according to the amount of money each contributes to the organization. Receiving benefits from these institutions was often made conditional on signing BITs, and weaker countries were often ostensibly supported in negotiating BITs by these institutions. However, because the priorities and agendas of these institutions may be in large part determined by the countries making the largest donations, weaker countries could not rely on them for unbiased advice or aid.

We do not expect individuals contracting with one another to be the most moral, generous versions of themselves. Indeed, the law allows contracting parties to exploit superior knowledge, a more comfortable bargaining position, or a greater wealth of experience as long as this does not result in deliberate misrepresentation or fraud.<sup>85</sup> Similarly, we do not expect treaty partners to disclose all relevant information to one another. Instead, in elucidating the procedural concerns below, I am attempting to point out is a kind of bug in the international system. Countries are unlike domestic contracting parties, which can form contracts within their legal system. Domestic contracting parties can employ outside experts and lawyers to oversee and advise during the contracting process. Finally, if a dispute occurs, it can be overseen by judges independent of the drafting of the contract or the benefits accruing from it.

Between countries, the situation is much different. After the Second World War, a number of multilateral institutions were established to author and administer international law and to promote world order.<sup>86</sup> As part of their mandate, many of these institutions provide guidance or aid (financial or otherwise), and seek to occupy an impartial advisory position.<sup>87</sup> Often, capital-importing countries concluding BITs with capital-exporting countries rely on input, advice, or encouragement from these multilateral institutions. However, multilateral institutions reflect the priorities and the will of the individual countries that constitute them. As will be demonstrated below, more powerful countries sometimes have the ability to influence the agenda of these multilateral institutions. In this way, the power asymmetries that characterize many BIT negotiations are both reproduced in and sustained by the interaction between developing countries and these institutions.

*i. 1980s Debt Crisis and the Role of the IMF*

The IMF began its operations on March 1, 1947.<sup>88</sup> Two months later, France was the first country to draw upon the fund.<sup>89</sup> However, it was not until the early

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<sup>85</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, § 161 cmts. a, d (AM. LAW INST. 1981).

<sup>86</sup> Such institutions included the U.N., the International Court of Justice, the IMF, and the World Bank.

<sup>87</sup> For example, part of the mandate of the IMF is to provide policy advice and technical assistance to its members; the World Bank provides technical assistance to developing countries; the OECD provides policy advice even to non-member countries; and various bodies of the United Nations provide political advisory services to member countries.

<sup>88</sup> *History*, IMF, <https://www.imf.org/external/about/histcoop.htm>.

<sup>89</sup> *IMF Chronology*, IMF, <https://www.imf.org/external/np/exr/chron/chron.asp>.

1980s, during a global debt crisis mostly impacting least developed countries (“LDCs”), that the IMF truly emerged onto the international scene.<sup>90</sup> It has been hailed as both a savior and a villain.<sup>91</sup> While analyzing the LDC debt crisis in detail is beyond the scope of this piece, I consider some of the factors that led to the crisis, as well as the IMF’s involvement in its aftermath, below.

On August 12, 1982, Mexico’s Minister of Finance told the Chairman of the Federal Reserve, the U.S. Secretary of the Treasury, and the Managing Director of the IMF that Mexico would be unable to meet an obligation later that year to service an \$80 billion debt.<sup>92</sup> Mexico’s inability to pay only signaled the beginning of the crisis. By October of the following year, twenty-seven countries owing \$239 billion had rescheduled or begun to reschedule their debts.<sup>93</sup> Sixteen of those nations were located in Latin America, and each of the largest economies in the region were implicated.<sup>94</sup> A large portion of the debt was owed to the eight largest U.S. banks, and the amount owed exceeded the capital and reserves of Latin America’s largest economies at the time by nearly 150%.<sup>95</sup>

Scholars trace the origins of the debt crisis to the international expansion of banking organizations in the United States during the 1950s and 1960s.<sup>96</sup> As LDCs around the world began to develop, growth rates averaged about 6% annually, slowing to 4-5% during the 1970s<sup>97</sup>—still a point or two higher than growth in developed economies. The sustained rapid growth in these markets generated U.S. corporate investment and led to the development of the so-called Eurodollar market, which provided U.S. banks with access to funds with which they could provide loans to developing countries on a large scale.<sup>98</sup> These international investment opportunities proved all the more attractive as U.S. commercial banks had been losing many of their former clients to the commercial paper market, and shares of traditional loan products dwindled.<sup>99</sup> As revenue streams at home dried up, U.S. banks looked overseas for opportunities.

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<sup>90</sup> JAMES M. BOUGHTON, *SILENT REVOLUTION: THE INTERNATIONAL MONETARY FUND, 1979-1989*, at 2 (2001).

<sup>91</sup> See, e.g., David Goldsbrough, *The Nature of the Debate Between the IMF and its Critics* (Working Group on IMF Programs and Health Expenditures, Background Paper, Sept. 2006), <https://pdfs.semanticscholar.org/6c55/7f75f8079a349a5bd84c064df3f4be73c6e0.pdf>; Charlotte Denny, *The Contented Malcontent*, *THE GUARDIAN* (July 5, 2002), <https://www.theguardian.com/business/2002/jul/06/globalisation>; Thomas D. Willett, *Understanding the IMF Debate*, 5 *INDEPENDENT REV.* 593 (2001).

<sup>92</sup> BOUGHTON, *supra* note 90, at 290.

<sup>93</sup> GEORGE HANC, *FEDERAL DEPOSIT INSURANCE CORPORATION (FDIC), HISTORY OF THE EIGHTIES: LESSONS FOR THE FUTURE* 191 (1997).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 192.

<sup>97</sup> David C. Beek, *Commercial Bank Lending to the Developing Countries*, *FED. RESERVE BANK OF N.Y. Q. REV.* 1 (Summer 1977).

<sup>98</sup> HANC, *supra* note 93, at 192.

<sup>99</sup> *Id.* at 196.

What may have been a mutually beneficial arrangement to both the U.S. and the Latin American economies it was investing in became suddenly complicated in 1973, when crude oil prices rose unexpectedly and stayed high for nearly a decade.<sup>100</sup> Not only did this price hike generate inflation around the globe, it also caused a balance of payments problem for developing countries, which suddenly found themselves less able to grapple with the new high price of oil and other imported goods.<sup>101</sup> This, in turn, made oil-importing developing countries more dependent on loans to finance the deficits, but inflation also increased the quantity of funds available for lending.<sup>102</sup> Finally, the rise in oil prices triggered a world recession from 1974-75, which produced a decline in the global commodities market for minerals and agricultural goods, reducing the exports of many developing countries and augmenting their debt burdens.<sup>103</sup>

As borrowing became more necessary for LDCs, lending became more attractive for commercial banks in the United States. In 1977, Arthur Burns, the chairman of the Federal Reserve Board, warned of the danger of this trend in a speech at the Columbia University Graduate School of Business:

Under such circumstances, many countries will be forced to borrow heavily, and lending institutions may well be tempted to extend credit more generously than is prudent. A major risk in all this is that it would render the international credit structure especially vulnerable in the event that the world economy were again to experience recession . . . [C]ommercial and investment bankers need to monitor their foreign lending with great care, and bank examiners need to be alert to excessive concentrations of loans in individual countries.<sup>104</sup>

The Ford Administration did not heed Burn's warning, and neither did the bankers. The second oil shock of the decade occurred in 1979, and further exacerbated existing problems.<sup>105</sup> As LDCs became more mired in debt, it became clear that U.S. banks might find themselves in serious trouble as well. One Federal Reserve Board governor called for regulation to govern banks' exposure to sovereign risk.<sup>106</sup> But these warnings did not constrain the banks. Lending continued, and the debt crisis worsened.

As global development and global lending were reshaping the international economic order, the IMF was reshaping its role in it. In 1974, one year after the

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<sup>100</sup> BOUGHTON, *supra* note 90, at 247.

<sup>101</sup> *Id.*

<sup>102</sup> Between 1972 and 1977, the annual oil revenues of the Organization of Petroleum Exporting Countries jumped from \$14 billion to \$128 billion. Increased revenues also increased the amount of OPEC's bank deposits, which were mostly in the Eurodollar market. BENJAMIN J. COHEN, *BANKS AND THE BALANCE OF PAYMENTS* 7, 32 (1981)

<sup>103</sup> HANC, *supra* note 93, at 192-93.

<sup>104</sup> Arthur F. Burns, *The Need for Order in International Finance*, 63 FRB RICHMOND ECON. REV. 14, 18 (1977).

<sup>105</sup> BOUGHTON, *supra* note 90, at 269.

<sup>106</sup> See generally Henry C. Wallich, *LDC Debt: To Worry or Not to Worry*, 24 CHALLENGE 28 (1981).

first oil crisis, the IMF set up an Extended Fund Facility to provide medium-term assistance to members experiencing balance of payment problems due to structural economic changes.<sup>107</sup> In 1976, the Executive Board of the Fund established a Trust Fund to provide assistance specifically to developing country members with profits from the sale of gold.<sup>108</sup> In 1982, when Mexico announced that it would have to reschedule its \$80 billion debt, the IMF approved a \$3.9 billion loan. Attached to that loan, and to the many other loans that the Fund would make to deeply indebted LDCs during the 1980s, came a set of conditionalities.

*ii. Conditionalities, the BIT Regime, and Coercive Power*

Conditionalities are the set of stipulations under which an IMF loan is made. Generally, conditionalities consist of legislative and regulatory demands, including requirements to make investor-friendly changes to national laws, privatize formerly State-run industries, and to allow foreigners to bid competitively on those industries. IMF loans are typically released in tranches, and adherence to a prescription of policy changes is evaluated before the release of each successive tranche.<sup>109</sup> This process is meant to ensure that countries can be held accountable for their policy promises. Meanwhile, the World Bank's International Finance Corporation (IFC) also encourages developing countries to make investor- and market-friendly changes to their laws, including incorporating measures designed to simplify bankruptcy proceedings, protect intellectual and other forms of property, and to enforce contracts and enable access to arbitration.<sup>110</sup> This pressure to liberalize and to ensure friendliness toward investors in an effort to gain access to desperately needed international loans meant that indebted countries often found themselves under pressure to enter into BIT agreements as part of a broader program of IMF-supervised reforms. The real deal being negotiated, then, was not contained in the text of the BIT itself. The BIT, even though it endures as a treaty, was only one small piece of a much broader set of negotiations.

Countries accepting loans with attached conditionalities were trading short-term assurances of help with stabilizing their balance sheets for long-term commitments to sweeping reforms that, in some cases, placed relatively semi-permanent constraints on important aspects of their sovereignty, including regulatory and legislative discretion. Signing BITs was just one way that this trend was memorialized and codified. Daniel Kalderimis, former associate professor at Columbia Law School, argues that conditionalities of the sort imposed by the

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<sup>107</sup> BOUGHTON, *supra* note 90, at 705.

<sup>108</sup> *Id.*

<sup>109</sup> BOUGHTON, *supra* note 90, at 46.

<sup>110</sup> The World Bank's Doing Business Reports, which are issued each year for every country, provide metrics indicating the ease of doing business in each place. Metrics include dealing with construction permits, getting credit, enforcing contracts, protecting investors, and many others. See WORLD BANK, *Doing Business: Measuring Business Regulations*, <http://www.doingbusiness.org/documents/DB-2016-overview.pdf>.



IMF and the IFC amount to regulation by appropriation — a “soft” form of regulation that has the power to indirectly influence aspects of government that it does not have the ability or desire to control directly.<sup>111</sup> Requiring performance as a conditionality for loan disbursements has a regulatory effect on the government accepting the loan, allowing capital-exporting countries to exercise regulatory control over the domestic processes of capital-importing countries.<sup>112</sup>

The relationship of developing countries to the IMF and the IFC is characterized by the same kind of power asymmetry that features in BIT negotiations. Ultimately, both aspects of the international investment regime have the power to exert an enormous amount of pressure on LDCs to pass laws that protect investors and to refrain from regulations that might harm their citizens. The actions of these multilateral institutions reinforces and even encourages the proliferation of BITs, as a demonstrated willingness to enter into BITs could be seen as a demonstrated willingness or intention to comply with conditionality packages.

*iii. Sophistication, Ignorance, and Procedural Unfairness*

The word “negotiate,” from the Latin *negōtiātiōn*, has meant different things at different times. The Merriam-Webster Dictionary tells us that, as a transitive verb, it means “to arrange for or bring about through conference, discussion, and compromise.”<sup>113</sup> The Oxford English Dictionary points to the original Latin word, which meant simply “done in the course of business.”<sup>114</sup> Merriam Websters’ definition is closer to what people think goes on during treaty-making today. The process, one imagines, is long and difficult, both sides listening to the demands of the other, and both eventually conceding something. The process may be characterized by stress, disappointment, and hard bargaining around. This is especially true of treaty negotiations, which are likely to involve a complex weighing of various priorities, the need to account for diverse stakeholders, and the fact that a treaty is likely to govern long into the future, even as the political reality of the signatories changes. Indeed, John Maynard Keynes died after his 1946 involvement in intense talks on how to best design multilateral financial institutions. The cause of death was likely exhaustion. Of course, we don’t expect treaty negotiation to be as taxing as it was for Keynes. Neither do we expect “negotiation” to mean the same thing as its Latin cousin, *negōtiātiōn*. et, numerous examples exist of treaties negotiated between weak states and strong states that were conducted more like simple business transactions than treaty negotiations.

In the 1980s, for example, the U.S. State Department was especially unwilling to sign treaties that deviated only slightly from its Model BIT. One

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<sup>111</sup> Daniel Kalderimis, *IMF Conditionality as Investment Regulation – A Theoretical Analysis*, 13 SOC. & LEGAL STUD. 103, 105 (2004).

<sup>112</sup> *Id.* at 110–11.

<sup>113</sup> *Negotiate*, MERRIAM-WEBSTER DICTIONARY (2018).

<sup>114</sup> *Negotiate*, Oxford Dictionary, available at <https://en.oxforddictionaries.com/definition/negotiate>.

former American negotiator reported that there was no negotiation, only “an intensive training seminar conducted by the United States, on U.S. terms, on what it would take to comply with the U.S. draft.”<sup>115</sup> The BIT with Grenada, about which talks began after the U.S. invaded the country, were concluded at the hospital bedside of the Grenadian Prime Minister as he was receiving medical treatment in Washington DC.<sup>116</sup>

After the Cold War ended, American lawyers, consultants, and advisers rushed into the former Soviet States to shepherd in a series of preferred economic and legal reforms.<sup>117</sup> The US Agency for International Development played a key role in this process, lending support to the Central and Eastern European Law Initiative (CEELI), an organization affiliated with the American Bar Association.<sup>118</sup> While CEELI represents itself as a neutral actor that provides training and skills development to legal professionals, the organization’s faith in the emerging international investment regime certainly played a role in the advice it administered.<sup>119</sup> These lawyers became cheerleaders of BITs in the countries they worked in, encouraging the countries not only to sign the BITs they were presented with, but to model new investment laws on the basic provisions of BITs.<sup>120</sup> These enthusiastic American lawyers also advised many countries over the course of their BIT negotiations with other countries. When it came time for Lithuania to conclude a BIT negotiation with the United States, however, the jig was up. The State Department did not want its negotiating partners to be *too* informed.<sup>121</sup> The American negotiating team understood that, absent expert counsel from sophisticated CEELI lawyers, Lithuania would be in over its head.<sup>122</sup> With that in mind, the U.S. government asked U.S. citizen and CEELI lawyer Kenneth Vandeveld — who was concerned that Lithuania would be unduly exposed to expropriation claims from American investors dating back to the Soviet occupation — to leave the room.<sup>123</sup> CEELI lawyers — whether as cynics or true believers — promoted a narrative in which bilateral investment agreements promoted FDI; it was a persuasive narrative. Governments then moved to take advantage of a climate in which government officials were open to signing these treaties, in no small part due to the enthusiastic, continuous encouragement of foreign counsel. From 1990 to 1998, therefore, the United States managed to

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<sup>115</sup> José E. Alvarez, *The Development and Expansion of Bilateral Investment Treaties: Remarks*, 86 AM. SOC’Y INT’L L. PROC. 532, 553 (1992).

<sup>116</sup> Kenneth J. Vandeveld, *The BIT Program: A Fifteen-Year Appraisal*, 86 AM. SOC’Y INT’L L. PROC. 532, 539 (1992).

<sup>117</sup> POULSEN, *supra* note 4, at 83.

<sup>118</sup> *Id.*

<sup>119</sup> *Mission of the CEELI Institute*, CEELI INSTITUTE, <http://www.ilacnet.org/blog/organisations/ceeli-institute>; POULSEN, *supra* note 4, at 85.

<sup>120</sup> *Id.* at 86.

<sup>121</sup> POULSEN, *supra* note 4, at 85.

<sup>122</sup> *Id.* at 86.

<sup>123</sup> *Id.* at 86–87.

complete BITs with all thirteen of the former Communist states.<sup>124</sup> Hungary was the only exception.

It was not only the United States that was indirectly championing BITs favorable to capital-exporting States. Even multilateral institutions were keen to get in on the trend, albeit for very different reasons. The United Nations Conference on Trade and Development (UNCTAD), which had criticized lack of due-diligence in the lending programs of developed countries in the lead-up to the debt crisis of the 1980s and had championed debt relief for developing countries,<sup>125</sup> endured a kind of identity crisis following the Cold War. In 1984, a Washington-friendly Secretary General was appointed, thereby “defanging” the organization, in the words of historian Mark Mazower.<sup>126</sup> The United Nations came under severe financial pressure during the late 1980s and early 1990s, mainly because the United States refused to honor its contributions.<sup>127</sup> Meanwhile, the Reagan administration sought to establish a “reflection group” as part of a wider effort to reform UNCTAD’s leadership and its role.<sup>128</sup> Officials unsympathetic to the West were removed during this period, and 30 senior staff members were replaced.<sup>129</sup> UNCTAD also received a new mandate: to study and provide information on FDI flows and the activities of transnational corporations, all the while emphasizing the benefits that FDI could generate.<sup>130</sup> The potential negative consequences of FDI went largely unexamined.<sup>131</sup>

As UNCTAD began to shift its focus to the benefits of FDI, it also began to facilitate BITs on a massive scale. In the late 1990s and early 2000s, UNCTAD became the only international organization to focus directly on BITs, and to grease the wheels of negotiation with overwhelming financial and logistical support. UNCTAD bore travel costs, full board, and lodging costs for developing country officials, and provided facilities for meetings and negotiations.<sup>132</sup> UNCTAD hosted ten events in Geneva between 2000 and 2005, which resulted in more than 160 BITs signed between sixty developed and developing countries.<sup>133</sup> Reflecting on the five agreements his country had signed over a two-week period with the help of UNCTAD, the head of the Philippine delegation said that they were able to conclude “far more [agreements] than we could have otherwise done in two years.”<sup>134</sup> Maybe that is because these sessions lacked the kind of lengthy

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<sup>124</sup> *Id.* at 88.

<sup>125</sup> JOHN TOYE, UNCTAD AT 50: A SHORT HISTORY 64, U.N. Doc. UNCTAD/OSG/2014/1 (2014).

<sup>126</sup> *Id.* at 74.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 75.

<sup>130</sup> *Id.* at 84.

<sup>131</sup> *Id.* at 84.

<sup>132</sup> POULSEN, *supra* note 4, at 92–94.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 94; *see also* Press Release, UNCTAD, 22 Bilateral Investment Treaties Signed at Sapporo (Japan), U.N. Press Release TAD/INF/PR/048 (June 28, 2000).

bargaining process that one might expect in treaty negotiations. As one South African official put it, “The OECD model was actively promoted during this session, and no real negotiations actually took place. Treaties were just signed off in a rush in two or three hours.”<sup>135</sup> More significantly than the logistical and financial support, however, UNCTAD was trading on its past reputation among developing countries to promote a completely new agenda. The hypocrisy was complex. BITs were being encouraged even as UNCTAD’s own studies were showing that they did not produce any discernible investment impact.<sup>136</sup>

### B. Substantive Unconscionability

In domestic law, the criteria for determining the presence of substantive unconscionability are looser than those of its procedural cousin. The Washington State Supreme court wrote that a substantively unconscionable term is “one-sided or overly harsh, shocking to the conscience, monstrously harsh, or exceedingly calloused.”<sup>137</sup> The Mississippi Supreme Court held that substantively unconscionable agreements are “one-sided [and] one party is deprived of all the benefits of the agreement or left without a remedy for [the other] party’s nonperformance or breach, a large disparity between cost and price or a price far in excess of that prevailing in the market [exists], or [the] terms bear no reasonable relationship to business risks assumed by the parties.”<sup>138</sup> In short — courts know it when they see it.

BITs are often characterized by several profound inequalities and a one-sided allocation of risk. However, these inequalities are largely absent from the language of the treaties themselves. They lie primarily in their interpretation and enforcement. First, BITs often require that foreign investors be treated more favorably than citizen-investors. While this may be a legitimate bargain in some cases, it also creates a situation in which international investors are subject to a substantially different legal regime, and gives foreign investors the ability to influence government actions in ways that citizens may be unable to. Second, the trajectory of interpretation of BIT language often means that sovereigns relinquish significant portions of their regulatory and legislative power. Finally, the arbitration provisions of BITs restrict sovereign authority, pushing disputes out of the diplomatic realm and constraining the discretion of the State.

It is not difficult to see how restrictions on certain kinds of legislative activity could be important to preventing unjust expropriation. A State might, for instance, pass an environmental law in bad faith and choose to enforce it selectively in order to halt the operations and profitability of a mining project in the hopes of

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<sup>135</sup> POULSEN, *supra* note 4, at 96.

<sup>136</sup> HALLWARD-DRIEMEIER, *supra* note 71, at 11 (arguing that UNCTAD’s bilateral investment in the mid-1990s shows only a weak correlation between FDI and BITs, and did not control for the general upward trend of FDI at the time).

<sup>137</sup> *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197 (Wash. 2013).

<sup>138</sup> *Bank of Indiana, Nat’l Ass’n v. Holyfield*, 479 F. Supp. 104, 110 (S.D. Miss. 1979); *MS Credit Center v. Catherine Horton*, 926 So.2d 167, 177 (2006).

appropriating the equipment or infrastructure associated with it. Alternatively, corruption could incentivize a State to pass a law favoring domestic over foreign investors and interfering with general principles of fairness. These kinds of behaviors are worth protecting against and are properly prohibited in a BIT regime. However, there are examples of instances in which legislation that legitimately protects citizens or the environment, or safeguards the economy in times of crisis has been prohibited or chilled. In those cases, the State is prevented from fulfilling what is perhaps its primary role: protecting its citizens and respecting the institutional frameworks that allow for self-determination. When this primary duty is bargained away (maybe even for a very cheap price), it is done in a manner out of keeping with notions of sovereignty contemplated by Lauterpacht.<sup>139</sup> Such bargains are or have the potential to become “shocking to the conscience” and may constitute the kind of substantive inequality that would be likely to be recognized by domestic courts.

*i. Interference with Domestic Authority: Creation of a Two-Tiered System*

Under many BITs, foreign investors are afforded more expansive property rights than domestic investors. Domestic investors are constrained by domestic law, which may, depending upon the values of the State and the polity, limit the extent of property rights or subordinate them to the public good. A foreign investor with the same enterprise and cause of action as a domestic investor may, therefore, prevail in an action against the State where his domestic counterpart fails. This creates a situation in which governments may be held liable for actions that are wholly within the scope of their domestic laws, which may promote the interests of the country or protect its citizens, and are implemented in a non-discriminatory manner. BITs effectively set up two legal regimes within a single territory, creating a situation in which members of the sovereign political community are more constrained than foreigners. Furthermore, foreign investors can legally contest regulatory and legislative measures taken through democratic processes, allowing them greater influence over the political reality of the States than—in some cases—citizens themselves.

*ii. Constraints on Legislative Power*

Various provisions of BITs have been interpreted in a manner that effectively undermines the legislative and executive power of States. It is difficult to say whether the “rule-makers” anticipated and desired this result, or whether it has been a natural and perhaps welcome outcome for capital-exporting countries. The fact is that the substantive language in treaties has been used to curtail the sovereign authority of States in ways that may have a chilling effect on state regulatory action or legislation. Technically, States retain their prerogative to interfere with foreign investments, but the price of doing so might be extremely high.

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<sup>139</sup> See *infra* Section IV.

Investment awards may be so large that they equal or exceed broad areas of public spending. This may end up pitting the public interest against the interests of foreign investors. Indeed, the increasing influence of arbitral tribunals on the regulatory power of States has left some scholars to characterize investment arbitration as part of the evolving notion of administrative law.<sup>140</sup>

*iii. Fair and Equitable Treatment Clauses*

Most investment treaties and some trade agreements require governments to provide “fair and equitable treatment” to foreign investors.<sup>141</sup> There has been plenty of discussion about how to interpret this phrase, but efforts to provide a normative analysis of it have occurred only relatively recently. Some argue that the vagueness of the concept is a feature rather than a bug—that it provides arbitrators with the ability to use their discretion and to incorporate their own notions of “fairness” and “equity.”<sup>142</sup> This argument is only compelling, of course, if one also holds that *arbitrators’* notions of fairness and equity are the appropriate standard on which to base this analysis. For critics of international investment arbitration, of course, this is not the case. There is a perceived bias on the part of arbitrators.

While the institutions overseeing arbitration proceedings have guarded against the potential personal or national biases of arbitrators fairly effectively,<sup>143</sup> a number of observers and scholars have criticized BIT arbitration panels for what they see as a bias toward investors and capital-exporting countries.<sup>144</sup> Empirical studies have not shed much light on the issue. Even when they go some distance toward exploring the existence of bias, their results have to be taken with a grain of salt: they are likely to reflect the political bent of the organization that commissioned them.<sup>145</sup> At the time of writing, the most recent information

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<sup>140</sup> Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775 (2008).

<sup>141</sup> See Investment Policy Hub, IIA Mapping Project, UNCTAD, <http://investmentpolicyhub.unctad.org/IIA> (showing that 2441 of the 2572 mapped BITs contain a fair and equitable treatment clause).

<sup>142</sup> ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW 3 (2004) (available at [https://www.oecd.org/daf/inv/investment-policy/WP-2004\\_3.pdf](https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf)).

<sup>143</sup> See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1587 n.329 (2005) (Susan Franck’s criticism of scholars asserting that arbitrators may be subject to personal and national bias or other kinds of undue influence).

<sup>144</sup> See, e.g., Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration*, 47 VIRGINIA J. INT’L L. 953 (2007); Ibironke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 SAN DIEGO INT’L L. J. 345 (2007).

<sup>145</sup> The studies published by the International Institute for Sustainable Development or highlighted on their website tend to demonstrate that arbitration panels are likely to be biased. Language used in the study mentioned in *infra* note 83 even suggests that the study sees itself as explicitly contradicting supposed proponents of the international arbitration system. The study published by UNCTAD, which

available from the United Nations Conference on Trade and Development reports that of the 855 investment cases that have made their decisions publically available, 37% have been decided in favor of the State, while only 28% have been decided in favor of investors.<sup>146</sup> However, another study uses this same data to show that even though arbitration tribunals are more likely to resolve claims in favor of States, most of these decisions are made because of jurisdictional problems.<sup>147</sup> These jurisdictional questions often terminate the arbitration. Of the cases that proceeded to the merits, however, investors have won 60%.<sup>148</sup> Of cases that involved more complex jurisdictional determinations, investors won 72%.<sup>149</sup> A slightly older empirical study focused specifically on how arbitration tribunals were likely to interpret issues on which treaties are ambiguous or silent.<sup>150</sup> In that study, Professor Gus Van Harten found that arbitrators were more likely to take an expansive, claimant-friendly approach to such provisions, which favors investors over States. While it shows the existence of a trend, this study is not completely satisfying for our purposes because it does not track interpretations of the fair and equitable treatment clause specifically.

All of this to say that while it is difficult to demonstrate the existence of a bias toward claimants, arbitrators have an enormous amount of discretion over how they choose to read the “fair and equitable treatment” standard. There are many examples of arbitrators choosing to read the standard in an expansive way. These expansive readings arguably extend investor rights under the provision beyond what might have been reasonably expected based on the language of the treaty, at least for treaties signed before the last few years, during which the reading of this standard has been expanding. I provide a few examples of such cases below.

#### *a. Background and Scope*

The notion of legitimate expectations, which is sometimes referred to as basic, reasonable or justifiable expectations,<sup>151</sup> is a key element of the fair and equitable treatment standard. It has been invoked by arbitral tribunals in decisions that effectively widen the scope of protection granted to foreign investors. The tribunal in *Tecmed v. Mexico* has provided what is perhaps one of the most far-reaching definitions of this concept:

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has historically underwritten efforts to encourage countries to sign BITs, does not suggest any kind of bias. In fact, the way that UNCTAD displays its data would seem to undercut an argument that arbitrators are biased.

<sup>146</sup> United Nations Investment Policy Hub, *Investment Dispute Settlement Navigator Tool*, UNCTAD (2018), <http://investmentpolicyhub.unctad.org/ISDS>.

<sup>147</sup> See Howard Mann, *ISDS: WHO WINS MORE, INVESTORS OR STATES?* INT’L INST. FOR SUSTAINABLE DEV. (Jun. 2015), <https://www.iisd.org/itn/wp-content/uploads/2015/06/itn-breaking-news-june-2015-isds-who-wins-more-investors-or-state.pdf>.

<sup>148</sup> *See id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Saluka Investments B.V. v. Czech Republic*, 302 (Perm. Ct. Arb. 1991).





...this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>152</sup>

While a couple of arbitral decisions have asserted a narrower view of the standard,<sup>153</sup> it has been echoed and endorsed in many other arbitral decisions.<sup>154</sup> Despite disagreement on the scope of the principle, some consensus seems to be emerging around the notion of legitimate expectations. First, arbitral tribunals seem to be reading into “fair and equitable treatment” an obligation to ensure a stable business environment, meaning that host countries must provide a transparent and predictable framework for investors’ business planning and investment.<sup>155</sup> It follows, then, that inconsistency of the actions of the host State may indicate a breach of the treaty.

In *MTD v. Chile*, for example, one government agency encouraged and approved an investors’ construction project while another denied the required zoning permits.<sup>156</sup> Chile was held to be in breach of the standard. Similarly, a lack

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<sup>152</sup> FIONA MARSHALL, INT’L INST. FOR SUSTAINABLE DEV., FAIR AND EQUITABLE TREATMENT IN INTERNATIONAL INVESTMENT AGREEMENTS 10 (2007), [https://www.iisd.org/pdf/2007/inv\\_fair\\_treatment.pdf](https://www.iisd.org/pdf/2007/inv_fair_treatment.pdf).

<sup>153</sup> See, e.g., *Saluka Investments B.V. v. Czech Republic*, 304 (Perm. Ct. Arb. 1991); *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 335 (Sept. 11, 2007).

<sup>154</sup> See *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 112 (May 25, 2004) (citing *Tecmed v. Mexico*); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award, ¶ 185 (Oct. 5, 2012); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award, ¶ 371 (July 14 2006); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, ¶ 297 (Jan. 17, 2007); *Gami Investments, Inc. v. Mexico*, UNCITRAL, ¶ 88 (Nov. 15, 2004); *Eureko v. Poland*, ¶ 235 (Aug. 19, 2005).

<sup>155</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000); see also *Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, ¶ 154 (May 29, 2003); *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004); *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, ¶ 183 (Oct. 5, 2012); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, ¶ 371 (July 14 2006); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, ¶ 297 (Jan. 17, 2007); *GAMI Investments, Inc. v. Mexico*, UNCITRAL, ¶ 88 (Nov. 15, 2004).

<sup>156</sup> *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.

of transparency may also indicate a breach. In *Metalclad v. Mexico*, the tribunal stated that it understood the principle of transparency “to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments... should be capable of being readily known to affected investors.”<sup>157</sup> In *Tecmed v. Mexico*, the standard is even higher—requiring that the investor be able to “know beforehand and all rules and regulations that will govern its instruments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”<sup>158</sup>

Most surprisingly, however, new regulations or disagreement between government agencies may be sufficient to constitute a breach even if these actions were not taken in bad faith and do not constitute “outrageous behavior.”<sup>159</sup> Given the very real worry about transparency in many capital-importing countries, a strict interpretation of a breach may not be unwarranted, but it seems curious that an arbitral tribunal would explicitly state that even a regulation passed in good faith can constitute a breach. This establishes a restrictive regime—while it may be reasonable to expect that a given agency or government may be able to fully inform an investor about how domestic law is likely to affect investments, requiring this over any length of time would seem to preclude reform, regulatory response to environmental or labor activism, and other legitimate exercises of sovereign authority. Finally, even a bureaucracy that zealously enforces existing laws may be found to be pursuing a campaign of harassment against a foreign investor.<sup>160</sup> In these examples, good faith, robust enforcement of regulation is enough to trigger hefty liabilities for host States.

*b. The Chilling Effects of an Expanded Fair and Equitable Treatment Standard*

*i. Enforcement of Existing Laws*

In 2012, an arbitral tribunal issued one of the largest awards in history to Occidental Petroleum Corporation (Oxy) after it launched a successful claim against Ecuador under the U.S.-Ecuador BIT.<sup>161</sup> The claim was brought when the

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<sup>157</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, NAFTA, ¶ 76 (Oct. 30, 2000).

<sup>158</sup> *Tecmed, S.A. v. Mexico*, ICSID Case. No. ARB (AF)/00/2, ¶ 154 (May 29, 2003).

<sup>159</sup> See Marshall, *supra* note 152, at 13 (citing *Mondev v. United States*, ¶ 116; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) (NAFTA) Award 9 January 2003, ¶ 180; *Tecmed v. Mexico*, ¶ 153; *Waste Management No. 2 v. Mexico*, ¶ 93; *Azurix v. Argentina*, ¶368; *Siemens v. Argentina*, para 297; *Eureko v. Poland*, para 234; *Occidental v. Ecuador*, para 186; *Enron v. Argentina*, ¶ 263; *CMS v. Argentina*, ¶ 280; *LG&E v. Argentina* ¶ 129; *Lowen v. United States*, ¶132).

<sup>160</sup> See *id.*; see also CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 243 (2007).

<sup>161</sup> Tai-Heng Cheng & Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v. the Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an->

government terminated an oil concession after Oxy sold 40 percent of its production rights to another firm without government approval, in violation of both the contract it had concluded with the Ecuadorian government and Ecuadorian law.<sup>162</sup> The contract between the investor and the country enforced Ecuador's hydrocarbons law, which protects the government's prerogative to exercise discretion over which companies are permitted to produce oil in its territory.<sup>163</sup> This was of particular importance in the area in which Oxy was operating—an environmentally sensitive part of the Amazon region. While the tribunal acknowledged that Oxy had broken Ecuadorian law and that the response of the government was foreseeable, it held that the government had not responded proportionally and had therefore violated the “fair and equitable treatment” requirement under the BIT.<sup>164</sup> In doing so, it read into “fair and equitable treatment” a proportionality requirement that, in its view, determined the proper scope of government action, apparently absent in established domestic law and even the contract concluded between the investor and the state. The tribunal held that “any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences.”<sup>165</sup> It read the same proportionality requirement into Ecuadorian law—to a remarkable result.<sup>166</sup> On this logic, the tribunal found that Ecuador was liable to the investors for the amount of future profits that Oxy would have received from the full exploitation of the oil reserves that it had forfeited through its breach of the contract and its violation of the law.<sup>167</sup> The \$2.3 billion award included the profits from reserves that had yet to be discovered, and was one of the largest awards in history.<sup>168</sup> The amount of the award represented more than 2% of the country's GDP that year.<sup>169</sup>

#### ii. Delegation of Power to Local Authorities

In *Metalclad v. Mexico*, a U.S. waste management firm brought a claim against Mexico under NAFTA's investor-state dispute resolution mechanism.<sup>170</sup> The firm complained that a Mexican municipality had refused to grant it a

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overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador.

<sup>162</sup> See *Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

<sup>163</sup> *Id.* ¶ 2.

<sup>164</sup> *Id.* ¶ 404.

<sup>165</sup> *Id.* ¶ 416.

<sup>166</sup> *Id.* ¶ 422.

<sup>167</sup> *Occidental v. Ecuador*, *supra* note 162, ¶ 739–43, 824–25 (discussing the methods employed in calculating the award).

<sup>168</sup> *Id.* ¶ 748; Luke Eric Peterson, *Ecuador Must Pay \$1.76 Billion to US Occidental Corporation for Expropriation of Oil Investment: Largest Ever Award Ever in Bilateral Investment Treaty Case at ICSID*, INVESTMENT ARBITRATION REPORTER (Oct. 5, 2012), <http://www.iareporter.com/articles/20121005>.

<sup>169</sup> Ecuador GDP, TRADING ECONOMICS (2016), <http://www.tradingeconomics.com/ecuador/gdp>.

<sup>170</sup> *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

construction permit for the expansion of a toxic waste facility.<sup>171</sup> The municipality was concerned about water contamination and other environmental and health hazards.<sup>172</sup> The local government was acting consistently with its past decisions to deny permits to the Mexican firm from which Metalclad had acquired its facility.<sup>173</sup> Metalclad claimed that Mexico was essentially expropriating its property through a regulatory taking.<sup>174</sup> The tribunal agreed, and further found that Mexico had failed to provide a “transparent and predictable” regulatory environment to its investors.<sup>175</sup> Critics of the decision describe it as reading into NAFTA the duty for signatories to walk foreign investors through the complexities of municipal, state and federal law and to ensure that officials at different levels of governments never give inconsistent advice.<sup>176</sup> Such a standard would seem to undermine the powers delegated to local governments while simultaneously relieving the investor of the obligation to conduct basic due diligence in the jurisdiction in which it seeks to operate.

### *iii. Maintaining Peace and Public Order*

In 2001, many factors converged to push Argentina toward one of the most serious economic crises in recent history. As the situation worsened, Argentinians rushed to the banks, believing that their pesos would be devalued.<sup>177</sup> President Cavallo responded by limiting bank withdrawals in an effort to prevent the banks from becoming overdrawn.<sup>178</sup> His response triggered a wave of uncertainty and anger throughout the country. People began rioting, looting, and gathering in the thousands outside Cavallo’s apartment, which caused him to resign.<sup>179</sup> The unrest continued, however, and protests became increasingly violent. More than twenty people were killed in the clashes.<sup>180</sup> The government changed hands several times as leaders struggled to stave off chaos.<sup>181</sup>

Invoking the Economic Emergency Law, the government took a number of steps to try to limit inflation. One such effort involved limiting gas utility rate

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<sup>171</sup> *Id.* ¶ 50.

<sup>172</sup> *Id.* ¶¶ 44, 46.

<sup>173</sup> *Id.* ¶ 53.

<sup>174</sup> *Metalclad Corp. v. Mexico*, *supra* note 170, ¶ 59.

<sup>175</sup> *Id.* ¶ 99.

<sup>176</sup> See Stephen L. Kass and Jean M. McCarroll, *The Metalclad Decision Under NAFTA’s Chapter 11*, N.Y. L. J. (2000).

<sup>177</sup> Jorge Schvarzer, *The Costs of the Convertibility Plan: The Economic and Social Effects of Financial Hegemony*, in *BROKEN PROMISES? THE ARGENTINE CRISIS AND ARGENTINE DEMOCRACY* 73, 87 (Edward Epstein & David Pion-Berlin eds. 2006).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*; see also Clifford Kraus, *Reeling from Riots, Argentina Declares a State of Siege*, N.Y. TIMES (Dec. 20, 2001), <http://www.nytimes.com/2001/12/20/world/reeling-from-riots-argentina-declares-a-state-of-siege.html> (describing riots and looting in Argentina in late 2001).

<sup>180</sup> Uki Goni, *Argentina collapses into chaos*, THE GUARDIAN (Dec. 20, 2001), <https://www.theguardian.com/world/2001/dec/21/argentina.ukigoni>.

<sup>181</sup> Schvarzer, *supra* note 177, at 87.

increases.<sup>182</sup> This decision caused the value of the Argentine peso to fall in global markets. As the peso fell, CMS Gas Transmission Company, a U.S. firm, lost revenue. CMS subsequently brought an action against the (new) Argentinian government, claiming that the freezing of gas rates violated the “fair and equitable treatment” provision of the BIT, among others.<sup>183</sup> Argentina argued that not only was its treatment of CMS non-discriminatory, but that the actions of the government were necessary in the face of the national emergency it was grappling with.<sup>184</sup> In order to justify its decision, it was even able to point to a provision of the U.S.-Argentine BIT under which CMS was bringing its claim: “This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”<sup>185</sup>

The tribunal decided against Argentina, finding that the economic crisis its citizens suffered was not sufficiently severe for it to be able to rely on this defense.<sup>186</sup> Argentina was found liable for \$133 million, to be paid out of public coffers in the wake of a crisis that had left over 75% of the population poor or indigent.<sup>187</sup> A separate tribunal hearing a similar claim under the same BIT came to the opposite conclusion.<sup>188</sup> Reflecting on the pair of cases, Argentina’s Minister of Justice Horacio Rosatti said that it was obvious to the people of Argentina that a foreign tribunal should not be deciding the consumer rates for public utility services.<sup>189</sup> Adding insult to injury, eventually CMS sold its claim, and the subsequent owner pursued the award in U.S. courts.<sup>190</sup>

#### *iv. The Dispute Resolution Mechanism Contained in BITs Restricts Sovereign Authority*

While BITs technically grant reciprocal rights to investors of both signatory States, they are instruments of public international law that effectively restrict the power of States while granting rights to private investors. Arbitration tribunals, which are convened by the parties to a dispute outside of the public State

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<sup>182</sup> Sarah Anderson & Sara Grusky, *How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About It*, FOOD AND WATER WATCH (2007) [https://www.foodandwaterwatch.org/images/water/world-water/bank-policy/ICSID\\_print.pdf](https://www.foodandwaterwatch.org/images/water/world-water/bank-policy/ICSID_print.pdf).

<sup>183</sup> CMS Gas Transmission Company v. Argentina, ICSID Case No. Arb/01/8, Award, ¶¶ 84–88 (May 12, 2005).

<sup>184</sup> *Id.* ¶ 99.

<sup>185</sup> *Id.* ¶ 332.

<sup>186</sup> *Id.* ¶¶ 354–56.

<sup>187</sup> Alan B. Cibils, Mark Weisbrot & Debayani Kar, *Argentina Since Default: The IMF and the Depression*, CTR. FOR ECON. AND POLICY RESEARCH (Sept. 3, 2002).

<sup>188</sup> LG&E Energy Corp. v. Argentina, ICSID Case No. ARB/02/1, Award, ¶ 257 (Oct. 3 2006).

<sup>189</sup> *Rosetti respaldo el Proyecto anti-CIADI*, PARLAMENTARIO (2018), [www.parlamentario.com/noticia-4068.html](http://www.parlamentario.com/noticia-4068.html).

<sup>190</sup> *Come and get me*, THE ECONOMIST, Feb. 18, 2012.

apparatus, are endowed with the power to effectively review acts of State. A State party to an arbitration dispute does not participate as a public entity. Structurally and legally, arbitration places the investor and the State on equal footing. The State does not receive special rights or recourse to its public policy initiatives. While the legal doctrine of *rex non potest peccare*—the king can do no wrong—is recognized by countries around the world to grant sovereign immunity, arbitration strips a state of its sovereignty. The tribunal—privately convened, unaccountable to citizens—has the jurisdiction to review public State actions while investors are effectively shielded from similar scrutiny because their conduct is governed by the treaty. Finally, in this system, only investors may initiate claims, and only States must pay damages.<sup>191</sup> By signing a BIT, the State binds itself to a legal regime in which findings of liability only ever run in one direction. In one way, of course, this is what the State has bargained for. While the scope of the “fair and equitable treatment” standard as interpreted by the tribunals would be difficult or impossible to predict, arbitration clauses are clearly stated in BITs. However, given the fact that investors have brought claims that touch such critical aspects citizens’ lives and have the potential to chill the legislative processes, it is especially troubling that arbitration panels are so insulated against wider accountability and that proceedings are so one-sided.

### III.

#### UNCONSCIONABILITY DOCTRINE IN DOMESTIC CASES

Domestic courts can use equitable remedies to promote justice and fair dealing between unequal parties that conclude agreements together. While the doctrine has often been described as paternalistic because it constrains contracting freedoms, it enhances the overall equality of bargain-makers by preventing desperate parties from making their situations even more desperate. By the same token, the doctrine provides a disincentive for stronger parties to attempt to coerce or deceive a weaker party into signing a one-sided agreement. The unconscionability doctrine has existed at least since Roman law, under which, a contracting party who received the raw end of a deal was allowed to rescind the contract “if the disproportion between the values exchanged was greater than two to one.”<sup>192</sup> In the early nineteenth century, an American court also found that in cases in which a “contract ought not, in conscience, to bind one of the parties, as if he had acted under a mistake, or was imposed upon by the other party... a court of equity will interpose and afford a relief... by setting aside the contract.”<sup>193</sup> Later that century, courts characterized unconscionable contracts as contracts written

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<sup>191</sup> For a more in-depth discussion of these tensions, see Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT’L L. J. 491, 518 (2009).

<sup>192</sup> CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 599 (7th ed. 2012).

<sup>193</sup> *Hepburn v. Dunlop & Co.*, 5 U.S. (1 Cranch) 179, 197 (1816).

“such as no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>194</sup>

Perhaps the clearest and most frequently cited articulation of the doctrine emerged during the 1950s after Section 2-302 of the Uniform Commercial Code was drafted.<sup>195</sup> The U.C.C. stipulated that “if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract” or it may limit the effect of the offending portion so as “to avoid any unconscionable result.”<sup>196</sup> The U.C.C. also lays out a contextual test for determining unconscionability: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>197</sup> The principle underlying this contextual test “is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”<sup>198</sup> It wasn't until nearly a decade later that courts began looking to the U.C.C. to give substance to their invocation of unconscionability.<sup>199</sup> At present, the U.C.C. has been adopted by nearly all states.<sup>200</sup> While the U.C.C. traditionally only regulated merchant-to-merchant transactions, the doctrine as articulated by the Code has been expanded to other kinds of agreements as well. However, unconscionability doctrine has enjoyed a broader life as an equitable remedy in U.S. courts, and analogues of the doctrine can be found in legal systems around the globe.<sup>201</sup>

#### A. U.S. Courts

Unconscionability doctrine has been applied idiosyncratically throughout the U.S. While some states have created tests for unconscionability, these tests are largely unclear for the in the same way that unconscionability doctrine itself

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<sup>194</sup> *Hume v. United States*, 132 U.S. 406, 411 (1889).

<sup>195</sup> See Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275 (1998), describing the drafting process during the 1940s, for a discussion of the history of the U.C.C.

<sup>196</sup> U.C.C. § 2-302 (amended 2003).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> The reference to the U.C.C. occurred in a New York State Supreme Court case in 1958. See *Donato v. Blatusaitis*, 56 Misc. 2d 935, 942 (1958). There, while the Court did not find it necessary to decide on whether a particular contract provision was unconscionable, the opinion seems to point to the U.C.C. as offering a framework for making such a decision.

<sup>200</sup> After the first publication of § 2-302 of the U.C.C., the ambiguity of the term “unconscionability” induced the State of California to initially drop § 2-302 from their adoption of the Code. See Simon Reznikoff, *The Unconscionable Controversy*, 17 AM. BUS. L.J. 61 (1979); see also CAL. COM. CODE § 2302 (West 2012) for an in-depth explanation as to why the provision was not enacted in California. Also, until 1971, the state of North Carolina also omitted this section from the Code. See N.C. GEN. STAT. ANN. § 25-2-302 (1966) for a discussion of why North Carolina did not initially adopt the provision.

<sup>201</sup> See discussion *supra* Section III(B).

is unclear.<sup>202</sup> Courts, therefore, apply the doctrine on a case-by-case basis, considering a totality of the circumstances under which the contract was made and acted upon.<sup>203</sup> Generally, courts require the presence of both procedural and substantive unconscionability in order to invalidate a contract.<sup>204</sup> Even in cases where factors suggesting unconscionability might be present, some judges insist on formalism, refusing to apply the doctrine, instead appealing to laissez-faire arguments, or warning against paternalism.<sup>205</sup>

*i. Procedural Unconscionability in U.S. Courts*

Mandatory rules may also provide protection to parties that lack the information or the capacity to protect themselves from the negative outcomes of agreements. In a departure from the precedent established in *Lochner*,<sup>206</sup> the United States Supreme Court upheld a statute restricting the working hours of women in *Muller v. Oregon*.<sup>207</sup> In an argument that has since become obsolescent in this context, the court argued that even if legislation removes a woman's personal and contractual rights, "there is that in her disposition and habits of life which will operate against a full assertion of those rights."<sup>208</sup> This is both a social and historical fact, according to the court.

[W]oman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control... has continued to the present... She will still be where some legislation to protect her seems necessary to secure a real equality of right... Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained....<sup>209</sup>

The argument that women require special labor protections because of their physical inferiority to men is, thankfully, superannuated. However, the underlying

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<sup>202</sup> M. Neil Browne & Lauren Bicksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 MICH. ST. L. REV. 211, n. 252 (2014) (the authors describe the test set forth in *Am.Gen. Fin., Inc. v. Branch*, 793 So. 2d 738,748 (Ala. 2000) in which an Alabama court determined that a contract was unconscionable if: (1) its terms are grossly favorable (2) to a party with overwhelming bargaining power).

<sup>203</sup> See Arthur Allen Leff, *Unconscionability and the Crowd – Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 354–55 (1970).

<sup>204</sup> RICHARD A. LORD, WILLISTON ON CONTRACTS §18:10 (4th ed. 2011) (collecting cases); JOHN EDWARD MURRAY, MURRAY ON CONTRACTS § 96 (4th ed. 2001), § 96(B)(2)(b) (collecting cases); LINDA J. RUSCH, HAWKLAND UCC SERIES § 2:302:5 (2010) (collecting cases).

<sup>205</sup> Browne & Bicksacky, *supra* note 202, at 250.

<sup>206</sup> In *Lochner v. New York*, 198 U.S. 45 (1905), the Court invalidated a New York statute forbidding bakers from working more than 60 hours per week or 10 hours per day on the grounds that the statute interfered with the freedom of contract.

<sup>207</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>208</sup> *Id.* at 422.

<sup>209</sup> *Id.* at 421–22.



principle still applies: lawmakers and administrative elites may have better access to information than contracting parties. As Robert Clark explains it,

when technical information is highly relevant to the choice of a welfare-enhancing rule, there are specialists or experts in the technical information, and the judgments made by the experts cannot be rationally second-guessed by non-experts unless they take on enormous costs to become experts themselves... Similarly, an important asymmetry may exist when the factual beliefs most relevant to choice of a rule are of a general and judgmental sort that depend on experience, and more and wider experience does tend to produce better judgments.<sup>210</sup>

When contracting parties find themselves in a weak position and open to exploitation, it is legitimate for lawmakers to step in and apply mandatory rules that limit the ability of parties to contract in a way that affords greater protection.

Rules may also be designed to protect weaker parties from being forced into a weak bargaining position. Regulations that fill this role include prohibitions on disclaiming the warranty of habitability, and not allowing employees to contract away their rights under labor regulations.<sup>211</sup> While unfair contracts are generally voidable by the affected party, a weak party is unlikely to be in a position to access the information or bear the costs of engaging in adjudication. Mandatory rules, then, are a kind of protective measure that anticipate the ways in which inequality will affect agreement-making and seek to mitigate against its worst effects. Unconscionability doctrine is merely a *specific kind* of mandatory rule.

Procedural unconscionability can be determined by closely examining the bargaining process itself. In a contract dispute between a company and a consumer, for example, courts might look to evidence of specific and objective indications demonstrating that the consumer was unable to read and understand the terms of the agreement.<sup>212</sup> The inquiry would be a fact-intensive one, and a court would likely carefully consider the age, literacy, business sophistication, education, and socioeconomic status of the party making an unconscionability claim.<sup>213</sup> The court would also examine the company's tactics for evidence of bad behavior, pressure tactics, the use of unnecessarily complex language, or the desire to hasten the consumer's signature.<sup>214</sup> Finally, courts also consider whether

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<sup>210</sup> Robert C. Clark, *Contracts, Elites, and Traditions in the Making of Corporate Law*, 89 COLUM. L. REV. 1703, 1718 (1989).

<sup>211</sup> Omar M. Dajani, *Contractualism in the Law of Treaties*, 34 MICH. J. INT'L L. 1, 23 (2012); *see, e.g.,* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392–94 (1937).

<sup>212</sup> *See, e.g.,* Weaver v. Am. Oil Co., 276 N.E.2d 144, 145 (Ind. 1971) (finding procedural unconscionability where plaintiff, a gas station operator, “had left high school after one and a half years and spent his time ... working at various skilled and unskilled labor oriented jobs.”).

<sup>213</sup> *Id.*

<sup>214</sup> E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28; Browne & Bicksack, *supra* note 202, at 297–98; *see, e.g.,* John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1574 (D. Kan. 1986) (finding procedural unconscionability where the contract provisions contained complex “legalese” written in fine print).

the contract in question is one of adhesion, although the mere existence of an adhesionsary contract will generally be insufficient to show unconscionability.<sup>215</sup>

ii. *Substantive Unconscionability in U.S. Courts*

When determining substantive unconscionability, the court will look to the text of the contract itself and determine whether the provisions of the document are unfair. In its analysis, it may examine the allocation of risks to determine whether they are unreasonable or one-sided.<sup>216</sup> Remedy limitations, penalty clauses, and price terms that impose a significant cost-price disparity are generally recognized by scholars to factor heavily into a determination that risks fall unfairly on the consumer.<sup>217</sup> The standard echoed in many courts is that an unconscionable provision is one that “no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>218</sup> This turn of phrase was taken from the Webster’s dictionary in the eighteenth century, and has been used by courts ever since.<sup>219</sup> In the conventional view of most courts, then, if it is to be found unconscionable, the provision in question must be more than “unreasonable.” It must also be “harsh” or “oppressive,” or the terms must be so one-sided as to “shock the conscious.”<sup>220</sup>

iii. *The Sliding Scale Approach*

The conventional approach to unconscionability requires that procedural and substantive unconscionability both be present in order for a court to find

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<sup>215</sup> MURRAY ON CONTRACTS, *supra* note 204, § 96, at 547–49.

<sup>216</sup> *See, e.g.*, Dalton v. Santander USA, Inc., 2016-NMSC-035, 385 P.3d 619 (N.M. 2016) (noting that a determination of substantive unconscionability requires the court to consider whether the contract terms are commercially reasonable and fair and to take into account the purpose and effect of the terms, the one-sidedness of the terms, and other similar public policy concerns to determine the legality and fairness of the contract terms themselves); State ex rel. Ocwen Loan Servicing, LLC v. Webster, 232 W. Va. 341, 358 (2013) (noting that substantive unconscionability involves the unfairness of the contract itself, and whether the contract terms are one-sided and will have an overly harsh effect on the disadvantaged party, and that courts may consider the commercial reasonableness of the terms, the purpose and effect of the terms, public policy concerns and the allocation of risks between the parties in making a determination).

<sup>217</sup> *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, § 4-4; Browne & Bicksacky, *supra* note 202, at 298-99; Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1079–80 (2006).

<sup>218</sup> Decisions using this very language, attributable to Hume v. United States, 10 S.Ct. 134, 136 (1889), include: United States v. Lennox Metal Mfg., 225 F.2d 302, 310 (1955); *Hojnowski v. Buffalo Bills, Inc.*, 995 F. Supp. 2d 232, 238 (2014); Smith v. Harrison, 325 N.W.2d 92, 94 (Iowa 1982); and Layne v. Garner, 612 So.2d 404, 408 (Ala. 1992), among many others.

<sup>219</sup> Earl of Chesterfield v. Janssen [1750], 28 Eng. Rep. 82, 100 (Ch.); *see* Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMP. L.Q. 743, 743 & n.2 (1981) (noting that since the eighteenth century, most courts have parroted Webster’s Dictionary definition – “not guided or controlled by conscience”).

<sup>220</sup> LINDA J. RUSCH, HAWKLAND UCC SERIES § 2:302:4 (2010).

sufficient grounds to invalidate a contract or a particular provision of it.<sup>221</sup> The “sliding scale” approach to unconscionability doctrine, the first example of which emerged in 2000, has since been adopted or reaffirmed by at least a dozen state supreme courts.<sup>222</sup> Rather than requiring that strong evidence of both procedural and substantive unconscionability be present, and reviewing evidence of each separately, courts have recently shown themselves amenable to taking a more holistic approach. Under this new approach, the overwhelming presence of either procedural or substantive unconscionability may be enough to offset a lesser amount of its complement, or may even itself be sufficient to find the entire contract unconscionable.<sup>223</sup>

Under this more relaxed approach, some courts have shown themselves willing to find the mere existence of a consumer contract of adhesion sufficient to satisfy procedural unconscionability—without looking further to evidence of deficient assent.<sup>224</sup> A contract of adhesion that is *also* found to be significantly substantively unconscionable might fulfill the criteria of a sliding scale. This reduced standard of analysis can then allow the court to proceed more easily to matters of substantive unconscionability. The court is not required to engage in tortured speculation over a long and complicated set of facts that may or may not be sufficient to establish whether or not the consumer was appropriately educated, had sufficient time to review the contract, and could have understood the contractual provisions. However, the appeal to the sliding scale approach, and its contours even in jurisdictions where it has been adopted, is far from settled law.<sup>225</sup>

### B. Foreign Courts

As I argue that unconscionability doctrine should have some role in treaty interpretation and therefore in international law, it is worth noting that the doctrine

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<sup>221</sup> Lord, *supra* note 204, § 18:10 (collecting cases); 1-6 MURRAY ON CONTRACTS § 96 (4th ed. 2001), § 96(B)(2)(b) (collecting cases); Rusch, *supra* note 220, § 2-302:5 (collecting cases).

<sup>222</sup> Melissa T. Lonegrass, *Finding Room for Fairness in Formalism — The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 5 (2012).

<sup>223</sup> For an extensive discussion of the evolution of the sliding scale approach, see *id.* For a list of cases in which courts have found that either substantive or procedural unconscionability was sufficient to find that unconscionability was present, see Lauterpacht, *supra* note 24.

<sup>224</sup> For example, in California, where the sliding scale approach has been utilized for some time, courts are generally willing to find procedural unconscionability established by the existence of a typical standard form contract. See, e.g., *Gentry v. Superior Court*, 165 P.3d 556, 572 (Cal. 2007) (“The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ‘which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005), overruled on other grounds by *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011))).

<sup>225</sup> See *Sitogum*, 800 A.2d at 921-22 (noting disagreement among jurisdictions); *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58 (Ariz. 1995) (same). See also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RES. 757, 795 (2004) (noting that some cases require both forms of unconscionability while others only require one).

does not exist only in American law. Other nations' courts have also incorporated unconscionability doctrine into their legal systems, some taking a broader view of the doctrine than those in the United States. In Australia, for example, a court tasked with determining whether a particular contract was unconscionable is required by law to consider: (1) the relative strength and the bargaining positions of the corporation and the consumer; (2) whether the consumer was able to understand any documents related to the supply of the goods or services in question; and (3) whether any undue influence or pressure was exerted on the consumer<sup>226</sup> In fact, the doctrine is more expansive in Australia than it is in the United States<sup>227</sup> because unconscionability doctrine does not exist only as a treaty defense, but can provide the basis for suits brought by the Australian Competition and Consumer Commission—a government regulatory body—for injunctions and declarations.<sup>228</sup> In Australia, then, unconscionability doctrine is more than just an equitable remedy, it is a method for the government to actively deter unfair agreements.

Unconscionability doctrine has also been articulated by the German Civil Code; specifically in Articles 138, 242 and 826 of the Code.<sup>229</sup> While Article 138 mainly governs unconscionable contract terms, Article 242 combats the unconscionable or bad faith enforcement of contractual rights, even if the contractual text is not itself unconscionable.<sup>230</sup> While American courts have focused on the text of the contract itself and the bargaining power of the parties to the contract, they have not considered unconscionable *enforcement* of contract terms.<sup>231</sup> Article 242 of the German Civil Code allows Courts to address the unfair use of contractual rights, even where when a provision conferring those rights is fair on its face.<sup>232</sup> This is a compelling approach and is in line with the remedies I suggest for substantive unconscionability in Section V(B). Finally, Article 826 provides that “one who intentionally injures another by conduct offending good morals must make repatriation.”<sup>233</sup> This Article, like the German statute, advocates for an approach that would regulate the actions of groups with “overriding, economic power.”<sup>234</sup>

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<sup>226</sup> M. Neil Browne and Lauren Biksacky, *supra* note 202, at 241 (2014).

<sup>227</sup> *Id.* at 241.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 243–46.

<sup>230</sup> *Id.*

<sup>231</sup> Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT'L & COMP. L.J. 455, 505–06.

<sup>232</sup> *Id.*

<sup>233</sup> John P. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1044–45 (1976).

<sup>234</sup> *Id.* at 245.

IV.  
TREATIES AS CONTRACTS

Treaties have long been seen and treated as close cousins of contracts. In his article on the overlap between the law of contracts and international treaty law, Professor Dajani emphasizes that just as unconstrained contractualism has been prohibited by the State, natural or supranational limits were long thought to limit the extent to which States could affect international law through unconstrained treaty-making.<sup>235</sup> Medieval France and England, for instance, both had rules prohibiting monarchs from ceding sovereignty or authority in ways that would prove injurious to the subjects they were responsible for.<sup>236</sup> The Italian jurist Alberico Gentili saw monarchs as bound not by their domestic law, but by natural law.<sup>237</sup> Natural law, in his view, was also the bedrock of the law of nations.<sup>238</sup> The alienation of sovereignty “seems to be forbidden by the general law of all kingdoms, which comes into being with the kingdoms themselves and as it were by the law of nations.”<sup>239</sup> These rules and their articulation by legal scholars, Dajani points out, reveals that even early legal theorists were aware of, and concerned about, problems of agency and representation during treaty making, and were also aware that the will of the sovereign leader was not the only factor upon which the value or relevance of treaties should be judged.<sup>240</sup>

While this understanding of the interaction of international law with treaty law was briefly interrupted by legal positivist thinking, nineteenth century scholars involved in efforts to codify the law of treaties were also amenable to it. Johann Kaspar Bluntschli, the Swiss founder of the Institut de Droit International, wrote that treaties infringing on general human rights or the necessary principles of international law should not be respected, but should be found to be null and void.<sup>241</sup> Bluntschli also wrote that treaties which seek to “establish the domination of one Power over the whole World” or violently eliminate States that are not threatening peace should also be void.<sup>242</sup> The Italian legal scholar Pasquale Fiore—living and writing in the same period as Bluntschli—came to similar conclusions. The code he authored also established a mandatory rule prohibiting coercion, which he said included “true physical violence or when the person who

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<sup>235</sup> *See id.*

<sup>236</sup> *Id.* at 26.

<sup>237</sup> Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 AM. J. INT’L L. 1, 14 (1995).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Dajani, *supra* note 211, at 27.

<sup>241</sup> *Id.* at 28.

<sup>242</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties*, U.N. Doc. A/CN.4/23 (Apr. 14, 1950) (by J.L. Brierly), reprinted in [1950] 2 Y.B. Int’l L. Comm’n 245, app. D, art. 410, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (entitled “Bluntschli’s Draft Code,” and listing “[r]elevant articles” translated into English from Johann Caspar Bluntschli, *Le droit international codifié* (C. Lardy trans., Librairie de Guillaumin et Cie ed. 1870) (1868)).

signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgment.”<sup>243</sup> The exception, for Fiore, was treaties made under occupation. Ensuring stability and ending conflicts were worth the risk of concluding unequal treaties.<sup>244</sup>

It was not until the early twentieth century that Professor Alfred von Verdross of the University of Vienna became the first scholar to thoroughly explore the question of whether there might be mandatory rules of international law. His article on the subject appeared in 1937 in the *American Journal of International Law*.<sup>245</sup> In Verdross’s view, mandatory rules were necessary in the treaty context in two instances. First, they were necessary to protect third parties whose legal interests might be adversely affected by treaties between other States.<sup>246</sup> Second, mandatory rules also limited the conclusion of treaties that ran contrary to the morals or ethics of the international community.<sup>247</sup> He based the second idea in domestic law, which prohibits contracts *contra bonos mores*. In order to extrapolate on the scope of his proposed rules, Verdross provided some examples of treaties that would be forbidden under the mandatory rules of international law. In his view, an immoral treaty is one that prevents States from exercising their primary moral tasks which include the “maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, and protection of citizens abroad.”<sup>248</sup> These duties constituted the “universally recognized tasks of a state” and could not be abrogated because doing so would leave a situation in which a community of people would go uncared for.<sup>249</sup> While Verdross and others focused on the appropriate substantive content of treaties, it was not until after the Second World War that legal scholars began to seriously concern themselves with *procedural* issues.

Despite Verdross and many legal scholars before him drawing parallels between domestic law and treaty law, most international law scholars continued to hold that the private defense of duress simply could not be applied to the law of treaties.<sup>250</sup> Voiding agreements concluded by force, the argument went, would upend peace treaties and might have the result of prolonging hostilities.<sup>251</sup> It was not until 1953 that Sir Hersch Lauterpacht, second Special Rapporteur on the law of treaties, stopped that trend. He argued that treaty law should be made to conform to “the general principle of law which postulates freedom of consent as

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<sup>243</sup> Dajani, *supra* note 211, at 29.

<sup>244</sup> *Id.*

<sup>245</sup> Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT’L L. 571 (1937).

<sup>246</sup> *Id.* at 571–73.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 577.

<sup>249</sup> *Id.* at 571 (1937).

<sup>250</sup> IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 177 (1984).

<sup>251</sup> *Id.*

an essential condition of the validity of consensual undertakings.”<sup>252</sup> Lauterpacht observed that the existence of the U.N. Charter and its prohibition on the use of force had made this possible for the first time in history.<sup>253</sup>

Lauterpacht’s assertions were based on his idea of consent. Consent, Lauterpacht argued, is a necessary component if a treaty is to be valid.<sup>254</sup> Treaties concluded in the absence of real consent are, in his view, fundamentally defect. In fact, a treaty concluded without real consent is no treaty at all. Lauterpacht also drew in the idea of equitable estoppel, arguing that because force or threats of force constitute a violation of international law, a treaty based on such acts cannot produce legal rights for the benefit of the state that has perpetrated them.<sup>255</sup> Lauterpacht did not have much of an audience on these issues. In the 10 years that followed his assertions, the International Law Commission “was not able to do much more than give occasional glances at these reports.”<sup>256</sup> With an overflowing plate of international legal challenges, ILC first began devoting time to the issue in 1963, when it began the codification of the law of treaties.<sup>257</sup> By then, Lauterpacht had passed away. While Article 52 of the Vienna Convention demonstrates that Lauterpacht’s ideas on coercion enjoyed a lasting legacy, the jury is still out on what constitutes coercion in the international legal context. Nevertheless, Lauterpacht and his predecessors make it clear that the creation and enforcement of treaties is not absolute, but can and should be limited by some of the same principles evoked for constraining the power of individuals in a domestic law setting.

## V.

### UNCONSCIONABILITY DOCTRINE AT THE ARBITRATION TRIBUNAL

In the domestic context, unconscionability is an equitable doctrine. Its primary aim is not to punish, but to promote fairness. As such, courts invoking the doctrine have relatively wide latitude in deciding how their invocation will affect the contract. A court that decides a contract governing the sale of goods is unconscionable under §U.C.C. 2-302 has three options available to it: it can refuse to enforce the agreement in its entirety; it can remove the unconscionable clause

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<sup>252</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties*, Int’l Law Comm’n, U.N. Doc. A/CN.4/63 (Mar. 24, 1953) (by Hersch Lauterpacht), *reprinted in* [1953] 2 Y.B. Int’l L. Comm’n 90, art. 12, cmt. A.3, U.N. Doc. A/CN.4/8ER.A/1953/Add.1 [hereinafter Lauterpacht Report].

<sup>253</sup> *Id.* at art. 12, cmt. A.3.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> Special Rapporteur on the Law of Treaties, *Law of Treaties: First Report*, Int’l Law Comm’n, intro. A.1, U.N. Doc. A/CN.4/144 (Mar. 26, 1962) (by Humphrey Waldock), *reprinted in* [1962] 2 Y.B. Int’l L. Comm’n 27, U.N. Doc. A/CN.4/SER.A/1962/Add.11.

<sup>257</sup> Provisional Agenda for Fifteenth Session of the Internal Law Commission, A/CN.4/153, (May 6–June 12, 1963), [http://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_153.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_153.pdf&lang=EF).

and enforce the remainder of the agreement; or, it can limit the application of the unconscionable clause so that an unconscionable result can be avoided.<sup>258</sup>

Because unconscionability doctrine is an equitable remedy, it is also a flexible one. U.C.C. § 2-302 does not authorize a court that has determined that a contract for the sale of goods is unconscionable to award damages to the victim of the unconscionability. This rule that has been extended to unconscionability analysis generally<sup>259</sup>. Rather, the court has the power to refuse enforcement of the agreement in its entirety, to remove the unconscionable clause and enforce the remainder of the contract, or to limit the unconscionable clause's application so that an unconscionable result will be avoided.<sup>260</sup>

These three kinds of remedies are equally plausible in the treaty context. However, because BITs are broader in scope than most commercial contracts, and are intended to govern a numerous and diverse range of investments, it is important to think carefully about the context in which each of these remedies might be invoked. In her article on unequal treaties, Jianfeng Li expands upon the framework suggested by other scholars to propose a framework of remedies for unequal treaties that distinguishes between procedural and substantive inequality.<sup>261</sup> Although I have argued that both procedural and substantive unconscionability are present in the negotiation, drafting, and adjudication of investment disputes, I think adopting the distinction Jianfeng Li proposes is helpful for thinking about how remedies might be implemented. Li identifies three kinds of treaties: procedurally unequal treaties, treaties that were substantively unequal at the time of their drafting, and treaties through which substantive inequality is introduced due to unforeseen circumstances.<sup>262</sup> While Li's

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<sup>258</sup> Lord, *supra* note 204, §§ 18F:1 to 18F:4.

<sup>259</sup> *Id.* § 18:17 (citing *Cowin Equipment Co., Inc. v. General Motors Corp.*, 734 F.2d 1581 (11th Cir. 1984) (quoting both the text and several other authorities):

"The language of § 2-302 and the Official Comment which follows it make no mention of damages as an available remedy for an unconscionable contract. This is consistent with traditional common law unconscionability theory. When the equity courts found contracts to be unconscionable, they refused specific enforcement .... No case has been cited in which a damage award was based on an unconscionable contract. Although apparently not decided in either Alabama or Ohio courts, the cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision, citing the language of § 2-302 and its common law precursor to demonstrate that § 2-302 was not intended to provide a basis for damage recovery."

<sup>260</sup> See *Jones v. Star Credit Corp.*, 59 Misc. 2d 189 (Sup. Ct. 1969) (holding "Section 2-302 of the Uniform Commercial Code enacts the moral sense of the community into the law of commercial transactions. It authorizes the court to find, as a matter of law, that a contract or a clause of a contract was 'unconscionable at the time it was made,' and upon so finding the court may refuse to enforce the contract, excise the objectionable clause or limit the application of the clause to avoid an unconscionable result. 'The principle,' states the Official Comment to this section, 'is one of the prevention of oppression and unfair surprise.' It permits a court to accomplish directly what heretofore was often accomplished by construction of language, manipulations of fluid rules of contract law and determinations based upon a presumed public policy.")

<sup>261</sup> Jianfeng Li, *Equal or Unequal: Seeking a New Paradigm for the Misused Theory of "Unequal Treaties"* in *Contemporary International Law*, 38 HOUS. J. INT'L L. 465 (2016).

<sup>262</sup> *Id.* at 469–78.



framework purports to deal with a broader problem, and does not seek to borrow from contract law, it can be used as a jumping-off point. For that reason, I use the same distinctions below to think about how to overlay the three equitable remedies pursued by courts responding to unconscionability cases in contract law.

While these kinds of remedies may have a useful role to play in thinking about how and even whether certain BITs should be enforced, a word of caution is in order. To put the doctrine of unconscionability on the table as a treaty defense is to tempt its abuse. Making it easier for parties to wiggle out of contractual obligations that have become irksome is destabilizing to contract-making. By the same token (although far more serious), making it easier for countries to wiggle out of irksome treaty obligations is destabilizing to the international legal order. I am arguing that unconscionability doctrine may ultimately increase the stability of BITs because it would encourage arbitral tribunals to view them in a broader context and find interpretative methods that may ultimately prevent capital-exporting countries from pulling out of BITs they see as unjust. However, it is important to state that finding that unconscionability provides a defense to enforcement should be a rare occurrence, reserved for the most egregious cases. The framework that I propose below, I believe, makes it very unlikely that unconscionability doctrine will be invoked in the majority of cases, but not impossible. If arbitral tribunals were to find BITs unconscionable only in extremely rare cases—that would be precisely the appropriate frequency.

#### A. Remedies for Procedural Unconscionability

A demonstration of procedural unconscionability is most damning to the treaty because it implies that the consent upon which the treaty is based was never granted. A State that is coerced into a treaty or failed to comprehend the content of the treaty has not truly consented to that treaty. In the example evoked at the beginning of this Article, it seems very likely that the Pakistani official signing the BIT with Switzerland did not understand what he was committing Pakistan to, and neither did his colleagues at home who might have been responsible for ratifying or approving the treaty. Like many capital-exporting countries at the time, Pakistan may have seen the BIT as a mere photo-opportunity with insignificant costs attached.<sup>263</sup> Just as domestic contract law might fail to find that a contract had been made due to a failure to find a “meeting of the minds,”<sup>264</sup> treaties are based on consent expressed through the will of the sovereign. If the sovereign has failed to understand the treaty, or its consent has been coerced, no

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<sup>263</sup> In the words of some South African officials reflecting upon the circumstances under which certain BITs were signed: “the BITs really have the regional desk officers something to do. Do ten agreements and you have been very successful that year.” Another official said: “we used to call them apple-pie agreements intended to give comfort to politicians.” A third official reflected that embassies requesting BITs “like photo-sessions and smiles, so they love to have a minister to come and sign an agreement, no matter how small the country.” POULSEN, *supra* note 4, at 184.

<sup>264</sup> Restatement (Second) of Contracts § 17 (1981).

true consent exists. If no consent was truly given, no treaty was actually made.<sup>265</sup> On this logic, if an arbitration tribunal determines that substantial procedural unconscionability exists in the treaty-making process, it should refuse to enforce the treaty in its entirety. The treaty would be invalid, and the investor would bear the risk of having relied on it.

At the risk of following a tangent, it is worth mentioning another lens that could just as easily be invoked to examine the behavior of the Pakistani official mentioned above. One might assert that such an official is not—because of his ignorance—a proper agent of the State. However, Article 7 of the Vienna Convention on the Law of Treaties recognizes any person endowed with “full powers” of the State to be a legitimate representative of that State, able to adopt or authenticate treaties on its behalf.<sup>266</sup> Alternatively, a Head of State, Head of Government or Minister of Foreign affairs possesses this legitimacy without further proof of possessing “full powers.” If even the highest officials of a State are truly ignorant about the implications of signing a BIT, or if the government of that State succumbs to external pressures to sign, it matters very little *who* does the actual signing. It is possible, then, to assert that even if a given official is very ignorant about what it ultimately means to sign a BIT, he can be reasonably seen as possessing the proper authority to sign it. The problem is not whether he can be considered an agent of the State—the problem is the idea—fundamental to the Vienna Convention—that States are equals at the negotiating table. To argue that unconscionability doctrine has a role in treaty interpretation is to begin to dismantle that idea.

However, this proposition is concerning because it has broad implications for the status of hundreds of treaties around the world, and the potential to influence the behavior of thousands or hundreds of thousands of investors. Numerous international law scholars have warned against inquiring too far into the validity of treaties, arguing that widespread inquiry would upset the stability of treaties, interfere with the status quo in international relations, and imply that future treaties might be less reliable.<sup>267</sup> Insofar as the international community is invested in the status quo, this is a serious concern.

However, I want to argue that in the cases we are concerned with here—namely, BITs—these concerns are overblown. I predict that even if procedural unconscionability is a rather widespread phenomenon in the conclusion of BITs, many countries are unlikely to rely on it as a defense. Even when they do so, it would be difficult to prove. In the rare cases in which countries are both keen to invoke it and able to prove it, then we might think it is right and proper for the claim to succeed.

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<sup>265</sup> See Dajani, *supra* note 211, at 36 (discussing Lauterpacht’s writing on this issue).

<sup>266</sup> VCLT, *supra* note 23.

<sup>267</sup> See, e.g., THE OXFORD GUIDE TO TREATIES 569 (Duncan B. Hollis ed., 2012); Statements by Eduardo Jiménez de Aréchanga of Uruguay concerning the dangers of recognizing unconscionability doctrine or the French doctrine of lésion, Summary Records of the 684th Meeting of the ILC, [1963] 1 Y.B. Int’l L. Comm’n 67, P31, U.N. Doc. A/CN.4/156/SER.A/1963, P45.

Countries may have natural incentives to not bring a procedural unconscionability defense before an arbitration tribunal. First, if Country A brings a successful defense of procedural unconscionability in a dispute against Investor X, it is foreseeable that Investors Y, Z and W, whose investments are protected by the same BIT, would also take notice. This might affect the decision to invest in Country A in the first place, or lead them to shift existing investments elsewhere. This kind of negative investor response would mean that the “grand bargain” promised by BITs is meaningful, that the BIT is actively encouraging FDI, and therefore that a country is less likely to bring an unconscionability defense in the first place. If investors fail to react to the invocation of the defense, this could be a signal either that they have sufficient faith in Country A’s domestic judicial system or that their investments are so profitable that they are willing to take on the additional risk of continuing operations even if they may not be protected by the BIT. In this case, it may be argued that the BIT was not doing much work in the first place, and its removal will not have much effect on the status quo. In any case, countries considering whether to bring such a defense are likely to make this assessment, and are therefore unlikely to bring such a defense in cases where BITs represent significant incentives to investors to stay and operate in the country.

Second, the arbitration tribunal could require a country invoking this defense to present evidence of procedural unconscionability. Procedural unconscionability takes two forms in this context: oppression and surprise.<sup>268</sup> Oppression results from the unequal bargaining power between the parties, and the fact that one party’s diplomatic and economic influence over the other can lead to a lack of meaningful choice. Surprise results from the unequal level of sophistication between the parties. While we would not expect terms of the agreement to be physically obscured or to consist of unreadable jargon, as we might see in the domestic context, we have seen that countries that are less sophisticated have simply failed to grasp the gravity and implications of the treaties they are encouraged to sign.<sup>269</sup> We have also seen countries relying on external experts that may misconstrue the treaties.<sup>270</sup> These situations also result in surprise. The presence of oppression and surprise are both difficult to prove. Oppression enacted through attenuated diplomatic channels has to be shown to be sufficiently connected to the decision to sign the treaty. Surprise is also difficult to show. Countries that failed to grasp the implications of the treaties they sign are less likely to have detailed records of negotiations, they are less likely to produce extensive intragovernmental communiqués or memos about the treaty (because such communication is unlikely to have taken place), and given that the countries bringing such a defense are largely “rule-takers,” they are unlikely to be

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<sup>268</sup> *Motsinger v. Lithia Rose-Ft, Inc.*, 211 Ore. App. 610, 614 (Or. Ct. App. 2007).

<sup>269</sup> See *supra* Section I (discussing the Pakistan–Switzerland BIT).

<sup>270</sup> As discussed in Section II(A)(3), the experts affiliated with the American Bar Organization were involved in advising countries that were negotiating BITs, but were subject to the sometimes countervailing priorities of the U.S. State Department.

able to produce evidence of their understanding of the terms treaty. Therefore, even when surprise does exist, it is difficult to imagine that most countries are able to prove it. If, somehow, a country overcomes this burden, we might conclude that the defense should be especially justified in succeeding.

The idea of “competence-competence” allows tribunals to make determinations about their own jurisdiction. In cases in which procedural unconscionability is determined to be present, the arbitration tribunal’s authority to hear the case would end there. Unlike a domestic court, which derives its power from the State, an arbitral tribunal derives its power from the parties who have consented to the arbitration. The arbitration agreement, concluded between the parties, establishes the scope of that power. This leads to a certain paradox, wherein an arbitration tribunal must find that it does not have the authority to decide on the case because the treaty does not establish jurisdiction over the case. If a tribunal finds that a treaty is procedurally unconscionable, further considerations, or the narrower question of substantive unconscionability, would not be touched. This is, of course, unlike a domestic court, which is likely to look at the coexistence and interaction of both procedural and substantive unconscionability. This may mean that unconscionability doctrine may take more time to gain footing in the arbitration context.

#### *B. Remedies for Substantive Unconscionability*

A showing of substantive unconscionability is unlikely to be damning to the entire treaty because it may be focused on a single provision. However, given that BITs are concluded between *countries* and are reciprocal on their face, it is unlikely that a tribunal will be able to identify a single unconscionable provision. This is because a stronger party is unlikely to advocate for treaty language that could—even in a distant eventuality—be potentially harmful to it. The unconscionability inherent in many BITs only comes into play when the BIT is relied upon in a dispute between an investor and a sovereign State, and when arbitration tribunals read fairly innocuous phrases such as “fair and equitable treatment” to include inherent limitations on legislative and regulatory power. When dealing with substantive unconscionability, a court may choose to strike the offending provision from the contract, or to interpret it in a way that avoids an unconscionable effect. Because most BITs are unlikely to be unconscionable on their face, the second option is more plausible for arbitration tribunals adopting this approach. Tribunals can simply refrain from reading the host country obligations under a BIT too expansively. Indeed, some tribunals have taken issue with the broad readings of “fair and equitable treatment” employed in the cases discussed in Section II(B).<sup>271</sup> If tribunals were amenable to the invocation of unconscionability doctrine, host countries could invoke the doctrine to push tribunals toward a narrower reading of the treaties.

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<sup>271</sup> While a number of tribunals endorsed the expansive reading of “fair and equitable treatment” championed in *Tecmed v. Mexico*, for example, the tribunal in *Saluka v. Czech Republic* distanced itself from the tribunal’s reading in *Tecmed*.

## CONCLUSION

After two devastating world wars, the international community realized that it needed to change the rules of the game. The United Nations, flawed as it is, was perhaps the first forum in history in which small, weak States could exercise their voices and advocate for their positions on the international stage. The architects of the United Nations project saw this as a way to preserve stability and prevent conflict. These priorities are still important today.

Skepticism toward globalization, the vehemence of anti-colonial sentiment, and the rise of neoliberal attitudes in multilateral financial institutions posed a threat to this fragile project. Now, developing countries around the world are pulling out of BITs, and developed countries are wary of including arbitration provisions in multilateral treaties. Similar criticisms to those discussed in this Article are being made of international tax and trade agreements, and their legitimacy is being questioned. Doubtless, these agreements are flawed. Doubtless, enforcement can be unjust. However, I make a conservative argument: by finding ways to promote more just outcomes and honoring the ideals upon which the international legal system is built, these agreements can continue to be meaningful and perhaps helpful into the future. Incorporating unconscionability doctrine in bilateral investment arbitration is just one small way to do that.

# Reversing the Two Wrong Turns in the Economic Analysis of International Law: A Club Goods Theory of Treaty Membership & European Integration

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*This article argues that law-and-economics research on international law has been limited by two methodological wrong turns. First, the literature generally assumes that the standard dilemmas of international cooperation do not apply to the European Union, on the grounds that the EU represents a single super-federation rather than an agreement among multiple countries. That position has proven implausible, however, in light of the recent unraveling of legal coordination across Europe. Second, the economic analysis of international law tends to assume that treaties are designed to facilitate the provision global public goods. That starting point is problematic as well, because a vast body of international agreements cover joint investments in club goods, which raise a distinct set of collective action problems. The broader claim of this article is that the two wrong turns in the economic analysis of international law are related, and correct each other when examined in parallel. The first half of the article shows how the theory of club goods can provide a unified explanation of all three waves of European disintegration: the Eurozone financial crisis, the collapse of Schengen Area border controls, and Brexit. The second half explains why analyzing EU treaties under that framework also clarifies the way that other international agreements dealing with club goods work. Specifically, it reveals*

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*that the legal elements which regulate entry and exit in those agreements serve radically different functions than are otherwise suggested by prevailing theories of treaty design. The result is to flip some fundamental debates in international law on their head, including the question of whether treaties act to “screen or constrain” the compliance of members and the extent to which agreements with more flexible terms promote international cooperation.*

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## INTRODUCTION

Over the past two decades, the study of international law has been transformed by a growing body of research that draws on economic concepts and related social science tools (the rational choice literature).<sup>1</sup> The main innovation of this scholarship is to treat nation-States as rational, self-interested agents and to view treaties as contracts, which States use in order to obtain mutual gains from cooperation.<sup>2</sup> In doing so, research from a rational choice perspective has developed a more realistic account of how the global legal system works than is provided in the traditional international law scholarship (the doctrinal literature). Despite the relative rigor of the law-and-economics approach, this Article argues that it has nonetheless been limited by two methodological wrong turns.

The first wrong turn consists of a failure to incorporate the historical process of European integration into its broader theoretical model. A persistent theme in the traditional doctrinal scholarship on international law from the 1990s and early 2000s was that the ambitious commitments to policy coordination that were taking place within the European Union (EU) proved the potential for international law to govern world affairs, and reflected a success story that could be more broadly exported around the globe.<sup>3</sup> The rational choice literature, meanwhile, denied the relevance of European integration for international law altogether, on the grounds that the EU is best understood as a unified quasi-federation, rather than an agreement among sovereign States.<sup>4</sup>

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<sup>1</sup> The economic analysis of international law is an interdisciplinary project that has been jointly advanced by legal academics and international relations political scientists. See Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); see generally ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW (2013); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008); JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW (2008); ERIC A. POSNER & JACK GOLDSMITH, THE LIMITS OF INTERNATIONAL LAW (2005).

<sup>2</sup> See POSNER & SYKES, *supra* note 1, at 24 (“[F]rom an economic standpoint the international agreements that create international law are contracts.”); see generally BARBARA KOREMENOS, THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN (2016); ALEXANDER COOLEY & HENDRIK SPRUYT, CONTRACTING STATES: SOVEREIGN TRANSFERS IN INTERNATIONAL RELATIONS (2009); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006).

<sup>3</sup> See, e.g., William Burke-White & Anne-Marie Slaughter, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 329 (2006) (“We therefore move beyond description and prediction to prescription, suggesting ways that the European way of law should become the future of international law writ large.”); see also MARK GILBERT, EUROPEAN INTEGRATION: A CONCISE HISTORY, 173 (2012) (“By the mid-2000s . . . [c]ommentators on both sides of the Atlantic were convinced that the EU was emerging as a ‘postmodern’ political entity whose values and modus operandi were more appropriate for the challenges of the twenty-first century than those of the neoconservatives in power in Washington.”); JEREMY RIFKIN, THE EUROPEAN DREAM: HOW EUROPE’S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004); cf. JURGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION: A RESPONSE 57 (2012) (“The historically unprecedented construct of the EU would fit seamlessly into the contours of a politically constituted world society.”).

<sup>4</sup> Because the EU is *sui generis*, the argument went, the standard theories of international cooperation cannot be used to understand its legal development; and conversely, neither can European integration



None of these positions have aged well in light of the three waves of disintegration that have unfolded across Europe within the last decade: the Eurozone sovereign debt crisis;<sup>5</sup> the unraveling of coordinated border controls put in place by a pair of treaties known as the Schengen Agreements;<sup>6</sup> and Brexit.<sup>7</sup> These developments have exposed that the EU is, at bottom, a collection of nation-states, bound together by treaties that are essentially no different from other international agreements. The recent reversals to legal integration in Europe also represent a historic breakdown in international cooperation, which currently lacks any systematic explanation due to the prior theoretical commitments of both rational choice and doctrinal scholars.

The second wrong turn in the rational choice literature consists of a failure to incorporate the economic theory of clubs in its analysis of treaty design.<sup>8</sup> That theory seeks to explain the dynamics of “economic clubs,” a term that refers to any association—ranging from literal social clubs to political entities—which is formed to produce benefits, “club goods,” that can be shared among members but excluded from outsiders.<sup>9</sup> Its core insight is that the optimal size of clubs is always limited: if participants in a club are too numerous or heterogeneous, it will no longer operate to the benefit of its members. As a result, the central problem of institutional design for clubs is properly calibrating the membership decision by identifying the marginal member.<sup>10</sup> The omission of club theory from the economic analysis of treaty design is problematic due to a standard assumption

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be interpreted as a meaningful data point for testing or revising those theories. *See, e.g.*, GUZMAN, *supra* note 1, at 14 (“[T]he dramatic success of the EU makes it a problematic model for cooperation among states . . .”); POSNER & GOLDSMITH, *supra* note 1, at 5 (“Although the EU project is in some respects constituted by international law, we think it is more usefully viewed as an example of multistate unification akin to pre-twentieth century unification efforts in the United States.”); Michael J. Gilligan & Leslie Johns, *Formal Models of International Institutions*, ANN. REV. POL. SCI., 7.1, 7.2 (2012) (“We do not discuss the European Union because it has become more like a federal organization than an international one. Scholars may debate whether the EU is an international or a supranational institution, but it is qualitatively different from the types of institutions we discuss here.”).

<sup>5</sup> The euro sovereign debt crisis first emerged in 2010, and has since imperiled the viability of the EU’s common currency, which entered circulation in 2001 under the auspices of the European Monetary Union (EMU or Eurozone). *See generally* Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 1 (2011) (providing an analysis of the Eurozone crisis during its early stages).

<sup>6</sup> This second wave of disintegration can be traced to the onset of the Syrian civil war in 2011, which sparked a mass migration of political refugees across the EU’s region of shared territorial borders, known as the “Schengen Area.” *See generally* RUBEN ZAIOTTI, CULTURES OF BORDER CONTROL: SCHENGEN & THE EVOLUTION OF EUROPEAN FRONTIERS (2011).

<sup>7</sup> The so-called Brexit referendum that took place in June of 2016, when voters in the United Kingdom opted in favor of their country’s complete withdrawal from the EU. *See generally* Paul Craig, *Brexit: A Drama in Six Acts*, EURO. L. REV. (2016), [HTTP://SSRN.COM/ABSTRACT=2807975](http://ssrn.com/abstract=2807975).

<sup>8</sup> *See infra* note 36, and accompanying text (reviewing the sparse references to club theory in the rational choice literature).

<sup>9</sup> *See* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965); *see generally* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS (2d ed. 1996); Todd Sandler & John Tschirhart, *Club Theory: Thirty Years Later*, 93 PUB. CHOICE 335 (1997).

<sup>10</sup> *See* Buchanan, *supra* note 9, at 2.

in the literature that States use international agreements to facilitate cooperation over non-excludable “public goods”—for example, climate change mitigation efforts, where the potential for free-riding means that *universal* rather than limited participation is optimal.<sup>11</sup> The upshot is that, because many international agreements establish economic clubs, the otherwise extensive rational choice literature on treaty design remains incomplete in important respects.<sup>12</sup>

This Article not only identifies the gaps in the scholarship that are summarized above, but also demonstrates that they overlap in a number of surprising ways. In fact, when analyzed in conjunction, the two wrong turns in the economic analysis of international law end up reversing one another. On the one hand, club theory supplies the missing conceptual framework that is necessary for a unified explanation of European disintegration from a rational choice perspective. On the other hand, a close examination of the EU’s constitutive treaties provides insights into an overlooked set of design problems that apply to international agreements dealing with club goods.

The first half of the Article takes up the former task by using club theory to construct a simple yet comprehensive account of European disintegration. As will be shown, the common foundations of all three waves of disintegration become apparent once it is recognized that the policy regimes at issue—the Eurozone, the Schengen Area, and the EU as a whole—each share the properties of economic clubs. The underlying cause of the instability these institutions have experienced is that they were structured pursuant to overly inclusive treaty agreements which violate the limited participation constraint that is at the heart of club theory.

In addition to this initial diagnosis, a club theory analysis also clarifies why effective reforms have proven so elusive for EU members. The logic of clubs suggests that two options are available when the membership decision has been subject to miscalculation: either reduce the size of the club, or revise the terms of membership in a way that shifts the costs and benefits of participation so that they are more evenly distributed among members. While European policymakers have pursued a bewildering array of reforms in recent years, nearly all of them boil down to one of those two basic strategies. Once those proposals are reframed as attempts to renegotiate the initial membership decision, the legal and non-legal barriers that have limited their success come into plain view, as do their implications for policy-making in the EU going forward after Brexit.

The second half of this Article turns to the theoretical literature on the design of international agreements. Research in this area seeks to provide a functional explanation for the particular legal elements that States choose to include when drafting treaties.<sup>13</sup> Here it is argued that, contrary to the dominant assumption in rational choice scholarship, the treaties underpinning European integration are far

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<sup>11</sup> See *infra* Section I.

<sup>12</sup> See *infra* Section III.A.i.

<sup>13</sup> See, e.g., Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2005); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005).

from irrelevant outliers. Instead, they provide a valuable window into the workings of other treaties that deal with club goods, by playing out the design problems that are shared across those agreements on a uniquely grand scale. The main insight which follows is that, due to unique dynamics of the membership decision for economic clubs, the standard predictions regarding legal elements that regulate treaty entry and exit do not apply to international agreements that form clubs.

The discussion of treaty entry focuses on two kinds of provisions: accession conditions and reservations.<sup>14</sup> In doing so, this discussion provides a new interpretation of the debate over whether treaties “screen or constrain.”<sup>15</sup> The traditional view in the doctrinal literature is that international law effectively constrains State behavior, because the legal obligations that are announced in treaties are “almost always” followed.<sup>16</sup> An influential counter-argument found in the rational choice scholarship is that international law may often be inconsequential, because treaty provisions can operate by only attracting States that already intended to comply with their terms and screening out those that did not. The significance of the competing screen-versus-constrain hypotheses is radically changed in the context of club treaties, however, which must include provisions that function to screen out certain potential entrants in order to provide benefits to member States.<sup>17</sup> In other words, many international agreements cannot constrain *unless* they screen.

The analysis of treaty exit examines how the membership decision is controlled *ex post*, by provisions that set the terms for voluntary withdrawal or involuntary expulsion. Here again, law-and-economics scholars have provided a revisionist critique of the conventional wisdom in the doctrinal literature, which tends to assume that treaties must strictly police exit in order to prevent States from shirking on their obligations.<sup>18</sup> Instead, they argue that States often benefit when international agreements are designed to reduce exit costs,<sup>19</sup> because greater flexibility in treaty obligations provides a useful form of mutual insurance against

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<sup>14</sup> Accession conditions are provisions that set out requirements States must satisfy in order to become party to a treaty. Reservations allow States to enter into agreements on a partial basis, by committing to some treaty obligations but not others.

<sup>15</sup> See Jana Von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 AM. POL. SCI. REV. 611 (2005); George W. Downs, David M. Roake, & Peter N. Barsboom, *Is the Good News About Compliances Good News about Cooperation?*, 50 INT'L ORG. 379 (1996).

<sup>16</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1968).

<sup>17</sup> See, e.g., Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006); Laurence R. Helfer, *Not Fully Committed? Reservations, Risk, and Treaty Design*, 31 YALE J. INT'L L. 307 (2006); Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531 (2002).

<sup>18</sup> Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (providing a skeptical analysis of the traditional view).

<sup>19</sup> See generally Helfer, *supra* note 18; Eric Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, Legalized Noncompliance, and Related Issues*, 110 MICH. L. REV. 243 (2011); Timothy Meyer, *Power, Exit Costs, and Renegotiation in International Law*, 51 HARV. J. INT'L L. 379, 420–22 (2010); Barbara Koremenos & Allison Nau, *Exit, No Exit*, 21 DUKE J. COMP. & INT'L L. 81 (2010).

the uncertainty of future events.<sup>20</sup> Notably, a leading article in this area directly addresses the relevance of club theory, and concludes that exit costs should be especially low when treaties deal with club goods.<sup>21</sup> After taking a closer look at the way that withdrawal and expulsion provisions function in the context of club treaties, this Article finds that a number of prominent claims in this area do not, in fact, hold up. An implication is that, at least with regard to treaty exit, the standard economic analysis of the role of flexibility in agreement design has a more tenuous theoretical and empirical basis than is conventionally thought.<sup>22</sup>

The discussion below proceeds as follows: Section I introduces the basic concepts of club theory, Section II uses those principles as a framework to explain the three waves of European disintegration, Section III addresses broader theoretical questions regarding the design of international agreements, and Section IV briefly concludes.

## I.

### OVERVIEW OF THE ECONOMIC THEORY OF CLUBS

The economic theory of clubs is generally attributed to a 1965 *Economica* article by James Buchanan.<sup>23</sup> In that article, Buchanan introduced the concept of “economic clubs,” which he used to refer to voluntary associations that are formed to facilitate the joint production and consumption of a “club good.” Its novelty was to distinguish club goods from the traditional economic concept of public goods, such as national defense or clean air.

The key point of difference between the two is that club goods lack the properties of non-excludability and non-rivalry in consumption that are defining features of public goods. When a factory reduces its emissions (and thereby contributes to a public good such as clean air), none of the surrounding residents can be excluded from the benefits of less pollution. Likewise, there is no “rivalry” in the consumption of those benefits because when one person takes a breath, they do not reduce the amount of clean air available to others. The classic example of a club good, provided by Buchanan’s original article, is a community swimming pool.<sup>24</sup> Community pools are excludable: the number of swimmers can be limited by gating the pool and establishing membership privileges. They also involve an

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<sup>20</sup> See Laurence Helfer, *Flexibility in International Agreements*, in *INTERNATIONAL LAW & INTERNATIONAL RELATIONS: TAKING STOCK* (Dunoff & Pollack eds. 2012); Barbara Koremenos, *Contracting around International Uncertainty*, 99 *AM. POL. SCI. REV.* 549 (2009); Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 *INT’L ORG.* 289 (2001).

<sup>21</sup> Helfer, *supra* note 18, at 1637 (“[A]n important prescriptive insight for treaty makers: when negotiating agreements that regulate private or club goods, drafters can include capacious exit clauses to encourage broad ratification or enhance depth.”).

<sup>22</sup> See *infra* Section III.C.iii.

<sup>23</sup> See Buchanan, *supra* note 9; but see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 36–43 (1965) (providing a contemporaneous account of the same basic concepts).

<sup>24</sup> See Buchanan, *supra* note 9.

inherent rivalry in consumption: swimming pools can only hold so many people. Another example of a club good would be a local area computer network. With a computer network, users can be excluded with password-protection, and consumption rivalry appears when the addition of new users takes up bandwidth and lowers the network's performance for existing users.

When combined, the propositions that club goods are at least partially excludable and partially rivalrous carry the important implication that the optimal size of economic clubs is always limited.<sup>25</sup> Although a club will initially grow in size to take advantage of economies of scale, every club eventually arrives at a state in which either existing members are not made better off by the admission of an additional non-member, or potential new members receive no net benefit from joining. By contrast, the optimal production of public goods requires full participation by all relevant parties.<sup>26</sup> A consequence is that a central question of institutional design unique to economic clubs involves limiting participation by identifying the marginal member.<sup>27</sup> Accordingly, much of club theory explores the variables that determine the optimal size and composition of club membership.

The most important of those variables turns on a distinction between clubs with homogeneous versus heterogeneous members. The simplest model is a homogeneous club, in which members are assumed to have identical "endowments" (capacities for contributing to the production of the club good) and "tastes" (preferences over the characteristics of the club good that is consumed). The primary mechanism limiting the size of homogeneous clubs is consumption rivalry that appears in the form of congestion externalities—in other words, various forms of overcrowding—as membership size increases.

Heterogeneous clubs (also known as "mixed clubs") have members with non-identical endowments or tastes.<sup>28</sup> The relevant congestion externalities for mixed clubs derive from the fact that heterogeneity increases with membership size. Heterogeneity in tastes implies that the precise form that the club good takes will not perfectly align with the consumption preferences of a given member, and will increasingly depart from those preferences as the club grows.<sup>29</sup> The existence of heterogeneous endowments means that, as a mixed club expands, there will be increasing divergence in the ability of members to contribute to provision of the club good.

Two further structural features are important factors in determining the optimal size of mixed clubs. One is whether a club is designed so as to allow for transfers among members that reallocate the costs or benefits of participation in

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<sup>25</sup> CORNES & SANDLER, *supra* note 9, at 348.

<sup>26</sup> *Id.* ("The optimal sharing size for a pure public good includes the entire population of the jurisdiction whose marginal benefit from the public good is positive.")

<sup>27</sup> See Buchanan, *supra* note 9, at 2.

<sup>28</sup> CORNES & SANDLER, *supra* note 9, at 351.

<sup>29</sup> Returning to the swimming pool hypothetical, the presence of heterogeneous tastes could mean that certain individuals prefer to use the pool for swimming laps, others for diving, and still others for wading around. Membership will be limited by the fact that the pool's layout will inevitably entail tradeoffs that accommodate some of those tastes more than others. See Buchanan, *supra* note 9.

the club.<sup>30</sup> All else equal, the presence of a redistribution mechanism makes the optimal size of a mixed club larger than would otherwise be the case.<sup>31</sup> Another relevant feature is the number of distinct, excludable goods that a club provides. Where there are economies of scope in addition to scale, it may be efficient for a single club to produce more than one kind of club good.<sup>32</sup> The optimal size of such “multi-good clubs” will be larger when there are exclusion mechanisms within the club that allow some members to participate in the production and consumption of only a subset of the total club goods that are available.<sup>33</sup> Although these preceding points are somewhat abstract, their relevance will become clear when applied in the case studies of European integration that appear directly below.

Soon after Buchanan’s article, economists began to extend club theory beyond firms and other private associations, by examining cases where club goods are provided via public entities and government regulations.<sup>34</sup> Even more expansively, political units themselves (cities, federal states, and entire countries) have been treated as clubs.<sup>35</sup> Thus, club theory has proven a popular analytical tool, largely because it is adaptable to a wide array of contexts that involve the formation of groups and coordination of collective action.

Despite its broad application in the social science literature, rational choice scholarship on international law has only incorporated club theory to a minimal extent.<sup>36</sup> This is surprising for a couple of reasons. First, club theory is rooted in

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<sup>30</sup> For the swimming pool, transfers might be accomplished by adopting a policy of charging a per-visit fee rather than a flat membership rate. Such an arrangement would serve as a form of price discrimination that shifts a larger proportion of the cost of producing the club good to members who prefer to use the pool more often.

<sup>31</sup> See Todd Sandler & John T. Tschirhart, *The Economic Theory of Clubs: An Evaluative Survey*, 18 J. ECON. LIT. 1481, 1492 (1980).

<sup>32</sup> See Jan K. Brueckner & Kangoh Lee, *Economies of Scope and Multi-Product Clubs*, 19 PUB. FIN. 193 (1991).

<sup>33</sup> Country clubs are classic multi-good clubs because they typically provide members with a menu of amenities—golf courses, pools, tennis courts, dining areas, social events. A common exclusionary mechanism used by country clubs is to adopt a tiered membership structure, in which fees increase according to the number of amenities that a member has permission to access.

<sup>34</sup> State parks, toll roads, and publicly owned utilities have all been analyzed as clubs. See CORNES & SANDLER, *supra* note 9.

<sup>35</sup> The canonical exposition of this idea is known as the Tiebout Model. It assumes that local political jurisdictions such as cities function as clubs that attract tax-paying residents (the members) by offering bundles of public services (the club goods). Charles Tiebout, *A Pure Theory of Local Expenditures*, J. POL. ECON. 416 (1956); cf. Sandler & Tschirhart, *supra* note 31, at 1481 (noting that the Tiebout Model predates the Buchanan article but anticipates its core elements). Recent research by Alberto Alesina and Enrico Spolaora extends the Tiebout Model to its logical extreme, by treating the nation-State as a club in order to explain historical variation in the population-size of countries. Alberto Alesina & Enrico Spolaora, *On the Number and Size of Nations*, 112 Q. J. ECON. 1027 (1997) (applying club theory to State formation); see also Michele Ruta, *Economic Theories of Political (Dis)Integration*, 19 J. ECON. SURVS 1 (2005) (providing a review of the subsequent literature).

<sup>36</sup> For example, most of the leading book-length treatments of the economic analysis of the law do not mention economic clubs at all. Nor do they cite Buchanan’s 1965 article, which is a standard reference whenever club theory is discussed. See, e.g., POSNER & SYKES, *supra* note 1; GUZMAN, *supra* note 1;

the same basic economic principles that are otherwise used to organize analysis of that research. Second, a dominant concern in the economic analysis of international law is to understand how States can engage in collective action relating to global public goods. Club goods were explicitly conceived as a variation on the public goods concept.<sup>37</sup> These connections have not been entirely overlooked, however, and club theory analyses of international law have made scattered appearances in recent years, particularly in the area of international trade.<sup>38</sup> One aim of this Article is to advance the nascent literature, which applies club theory to international law, by adding to its rigor and generalizing its scope.

## II.

### A CLUB THEORY OF EUROPEAN (DIS)INTEGRATION

European integration refers to the trend of deepening legal coordination among European countries that has taken place since World War II.<sup>39</sup> The recent reversal of that trend represents a turning point in the history of international cooperation. It is therefore striking that the international law literature lacks any systematic account of those developments. As a result, each succeeding wave of legal disintegration is met with *ad hoc* interpretations, which usually attribute outcomes to idiosyncrasies of a particular policy area or the outbreak of unforeseeable circumstances.<sup>40</sup> Debate over the necessary institutional reforms is then filled with vague exhortations to greater political solidarity, which beg the question and often take on an accusatory or moralizing tone.<sup>41</sup>

The failure to confront European disintegration at a conceptual level is partly due to limitations of the doctrinal literature. In taking an uncritical (and often

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Scott & Stephan, *supra* note 2; KOREMENOS, *supra* note 2. In cases when treaties or international organizations are described as “clubs,” the term is usually used in a colloquial sense (to mean a “small group”) without reference to the technical criteria of excludability or rivalry in club goods. *See, e.g.*, ROBERT O. KEOHANE & JOSEPH S. NYE JR., THE CLUB MODEL OF MULTILATERAL COOPERATION AND PROBLEMS OF PROBLEMS OF DEMOCRATIC LEGITIMACY (2001); Brian Hocking, *Changing the Terms of Trade Policy Making: From the ‘Club’ to the ‘Multistakeholder’ Model*, 3 WORLD TRADE REV. 3 (2004).

<sup>37</sup> *See infra* Section III.A.ii.

<sup>38</sup> *See, e.g.*, Nicolas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT’L L. 107 (2016); Chris Brummer, *Regional Integration and Incomplete Club Goods: A Trade Perspective*, 8 CHI. J. INT’L L. 535 (2008); Helfer, *supra* note 18, at 1637.

<sup>39</sup> For the history of European integration, *see generally* GILBERT, *supra* note 3; DESMOND DINAN, *EVER CLOSER UNION: AN INTRODUCTION TO EUROPEAN INTEGRATION* (2010); TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005).

<sup>40</sup> Thus, the Eurozone was destabilized by an unpredictable global financial crisis, which is unrelated to legal discord in the Schengen Area, a product of political violence in Africa. Meanwhile, Brexit can on some level be traced to Donald Trump. *See What Brexit and Donald Trump Have in Common*, THE ECONOMIST (Jan. 30, 2017), <https://www.economist.com/blogs/bagehot/2017/01/long-list>.

<sup>41</sup> Accordingly, it is frequently claimed that saving the euro requires Germans to become less “stingy” or Greeks to become less “lazy.” Likewise, the solution for harmonizing border security and asylum procedures is a spontaneous reduction in xenophobia. *See, e.g.*, Thomas Piketty, *A New Deal for Europe*, N.Y. REV. OF BOOKS (Feb. 25, 2016); Griff Witte, *Immigration Backlash at the Heart of British Push to Leave the E.U.*, WASH. POST, May 22, 2016.

triumphalist) view of the expansion of European integration, many international law scholars reject the kinds of arguments that can explain its contraction.<sup>42</sup> It is also a product of a particular methodological decision in rational choice literature. By insisting that the EU be treated as if it were the equivalent of a single country (rather than a set of legal agreements among States), law-and-economics research on international law essentially abandoned the field on European integration.<sup>43</sup> That decision represents a missed opportunity because, as this Section will demonstrate, the standard theoretical assumptions that are used in the economic analysis of international law apply with equal force to the underlying legal structure of the EU.<sup>44</sup> Specifically, the discussion that follows provides a unified explanation for all three waves of European disintegration, by incorporating the club theory principles outlined above within a rational choice framework.

Part A covers the Eurozone, Part B turns to the Schengen Area, and Part C looks at Brexit. Part D sums up by briefly noting some normative points that these developments suggest for the future of the EU.

#### A. *The Eurozone as a Monetary Club*

The “Eurozone” is a term that collectively covers the group of EU countries that have agreed to pool their monetary policy through a common currency. While it was once hailed as the “crown jewel” of the European Union,<sup>45</sup> the past several years have left the Eurozone in a continuous state of near-collapse. Making sense of this dramatic shift from integration to disintegration becomes much easier once it is recognized that the treaty framework underlying the Eurozone takes the form of an economic club.

##### i. *From Integration to Disintegration*

The legal foundations of the Eurozone were established by the Maastricht Treaty of 1992, which transformed the European Community into the European Union and set out a roadmap for establishing a European Monetary Union (EMU)

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<sup>42</sup> A common view was that the advance of legal cooperation in Europe was an irreversible, self-perpetuating historical process. That mindset is epitomized by the colloquial “bicycle theory,” which holds that—just as a cyclist—the project of European integration is sustained by its constant forward trajectory, with stasis leading to collapse. See GILBERT, *supra* note 3, at 4; see also Andrew Moravcsik, *The European Constitutional Compromise and the Neofunctionalist Legacy*, 12 J. EUR. PUB. POL’Y 349, 350 (2005) (“Since the 1950s, this spectacular record of growth and achievement has led most analysts to treat the EU as an institution on an upward, if uneven, course for ‘ever closer union.’”).

<sup>43</sup> See *supra* note 4.

<sup>44</sup> Those assumptions can be summarized as follows: (1) States are the primary actors in international law; (2) States seek to maximize their self-interest, however that may be defined through the domestic political process; (3) the decision-making of States is “rational,” in the sense that the term is used in microeconomics; and (4) international agreements function similar to contracts and are used by States to facilitate cooperative arrangements that provide mutual gains to the contracting parties. See POSNER & SYKES, *supra* note 1.

<sup>45</sup> Cf. Barry Eichengreen, *Europe’s Historic Gamble*, PROJECT SYNDICATE (May 15, 2010), <https://www.project-syndicate.org/commentary/europe-s-historic-gamble?barrier=accesspaylog>.



within the decade.<sup>46</sup> The EMU has two core components: the adoption of a common currency, eventually to be named the euro; and the creation of a European Central Bank (ECB), tasked with controlling the money supply and otherwise administering the regime. Signatories of the Maastricht Treaty were eligible to be considered for entry into the EMU but not guaranteed admission.<sup>47</sup> Instead, only those countries that were found to have satisfied the “Maastricht Criteria” and an accompanying “Stability and Growth Pact”—which articulated standards relating to budgetary deficits, inflation rate, and other economic variables—would be allowed to join.<sup>48</sup>

In 1999, after seven years of openly contentious negotiations, eleven of the fifteen countries that signed the Maastricht Treaty were deemed to have met its accession criteria and officially joined the EMU. Greece was admitted as a twelfth member in 2000, and the euro entered physical circulation on January 1, 2001. The Eurozone’s membership expanded to nineteen members, due to seven additional countries adopting the euro following the EU’s enlargement in 2007, and currently stands at twenty-eight members.<sup>49</sup>

The Eurozone falls under a broader category of international regimes that are referred to as currency unions.<sup>50</sup> As with other currency unions, it reflects the essential features of an economic club and can be analyzed as such. The Eurozone’s central purpose is to facilitate the collective production and consumption of certain benefits by its members. These include the efficiencies that result from transacting across borders in a common currency, and the price stability that is achieved by delegating national monetary policies to the ECB. Those benefits are properly understood as club goods, rather than public goods, because they are excludable. Countries outside of the Eurozone cannot issue euro notes, nor can they have their monetary policy set by the ECB.<sup>51</sup>

The EMU is a mixed club that contains member States with diverse economic profiles and policy preferences.<sup>52</sup> As a result, the ability of the Eurozone

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<sup>46</sup> The idea of creating a common European currency emerged in the late 1980s, following two decades in which several less ambitious attempts at monetary coordination were tried and failed. See Turk, *supra* note 5 (reviewing the euro’s historical background).

<sup>47</sup> *Id.*

<sup>48</sup> Out of concern that the initial Maastricht Criteria were insufficiently stringent, the Stability & Growth Pact (SGP) introduced a further set of requirements in 1995. The SGP was notable for imposing conditions that came into effect *after* the EMU was eventually in place, by committing future members to report their fiscal status on an annual basis and prohibited deficits in excess of 3% of GDP. See Turk, *supra* note 5.

<sup>49</sup> See *From 6 to 28 Members*, EUROPEAN NEIGHBORHOOD POLICY AND ENLARGEMENT NEGOTIATIONS, [https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/from-6-to-28-members_en) (last visited Apr. 19, 2018) (providing a full timeline of the Eurozone’s membership).

<sup>50</sup> See MAURICE OBSTFELD AND KENNETH ROGOFF, FOUNDATIONS OF INTERNATIONAL MACROECONOMICS, 632-33 (1996); Alberto Alesina, Robert J. Barro, & Silvana Tenreyro, *Optimal Currency Areas*, 17 NBER Wk’g Ppr. No. 9072, at 302 (2002).

<sup>51</sup> See Turk, *supra* note 5.

<sup>52</sup> EMU countries such as Slovenia, Italy, and France occupy different levels of economic development, and therefore have different capacities to contribute to provision of the club good. See,

to function effectively depends on whether the heterogeneity of its membership is sufficiently limited. It is possible to answer that question by applying a framework known as the theory of optimum currency areas (OCA theory).<sup>53</sup> OCA theory fits well within a club theory analysis, because it identifies particular economic dimensions along which heterogeneity in the economic endowments of currency club members matters most. Specifically, OCA models predict that a currency union will not be viable unless it satisfies three key criteria. First, there must be cross-border mobility of goods, capital, and labor among members. Second, members cannot experience “asymmetric shocks” from common economic developments that affect the union as a whole, such as movements in the business cycle.<sup>54</sup> Third, if asymmetric shocks *do* occur, their severity must be mitigated by fiscal redistribution among currency union members.

At the time of its original twelve-member configuration in 2001, most economists concluded that the Eurozone did not meet the OCA criteria.<sup>55</sup> Although goods and capital could flow freely across borders due to the EU’s common market infrastructure, the mobility of labor was relatively limited.<sup>56</sup> In addition, the Eurozone was vulnerable to asymmetric shocks due to substantial differentials in productivity and fiscal stability that characterized countries in the EMU’s “North” relative to those in its “South.”<sup>57</sup> The potential for asymmetric shocks was further magnified by the absence of a collective budgetary mechanism capable of channeling fiscal transfers among EMU members during times of divergent economic performance.<sup>58</sup> From a club theory perspective, the overly diverse membership of the Eurozone meant that it was designed to fail from the outset.

The pessimistic forecast provided by OCA theory fell out of fashion when the euro’s initial years went smoothly, but was confirmed when the EMU

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*e.g.*, Gita Gopinath, Sebnem Kalemli-Ozcan, Loukas Karabarbounis, & Caroline Villegas-Sanchez, *Capital Allocation and Productivity in South Europe*, Fed. Reserv. Bank of Minneapolis, Wk. Ppr. No. 728 (July 2015). Eurozone members also do not have identical preferences over the form the club good takes. In other words, political support varies across countries with respect to the stance of the ECB’s monetary policy, the inflation rate of the euro, and related regulatory variables.

<sup>53</sup> For example, labor market rules are important sources of heterogeneity, while securities regulation policies are not.

<sup>54</sup> See Charles Wyplosz, *EMU: Why and How It Might Happen*, 3 J. ECON. PERSP. 3, 9–10 (1997).

<sup>55</sup> See, *e.g.*, Martin Feldstein, *The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability*, 11 J. ECON. PERSP. 23 (1997); Wyplosz, *supra* note 54, at 8 (“[T]he case for Europe as an optimal currency area is lukewarm at best.”).

<sup>56</sup> Although workers in Eurozone countries may have enjoyed a right to free movement pursuant to foundational principles of EU law, the presence of stringent and highly varied employment regulations across Eurozone countries restricted workers’ mobility in practice. See Wyplosz, *supra* note 54, at 9–10.

<sup>57</sup> Strong evidence on this point is the period of turbulent exchange rate fluctuations that took place among European countries in the early 1990s. See Turk, *supra* note 5.

<sup>58</sup> The Stability & Growth Pact was intended to prevent the outbreak of such convergence by constraining the economic policymaking of Eurozone governments. But it proved to be of limited utility once France and Germany violated its requirements without consequence soon after the EMU was formed. See Turk, *supra* note 5.

membership experienced asymmetric economic shocks in response to the global financial crisis that began in 2008. While the financial crisis depressed economic activity across the Eurozone, it had uniquely destructive effects on five members—Portugal, Ireland, Italy, Spain, and Greece.<sup>59</sup> The relatively severe economic slowdowns among that group caused fiscal deficits to shoot up to unprecedented levels. To finance those deficits, all five governments engaged in heavy foreign borrowing, which quickly led international investors to run on their sovereign debt and brought the EMU to the brink of a generalized collapse.<sup>60</sup> A total meltdown was only averted by a series of multi-billion euro bailouts in 2010 and 2011, jointly provided by the ECB, European Commission, and International Monetary Fund.<sup>61</sup> Thus, within the Eurozone's first decade, structural weaknesses in the membership rules laid out by the Maastricht Treaty were exposed, at a serious cost to its members.

*ii. Renegotiating the Terms of Membership*

Looking beyond the immediate crisis management environment of 2010–2011, European policymakers attempted to return the Eurozone to a more sustainable trajectory by renegotiating the terms of the club's membership. Debate over institutional reforms that could provide a viable burden-shifting device for the Eurozone converged on the idea of a banking union. Subsequent negotiations resulted in the creation of European Banking Authority (EBA), which was formally established in June 2012 and subject to an extensive series of amending agreements and supplemental protocols thereafter.<sup>62</sup>

The EBA was designed according to a “three pillar” structure. Its first pillar called for the imposition of a uniform set of supervisory standards and procedures, so that the risk-taking of banks within the Eurozone would be monitored and constrained to a similar degree. Its second pillar called for the development of a common resolution authority, which would centralize the liquidation or bailout of failed banks. The EBA's third pillar envisioned the provision of a joint deposit insurance system—collectively financed by Eurozone members—that would guarantee depositors' savings in the event of destabilizing bank runs.

In theory, a banking union organized around the EBA's three pillars could potentially constitute a burden-shifting mechanism capable of dampening the negative impact of asymmetric shocks within the EMU.<sup>63</sup> However, the EBA does not contain sufficiently robust versions of the features. The most obvious shortcoming is that agreement on the third pillar, jointly funded deposit insurance,

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<sup>59</sup> *See id.*

<sup>60</sup> Philip R. Lane, *The European Sovereign Debt Crisis*, 26 J. OF ECON. PERSP. 49–68 (2012).

<sup>61</sup> *See id.*

<sup>62</sup> *See* Jeffery N. Gordon & Wolf-Georg Ringe, *Bank Resolution in the European Banking Union: A Transatlantic Perspective on What It Would Take*, 115 COLUMB. L. REV. 1297 (2015).

<sup>63</sup> *But see* Tyler Cowen, *The Big Idea that Won't Fix Europe's Banks*, BLOOMBERG, (Aug. 9, 2016), <https://www.bloomberg.com/view/articles/2016-08-09/the-big-idea-that-won-t-fix-europe-s-banks> (taking a contrary position).

was never finalized in any usable form.<sup>64</sup> The second pillar was fleshed out more concretely in July of 2014, with an agreement that established the Single Resolution Mechanism. Yet for a laundry-list of technical reasons, EMU members retain a good deal of authority over the resolution of failing banks within their jurisdictions, and there is less to the Single Resolution Mechanism than meets the eye.<sup>65</sup> The third pillar is the most fully developed portion of the EBA's structure and is embodied in an agreement forming the Single Supervisory Mechanism, which grants the ECB authority to monitor any large bank within the Eurozone that is considered to pose systemic risks.<sup>66</sup> Unlike the other two pillars, however, the Single Supervisory Mechanism cannot directly facilitate fiscal transfers among Eurozone members; rather, its function is to make the redistributive machinery of the deposit insurance and resolution authority pillars operate more efficiently. As a result, the Single Supervisory Mechanism, standing alone, is unable to sustain the current configuration of the EBA.

The EBA has been broadly received as a disappointment due to the institutional compromises outlined above, and is often accused of representing a failure of political will on the part Eurozone leaders.<sup>67</sup> But lack of solidarity is a superficial explanation. Instead, the weaknesses of the EBA are better understood as stemming from the club structure of the Eurozone back when the euro was introduced in 2001. That is because in any currency union as economically diverse as the EMU, a full-fledged banking union implies an open-ended and potentially extravagant transfer of resources from some members to others. For that very reason, it will be opposed by the more financially stable group of club members, and never gain enough support to be adopted. The legal framework governing the Eurozone's original membership decision was therefore a driver of two factors: its original turn to instability, and the inability of its members to negotiate reforms capable of placing the euro on a more sustainable footing.

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<sup>64</sup> The idea of deposit insurance was abandoned at the outset under pressure from Germany, and has not shown signs of being revived since. Gordon & Ringe, *supra* note 61, at 1309–10.

<sup>65</sup> To name a few: (1) the resolution process is delegated to national authorities in the first instance; (2) centralized resolution decisions are subject to multiple veto-points; (3) the common resolution fund is severely under-financed relative to reasonably anticipated costs; and (4) the entire package will not be in place until the end of an eight-year long phase-in period. *See id.* at 1348.

<sup>66</sup> One threshold problem with the Single Supervisory Mechanism is that it applies to only a subset of the Eurozone's financial institutions. Another is that there is little basis to believe it will be enforced in a reliable manner. Eurozone members' previous disregard of requirements promulgated under the Stability & Growth Pact serves as an important precedent on this point. *See* Jens Dammann, *The Banking Union: Flawed by Design*, 45 GEO J. INT'L L. 1057 (2014); *see also* Michele Fratianni & John C. Pattison, *Basel III in Reality*, 30 J. ECON. INTEGRATION 1 (2015).

<sup>67</sup> *See* William Rhodes, *Eurozone Must Complete Banking Union to Avert Crisis*, FIN. TIMES (July 28, 2016), <https://www.ft.com/content/5eb51992-5413-11e6-9664-e0bdc13c3bef>; Wolfgang Munchau, *Concession to Britain Will Create a Two-Tier Europe*, FIN. TIMES (Feb. 21, 2016), <https://www.ft.com/content/c5680d9a-d6fd-11e5-829b-8564e7528e54> ("The banking union was supposed to be the answer, but is incomplete because it lacks fiscal support and joint deposit insurance"); Wolfgang Munchau, *Politics Undermines Hope of Banking Union*, FIN. TIMES (Dec. 16, 2012) ("If you study the details of [the proposed banking union], the substance evaporates.").

*iii. Exit*

In the most idealized club models, entry and exit of members is assumed to be costless, which makes reducing membership size a natural solution for mixed clubs that are overly heterogeneous. For the Eurozone, the primary candidates for exit included a handful of members that were experiencing sovereign debt crises, particularly Greece. The prospect of Greece's voluntary withdrawal became tangible in July of 2015, when the Greek government announced its intention to hold a referendum over its continued participation in the euro (Grexit). Around the same period, an alternate Grexit scenario involving Greece's involuntary expulsion also received serious consideration, and was publicly promoted by influential technocrats within the German government and at the ECB.<sup>68</sup> With respect to either approach, it soon became clear that the theoretical assumption of costless exit did not apply, and that exit of a Eurozone member would impose substantial burdens on all parties involved.

The legal cost associated with Grexit arose from the fact that the applicable EU treaties do not include any reference to the possibility of unilateral withdrawal from the EMU. Moreover, the prevailing interpretation of textual silence on that point is that any such withdrawal would be illegal as a matter of both international and EU law.<sup>69</sup> As a consequence, the only legal avenue for a Eurozone member to abandon the common currency is by invoking Article 50 of the Treaty of Lisbon, which authorizes exit from the EU as a whole.<sup>70</sup> The same conclusion holds with even greater force with respect to expulsion from the Eurozone, which commentators uniformly regard as prohibited under EU and international law.<sup>71</sup>

The Grexit scenario also drew attention to the substantial extralegal costs of exiting the euro. For Greece, reintroducing drachmas into circulation on very short notice presented a variety of logistical hurdles that its government was ill-prepared to address, and would send the country into even deeper economic

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<sup>68</sup> See Yannis Palailogos, *How Trichet Threatened to Cut Greece Off*, EKATHEMIRINI (Nov. 3, 2014), <http://www.ekathimerini.com/158504/article/ekathimerini/business/how-trichet-threatened-to-cut-greece-off>; A *Government Divided: Schaeuble's Push for Grexit Puts Merkel on the Defensive*, DER SPIEGEL (July 17, 2015) <http://www.spiegel.de/international/germany/schaeuble-pushed-for-a-grexit-and-backed-merkel-into-a-corner-a-1044259.html>; Hans-Werner Sinn, *Why Greece Should Leave the Eurozone*, N.Y. TIMES (July 24, 2015), <https://www.nytimes.com/2015/07/25/opinion/why-greece-should-leave-the-eurozone.html>.

<sup>69</sup> Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, European Central Bank Working Paper Series No. 10 (2009). The fact that the Greek referendum was posed in tortured language (which left its legal import with respect to membership in the Eurozone completely unclear), may reflect an attempt to finesse the costly legal sanctions that would accompany the decision. See Joel Gunter, *The Greek Referendum Question Makes (Almost) No Sense*, BBC NEWS (June 29, 2015) <http://www.bbc.com/news/world-europe-33311422>.

<sup>70</sup> See Athanassiou, *supra* note 69; see also *infra* note 117. The cost of withdrawing from the euro is thereby heightened because, in order to be valid, it must be packaged with a self-imposed ouster from other, potentially desirable, aspects of EU membership.

<sup>71</sup> See *id.*; Annie Lowrey, *Could Greece Get Kicked Out of the European Union? No*, FOREIGN POLICY (Mar. 23, 2010), <http://foreignpolicy.com/2010/03/23/could-greece-get-kicked-out-of-the-european-union/>.

depression if handled poorly.<sup>72</sup> Grexit (whether voluntary or involuntary) also posed a potential problem for the economies of remaining Eurozone members. The departure of Greece would inevitably lead international markets to speculate over the fate of similarly-situated EMU members—such as Portugal, Italy, or Spain. By doing so, Grexit threatened to reverse those countries' economic recoveries and reduce business activity across the Eurozone more broadly. Awareness of this collateral damage likely limited support for proposals to expel Greece.

To summarize, the initial source of the Eurozone crisis was its overly diverse membership. A return to stability has proved difficult due to the high costs of renegotiating the original membership decision. On one hand, the experiment with banking union revealed that a fundamental reallocation of the benefits and burdens of membership is politically unrealistic. On the other hand, the Grexit scenario led to a widespread appreciation that entrance into the Eurozone club is much easier than exit. As a result of its legal-institutional structure, the EMU now occupies a new status quo of indefinite financial instability and economic dysfunction.<sup>73</sup>

### B. *The Schengen Area as a Border Security Club*

The “Schengen Area” refers to an institutional framework (and literal geographic region) established by European countries for the purpose of collectively administering the security of their national borders.<sup>74</sup> Outside of Europe, the Schengen Area may be less well known than the Eurozone, but it represents an equally audacious experiment in international policy coordination.<sup>75</sup> Accordingly, the increasingly widespread perception that the entire Schengen system has fallen apart signifies a reversal of the historical arc of European integration that is no less profound than the case of the Eurozone financial crisis.

#### i. *From Integration to Disintegration*

The legal basis for the Schengen Area can be traced to a pair of treaties: the Schengen Agreement of 1985<sup>76</sup> and the 1990 Convention Implementing the

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<sup>72</sup> See Atthanassiou, *supra* note 69, at 39.

<sup>73</sup> See Sarah Gordon, *The Spreading Pain of Italy's Bank Saga*, FIN. TIMES (Aug. 10, 2016), <https://www.ft.com/content/821f138a-5e2a-11e6-bb77-a121aa8abd95>; Giovanni Legorano, *Bad Debt Piled in Italian Banks Looms as Next Crisis*, WALL ST. J. (July 4, 2016), <https://www.wsj.com/articles/bad-debt-piled-in-italian-banks-looms-as-next-crisis-1467671900>.

<sup>74</sup> See *The Schengen zone: a timeline*, TELEGRAPH (Dec. 21, 2007), <https://www.telegraph.co.uk/news/worldnews/1573359/The-Schengen-zone-a-timeline.html>.

<sup>75</sup> Control of a physical territory—along with the policing of its borders that such control necessarily entails—is a hallmark of the modern Westphalian nation-state. Cf. Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983; 3d ed. 2006). The goal of eliminating internal borders within the Schengen Area is therefore one of the most ambitious projects in international law that has been attempted in recent times. See ZAIOTTI, *supra* note 6.

<sup>76</sup> The Schengen Agreement gets its name from the fact that it was concluded on a boat outside of the town of Schengen, Luxembourg. The original signatories were France, Germany, Belgium, the

Schengen Agreement (CISA or Schengen II) (collectively, Schengen Agreements).<sup>77</sup> As conceived by those agreements, the construction of a common border policy took place through a two-step process. The first step was to allow for the free movement of treaty-member nationals within the Schengen Area by abolishing all pre-existing controls that were in place along the region's shared internal borders.<sup>78</sup> The second step was to counter-balance the removal of internal border controls by providing enhanced security measures along the external borders of the Schengen Area's shared perimeter.<sup>79</sup>

In its original form, the Schengen Area was notable for its narrow membership, consisting only of five of the six countries responsible for the origins of European integration (Italy was left out).<sup>80</sup> Subsequent admission of new entrants was limited by restrictions requiring that an eligible country receive the unanimous approval of pre-existing members.<sup>81</sup> It was also restricted to States that were able to satisfy an assessment covering a number of technical and political criteria meant to determine the applicant's fitness for contributing to the regime.<sup>82</sup> Those procedures nonetheless coincided with a steady expansion of the Schengen Area, from its initial five members in 1995, to fifteen in 2001, to its present total of twenty-six.<sup>83</sup>

All of the defining properties of an economic club apply to the Schengen Area.<sup>84</sup> Like the Eurozone, the Schengen Area is a mixed club with member

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Netherlands, and Luxembourg. See ZAIOTTI, *supra* note 6, at 68-70.

<sup>77</sup> CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT OF JUNE 14, 1985 BETWEEN THE GOVERNMENTS OF THE STATES OF THE BENELUX ECONOMIC UNION, THE FEDERAL REPUBLIC OF GERMANY AND THE FRENCH REPUBLIC ON THE GRADUAL ABOLITION OF CHECKS AT THEIR BORDER BOUNDARIES, June 19, 1990 [*hereinafter*, Schengen II]. The Schengen Agreement initially represented "more of a working program than a detailed plan of action," but gained greater practical significance with the signing of Schengen II, which created an elaborate bureaucratic apparatus to administer the goals laid out in the prior agreement. ZAIOTTI, *supra* note 6, at 70.

<sup>78</sup> SCHENGEN II, art. 1. Facilitating free movement within Schengen Area's internal borders not only necessitated the complete elimination of border checks, but also required coordination on a number of other fronts, including: the development of a common visa policy, harmonization of policing practices, and the creation of an information-sharing infrastructure, known as the Schengen Information System (SIS). See ZAIOTTI, *supra* note 6.

<sup>79</sup> ZAIOTTI, *supra* note 6, at 72; SCHENGEN II, arts. 2.1, 17. Enhancing controls along the external border entailed an equally extensive set of harmonization efforts, regarding issues such as asylum procedures, customs rules, airport security, and the prevention of drug trafficking and terrorism.

<sup>80</sup> Notably, unlike the Eurozone and most other projects of European integration, the Schengen negotiating process took place in complete independence from any EU decision-making bodies and its legal outputs lacked any formal connection to EU law. See ZAIOTTI, *supra* note 6, at 73-74.

<sup>81</sup> See ZAIOTTI, *supra* note 6.

<sup>82</sup> *Id.* at 72, 99 ("The original group of Schengen members included countries that had the will and capacity to carry out the task of dismantling borders across Europe.").

<sup>83</sup> During that same period, the Schengen Agreements and their associated body of regulations were incorporated into the EU's legal structure via the Treaty of Amsterdam, which entered into force in 1999. The Schengen Area's current membership of 26 is due to the admission of nine countries following the 2007 Enlargement, along with the subsequent entry of Switzerland and Lichtenstein.

<sup>84</sup> The elimination of internal border controls and standardization of travel documentation provided legal residents of member countries with greater freedom of movement, which is a collective good analogous to the transaction cost efficiencies of the EMU's common currency. The pooling of internal

countries that vary along a number of relevant dimensions.<sup>85</sup> Its long-run sustainability therefore turns on the same three factors that were relevant in the prior analysis: heterogeneity of membership, susceptibility to asymmetric shocks, and the presence of burden-shifting mechanisms to mitigate those shocks. As with the Eurozone, the legal structure of the Schengen Area also provides grounds for skepticism with regard to all three criteria.

Perhaps the most glaring issue relates to asymmetric shocks. Pursuant to a protocol known as the Dublin Regulation, asylum procedures in the Schengen Area must be conducted by the member-State where a migrant first enters from outside the common external border.<sup>86</sup> The disparate burdens that such a system creates for Schengen's landlocked members compared to those on its periphery are obvious and severe. The asymmetry created by the Dublin Regulation is further exacerbated by the absence of genuine redistributive devices for sharing the burden of administering the movement of people within the Schengen Area. Although Schengen Area members have established a pair of border security programs—Europol (responsible for policing of internal borders), and Frontex (addressing security along external borders)—that would appear to fill such a role, a closer look reveals that those organizations lack meaningful funding and are essentially information-sharing agreements.<sup>87</sup>

Recent developments have also made clear that the Schengen Area fails the first criteria regarding membership homogeneity. Since the influx of North African refugees into Europe began to escalate in 2012 (the migrant crisis), there has been a widespread breakdown in coordination along the Schengen Area's external borders.<sup>88</sup> One source of conflict is a seemingly irreconcilable rift in member's preferences over the stringency of asylum procedures. On one hand, Northern European countries, such as Germany and Sweden, have tended to adopt an accommodating position on the admission of migrants. On the other hand, members such as Hungary, Austria and many Balkan States have taken radical steps toward keeping their borders tightly policed.<sup>89</sup> Another division has been

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policing and external border control measures also provides members with the non-rivalrous good of security. The benefits of both security and mobility are largely excludable from non-members. The Schengen Area's status as an economic club is further confirmed by its legal structure and historical development, both of which evidence a focus on maintaining a limited and cohesive membership.

<sup>85</sup> One source of heterogeneity is that its members do not share identical policy preferences with respect to the openness-versus-security tradeoff that is implicit in any given level of border controls. Another is that the ability of Schengen Area countries to effectively administer the regime's border controls inevitably varies due to differences in geography, wealth, and institutional capacity.

<sup>86</sup> Council Regulation 343/2003, O.J. (L 50), 25.2.2003.

<sup>87</sup> See Henry Farrell, *Here's Why Europe Can't Police Terrorism Very Well*, WASH. POST (Mar. 22, 2016).

<sup>88</sup> See Griff Witte & Anthony Faiola, *Spring Could Bring a Fresh Surge of Refugees. But Europe Isn't Ready for Them*, WASH. POST (Feb. 16, 2016).

<sup>89</sup> The extent of this gap is captured by the recent decision of a Finnish administrative law court, which blocked the transfer of an asylum seeker from Finland to Hungary on the grounds that doing so would potentially subject that individual to "unhuman and degrading treatment" and thereby violate Finland's obligations under human rights treaties. It is difficult to imagine a meaningful agreement on common border control policies if one party to the agreement interprets its interactions with certain other



produced by certain members' inability to secure their external borders. The clearest cases here are countries along the Mediterranean periphery—in particular Greece and Italy—which have encountered logistical challenges that vastly exceed their institutional-resource capacity.<sup>90</sup>

Administration of the Schengen Area's internal borders has also fragmented in the wake of a series of catastrophic terrorist attacks that took place in France and other EU countries over the course of 2015 and 2016.<sup>91</sup> Heterogeneous security preferences are evident in the emergency re-imposition of internal border controls by France and several neighboring countries.<sup>92</sup> Divergent resource constraints have also become problematic in connection with internal borders. For example, the mismanagement of cross-border manhunts in search of fleeing terror suspects has revealed that many jurisdictions within the Schengen Area are not equipped to police internal borders at a level that is consistent with their treaty obligations.<sup>93</sup>

From a club theory perspective, there are several reasons why the collapse of the Schengen Area should be attributed to defects in the institutional design of its membership decisions, rather than extreme or unforeseeable events. First, the present incompatibility of its members is not unprecedented, and in fact closely parallels disputes that arose during the Schengen Area's formative period in the 1990s.<sup>94</sup> Second, although the flow of migrants into Europe has certainly increased in recent years, it is still not high by international standards, nor is it large relative to the EU's population of over 600 million people.<sup>95</sup> Third, the Schengen Area is a much more ambitious undertaking than Europe's previous border club, an arrangement known as the Nordic Passport Union. While that arrangement proved fairly stable, it does not suggest that a club including countries as diverse as Portugal, Hungary, Finland, Spain, Lichtenstein, and Estonia could coordinate every substantive dimension of both internal and

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members as constituting a human rights violation. See Umut Uras, *Finland Court Rules Against Sending Refugee to Hungary*, AL JAZEERA (Apr. 22, 2016).

<sup>90</sup> Witte & Faiola, *supra* note 88.

<sup>91</sup> See *Timeline: Attacks in France*, B.B.C. NEWS (Jul. 26, 2016), <http://www.bbc.com/news/world-europe-33288542>.

<sup>92</sup> See Michael Stothard, *France Plans to Keep State of Emergency Until ISIS is Defeated*, FIN. TIMES (Jan. 22, 2016).

<sup>93</sup> See Adam Nossiter, *As Terrorists Cross Borders, Europe Sees Anew that its Intelligence Does Not*, N.Y. TIMES, Mar. 23, 2016; Farrell, *supra* note 87 ("Belgium is a notorious problem case, because its policing arrangements are heavily localized. In the past, many Belgian policing forces have had difficulty cooperating with each other, let alone with other European forces.").

<sup>94</sup> France's recent re-imposition of border checks due to terrorism concerns is a replay of its previous decision to do so (on identical grounds) for much of the 1990s. Similarly, doubts over Italy's wherewithal to fully secure its external borders was the main reason why its entrance into the Schengen Area club was delayed for the first several years of its existence. ZAIOTTI, *supra* note 6, at 105–07.

<sup>95</sup> For example, the peak years of the EU's refugee crisis have involved less total annual migration than the U.S. experiences during normal times. See Gordon Hanson & Craig McIntosh, *Is the Mediterranean the New Rio Grande? US and EU Immigration Pressures in the Long Run*, 30 J. ECON. PERSP. 57 (2016).

external border security on a sustainable basis.<sup>96</sup> Lastly, a border club that is built for only tranquil geopolitical conditions is flawed by conception, and the Schengen Area was structured so that any major fluctuation in the border security environment would sow discord among its members. Therefore, just as the Eurozone crisis served as a reminder that currency unions must be designed to only include participants that can equally withstand the business cycle's inevitable troughs, the Schengen Area repeats a parallel lesson for border clubs.

*ii. Renegotiating the Terms Membership*

In response to the conflicts that have swept across the Schengen Area, European policymakers have bargained toward several reforms, many of which are at least theoretically consistent with the burden-shifting imperative suggested by club theory. The three most prominent proposals are surveyed below. The common outcome in each instance, however, is that creative policy thinking has not been accompanied by meaningful implementation.

One attempt to overhaul the Schengen Area has been a proposed "quota system," spearheaded by Germany. The quota system calls on each Schengen Member to accept a reallocation of 160,000 refugees into their jurisdiction, and targets members with a 250,000-euro penalty for each refugee that is denied admission before the quota has been met.<sup>97</sup> It thereby dissolves the asymmetrical costs of asylum policy established pursuant to the Dublin Regulation, and represents a very direct form of burden shifting among club members. The problem is that the quota system has been ignored. Below-quota members, such as Hungary, scoffed at the idea of paying fines, and the proposal has yet to result in the transfer of more than a handful of refugees among Schengen members.<sup>98</sup>

A second avenue of reform involves enhancements to the Schengen Area's common border security organizations. This has specifically taken the form of the creation of a new subsidiary entity within Frontex, the European Border and Coast Guard, which has been tasked with securing external borders along the Mediterranean. The burden-smoothing features of these efforts are self-evident. They have not been realized, however, because Schengen members have been unable to agree on more than modest funding increases for the new programs.<sup>99</sup>

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<sup>96</sup> The Nordic Passport Union called for the harmonization of passports among a handful of politically, geographically, culturally, and economically homogeneous Northern European countries, and functioned fairly smoothly in doing so. ZAIOTTI, *supra* note 6, at 105-07.

<sup>97</sup> See Alex Barker & Duncan Robinson, *EU States Face Charge for Refusing Refugees*, FIN. TIMES (May 2, 2017), <https://www.ft.com/content/346ba28a-10b8-11e6-bb40-c30e3bfcf63b>.

<sup>98</sup> See *Hungarian PM Vows to Resist EU's 'Misguided' Migrant Policy*, REUTERS (Feb. 26, 2016) (noting opposition to quota system); *No European Solution on the Migration Crisis in Sight* OPEN EUROPE (Feb. 26, 2016) (observing that less than 500 migrants had been transferred pursuant to the Schengen members quota plan).

<sup>99</sup> See Witte & Faiola, *supra* note 88 (describing the insufficient funding of Frontex); Daniel Gros, *Can Schengen Survive?*, CENTRE FOR EUROPEAN POLICY STUDIES (Dec. 2015) (discussing the need for greater progress toward a common European Coast Guard).

As a result, countries such as Italy and Greece remain largely on their own when it comes to securing critical portions of the Schengen Area's external border.

The third and most controversial reform strategy consists of a deal between the Schengen Area membership and Turkey. The Turkey deal anticipated a multi-billion-dollar payment from the EU to the autocratic Erdogan government, in exchange for its commitment to retain migrants who were attempting to enter the Schengen Area via Turkish territory.<sup>100</sup> Even though it involves large transfers to a third party, the agreement represents another attempt at intra-club reallocation, because it implies a more collectivized funding of border security on the part of Schengen members. As might have been expected, though, the Turkey deal unraveled on both sides almost immediately after it was finalized.<sup>101</sup>

Thus, attempts to renegotiate the terms of membership under the Schengen Agreements parallel the Eurozone's struggle to establish a banking union. In both cases, because the uneven distributional impact of proposed policies was substantial and predictable, members were only willing to agree to superficial reforms. And, although the bargaining process in both cases has been infused with rhetoric of solidarity, the failure to set administration of the Schengen Area border club on a more sustainable path is ultimately due to a prior miscalculation of the membership decision under the Schengen Agreements, just as it was for the Maastricht Treaty and EMU.<sup>102</sup>

### *iii. Exit*

The Schengen Area has yet to produce showdowns on the scale of Grexit or Brexit, but its member States have nonetheless continuously explored the possibility of exit. This has taken place most explicitly in countries such as Hungary, where political leaders have raised the prospect of holding national withdrawal referenda. Exit has also been pursued in more ambiguous forms. For example, Austria and nine Balkan States held a summit in February of 2016 in order to collectively rethink their asylum policies.<sup>103</sup> The plans that were explored at that meeting in effect implied the creation of a new border club within the Schengen Area. Another example is the decision by France (along with several neighboring countries) to announce an indefinite suspension of restrictions on internal border controls.<sup>104</sup> In one sense, then, there has already been widespread

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<sup>100</sup> See STATEMENT OF THE EU HEADS OF STATE OR GOVERNMENT (July 3, 2016) (summarizing the terms of the Turkey deal); Adam Chandler, *Europe's Latest Proposal for the Refugee Crisis*, ATLANTIC (Mar. 8, 2016).

<sup>101</sup> See Anthony Faiola, *EU Strikes Deal to Send Migrants Back to Turkey*, WASH. POST (Mar. 18, 2016) ("But even as an agreement was being hashed out, Turkey's authoritarian President Recep Tayyip Erdogan appeared to belittle European demands.").

<sup>102</sup> Cf. EDINA LILLA MESZAROS & IOAN HORGA, SOLIDARITY AND EQUAL BURDEN SHARING IN THE EU OVER IRREGULAR MIGRATION: PERVASIVE REALITY OR BEDTIME STORY (2013).

<sup>103</sup> See Alison Smale, *With E.U. Paralyzed, 10 Nations Try to Stem Migrant Flow*, N.Y. TIMES (Feb. 24, 2016).

<sup>104</sup> Compare Stothard, *supra* note 91 (covering France's decision to reinstate border controls "until ISIS is defeated") with Schengen II, art. 2.2 (only authorizing controls at the Schengen Area's internal

*de facto* exit from the Schengen Area by members that have adopted a posture of permanent non-compliance.

The Schengen Agreements do not contain provisions that allow for either voluntary withdrawal or involuntary expulsion, and therefore likely impose the same prohibition on exit that characterizes the EMU.<sup>105</sup> From one perspective, exit from the Schengen Area club appears more manageable than for the Eurozone, because the mass defection of treaty members reduces the reputational sanction associated with the violation of treaty commitments. However, while informal or implicit withdrawal dampens the cost of illegal exit along some dimensions, it simultaneously increases them with respect to others.<sup>106</sup>

For one, because *de facto* exit lacks the publicity of formal withdrawal, it raises the cost of coordination for non-exiting members by introducing ambiguity as to which treaty commitments will remain focal points for cooperation, and among whom.<sup>107</sup> In the Schengen Area, the opacity of informal withdrawal creates obvious issues, because migrant flows or terrorist threats pose time-sensitive problems that require a swift collective response. And, as a result of the week-to-week uncertainty over which portions of the Schengen Agreements are still in place, the entire regime has become unmanageable.

Another reason why informal exit has not returned the Schengen Area to functionality is that it has not involved the removal of *marginal* members.<sup>108</sup> Exit might not be destabilizing if it involved peripheral States like Latvia or Malta, while the original core membership of the border club remained intact. Instead *de facto* withdrawal has been pursued by countries, such as France and Belgium, that have played a central historical-political role in the development of the Schengen Agreements, or by members such as Italy or Greece, with geographic attributes that make their participation essential from a logistical perspective. The exit of certain Schengen Area countries therefore resembles the mutually assured destruction logic that was at work with the Grexit scenario in the Eurozone.

In summary, the disintegration of the Schengen Area is best understood to have resulted from its club structure, combined with the fact that the Schengen Agreements have allowed for an overly numerous and diverse membership. As with the Eurozone, miscalculation of the initial membership decision cannot be easily remedied through burden-shifting reforms or through member exit.

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borders on a temporary, emergency basis); *see also* Duncan Robinson & Richard Milne, *EU States Told to Lift Schengen Border Controls Within 6 Months*, FIN. TIMES, May 2, 2017 (detailing a European Commission warning over the legality of “temporary” border controls put in place by Germany, Denmark, and Sweden).

<sup>105</sup> The legality of withdrawal or expulsion from the Schengen Area has received essentially zero attention from commentators, but the absence of applicable EU treaty provisions that explicitly authorize either form of exit suggests that, as in the Eurozone context, such actions would constitute violations of both EU and international law. *See* Athanassiou, *supra* note 69.

<sup>106</sup> *Cf.* Helfer, *supra* note 18, at 1627 (explaining the costs and benefits of formal versus informal treaty exit).

<sup>107</sup> *See id.*

<sup>108</sup> *See* Buchanan, *supra* note 9, at 2.

Unfortunately, the institutional dysfunction that has recently overtaken the Schengen Area is likely to remain problematic, because the rise of global migration and specter of terrorism are not temporary emergencies that will pass in the short term.<sup>109</sup>

### C. *The EU Club-of-Clubs & Brexit*

The third wave of European disintegration was triggered by the Brexit referendum. It can also be analyzed from a club perspective, by treating the European Union in its entirety as a single economic club. That is because the EU represents an umbrella “club-of-clubs” within which subsidiary clubs such as the Eurozone and Schengen Area are nested. Since the coordination of monetary policy and border security are only two examples of the numerous prerogatives that have been pooled at the EU level, it is an extreme example of a multi-good club.<sup>110</sup>

Starting from the founding six-member group of countries that established the European Coal & Steel Community with the 1951 Treaty of Paris, the history of the EU is one of staged, negotiated expansions.<sup>111</sup> Consistent with the limited participation constraint that defines mixed clubs, members have sought to manage not only size of this club but also the homogeneity of new entrants.<sup>112</sup> Since 1993, that task has been guided by the “Copenhagen Criteria,” which are a set of principles used to determine a potential entrant’s ability to comply with the obligations that accompany EU membership.<sup>113</sup> While the EU consisted of twelve members at the time the Copenhagen Criteria were adopted, it has subsequently undergone a series of “enlargements.” The most significant of these occurred in 2004 and 2007, which resulted in a doubling of the EU’s membership due to the admission of a dozen Eastern European countries.<sup>114</sup>

The UK was excluded from Europe’s formative club institutions for sixteen years—largely due to opposition from France—until joining the European Economic Community in 1973. Since then, the UK has consistently sought to keep the extent of its participation in the EU to a minimum, most notably by

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<sup>109</sup> See T. Alexander Aleinikoff & Stephen Poellet, *The Responsibility to Solve: The International Community and Protracted Refugee Situations*, 54 VA. J. INT’L L. 195 (2013) (explaining how the current refugee crisis is part of a broader, long-term acceleration in global migration patterns).

<sup>110</sup> See *supra* note 32, and accompanying text (explaining the concept of multi-good clubs).

<sup>111</sup> Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140. See generally GILBERT, *supra* note 3.

<sup>112</sup> See generally CHRISTINA J. SCHNEIDER, CONFLICT, NEGOTIATION AND EUROPEAN UNION ENLARGEMENT (2009); Frank Emmert & Sinisa Petrovic, *The Past Present and Future of EU Enlargement*, 37 FORDHAM INT’L L.J. 1349 (2014).

<sup>113</sup> The Copenhagen Criteria assess a potential entrant’s admissibility with respect to democratization and human rights practices, the presence of a functioning market economy, and a physical proximity to the historical geographic territory of ‘Europe.’ See generally Christophe Hillion, *The Copenhagen Criteria and their Progeny* (2014).

<sup>114</sup> With the accession of Croatia in 2013, the EU presently includes twenty-eight member States. See Emmert & Petrovic, *supra* note 103.

foregoing membership in the Eurozone and Schengen Area.<sup>115</sup> Thus, the UK has never been at the forefront of European integration, and an ambivalence over its membership in Europe's club institutions (known colloquially as "Euroscepticism") is a longstanding feature of British political culture.<sup>116</sup>

The path to Brexit gained momentum with the UK's elections in 2010, which resulted in a new government led by the (relatively Eurosceptic) Conservative Party. Brexit can be traced even more directly to Prime Minister David Cameron's "Bloomberg Speech" on January 23, 2013,<sup>117</sup> in which he pledged to negotiate a more limited basis for the UK's membership in the EU, and to subject the resulting terms to a national referendum.<sup>118</sup> Those negotiations eventually resulted in an agreement between the UK and the EU in February of 2016 (the Renegotiation Agreement). Terms of the Renegotiation Agreement included changes to the UK's obligations in areas relating to financial regulation, procedural limitations on the scope of EU legislation, and certain social benefits available to immigrants into the UK from other parts of the EU.<sup>119</sup> Ultimately, however, the deal constituted only a modest reshuffling of the UK's relationship with the EU.

The Brexit referendum that followed presented voters with two alternatives: "Remain" in the EU pursuant to the new terms provided in the Renegotiation Agreement, or "Leave" the EU entirely. When the vote was held on June 23, 2016, Leave beat Remain by a margin of 52 to 48 percent.<sup>120</sup> The Brexit vote itself, however, did not result in the immediate withdrawal of the UK from the EU. Instead, it opened a highly uncertain path forward that both sides must navigate before exit can take effect.<sup>121</sup>

The EU's legal structure is a major source of that uncertainty. Before the 2007 Treaty of Lisbon, no EU treaty provided explicit terms for withdrawal, which meant that the legal permissibility of exit was at best ambiguous.<sup>122</sup> Article

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<sup>115</sup> In the border controls context, this ambivalence is epitomized by Margaret Thatcher's famous "Bruges Speech" of 1988. Margaret Thatcher, *Speech Delivered at the College of Europe, Bruges*, Sept. 20, 1988.

<sup>116</sup> See generally GILBERT, *supra* note 3; see also Stephen George, *Britain: Anatomy of a Eurosceptic state*, 22 J. EUR. INTEGRATION 15–33 (2000).

<sup>117</sup> See Craig, *supra* note 7.

<sup>118</sup> David Cameron, *The EU Is Not Working and We Will Change It*, TELEGRAPH (Mar. 15, 2014), <https://www.telegraph.co.uk/news/newstoppers/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html>.

<sup>119</sup> See George Park & Alex Barker, *EU Referendum: Tusk Releases Outline Reform Deal for UK*, FIN. TIMES, Feb. 2, 2016; Stephen Booth, *What Did the UK Achieve in its EU Renegotiation*, OPEN EUROPE (Feb. 21, 2016), <https://openeurope.org.uk/today/blog/what-did-the-uk-achieve-in-its-eu-renegotiation> (providing an analysis).

<sup>120</sup> *E.U. Referendum: Results*, B.B.C. NEWS, [http://www.bbc.com/news/politics/eu\\_referendum/results](http://www.bbc.com/news/politics/eu_referendum/results) (last visited Apr. 20, 2018).

<sup>121</sup> See generally Phaedon Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MAASTRICHT J. EUR. & COMP. L. 2 (2013).

<sup>122</sup> The only historical precedent of formal exit from the EU is the withdrawal of Greenland in 1985, which for obvious reasons does not provide much guidance applicable to Brexit. Potentially more relevant is the "empty chair" crisis, which was triggered by France in the 1960s under Charles de Gaulle, and could be considered a prior instance of informal withdrawal. See GILBERT, *supra* note 3.

50 of the Lisbon Treaty eliminates the ambiguity regarding a right of exit by expressly setting forth terms for withdrawal, but its provisions introduce further complications. The problem is that, while the opening subsections of Article 50 appear to allow for a simple unconditional exit,<sup>123</sup> they are immediately followed by language that triggers a compulsory yet ill-defined renegotiation process that may take two years, or more, to complete.<sup>124</sup>

Moreover, although it is implausible that a member contemplating withdrawal would want to lose access to every club good that is produced within the EU, Article 50 anchors a legal framework that largely forecloses piecemeal forms of exit. Rather than facilitate exit from the EU, the structure of Article 50 calls attention to the massive cost of unwinding such a complicated legal relationship on an all-or-nothing basis. As a result, the UK now bears the risks involved in bargaining its way back into desirable terms of trade and preserving its compliance with various regulatory standards necessary for market access.<sup>125</sup> In light of the magnitude of those risks, a common speculation is that the logistical hurdles of Article 50 will cause the UK to abandon its attempt at withdrawal altogether.

Brexit stunned many observers and was widely considered an inconceivable outcome up to the eve of the vote. Seen through a club theory lens, however, it is entirely consistent with the EU's historical development and legal structure, and reflects the same underlying dynamics that apply to the Eurozone and Schengen Area. As an economic club, the optimal size and heterogeneity of the EU's membership is inherently limited. Yet, due to the EU's constantly evolving structure, the question of whether its membership is optimal is never permanently settled. Existing members must not only gauge their compatibility with new entrants, but also evaluate the benefits they receive from the changing menu of club goods that is provided as the EU's policy space expands.<sup>126</sup> The increasingly aggressive rounds of enlargement that took place during the 2000s clearly threatened to exceed those limits.

Like Greece in the Eurozone, or the Balkan States in the Schengen Area, the UK represents the EU's marginal member under the particular logic of club theory, and is an obvious focal point for reconfiguring its size. Accordingly, the UK Renegotiation Agreement was intended to secure the UK's continued participation in the EU club on more favorable conditions. But, as with the Eurozone banking union and Schengen Area reforms, the terms of the Renegotiation Agreement were too superficial to alter the UK's membership

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<sup>123</sup> Art. 50(1), (2): stating that “[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements,” and that “[a] Member State which decides to withdraw shall notify the European Council of its intention.”

<sup>124</sup> *Id.*, art. 50(2). A final subsection regarding timing sets a default deadline of two years, but allows that deadline to be extended indefinitely by the parties' agreement. *Id.* art. 50(3).

<sup>125</sup> See, e.g., Niamh Moloney, *Financial Services, the EU, and Brexit: An Uncertain Future for the City?*, 17 GERMAN L.J. 75 (2016).

<sup>126</sup> Susanne Lechner & Renate Ohr, *The Right of Withdrawal in the Treaty of Lisbon: A Game Theoretic Reflection on Different Decision Processes in the EU*, 32 EUR. J. L. & ECON. 357, 362 (2011).

calculus in a meaningful way. And, as with the EMU and Schengen Agreements, the limited scope for renegotiation under the Lisbon Treaty motivated efforts toward full withdrawal. Lastly, a final parallel among the three waves of disintegration is reflected in the Article 50 process, which once again demonstrates that exit from Europe's club institutions is no easy solution and imposes serious costs of its own.

#### D. Summary & Implications

This Section has applied a club theory framework to understand European disintegration at a conceptual level that allows for a unified explanation of its underlying causes, as well as the policy dilemmas it raises. The argument that emerges is that the EU has become dysfunctional along a number of dimensions because its underlying treaty agreements form economic clubs, but have been structured in a way that is inconsistent with the membership constraint inherently accompanying such an undertaking. Thus, although the three waves of disintegration may seem largely unrelated from one another, they are all the result of common defects in institutional design, rather than unforeseeable events or shortfalls in mutual goodwill.

While the primary aim of this analysis has been descriptive and diagnostic, it does point to one higher-level policy prescription. Namely, that the commitment to "ever closer union," which is formally enshrined in the Maastricht Treaty and has otherwise been the historic polestar of European integration, should no longer be pursued. Because it directly conflicts with the limited participation constraint that defines economic clubs, the ideal of ever-closer union is not within the EU's "feasible set" of political options and will ultimately be self-defeating.<sup>127</sup> Recent events have confirmed this basic theoretical point. Each of the EU clubs was created with the expectation that it would foster increasingly greater levels of mutual trust among European citizens. In all three cases, however, an overly ambitious institutional structure has led to division and mutual recrimination rather than solidarity, and thereby dealt a significant blow to the overarching project of European integration.<sup>128</sup>

A rejection of ever-closer union can be restated in positive terms as an embrace of "multi-speed" treaties, in which member countries are able to limit their participation across the EU's menu of club goods. Although such an approach has traditionally been derided as unacceptable (it is sometimes labelled "Europe à la carte"), it should instead be viewed as an appropriate end-goal of institutional design.<sup>129</sup> Club theory principles not only foreclose the availability of

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<sup>127</sup> Cf. Tyler Cowen, *The Importance of Defining the Feasible Set*, 23 *ECON. & PHIL.* 1 (2007).

<sup>128</sup> See Jurgen Habermas, *Democracy, Solidarity and the European Crisis*, Lecture delivered at Leuven, Belgium on April 26, 2013 ("What unites the European citizens today are the Eurosceptical mindsets that have become more pronounced in all of the member countries during the [Euro] crisis.").

<sup>129</sup> Compare Wolfgang Munchau, *An à la carte Europe Is Likely to Split*, *FIN. TIMES* (Oct. 4, 2004) with Wolfgang Munchau, *A Multi-Speed Formula Will Shape Europe's Future*, *FIN. TIMES* (Mar. 12, 2017), <https://www.ft.com/content/f01f1266-058e-11e7-ace0-1ce02ef0def9>.



ever-closer union, but also indicate that a multi-speed framework will increase the overall amount of cooperation within the EU. Multi-good clubs that are able to exclude members from certain club goods are able to have a larger membership and achieve greater overall benefits for their members.<sup>130</sup> Going forward, then, policymakers should look for creative ways to accommodate the reality that most member countries prefer to coordinate on only a subset of the many policies that are under the EU's purview.<sup>131</sup>

This final point suggests a tentative reinterpretation of Brexit, which is almost uniformly framed as a purely negative turn of events.<sup>132</sup> What the conventional, alarmist view fails to appreciate, however, is that if the political process operates smoothly enough, Brexit could be a useful precedent that spurs a broader recalibration of the EU club-of-clubs on a more sustainable basis. While a positive resolution to the Brexit negotiations is far from certain, this potential upside is rarely acknowledged.

### III.

#### REASSESSING THE DESIGN OF INTERNATIONAL AGREEMENTS

The pair of methodological missteps in research on the economic analysis of international law which this Article identifies are its tendency to disregard European integration and a failure to incorporate concepts from club theory. The previous Section sought to remedy the former blindspot by showing that a rational choice explanation of European disintegration is possible once the EU is understood as a collection of international treaty agreements that establish economic clubs. This Section draws on the preceding analysis of EU treaties as a case study, and uses it to examine the implications that club theory carries for the economic analysis of international agreements in general.<sup>133</sup>

In doing so, it provides a critical reassessment of the rational choice literature on treaty design. That topic has been subject to an extensive body of scholarship which looks at the particular legal components that States include when drafting

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<sup>130</sup> See Sandler, *supra* note 31.

<sup>131</sup> Certain EU regulations include harmonized requirements relating to the permissible decibel levels for lawnmowers, for example. See Philip Stephens, *Why Europe Needs Cross-Border Lawnmower Regulations*, FIN. TIMES (Oct. 15, 2013) <https://www.ft.com/content/ac04efc8-34c8-11e3-a13a-00144feab7de>; see generally Alberto Alesina, Ignazio Angeloni, & Ludger Schuknecht, *What does the European Union Do?* 123 PUB. CHOICE 275 (2005).

<sup>132</sup> See, e.g. Fiona Hill, *The "Greatest Catastrophe" of the 21<sup>st</sup> Century? Brexit and the Dissolution of the UK*, BROOKINGS (June 24, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/06/24/the-greatest-catastrophe-of-the-21st-century-brexit-and-the-dissolution-of-the-uk/>.

<sup>133</sup> It should be noted that international agreements come in many legal formats, including informal "soft law" texts that are not technically considered treaties. See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 (2010). This article uses terms "agreement" and "treaty" interchangeably, and does not distinguish among agreements based on their degree of legal formality.

international agreements, and seeks to explain how those features function to facilitate cooperation among treaty members. Of course, the idea of looking at the legal structure of international agreements is not novel, and the same basic questions have been addressed by the doctrinal literature in various ways. The rational choice research on treaty design is therefore best understood as posing a revisionist challenge to the traditional answers provided in international law scholarship. The theoretical innovation introduced by economic analyses is to treat international agreements as self-enforcing contracts between States (rather than binding laws handed down by a hypothetical world government, or moral imperatives).<sup>134</sup> In addition to developing a more rigorous theoretical framework, the law-and-economics scholarship has also made advances by conducting large-scale empirical studies that quantify how frequently various design features appear in the text of treaties.<sup>135</sup>

Despite this more sophisticated approach, the discussion below will demonstrate that the leading rational choice accounts of treaty design remain substantially incomplete due to the two “wrong turns” in that literature. Part A explains why treaty provisions which govern the membership of agreements relating to club goods are the key area of misunderstanding. Part B narrows the analysis and looks at specific design features that regulate the membership decision by setting the terms for treaty entry. Part C does the same for treaty exit.

#### A. *The Membership Decision in Club versus Non-Club Treaties*

This Part begins with an overview of international agreements outside of the EU that also deal with club goods (club treaties). It then turns to treaties concerning public goods (public goods treaties), which are usually taken as the baseline case in the rational choice literature on treaty design. A third and final sub-Part briefly reviews human rights treaties, which are a focal point of the doctrinal literature. As will be shown, the limited membership condition that applies to club treaties is reversed in the context of both public goods agreements and human rights treaties, where the central challenge of institutional design is to induce *maximal* participation.

##### i. *Club Treaties*

Perhaps the most well-developed area of international law is a body of economic agreements that have been formalized through trade and investment treaties. Both operate as clubs. With trade agreements, States make reciprocal commitments to reduce tariffs and other protectionist measures, and thereby enjoy

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<sup>134</sup> See *supra* note 2, and accompanying text; Guzman, *supra* note 13, at 585 (“It is therefore helpful to think of international agreements as a form of contract and bring to bear on the study of those agreements some of the insights from the contracts literature.”).

<sup>135</sup> See, e.g., KOREMENOS, *supra* note 2; Thomas J. Miles & Eric A. Posner, *Which States Enter into Treaties, and Why?* (U. Chicago Law & Econ., Olin Working Paper No. 420, 2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1211177](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1211177).

the benefits of an excludable club good in the form of market access.<sup>136</sup> Rivalry in consumption of the benefits of market access may appear for a number of reasons, such as the fact that there is heterogeneity in States' preferences for economic liberalization.<sup>137</sup> The optimal membership of trade treaties is therefore limited, and determined by a mix of factors that includes States' geographic proximity, domestic politics, economic productivity, and industrial organization. International investment agreements are often incorporated as chapters in trade treaties, but are also concluded on a stand-alone basis, and generally have similar club dynamics.<sup>138</sup>

The club properties of trade treaties are most apparent in the case of "preferential trade agreements"—such as NAFTA, Mercosur, and ASEAN—which have a relatively exclusive membership, often consisting of a handful of States within a given region.<sup>139</sup> Despite a much more expansive membership, the multilateral system established pursuant to the General Agreement on Tariffs and Trade (GATT) functions as an economic club as well. As a careful study by Nicolas Lamp has shown, the GATT framework contained a number of subtle procedural mechanisms that allowed sub-groups of States within the GATT to exchange trade preferences without providing them to all GATT member States.<sup>140</sup> When the GATT was transformed to the World Trade Organization (WTO) in 1994, those kinds of excludable bargains were eliminated by new WTO rules that imposed greater uniformity.<sup>141</sup> Along with the EU treaties discussed above, the WTO arguably provides another example of an over-extended club membership, as evidenced by the paralysis of global trade negotiations that occurred post-1994 and the widespread abandonment of the WTO as a bargaining forum that resulted.<sup>142</sup>

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<sup>136</sup> Trade agreements are commonly divided into two sub-categories: customs unions and free trade areas. See Brummer, *supra* note 38.

<sup>137</sup> Another source of consumption rivalry is introduced by the fact that new entrants can potentially "divert" trade in their direction in a way that reduces the value of market access previously enjoyed by existing parties. See *id.*; cf. JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

<sup>138</sup> Investment agreements typically consist of mutual commitments to protect direct private investments from expropriation, and to submit investor-state disputes to third-party arbitral tribunals for resolution. See POSNER & SYKES, *supra* note 1, at 288–97 (providing an overview of investment treaties). When entered into outside of trade treaties, investment agreements are frequently bilateral, and known as BITs (Bilateral Investment Treaties). See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 640 (1998).

<sup>139</sup> Michele Fratianni & John Pattison, *International Organizations in a World of Regional Trade Agreements: Lessons from Club Theory*, 24 WORLD ECON. 333 (2001); see also Brummer, *supra* note 38, at 544–45 (arguing that regional trading agreements resemble clubs but deviate from the idealized club criteria along certain dimensions).

<sup>140</sup> See Lamp, *supra* note 38.

<sup>141</sup> See *id.* For the WTO's constitutive treaty, see Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

<sup>142</sup> In addition to the rise of PTAs, another recent example on this point is the United States pursuing trade agreements, such as the Trans-Pacific Partnership (TPP), outside of the very same WTO structure that it was largely responsible for creating. Cf. Fratianni & Pattison, *supra* note 139, at 335–36 (on use of PTAs as substitute for WTO negotiating rounds).

Security alliances also tend to constitute economic clubs, depending on the particular military context.<sup>143</sup> The North Atlantic Treaty Organization (NATO) provides a subtle illustration of this point, because it has embodied both the exception and the rule at various stages in its development. During the height of the Cold War, the United States' commitment to the mutual defense rule laid out in Article V of the NATO charter meant that it provided a public good, in the form of a (non-excludable and non-rivalrous) nuclear umbrella that covered all of Western Europe, regardless of whether countries in that region were formally part of the NATO membership.<sup>144</sup> In the post-Cold War shift to conventional military engagement, however, Article V of NATO represents a club good, because it involves the deployment of scarce resources along a security perimeter that can exclude some national territories but not others.<sup>145</sup> Under those conditions, the optimal size of NATO is limited. It should therefore not be surprising that membership in NATO has been a critical issue over the past few decades, and the eastern expansions to the alliance that have taken place during that period have been controversial and carefully staged.<sup>146</sup>

Another prominent club treaty is the Articles of Agreement of the International Monetary Fund (IMF).<sup>147</sup> The IMF oversees a diverse set of initiatives, but at its core it is a common fund that is used for lending operations. In that respect, the IMF is the functional equivalent of a credit union that provides the excludable club good of financial liquidity to its members.<sup>148</sup> The club good aspect of IMF lending was particularly clear during the Bretton Woods era (roughly, 1945–1970), when its loans were directed at mitigating foreign exchange volatility among a homogeneous group of advanced economies that had pegged their currencies to the U.S. dollar.<sup>149</sup> Once the IMF's financing activities began to include a broader and more diverse set of States—specifically, in the 1990s, with various “bailouts” of developing countries that were facing financial crises at the time—the excessive heterogeneity of IMF members became more apparent, and the organization was subsequently consumed by in-fighting

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<sup>143</sup> CORNES & SANDLER, *supra* note 9, at 393; *see generally* Todd Sandler & Keith Hartley, *Economics of Alliances: The Lessons for Collective Action*, J. ECON. LIT. 869 (2001).

<sup>144</sup> Article V of NATO provides that: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244 34 U.N.T.S. 243, 246. *See* Mancur Olson & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. STUD. 266 (1966) (providing the public good interpretation); CORNES & SANDLER, *supra* note 9, at 529–34 (same).

<sup>145</sup> *See* TODD SANDLER & KEITH HARTLEY, *THE POLITICAL ECONOMY OF NATO: PAST, PRESENT, AND INTO THE 21<sup>ST</sup> CENTURY* (1999).

<sup>146</sup> *See* Herman W. Hoen, *NATO's Retirement?: A Club-theoretical Approach to the Alliance, in NATO'S RETIREMENT? ESSAYS IN HONOUR OF PETER VOLTEN* (Margriet Drent et al., eds. 2011).

<sup>147</sup> Articles of Agreement of the IMF, 60 Stat. 1401, 2 U.N.T.S. 39.

<sup>148</sup> Stanley Fisher, *The Asian Crisis: A View from the IMF*, 9 J. INT'L FIN. MGMT. & ACCT. 167, 167 (1998) (analogizing the IMF to a credit union); Joseph P. Joyce & Todd Sandler, *IMF Retrospective and Prospective: A Public Goods Viewpoint*, 3 REV. INT'L ORG. (2008) (distinguishing between the various public goods and club goods that the IMF produces).

<sup>149</sup> Carmen M. Reinhart & Christoph Trebesch, *The International Monetary Fund: 70 Years of Reinvention*, 30 J. ECON. PERSP. 3 (2016).

between internal lender and borrower factions.<sup>150</sup> The result, which parallels the rise of PTAs in the trade area, was that States shifted away from the global platform of the IMF to more exclusive regional credit clubs, such as the Chiang Mai Initiative in East Asia, the Fondo Latinoamericano de Reservas in Latin America, and the Arab Monetary Fund in the Middle East.<sup>151</sup>

A few further examples of club treaties are worth noting in passing. One involves agreements governing the administration of certain globally scaled technologies that have the properties of club goods; for example, the regime for outer-space telecommunications satellites, known as INTELSAT.<sup>152</sup> Another illustration of club treaties is provided by “democratization agreements”—such as those establishing the Organization of American States, Southern African Development Community, and the Central European Free Trade Area—which typically have a limited regional membership comprised of States that are attempting to coordinate their transition away from authoritarian political regimes.<sup>153</sup> A final relevant category includes certain international standard-setting entities like the International Standards Organization (ISO), which develop technical codes or best practices protocols.<sup>154</sup>

The foregoing survey is not meant to be comprehensive but instead to establish two preliminary points. First, it is a mistake to dismiss EU treaties as unrepresentative outliers: club treaties are pervasive, span a variety of policy areas and institutional forms, and represent some of the most ambitious agreements in international law. Second, the colloquial use of “clubs” that sometimes appears in the literature can be misleading because a small number of members is neither a necessary nor sufficient condition for economic clubs. Rather than the sheer size of a group, the key analytical considerations are the nature of the cooperative undertaking at issue, as well as the presence of a mechanism that can exclude outsiders from its benefits.

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<sup>150</sup> See JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002).

<sup>151</sup> See Barry Eichengreen, *Regional Funds: Paper Tigers or Tigers with Teeth?*, in *REGIONAL AND GLOBAL LIQUIDITY ARRANGEMENTS* 39 (Volz & Caliri eds., 2010).

<sup>152</sup> International technology agreements of this kind can be seen as analogous to domestic regulatory clubs, such as those that oversee the provisions of utilities like electricity. See CORNES & SANDLER, *supra* note 9, at 412–13, 526–27 (discussing INTELSAT); see also Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336 (1991).

<sup>153</sup> See Christodoulos Kaoutzanis, Paul Poast, & Johannes Urpelainen, *Not letting ‘bad apples’ spoil the bunch: Democratization and strict international organization accession rules*, 11 *REV. INT’L ORGS.* 399 (2016).

<sup>154</sup> Standards can be made excludable through a certification process. Firms or government bodies that are able to opt-in to these standards gain access to a club good that takes the form of the “brand value” associated with verified compliance with a given standard. See Aseem Prakash & Matthew Potoski, *International Standards Organization as a Global Governor: A Club Theory Perspective* (Nov. 2007). Determining the optimal membership size is a crucial issue for international standards clubs: overly stringent criteria will result in an excessively small membership that does not leverage the scale economies of a common brand; overly lax standards will dilute the signal of quality that accompanies exclusivity. See Aseem Prakash & Matthew Potoski, *Collective Action through Voluntary Environmental Programs: A Club Theory Perspective*, 35 *POL’Y STUD. J.* 773, 778–79 (2007).

*ii. Public Goods Treaties and Commons Treaties*

The rational choice literature generally analyzes international agreements based on the assumption that they are designed to facilitate cooperation on international public goods.<sup>155</sup> That decision is significant because, as mentioned, the defining properties of club goods—excludability and rivalry in consumption—are reversed in the case of public goods.<sup>156</sup> The upshot is that in contrast to the limited membership constraint on clubs, the optimal provision of public goods requires universal participation.<sup>157</sup> This distinction is critical for purposes of institutional design. For club agreements, the central challenge is to limit participation by identifying the marginal member and excluding other potential entrants. For public goods agreements, it is a given that the membership should include all willing entrants, and the problem of treaty design is how to induce participation to the greatest extent possible (through *de jure* membership and *de facto* compliance).<sup>158</sup>

Environmental treaties often concern public goods, and present a clear illustration of the membership dynamic in these types of agreements. A classic case is international agreements relating to climate change: no State can be excluded from the benefits associated with curbing global warming, and when one State “consumes” those benefits it does not limit their availability to others.<sup>159</sup> Accordingly, for agreements that attempt to limit global carbon emissions, such as the Kyoto Protocol and the more recent Paris Agreement,<sup>160</sup> the negotiation process is all about maximizing participation.<sup>161</sup> Other examples of public goods treaties are international disarmament agreements like the Treaty on the Non-Proliferation of Nuclear Weapons (NPT Treaty) or Ottawa Land Mine Removal Treaty.<sup>162</sup> Because the benefits that flow from limiting the cross-border circulation

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<sup>155</sup> See, e.g., Posner & Sykes, *supra* note 1, at 14, 20–24; GUZMAN, *supra* note 1, at 66–68; Miles & Posner, *supra* note 135, at 3 (“We argue that [S]tates enter treaties in order to obtain public goods.”).

<sup>156</sup> See *infra* Section I (contrasting club goods with public goods and providing examples).

<sup>157</sup> Because every State can enjoy the benefits of a public good, any State that does not contribute to the production of that good is said to be “free riding” on the cost of making the good available. See generally OLSON, *supra* note 23.

<sup>158</sup> See SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195 (2003); Timothy L. Meyer, *Global Public Goods, Governance Risk, and International Energy*, 22 DUKE J. COMP. & INT’L L. 319, 323–24 (2012); Sandler & Tschirhart, *supra* note 9, at 340.

<sup>159</sup> Meyer, *supra* note 158, at 324.

<sup>160</sup> The Kyoto Protocol was signed in 1997. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22. The Paris Agreement was signed in 2016. UNFCCC, Rep. of the Conf. of the Parties on its Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, at 21 (Jan. 29, 2016).

<sup>161</sup> See Helfer, *Fully Committed?*, *supra* note 18, at 377; cf. William Nordhaus, *Climate Clubs: Overcoming Free-Riding in International Climate Policy*, 105 AM. ECON. REV. 1339 (2015) (proposing a scheme for converting the public goods posture of climate agreements to the club format of trade agreements).

<sup>162</sup> The Ottawa Treaty was signed by 133 countries in 1997. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 35597 (2002), 36 I.L.M. 1507 (1997). The NPT Treaty was signed in 1968, and

of nuclear weapons or hidden underground explosives are largely non-excludable and non-rivalrous, these agreements are designed with the aim of achieving the broadest possible membership.<sup>163</sup>

Agreements which relate to what are known as common pool goods (commons treaties) are distinguishable from public goods treaties in certain respects but raise similar design problems for purposes of treaty membership. Common pool goods, which frequently take the form of un-proprietary natural resources (such as open fields, lakes, or forests), share the non-excludable quality of public goods but are distinguishable because they exhibit rivalry in consumption. That combination leads to the well-known “tragedy of the commons,” where there is over-exploitation of resources and over-investment in technological races to capture the resources first.<sup>164</sup> In order to combat this dynamic, commons treaties must have a broad membership, or else a small minority of non-participating States will be able to take advantage of unlimited access to the common pool good at issue. The quintessential commons treaty is the United Nations Convention on the Law of the Sea (UNCLOS), which sets forth rules over how States may exploit natural resources present in the world’s oceans, and has a near-universal global membership totaling 167 States.<sup>165</sup>

One caveat to the presumption that maximal membership in public goods agreements is optimal is that the universe of relevant participants may not include every country in the world, depending on whether the public good at issue is global or local in scope.<sup>166</sup> Thus, while the Kyoto Protocol and other agreements on carbon emissions sought a worldwide membership, participation in the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) only needed to include the subset of countries that released a non-negligible amount of the CFC gases that are responsible for depletion of the ozone.<sup>167</sup> The same qualification applies to commons treaties as well. Because the UNCLOS applies across the worldwide body of oceans, full participation implies that essentially every State must become a member to that treaty. For treaties relating to regional common pool goods, such as the Caspian Sea Agreement,

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presently includes 190 State parties. U.N. General Assembly, A/RES/2373(xxii), Annex, U.N. Doc. A/7016/Add.1, Annex, June 10, 1968.

<sup>163</sup> See Daniel Verdier, *Multilateralism, Bilateralism, and Exclusion in the Nuclear Proliferation Regime*, 62 INT’L ORG. 439, 439, 461 (2008); Helfer, *supra* note 18, at 1619 (noting the uproar that took place in 1993 after North Korea disavowed its participation in the NPT treaty).

<sup>164</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

<sup>165</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 297. The main function of the UNCLOS is to divide up access to a number of common pool resources—such as seabed minerals, undersea oil and gas deposits, and fisheries—that would otherwise be subject to over-consumption. See Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT’L L. 569 (2010).

<sup>166</sup> See Michael Gilligan, *Is There a Broader-Deeper Tradeoff in International Multilateral Agreements?*, 58 INT’L ORG. 459 (2004).

<sup>167</sup> See *id.* at n.3; BARRETT, *supra* note 158, at 221–53.

“universal” membership means the four countries that are adjacent to the Caspian Sea.<sup>168</sup>

A more fundamental complication in the membership decision for public goods treaties is raised by the so-called “breadth-versus-depth tradeoff.” That phrase refers to an influential argument, which holds that treaty terms may be drafted so as to either accommodate more member States (increasing breadth), or to require more intensive forms of cooperation from its members (increasing depth), but not both.<sup>169</sup> These claims are relevant because they introduce the possibility that, in addition to club treaties, all other international agreements must also be designed to limit rather than to maximize their membership.<sup>170</sup> The significance of the breadth-versus-depth dilemma is often overstated, however. That is because, at a basic conceptual level, no such tradeoff applies in the case of public goods treaties: a limited core of deep cooperators is always made better off by the addition of any party willing to make an investment in the public good, no matter how minimal or “shallow” that investment may be.<sup>171</sup> As a consequence, the membership of a public goods treaty can be expanded at no cost to its depth, so long as the agreement is designed to allow for variation in the contribution levels of its members. Because there are a number of ways that agreements achieve that result,<sup>172</sup> it should not be surprising that empirical studies that investigate the breadth-versus-depth tradeoff have failed to confirm any correlation between the intensity of treaty obligations and size of membership.<sup>173</sup>

In short, public goods treaties may not actually reflect universal membership as a practical matter. And the literature contains voluminous technical debates—including those over the breadth-versus-depth tradeoff—about how and when such second-best conditions might apply.<sup>174</sup> But it is a mistake to interpret those

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<sup>168</sup> Helfer, *supra* note 18, at 1638 n.159 (noting the requirement that all four States enter into the Caspian Sea Agreement); Gilligan, *supra* note 166 (making the same point with regard to a treaty relating to clean up of the Black Sea).

<sup>169</sup> See George W. Downs, David M. Rocke & Peter N. Barsoom, *Managing the Evolution of Multilateralism*, 52 INT’L ORG. 419 (1998) (providing an influential version of the theory).

<sup>170</sup> See, e.g., *id.* (arguing that treaties are most effective when they are initially narrow and deep, and then broaden their membership thereafter).

<sup>171</sup> Gilligan, *supra* note 166, at 461. In one sense, non-excludability implies that there is *always* universal participation in public goods agreements, in the form of universal consumption of benefits. A pacifist who objects to her government’s decision to maintain a military still has no choice but to consume the public good of national security.

<sup>172</sup> This can be done formally, with terms that tier obligations to accommodate less cooperative parties—and such tiered treaty structures are commonplace. See generally Lavanya Rajamani, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* (2006). The same result can also be achieved informally, by simply enforcing the obligations of low-contribution treaty members less vigorously.

<sup>173</sup> See Thomas Bernauer, Anna Kalbhenn, Valley Koubi & Gabriele Ruoff, *Is There a ‘Depth versus Participation’ Dilemma in International Cooperation?*, 8 REV. INT’L ORG. 477 (2013).

<sup>174</sup> See, e.g., Guzman, *supra* note 13 (focusing on the relationship between enforcement costs and treaty membership); Anu Bradford, *How International Institutions Evolve*, 15 CHINA J. INT’L L. 47 (2015) (focusing on transaction costs of negotiating treaty terms); Miles & Posner, *supra* note 135 (also emphasizing transaction costs).



claims as collapsing the fundamental distinction between the optimal membership of treaties relating to public goods and club goods. That distinction derives from the excludability of the collective benefit being consumed, rather than enforcement problems or other limitations of the bargaining environment. In other words, for club agreements, the limited membership principle holds even under idealized conditions where it is assumed that full compliance is always forthcoming and treaty terms can be negotiated with zero transaction costs.

iii. *Human Rights Treaties*

The rational choice literature acknowledges one major exception to its default assumption that international agreements are meant to coordinate joint investments in public or common pool goods: human rights treaties.<sup>175</sup> That is because the legal obligations contained in human rights agreements do not call for international cooperation of any kind, and instead concern States' treatment of their own populations.<sup>176</sup> From a law-and-economics perspective, this inward-looking orientation makes human rights treaties somewhat mysterious and, as a result, there is no consensus theory of why those agreements are created or how they are intended to work.<sup>177</sup> Probably the most common hypothesis is that human rights treaties function as commitment devices, which governments use to signal that they will forego repressive domestic policies, especially in future periods when they may have an incentive to impose them.<sup>178</sup> But, regardless of the particular interpretation of human rights treaties that is put forward, it is rare for the rational choice scholarship to identify a mechanism that would make it attractive for States to limit the membership of those agreements, or seek to block potential entrants.<sup>179</sup>

The doctrinal literature, by contrast, is quite emphatic that global participation in human rights treaties is optimal.<sup>180</sup> This view is often associated with the legal principle of *jus cogens*, which embodies the notion that every State must comply with a body of "peremptory" or "non-derogable" norms, including certain human rights.<sup>181</sup> Adopting the concept of *jus cogens* means that human

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<sup>175</sup> Posner & Sykes, *supra* note 1, at 202 (noting that human rights treaties "do not seem to fit th[e] model" that normally explains international cooperation).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See James Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties*, 51 J. CONFLICT RES. 588 (2007).

<sup>179</sup> See Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RES. 925, 926–32 (2005) (surveying some leading theories); *but cf.* James Hollyer & Peter Rosendorff, *Why Do Authoritarian Regimes Sign the Convention Against Torture? Signaling, Domestic Politics, and Non-Compliance*, 6 QUART. J. POL. SCI. 275 (2011) (suggesting autocratic governments may use entry into human rights treaties as a tactic to signal an intention to *violate* the terms of those agreements).

<sup>180</sup> See Eric A. Posner, *THE PERILS OF GLOBAL LEGALISM*, 176–90 (2009).

<sup>181</sup> See Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July

rights treaties call for universal membership almost by definition, since they tend to articulate obligations that the entire global community is already bound to honor in the first place, essentially as a matter of natural law.<sup>182</sup>

The way that human rights treaties are negotiated closely conforms to the doctrinal perspective. Beginning with the 1948 United Nations Declaration on Human Rights, an historic landmark in the development of human rights law, almost all human rights agreements have been characterized by a vast, nearly global membership.<sup>183</sup> Moreover, one of the most salient aspects of human rights treaties is that they often involve shaming campaigns that aim to encourage full participation, and tend to erupt into controversy when even a small minority of States refuse to join.<sup>184</sup> State practice therefore suggests that a key problem of agreement design in the context of human rights is how to attain maximal participation, just as it is in the case of treaties on public goods.

While economic analyses of international law tend to conclude that human rights treaties are an idiosyncratic phenomenon of questionable practical importance, they represent a paradigmatic case for the doctrinal literature. For traditional international law scholars, the universalist impulse that animates treaty-making on human rights is the most prominent expression of a more general view, which holds that world affairs should be governed by legal principle—rather than power or force—to the greatest extent possible.<sup>185</sup> Accordingly, the emphasis that they place on obtaining maximal participation in human rights treaties is often applied to other international agreements in a mechanical fashion.

The foregoing observations introduce a considerable irony. When approaching questions of treaty design, rational choice and doctrinal scholars proceed by focusing on two starkly dissimilar kinds of international agreements: treaties on public goods and those on human rights. They then analyze the membership dynamic of those agreements with conceptual frameworks that could not be less alike: the logic of collective action on one hand, and a cosmopolitan moral philosophy on the other. Yet by sheer coincidence, those literatures manage to arrive in the same place. That is, scholars from both perspectives tend to assume

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8, 1996); Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

<sup>182</sup> See Posner & Sykes, *supra* note 1, at 198–99 (explaining how a natural law philosophy is an underlying justification for the advocacy of human rights).

<sup>183</sup> See, e.g., 1951 Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (146 State parties); 1979 Convention on the Elimination of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (189 State parties); 1984 United Nations Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85 (161 State parties).

<sup>184</sup> See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011). One controversy occurred in 1997, when North Korea's announced it would no longer abide by the International Covenant on Civil and Political Rights (ICCPR). ICCPR, Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>185</sup> See generally MARTTI KOSKENIEMMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006); see, e.g. Antonia Chayes, *How American Treaty Behavior Threatens National Security*, 33 INT'L SECURITY 45 (2008); Harold Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

that the main problem of treaty design is for States to find ways to induce maximal participation by all relevant parties.

Taking that premise as a starting point is problematic in the case of treaties that concern club goods, because the assumption is diametrically opposed to the limited participation constraint that defines those agreements and was found to be so decisive in the context of European disintegration. Because many treaties outside of the EU also establish economic clubs, existing theories of treaty design are likely to miss important aspects of how international agreements work. This is especially so with respect to legal elements that are used to manage the numerosity and heterogeneity of treaty members. The particular issues of treaty design that have been overlooked are discussed in more detail in the remaining two parts of this Section, which follow directly below.

### B. Designing Treaty Entry

When examining the design features that are relevant to treaty membership, it is helpful to distinguish legal terms that govern treaty participation *ex ante* from those that apply *ex post*. In the former category are “entry provisions,” which regulate the membership decision on the front-end by setting rules for joining a treaty. The latter group consists of “exit provisions,” which influence the back-end of the membership decision by announcing procedures for the removal of existing members. Both kinds of provisions raise questions of agreement design, because States can influence the structure of treaty membership by drafting them with relatively liberal or restrictive terms.

This Part focuses on an important pair of entry provisions: accession conditions and reservations. As will be shown, both terms operate in counterintuitive ways when they are used in club agreements. On one hand, the optimal design of accession conditions in club treaties is more stringent than is conventionally understood. On the other hand, the optimal scope of reservations is broader than standard theories would predict. Taken together, these findings carry some surprising implications for one of the most foundational debates in international law, which turns on competing views over whether treaties function to either screen or constrain the States that join them, and what that means for the efficacy of international agreements in general.

#### i. Accession Conditions

Accession conditions govern the entry decision of potential member States by specifying requirements a State must meet before it will be accepted as a party to a treaty by existing members.<sup>186</sup> There is no background rule of international law that requires a treaty to include accession conditions—an agreement may expressly allow for the unconditional entry of any State that desires to join.<sup>187</sup>

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<sup>186</sup> See Vienna Convention on the Laws of Treaties, art. 15, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCOLT].

<sup>187</sup> See *id.*

When treaties incorporate accession conditions, there are two basic ways that States can design those provisions. With voting rules, states are able to introduce a procedural hurdle to membership by conditioning accession on the approval of existing members.<sup>188</sup> Accession conditions may also be drafted to include substantive requirements that a State must meet, such as being located in a particular geographic region, or obtaining a certain level of political or economic development.

It is revealing that the international law literature contains no general account of how accession conditions function as an element of treaty design.<sup>189</sup> Moreover, when those provisions *do* receive notice, the discussion typically assumes that they set forth toothless, ministerial requirements that have a limited effect on how treaties function as a whole. The standard view of accession conditions has been well-summarized as follows:

To become a member in global IOs [international organizations], it is often sufficient for countries to express an interest in membership, show some vaguely defined good-will, commit to a few, often non-binding, policy measures, have their request superficially discussed by existing members, and then their accession request is invariably accepted. In other words, global IOs are typically built on the premise that States have a 'presumptive right of membership save in the case of intractable and difficult political circumstances.'<sup>190</sup>

The absence of any comprehensive analysis of accession conditions is not an accident. Instead, it is a byproduct of the controlling assumptions in theories of treaty design, which extrapolate from agreements where the goal of maximal participation means that barriers to entry do not serve any useful purpose. In the case of public goods treaties, it makes no sense for existing parties to restrict the accession of additional States. Because non-parties cannot be excluded from the benefits that those treaties produce, the only effect that accession conditions have is to deter additional investment in the public good. The idea of including accession conditions is no less awkward in the context of human rights treaties. The terms of those agreements are thought to embody legal obligations that are *inescapable*, and it is bizarre to think of something like the prohibition on torture as a privilege of treaty membership that may be extended to some States but not others. The common theoretical intuition that accession conditions are rare and unimportant is further reinforced by a review of the major human rights treaties, as well as prominent agreements on global public goods, such as the Kyoto Protocol. A typical procedure in both instances is for treaties to be deposited with

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<sup>188</sup> The stringency of that hurdle can be further calibrated to various degrees, depending on the applicable voting threshold: for example, a majority rule, super-majority rule, or requiring unanimous consent. Cf. Eric A. Posner & Alan O. Sykes, *Voting Rules in International Organizations*, 15 CHI. J. INT'L L. 195 (2014).

<sup>189</sup> A Westlaw search of international law journals and general law reviews returns zero articles that contain the word "accession" in their title.

<sup>190</sup> Eric Neumayer, *Strategic Delaying and Concessions Extraction in Accession Negotiations to The World Trade Organization*, 12 WORLD TRADE REV. 669, 670 (2013).

the Secretary General of the United Nations and then held open on an unconditional basis to any State that is willing to join.<sup>191</sup>

Once club agreements are taken into consideration, however, it becomes clear that accession conditions can play a central role in treaty design. With economic clubs, those provisions are an essential tool for policing entry in order to limit the size and heterogeneity of treaty members. If a club treaty is designed with accession conditions that are insufficiently stringent, its membership may expand to the point that existing parties no longer benefit from participation in the agreement.

This Article's case study of European disintegration illustrates the importance of accession provisions for club treaties. The applicable treaty agreements for all three European clubs (the Eurozone, the Schengen Area, and the EU as a whole) were designed with voting rules that condition entry on the unanimous approval of existing members, which is the most restrictive procedural requirement possible.<sup>192</sup> The constitutive legal agreements for each club also demand that new members satisfy elaborate substantive policy conditions, and impose an onerous multi-year review process for verifying when those requirements have been met.<sup>193</sup> The history of European integration also suggests that the details of these provisions matter. During the bargaining processes that accompanied the development of all three clubs, the specific terms of accession procedures were a focal point of the EU members' negotiations.<sup>194</sup>

Trade agreements provide another example. Although accession to the GATT and WTO is not widely studied outside of the specialized literature on international trade, scholars in that area often note the highly burdensome accession conditions that those organizations have developed and consider them to be a key aspect of how the multilateral trade regime operates.<sup>195</sup> Accession conditions in both the GATT and WTO treaties include what are effectively unanimous voting rules. More subtly, those agreements also contain provisions that authorize each existing member to conduct a series of meetings with potential newcomers, which provide a mechanism for members to extract particularized trade concessions as a condition of approving a non-party's entrance.<sup>196</sup> The result tends to be a protracted accession process. For example, it took over a decade of bargaining for both China and Russia to be admitted to the WTO.<sup>197</sup> Nor are

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<sup>191</sup> United Nations, Office of Legal Affairs, Treaty Handbook, Section 2.3 (2006); Miles & Posner, *supra* note 135, at 2-3.

<sup>192</sup> See *supra* Sections II.A.i (the Eurozone), II.B.i (the Schengen Area), & II.C (the EU).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See Krzysztof Pelc, *Why Do Some Countries Get Better WTO Accession Terms Than Others?*, INT'L ORG. (2011); Todd L. Allee & Jamie E. Scalera, *The Divergent Effects of Joining International Organizations: Trade Gains and the Rigors of WTO Accession*, 66 INT'L ORG. 243 (2012); Christina L. Davis & Meredith Wilf, *Joining the Club: Accession to the GATT/WTO*, 79 J. POL. 964 (2017).

<sup>196</sup> See Lamp, *supra* note 38, at 184-85.

<sup>197</sup> China acceded to the WTO in 2001, after fifteen years of negotiations. Russia became the WTO's 156th member on August 22, 2012, after eighteen years of negotiating.

smaller States immune from similar treatment, as highlighted by a vaguely abusive round of negotiations that recently took place between WTO members and the island nation of Vanuatu.<sup>198</sup>

Heavy reliance on accession conditions is not due to anything unique about European politics or large trade agreements. Instead, it is a predictable institutional response to the excludability and rivalry in consumption that characterize club goods, and the same pattern holds across clubs treaties in most other areas; exacting accession procedures can be found in the constituent treaties for NATO, the IMF, and regional democratization agreements.<sup>199</sup> Thus, contrary to the conventional wisdom, accession conditions frequently appear in international agreements, are often drafted to include relatively sophisticated terms that introduce substantial barriers to entry, and in many cases are a key factor that determines whether a treaty will function effectively or not. The fact that the rational choice literature takes minimal notice of accession conditions therefore represents a significant missing piece in the overall understanding of treaty design.

The most basic takeaway from the preceding analysis is that accession conditions should receive greater attention from international law scholars. But a more subtle lesson follows as well, which turns on the distinction between the way that accession conditions are designed as a formal legal matter and how they actually operate in practice. An examination of European disintegration reveals that a treaty regime that includes rigorous accession conditions on paper may still be destabilized when those provisions are loosely applied.<sup>200</sup> The NATO charter provides a counterexample to the EU scenario, where strict accession conditions allowed the expansion of NATO's membership to be managed in a more discriminating and sustainable manner.<sup>201</sup> The disparity in these two outcomes points to an underappreciated limitation of empirical research on treaty design. The data underlying those studies is usually produced from a text-based analysis of a large sample of treaty documents. As a review of accession conditions indicates, the fact that a certain subset of treaties contains facially similar terms may not have any meaningful relationship to the way that those provisions influence the behavior of treaty members.

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<sup>198</sup> See Roman Grynberg & Roy Mickey Joy, *The Accession of Vanuatu to the WTO: Lessons for the Multilateral Trading System*, 34 J. WORLD TRADE 159 (2000).

<sup>199</sup> On accession to NATO, see Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001). On the IMF, see Beth Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 4 AM. POL. SCI. REV. 819 (2000); Von Stein, *supra* note 15. On democratization treaties, see Christina J. Schneider & Johannes Urpelainen, *Accession Rules for International Institutions: A Legitimacy-Efficacy Trade-Off?* 56 J. CONFLICT RES. 290 (2012).

<sup>200</sup> Frank Schimmelfennig, *EU Political Accession Conditionality After the 2004 Enlargement: Consistency and Effectiveness*, 15 J. EUR. PUB. POL'Y 918 (2008).

<sup>201</sup> See Andrew Kydd, *Trust Building, Trust Breaking: The Dilemma of NATO Enlargement*, 55 INT'L ORG. 801 (2001).

*ii. Reservations*

Reservation provisions allow States to agree to be bound by some treaty obligations but not others.<sup>202</sup> The default rule of international law is that reservations are permissible so long as they do not undermine the “object and purpose” of a treaty.<sup>203</sup> A further background norm is that reservations will be interpreted to operate in reciprocal fashion; when State A announces that it will not honor treaty term T, State B is thereby relieved of its commitment to comply with term T in its dealings with State A.<sup>204</sup> Subject to these limitations, reservations introduce another design variable that is relevant to the membership decision, because they allow States to fine tune treaty participation by converting it from a yes-or-no question into a matter of degree.<sup>205</sup>

Compared to the case of accession conditions, international law scholarship contains a lively debate over reservations.<sup>206</sup> In the doctrinal literature, reservations are generally viewed as suspect.<sup>207</sup> Although doctrinal international law scholars grant that reservations provide a source of flexibility that is desirable to some degree, the main concern is that they enable States to shirk international legal obligations by adopting a strategy of opportunistic “over-reserving,” and thereby undermine the goal of universal treaty participation.<sup>208</sup> As might be expected, these claims are most often applied in the context of human rights agreements, where doctrinal scholars have emphasized the need for treaties to explicitly prohibit reservations or otherwise include harsh severability terms.<sup>209</sup>

Research on the economic analysis of treaty design rejects the traditional skepticism that international lawyers have held towards reservations. This is primarily for two reasons. First, reservations can serve a useful information-producing function. When a reserving State announces that it will only join a treaty subject to certain limiting terms, non-reserving treaty members receive a potentially valuable signal about the reserving State’s perceived costs and benefits of treaty compliance.<sup>210</sup> Second, while full participation in a treaty may be ideal,

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<sup>202</sup> See VCOLT, *supra* note 186, art. 2(1)(d).

<sup>203</sup> See *id.*, art. 19(3).

<sup>204</sup> See *id.*, art. 21.

<sup>205</sup> In addition to the decision of whether to permit reservations at all, there are a number of ways States can customize those provisions on a more granular level. One method of making a treaty’s reservation rules less restrictive is to include a provision that expressly defines the agreement’s “object and purpose” in narrow terms. See Swaine, *supra* note 18, at 324–25. Another design variable involves the particular “severability” procedure that applies in the event that a treaty member attempts to assert a reservation that is overly broad or otherwise objectionable to other non-reserving parties. See Goodman, *supra* note 17; Swaine, *supra* note 17, at 322–23.

<sup>206</sup> See generally *supra* note 17.

<sup>207</sup> See Helfer, *supra* note 18, at 368 (noting the traditional opposition to reservations); Swaine, *supra* note 17, at 310 (same); see, e.g., Goodman, *supra* note 17; Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341 (1995).

<sup>208</sup> See Goodman, *supra* note 17, at 533.

<sup>209</sup> *Id.*

<sup>210</sup> See Swaine, *supra* note 17, at 333–39.

the availability of reservations can induce some States to partially enter into agreements that they would otherwise refuse to join altogether.<sup>211</sup> Under this something-is-better-than-nothing logic, reservations provide a way for States to get closer to the goal of maximal treaty membership by circumventing the breadth-versus-depth tradeoff with variable commitment levels. Lastly, while rational choice scholars concede that opportunistic reservations are a possibility, they argue that the ability to use reservations as a free-riding strategy is substantially reduced by the reciprocity principle as well as the object-and-purpose limitation.<sup>212</sup>

Both of these competing views run into a conspicuous empirical problem. The issue is that quantitative studies on treaty design have repeatedly found that States almost never enter reservations except in connection with human rights treaties.<sup>213</sup> Even more strangely, almost all reservations from human rights treaties are made by advanced liberal democracies, rather than the autocracies that tend to violate human rights.<sup>214</sup> This is awkward for doctrinal claims, because it reveals that the alleged downside of reservations—that they allow States to evade human rights commitments—does not materialize; governments that are scrupulous about human rights rely on reservations, while those that flout human rights do not. It also undermines the rational choice position, which is (implicitly) premised on the value of reservations for overcoming information and incentive problems in connection with public goods treaties, where those provisions appear never to be used.<sup>215</sup>

A more coherent picture of how treaty reservations work emerges once two points are appreciated. First, the dramatic skew towards human rights treaties found in quantitative studies is misleading, because those studies only code for provisions that meet the technical definition of “reservations” under the law of treaties, along with a handful of close variants, such as “declarations” and “understandings.”<sup>216</sup> However, many international agreements that do not meet those formal requirements nevertheless perform an equivalent function by allowing member States to selectively opt-out of some treaty requirements.<sup>217</sup> The distribution of reservations is less lopsided if such “informal” reservations are taken into account. Second, theoretical arguments often do not draw sharp

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<sup>211</sup> *Id.* at 311.

<sup>212</sup> See, e.g., Posner & Sykes, *Efficient Breach*, *supra* note 19, at 285 (“The reciprocity principle following the entry of a reservation further ensures that in most cases the reserve states cannot free ride.”).

<sup>213</sup> See KOREMENOS, *supra* note 2, at 163.

<sup>214</sup> Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397, 401 (2007).

<sup>215</sup> Statistical studies of reservations find that those provisions are invoked in only 98 percent of environmental agreements, which is one of the lowest rates across all treaty genres. See KOREMENOS, *supra* note 2, at 163. A well-known feature of the UNCLoS treaty on the law of the sea is that it was negotiated as a “package deal,” meaning that the parties expressly prohibited reservations of any kind. See Swaine, *supra* note 17, at 332.

<sup>216</sup> See, e.g., Neumayer, *supra* note 214, 405–06; KOREMENOS, *supra* note 2.

<sup>217</sup> See Helfer, *supra* note 18, at 377 (making this point).



distinctions across genres of agreements. This overlooks the fact that reservations serve fundamentally different functions, depending on whether the treaty at issue deals with human rights, public goods, or club goods.<sup>218</sup>

For example, the otherwise strange pattern of reserving that characterizes human rights treaties becomes straightforward once it is understood that the reciprocity principle is meaningless for those agreements, while the object-and-purpose rule does all the work.<sup>219</sup> By allowing non-participation at the margin, the object-and-purpose limitation enables countries in the United States and Europe to signal subtle philosophical disagreements over the nature of human rights when they join a treaty.<sup>220</sup> But by prohibiting reservations that go to the heart of an agreement, the rule also allows advanced democracies to express a mutual condemnation of the human rights abuses committed by illiberal States. Repressive autocracies have no use for reservations, because they intend to impose precisely those policies that violate the object-and-purpose of human rights agreements.<sup>221</sup>

The use of reservations in public goods treaties turns on an unrelated set of considerations. There, the driving factor is the non-excludability of public and common pool goods, which implies that, contrary to the conventional rational choice analysis, reservations almost always allow States to free ride. A consequence is that States rely on informal reserving mechanisms for public goods treaties, because neither the reciprocity principle nor the object-and-purpose rule that accompany formal reservations are desirable in those agreements. Enforcing the object-and-purpose rule would be self-defeating, since the entire point of reservations is to provide a second-best solution to expand treaty membership, by facilitating a limited amount of free-riding on investments that are at the core of the treaty's mission.<sup>222</sup> If applied, the reciprocity principle would also cause cooperation on public goods treaties to unravel due to the non-excludability feature.<sup>223</sup>

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<sup>218</sup> See, e.g., Swaine, *supra* note 17, at 312.

<sup>219</sup> The problem with reciprocal abdications of human rights commitments is well established. See Franco Parisi & Catherine Sevchenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1, 20–25 (2003) (explaining the “irrelevance of reciprocity in human rights agreements”).

<sup>220</sup> See Neumayer, *supra* note 214, 400–01.

<sup>221</sup> See *id.* at 401.

<sup>222</sup> For example, *de facto* reservations to the Montreal Protocol on Substances that Deplete the Ozone Layer take the form of “differential treatment” provisions, which authorize some members to make relatively smaller efforts at reducing their emission of the CFC gases that are responsible for depleting the ozone layer. See *supra* note 172, and accompanying text.

<sup>223</sup> Consider a hypothetical commons treaty that places limits on the hunting of fur seals. There is no way for non-reserving State A to disregard its treaty obligation with respect to reserving State B in a purely bilateral, reciprocal manner. When State A resumes hunting activities in response to State B's reservation, there are fewer seals in the world's oceans and every treaty member is equally disadvantaged. See Barrett, *supra* note 158, at 50 (labelling this the problem of “multilateral externalities”).

A distinct set of issues is raised when a treaty provides multiple benefits to member States, at least one of which takes the form of a club good. For international agreements that establish multi-good clubs, reservations also tend to be informal, but for reasons that are much different than in the case of public goods treaties. The critical factor once again is excludability. Because a reserving State is opting-out of both investment in and consumption of the club good, reservations do not give rise to free-riding, even when the treaty obligations in question are part of the object-and-purpose of an agreement. Excludability also means that reservations are automatically reciprocal as a functional matter, whether or not the reciprocity principle legally applies. An important implication of these features is that reservations to club treaties may be a first-best arrangement for facilitating international cooperation, rather than a pragmatic compromise aimed at expanding treaty membership.<sup>224</sup>

The case study of European disintegration highlights the under-appreciated aspects of treaty reservations that have been outlined above. First, it shows the artificiality of the formal definition of reservations that is used in empirical studies on treaty design. EU treaties are riddled with “opt-out” protocols and analogous devices for selective participation, despite lacking formal reservation provisions. Second, it demonstrates how the built-in reciprocity of reservations in club treaties precludes free-riding. By opting out of the euro, the Czech Republic does not enjoy the benefits of a common currency which accrue to Eurozone members, nor is it free-riding on other EU members’ investments in the monetary infrastructure administered by the ECB.<sup>225</sup> Third, the prescription for a multi-speed EU that eschews ever-closer union can be understood as an application of the proposition that the broad availability of reservations can be a first-best arrangement for international cooperation when club goods are at issue.<sup>226</sup>

The same dynamics can be seen at work in other treaties that oversee multi-good clubs. The multilateral trading system is one example. While it is often stated that the GATT prohibits reservations, that is only true in the technical legal sense. As mentioned, the GATT traditionally included procedures that allowed sub-groups of members to agree to excludable trade concessions; to the extent those carve-outs represented discrete bargains over market access, the GATT functioned as a multi-club treaty with liberal reservation rules.<sup>227</sup> Another example is the IMF Articles of Agreement. In addition to its core lending function, the IMF houses an array of other projects relating to global financial stability. As a study by Todd Sandler and Joseph Joyce has shown, the sustainability of the

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<sup>224</sup> In technical terms, this results from the presence of heterogeneous preferences plus rivalry in consumption. The combination means there can be circumstances where participation in certain club goods will lead to Pareto-inferior outcomes that are welfare reducing for both reserving and non-reserving States.

<sup>225</sup> Likewise, by opting out of the Schengen Area, Ireland is not free-riding on other EU members’ investments in a common passport system or external border infrastructure.

<sup>226</sup> See *supra* Section III.D.

<sup>227</sup> Posner & Sykes, *Efficient Breach*, *supra* note 19, at 285 n.156 (on the GATT’s system of *de facto* reservations); Lamp, *supra* note 38 (same).

IMF depends on whether its membership structure includes reservation-like policies that allow for selective access to services that represent club goods, while also maintaining full participation in the undertakings that provide public goods.<sup>228</sup>

As with the discussion of accession conditions, the preceding analysis of reservations has uncovered both empirical and theoretical gaps in the existing account of treaty design. The theoretical contribution is to introduce an overlooked conceptual distinction in the way that reservations function across different classes of international agreements. Reservation provisions can be particularly broad in the context of treaty obligations relating to club goods, where the drawbacks that accompany reservations in public goods treaties do not apply. The empirical point is that the use of reservations is more widespread than is generally recognized, because many provisions that do not technically qualify as reservations perform an equivalent function for purposes of treaty participation. This once again points to the limits of otherwise sophisticated quantitative studies in the rational choice literature, which must rely on a relatively formalistic analysis of treaty texts when making inferences about agreement design.

### *iii. Treaties as Screens versus Constraints*

The preceding analysis of entry provisions has delved into somewhat technical aspects of treaty structure but, when considered as a whole, it is also relevant to what is arguably the most fundamental debate in all of international law. That debate turns on competing interpretations of a famous remark made by Louis Henkin, who claimed that “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>229</sup> Henkin’s observation was intended as a rejoinder to international relations realists who doubted the possibility that international law could ever supersede raw power politics as an organizing principle in world affairs.<sup>230</sup> In Henkin’s view, the tendency for State behavior to conform to applicable treaty requirements or customary norms was persuasive evidence for the contrary view, and proved that international law “matters” because it effectively demands compliance from States. A hallmark of doctrinal scholarship is to accept this assessment at face value.<sup>231</sup>

One of the more influential contributions of the economic analysis of international law is its challenge to the traditional version of this claim. The key move by rational choice scholars was to point out that, regardless of whether Henkin’s observation is literally correct, it is irrelevant to the underlying question

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<sup>228</sup> See generally Joyce & Sandler, *supra* note 148.

<sup>229</sup> Henkin, *supra* note 16.

<sup>230</sup> *Id.*

<sup>231</sup> See, e.g., Oran Young COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS, 140 (1979); Abraham Chayes & Antonia Chayes, *On Compliance*, 47 INT’L ORG. 125 (1993).

of interest.<sup>232</sup> That is because the Henkin assertion does not preclude the possibility that States never violate the rules of international law for the simple reason that those rules only prohibit conduct that States never had any interest or intention to pursue in the first place.<sup>233</sup>

The rational critique was largely successful, and has led the oldest question in international law to be reframed as follows. International law matters to the extent that it operates as a “constraint” that causes member States to adopt a course of action that they would not otherwise follow in the absence of their treaty obligations. By contrast, treaties are inconsequential for purposes of international cooperation when they act as “screens,” which merely attract a set of States that were already going to observe the relevant treaty requirements no matter what.<sup>234</sup> Widespread acceptance of these theoretical points has turned debate over whether international law “matters” into an empirical question, and sparked a quantitative arms race in which researchers attempt to show that the “real,” more sophisticated form of compliance (reflecting treaties-as-constraints) is what often happens.<sup>235</sup>

From a perspective that is concerned with the design of human rights or public goods treaties, the screen-versus-constraint framework makes perfect sense. In both cases, the goal of achieving universal participation means that entry provisions should be structured so as to minimize a treaty’s screening function as much as possible. The design problem is to draw into a treaty’s membership those States that are otherwise reluctant to invest in global public goods or refrain from violating their nationals’ human rights. The other major design problem is to develop enforcement mechanisms that ensure that States actually comply with a treaty’s requirements once they become members. That is, to maximize the treaty’s ability to constrain participants. If States agree to honor human rights norms or contribute to public goods arrangements, but then disregard their commitment to do so, not much has been accomplished.

However, the standard screen-versus-constraint logic is turned upside down when applied to club treaties. Due to the limited membership principle that governs economic clubs, a club agreement cannot be effective at fostering international cooperation *unless* it successfully functions as a screen. The design problem is to draft entry provisions that enable treaty membership to expand to its optimal size, and then exclude all additional entrants. This is easy to see with accession conditions, which work as screens that allow current members to filter the population of potential new entrants into admissible and inadmissible types. The function performed by reservations is slightly more subtle, but amounts to a mirror-image version of the same thing. That is, reservations place discretion in

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<sup>232</sup> See Von Stein, *supra* note 15.

<sup>233</sup> Downs, Rocke, & Barsoom, *supra* note 15, at 397-419.

<sup>234</sup> *Id.*

<sup>235</sup> See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); Adam S. Chilton, *Experimentally Testing the Effectiveness of Human Rights Treaties*, 18 CHI. J. INT’L L. 164 (2017); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).

the hands of the non-member States with heterogeneous preferences to self-screen from certain treaty provisions, by avoiding participation in a sub-set of club goods that do not provide any benefits. Moreover, the need for maintaining a homogeneous membership in club treaties flips the conventional screening logic in an especially extreme way. In contrast to human rights or public goods treaties—where one goal is to include and then constrain the most recalcitrant and non-cooperative States—the design imperative for club treaties is to, first and foremost, establish screens that exclude heterogeneous outlier States from participation.

One value of the case study of European disintegration is that it makes these otherwise counter-intuitive dynamics of club treaties self-evident. Participation in the Eurozone has destabilized the financial systems of its members because the treaties underlying the EMU did not contain entry provisions that were effective at screening out States like Portugal or Greece.<sup>236</sup> Likewise, the benefits that the Schengen Area provides to its members have evaporated due to a treaty structure that imposed much less stringent screens than did previously successful European border security clubs, such as the Nordic Passport Union.<sup>237</sup> Lastly, Brexit can be attributed to a combination of weakly screening accession and reservation provisions, which simultaneously allowed the EU's membership to expand at an aggressive pace while limiting the ability for the UK to opt-out of many EU club goods.<sup>238</sup>

Other club agreements reflect a similar inversion of the standard screen-versus-constraint dynamic. The success of a diverse set of treaties—including security alliances (such as NATO), preferential trading agreements (such as ASEAN) and democratization treaties (like the Organization of American States)—can in part be explained by the fact they include entry provisions which have been designed to limit membership by acting as screens. At the same time, the past two decades of paralysis in the multilateral trading regime is largely due to the “single undertaking” format introduced by the WTO, which dismantled informal reservation procedures that served as screening devices in the old GATT system.<sup>239</sup> The flight to “mini-lateral” treaty arrangements that has also occurred in the area of international finance is symptomatic of the limited availability of internal screens at the IMF as well.<sup>240</sup>

To sum up, the rational choice literature has adopted an overly narrow view of how international agreements work, by shifting the debate over compliance with international law to a question of whether treaties screen or constrain. For a prominent genre of treaties—those that deal with club goods—a major design

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<sup>236</sup> See *supra* Section II.A.i.

<sup>237</sup> See *supra* Section II.B.i.

<sup>238</sup> See *supra* Sections II.C & II.D.

<sup>239</sup> See Lamp, *supra* note 38.

<sup>240</sup> On the IMF, see *supra* notes 139 & 140, and accompanying text; see generally CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT (2014).

problem is to structure entry provisions such that certain States are excluded from participation. If the screening function that those provisions perform is not sufficiently restrictive, international cooperation may stall or unravel altogether. This stands in stark contrast to the conventional analysis, where a finding that treaties operate as screens is considered synonymous with the idea that international law “does not matter.”

#### A. *Designing Treaty Exit*

In addition to entry provisions, treaty membership is also determined on the “back-end,” by design features that manage participation in international agreements after States have already joined. There are primarily two kinds of legal elements that regulate treaty exit: provisions that set the terms for a State’s voluntary withdrawal and those that relate to a State’s involuntary expulsion from an agreement’s membership. Traditional international lawyers take a dim view of treaty exit, as well as legal rules that make it easier to achieve.<sup>241</sup> However, the rational choice literature has made an effort to push back on that position by arguing that States can (and do) promote greater levels of international legal cooperation by designing treaties so that members are subject to more “flexible” legal obligations, including those that allow more latitude for exit.<sup>242</sup>

This Part walks through the mechanics of withdrawal provisions, and explains why the standard theoretical claims that point in favor of flexible treaty exit should apply with special force in the case of club treaties. It then turns to treaty exit through expulsion, which has largely been ignored by international law scholarship, and shows that the same conclusions apply there as well. In each instance, an empirical puzzle emerges, because club treaties (both inside and outside the EU) often include withdrawal and expulsion provisions that are deliberately designed to *raise* the cost of treaty exit. The discussion closes by suggesting that this disconnect is due to the fact that rational choice scholars have drawn from the economic theory of contracts in a selective and overly simplistic way.

##### i. *Withdrawal Provisions*

Withdrawal provisions, sometimes referred to as “denunciation provisions,” define when it is legal for a State to unilaterally terminate its membership in a treaty. The default norm of international law is that an agreement’s silence regarding withdrawal gives rise to a presumption that it is prohibited.<sup>243</sup> That presumption is rebuttable, however, if the treaty’s subject matter or the

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<sup>241</sup> The fundamental anarchy of the international system means that States are ultimately free to abandon their treaty commitments at any time. However, international agreements can nonetheless be designed in ways that raise or lower the costs of that decision, by triggering a legal sanction for some forms of exit but not others. See Helfer, *supra* note 18 (cataloguing the advantages States enjoy from legal treaty exit compared to illegal exit).

<sup>242</sup> See *supra* note 20 (citing to the flexibility research).

<sup>243</sup> VCOLT, *supra* note 186, art. 56(2).

circumstances that surrounded the drafting process indicate that the parties intended for withdrawal to be available.<sup>244</sup> States can also opt-out of the default prohibition by agreeing to terms that affirmatively authorize withdrawal. And in practice, treaties frequently include express withdrawal provisions. Although treaties can permit States to withdraw on an unconditional basis, withdrawal provisions often restrict the ease of exit with a variety of mechanisms, including notice requirements, waiting periods, and terms that make the availability of withdrawal subject to the occurrence of certain events.<sup>245</sup> Another way that treaties can be designed to raise the cost of exit is to provide that members can only withdraw with respect to the entirety of the agreement, rather than particular sub-parts.<sup>246</sup>

As mentioned, doctrinal scholars usually take a negative view of design features that facilitate treaty withdrawal.<sup>247</sup> That orientation is consistent with a classic background norm of international law, *pacta sunt servanda*, which, roughly stated, stands for the proposition that agreements are meant to be honored.<sup>248</sup> The fact that doctrinal scholars treat human rights treaties as the archetypal international agreement also explains their aversion to withdrawal. In keeping with the natural law principle of *jus cogens*, States' withdrawal from human rights obligations (such as prohibitions on torture and the like) would appear to be justified under rare or nonexistent circumstances.

Law-and-economics scholars have challenged this conventional wisdom with a number of counter-arguments for why treaties should be designed so that withdrawal is readily available to members. One is that, from an *ex ante* perspective, treaties that lower the cost of exit provide an inducement for States to join those agreements in the first place.<sup>249</sup> This is essentially the same reasoning that is applied to reservations, and interprets liberal withdrawal provisions as another workaround of the breadth-versus-depth tradeoff that can further the goal of maximizing the membership of public goods treaties.<sup>250</sup>

A separate line of argument in literature builds off of the economic theory of incomplete contracts. Contracts are considered "incomplete" when parties lack the foresight (or time, or other resources) to specify terms that identify an efficient set of performance obligations for every possible state of the world, and therefore leave some contingencies open for renegotiation.<sup>251</sup> In applying the contract

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<sup>244</sup> *Id.* Where that is the case, any member can exit after announcing an intent to withdraw and completing a year-long "notice period." *Id.*

<sup>245</sup> Helfer, *supra* note 18; KOREMENOS, *supra* note 2.

<sup>246</sup> See Posner & Sykes, *supra* note 19.

<sup>247</sup> See Helfer, *supra* note 18.

<sup>248</sup> VCOLT, *supra* note 186, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

<sup>249</sup> See Koremenos & Nau, *supra* note 19, at 83.

<sup>250</sup> See Helfer, *supra* note 18, at 1638; Gilligan & Johns, *supra* note 4.

<sup>251</sup> A "complete contingent contract," by contrast, is said to be renegotiation-proof because its terms are both *ex ante* and *ex post* efficient for both parties with respect to all potential eventualities. See generally Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 *ECONOMETRICA*

analogy to treaties, rational choice scholars emphasize that the complexity and pervasive uncertainty of global affairs makes it unlikely that States will be able to draft “complete” international agreements, meaning that treaties will tend to leave many issues open for renegotiation.<sup>252</sup> Under this analysis, withdrawal provisions should be designed to include liberal terms that lower the cost of treaty exit because the availability of exit serves as a valuable form of co-insurance for treaty members.<sup>253</sup>

Rational choice scholars often state the theoretical claim in favor of low exit costs at a general level, but the same arguments also make sense in the specific context of club treaties. Laurence Helfer, who wrote what is perhaps the leading study on treaty exit (as well as one of the few handful of pages in the treaty design literature that directly discusses the implications of club theory), provides some confirmation on this point. Helfer concludes that discussion as follows:

This [rational choice] analysis yields important prescriptive insight for treaty makers: when negotiating agreements that regulate private or club goods, drafters can include capacious exit clauses to encourage broad ratification or enhance depth.<sup>254</sup>

Helfer’s primary argument relies on the excludability of club goods, which means that, unlike with public goods treaties, withdrawal from club agreements cannot be used as an opportunistic strategy for free riding by exiting members.<sup>255</sup> In addition, the rivalry in consumption that applies to club goods provides a further reason why broad withdrawal provisions may be particularly useful in club treaties, because it raises the possibility that remaining members may affirmatively benefit from the exit of certain States. These considerations imply that club agreements should represent an especially strong case for the rational choice claim that flexible treaty terms can promote international cooperation by reducing exit costs.

However, the theoretical intuition that club treaties are well suited for capacious exit clauses does not receive empirical support from a review of actual international agreements dealing with club goods. The case study of European disintegration provides a notable counter-example here, since exit from all three of the EU clubs has been complicated by treaties which include conspicuously narrow withdrawal provisions.<sup>256</sup> Neither does a consistent pattern of broad

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755 (1988).

<sup>252</sup> See Koremenos & Nau, *supra* note 19, at 90–91; Helfer, *supra* note 18; Koremenos, *supra* note 18.

<sup>253</sup> Cf. Posner & Sykes, *supra* note 19 (approaching the same general argument from a “theory of efficient breach” perspective).

<sup>254</sup> Helfer, *supra* note 18, at 1637.

<sup>255</sup> *Id.* at 1637–68.

<sup>256</sup> In the case of the Eurozone and Schengen Area, for example, the absence of any applicable treaty provision authorizing withdrawal is usually interpreted to mean that a member’s unilateral exit is legally prohibited. See *supra* Sections II.A.iii & II.B.iii. The result is that withdrawal is restricted to the multi-good level of the EU as a whole. Even then, the EU itself did legally permit withdrawal until



withdrawal terms surface in a review of non-EU club treaties. BITs and related investment agreements are usually structured so that an exiting member will remain bound by certain treaty commitments for multiple decades after its withdrawal. Article 13 of the NATO Charter, on the other hand, allows for withdrawal after a one-year notice period. Meanwhile, the IMF Articles of Agreement grant members the flexibility to exercise an immediate, unconditional withdrawal.<sup>257</sup> Even within a common policy area, such as trade agreements, the design of treaty terms governing withdrawal varies in a wide and seemingly random fashion.<sup>258</sup>

The discrepancy between the theoretical rational choice research on treaty exit and observed State practice is susceptible to multiple interpretations. One possibility is that the standard analysis is ultimately sound, but that States often design withdrawal provisions to include inefficient terms that impose needless costs on treaty members. Indeed, it is not uncommon for the treaty design literature to adopt such an explicitly normative posture.<sup>259</sup> Moreover, the same lesson is often drawn from European disintegration, where restrictive exit clauses have exacerbated the considerable political chaos surrounding the Brexit and Grexit referenda.<sup>260</sup> Another possibility, however, is that the law-and-economics framework is in fact flawed, and overlooks functional reasons that explain why raising the costs of exit may be efficient for international agreements relating to club goods.<sup>261</sup> After turning to expulsion provisions directly below, this Part concludes by defending the latter interpretation.

#### *ii. Expulsion Provisions*

Expulsion provisions are the other design feature that allows States to modify the membership of an international agreement *ex post*. The main difference between expulsion and withdrawal, of course, is voluntariness: the former authorizes forcible ouster of certain treaty members by others. Another distinction is that, unlike the case of withdrawal, the law of treaties does not specifically address the scenario where an agreement is silent as to expulsion.<sup>262</sup> As a result,

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Article 50 of the Treaty of Lisbon was adopted in 2007. Yet, as explained in the discussion of Brexit, Article 50 incorporates a vague and potentially burdensome two-year renegotiation period that makes withdrawal from the EU quite difficult as well. See *supra* Section II.C.

<sup>257</sup> On BITs, see Laurence Helfer, *Terminating Treaties*, in OXFORD GUIDE TO TREATIES, 642–43 (Hollis ed., 2012); Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 471–72 (2010); KOREMENOS, *supra* note 2, at 142.

<sup>258</sup> The ASEAN treaty is silent with regard to withdrawal; Mercosur allows for withdrawal after a two-year notice period; the WTO and NAFTA treaties both limit the same restriction to a relatively brief period of six-months. KOREMENOS, *supra* note 2.

<sup>259</sup> Note, for example, that Helfer's analysis of treaty exit is framed as support for "prescriptive" (rather than descriptive) claims. Helfer, *supra* note 18, at 1637.

<sup>260</sup> See, e.g., Jens C. Dammann, *The Right to Leave the Eurozone*, 48 TEX. INT'L L.J. 125 (2012).

<sup>261</sup> Cf. SCOTT & STEPHAN, *supra* note 2, at 9 (arguing that the standard presumption that contracting by firms tends towards efficiency should also carry over to the analysis of international agreements).

<sup>262</sup> The background rules for both withdrawal and expulsion should be interpreted as applying to members' ability to exit "without cause." This is because the main enforcement device in international

the default rule of international law is usually understood to be that the lack of any provision on point means expulsion is prohibited, regardless of whether the drafting history or other textual cues suggest an intent of the treaty parties to the contrary.<sup>263</sup> However, States are not barred from opting out of that default. And, such provisions can be designed so that the availability of expulsion is calibrated along a spectrum, with the introduction of contingent terms, voting rules, and other procedural hurdles.

In comparison to treaty withdrawal, expulsion provisions are essentially ignored in both the doctrinal and rational choice research on agreement design.<sup>264</sup> The disparity in scholarly attention that is given to these two exit provisions parallels the case of treaty entry where there is a neglect of accession conditions relative to reservations. And it is for the same reasons. As with accession conditions, it makes little sense for States to include expulsion provisions in agreements on public goods or human rights, where universal membership is optimal.<sup>265</sup> In other words, for both kinds of treaties, forcing one State's exit rarely provides benefits to remaining members.

As was found with accession conditions, the neglect of treaty expulsion is also problematic when it comes to the design of club agreements, where those provisions would appear to present significant value for treaty members. From an incomplete contracts perspective, the logic of easy exit as insurance applies to expulsion no less than it does for withdrawal. While withdrawal provisions mitigate the error costs of the membership decision for acceding members, expulsion provisions help protect existing members from the uncertainty of future events, by allowing them to reverse prior accession approvals that turned out to be unwise. Moreover, the excludability of club goods means that the threat of expulsion can provide a powerful incentive for members to avoid shirking on their treaty obligations, and thereby provides an enforcement device that is unavailable in agreements on public goods.<sup>266</sup>

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law is a form of "exit for cause," where States no longer need to comply with treaty commitments with respect to counter-parties that are in material breach of their legal obligations. *See* VCOLT, *supra* note 186, art. 60(2) (laying out the rules for "terminating" treaties); *cf.* Hathaway & Shapiro, *supra* note 173.

<sup>263</sup> *See* Athanassiou, *supra* note 69; Jerzy Makarczyk, *Legal Basis for Suspension and Expulsion of a State from an International Organization*, 25 GERMAN Y.B. INT'L L. 476 (1982).

<sup>264</sup> In fact, none of the leading articles on flexibility in agreement design mention the possibility of expulsion, including those that specifically purport to address the topic of treaty "exit." For a very recent exception, see Joseph Blocher, Mitu Gulati, and Laurence R. Helfer, *Can Greece Be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127-50 (EUROPEAN UNIVERSITY INSTITUTE 2016), <https://ssrn.com/abstract=2780743>.

<sup>265</sup> Under a rational choice framework, it is a *non sequitur* to expel a State from a public goods agreement, because by definition they cannot be excluded from consuming the treaty's benefits, only from contributing towards its cost. For doctrinal scholars, the idea of excluding a State from its human rights obligations is abhorrent in principle and absurd in practice—in what sense could a State be "expelled" from a *jus cogens* prohibition against abusing its own citizens?

<sup>266</sup> *See* Blocher et al., *supra* note 264 (noting the potential for expulsion as an enforcement device in the case of club goods).

With expulsion, a look at European disintegration again reveals a gap in the thinking on treaty design. Specifically, the German-led proposal to expel Greece from the Eurozone pursuant to a sort of “buyout” package<sup>267</sup> has brought forth a stream of scholarly commentary on the merits of treaty expulsion, within the EU and otherwise.<sup>268</sup> In keeping with the theoretical points about the advantages of expulsion in club treaties outlined above, a general theme of recent research on the topic is that some potential benefits of treaty expulsion have been overlooked, and that international agreements should be interpreted or designed so that expulsion is more readily available to members.<sup>269</sup>

The foregoing observations regarding treaty expulsion lead to the same stalemate that arose in the discussion of withdrawal. Namely, there are clear theoretical reasons why States should consider the inclusion of expulsion provisions to be an especially attractive option when it comes to the design of club treaties. There is also empirical support for that theoretical intuition in the case of European disintegration, which provides a concrete illustration of how expulsion might provide benefits to treaty members. Yet, as was found with respect to withdrawal, there is no discernable pattern which reflects that liberal expulsion provisions are particularly common to club treaties. In addition to the absence of any legal basis for expelling Greece out of the Eurozone, the structure of treaties underlying the Schengen Area and the EU club-of-clubs implicitly make expulsion illegal as well.<sup>270</sup> Moreover, a review of international agreements outside of Europe once again indicates that it is rare for club treaties to reduce the cost of exit by incorporating expansive expulsion provisions.<sup>271</sup>

In short, the use of exit provisions in club agreements poses an explanatory problem that could be summed up as the “puzzle of positive exit costs.” The puzzle is how to explain the obvious tension between: (a) a high incidence of treaty provisions which appear deliberately designed to restrict exit; and (b) the use of those provisions in a context where theory suggests that States should be most concerned with making sure exit costs are low.

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<sup>267</sup> See Sinn, *supra* note 68, and accompanying text.

<sup>268</sup> See Blocher et al., *supra* note 264; Jens Dammann, *Paradise Lost: Can the European Union Expel Countries from the Eurozone?*, 49 VAND. J. TRANSNAT'L L. 693 (2016); Melissa Gutierrez, *Flying Too Close to the Sun: How an EMU Expulsion Provision Will Prevent the European Sovereign Debt Crisis from Becoming a Modern Day Greek Tragedy*, 35 HOUS. J. INT'L L. 431 (2013); Boyko Blagoev, *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?*, 16 TILBURG L. REV. 191 (2011).

<sup>269</sup> See, e.g., Blocher et al., *supra* note 264, at 13 n.45 (building off of the Grexit experience, and proposing a change to the law of treaties which makes the default rule more accommodating to expulsion).

<sup>270</sup> See Athanassiou, *supra* note 69.

<sup>271</sup> The exceptions that prove the rule are the IMF—where an expulsion provision was exercised to force out the Czech Republic in 1954 (then Czechoslovakia)—as well as the legally authorized expulsion of Cuba from the Organization of American States. See Blocher et al., *supra* note 264, at 708 (providing these examples, among other cases, including the League of Nations); CHRISTOPHER F. BRUMMER, *SOFT LAW AND THE GLOBAL SYSTEM: RULE MAKING IN THE 21<sup>ST</sup> CENTURY*, 159–61 (2015) (also noting treaties that incorporate rules on expulsion).

*iii. Resolving the Exit Costs Puzzle*

The mismatch between theory and observation that characterizes rational choice scholarship on treaty exit can be resolved by revisiting the incomplete contract frameworks that is the basis for those predictions. A general weakness of the standard approach to incomplete contracts is that the benefits of renegotiation as a form of insurance which it emphasizes only follow when treaties that are formed under idealized conditions. Whenever the contracting environment is complicated by informational or strategic considerations, it is no longer safe to assume that renegotiation serves an insurance function. Taking a close look at European disintegration proves valuable in this context because it provides a nearly comprehensive checklist of when and how the simplified model of treaty formation that is typically used in an incomplete contracts analysis do not hold. It also serves as a useful baseline case for gauging when those contracting problems will apply to other club treaties as well.

An initial technical issue is that most incomplete contract analyses rely on an assumption about the information available to States that appears conservative at first glance, but in fact is quite demanding. Specifically, while rational choice theories emphasize that States face uncertainty due to limited information over how the costs and benefits of treaty participation will be distributed in future states of the world, States can only design treaties in a way that provides insurance against that uncertainty when they all share the exact same body of limited information.<sup>272</sup> Where there is asymmetric information among treaty members, however, it is impossible to say in the abstract whether contractual incompleteness reflects the successful provision of mutually beneficial insurance, or whether it is the result of some breakdown in the bargaining process.<sup>273</sup> The use of this framework is particularly problematic for research on treaty design, because it means that the information gap which those studies focus on (uncertainty about how the costs-and-benefits of treaty participation will be distributed in light of future events), and the information gap which they assume away (uncertainty about the attributes of other treaty parties), are likely to be highly correlated.<sup>274</sup>

One significant form of asymmetric information that can make it efficient to *raise* rather than lower exit costs appears when States are unable to observe the actions of other treaty members. This kind of information asymmetry introduces the problem of moral hazard,<sup>275</sup> which is when treaty members may have an incentive to shirk on compliance by allocating resources away from investment in the club good or public good at issue in the treaty.<sup>276</sup> If a State is able to discreetly shift resources away from treaty compliance toward other outside options, it can thereby increase its bargaining power relative to other treaty members. An

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<sup>272</sup> See, e.g., Koremenos, *Contracting Around International Uncertainty*, *supra* note 20.

<sup>273</sup> See BERNARD SALANIE, *THE ECONOMICS OF CONTRACTS* 208 (2d ed. 2005); PATRICK BOLTON & MATHIAS DEWATRIPONT, *CONTRACT THEORY* 37 (2005).

<sup>274</sup> SALANIE, *supra* note 273, at 208 n.13; SCOTT & STEPHAN, *supra* note 2, at 70.

<sup>275</sup> See Bengt Holmstrom, *Moral Hazard and Observability*, 10 *BELL J. ECON.* 74 (1979).

<sup>276</sup> *Id.*; see also Bengt Holmstrom, *Moral Hazard in Teams*, 13 *BELL J. ECON.* 324 (1982).

obvious way for that State to exercise its newfound bargaining power is to threaten to withdraw from the treaty unless other members commit to securing its future participation on better terms. Treaties can be designed to mitigate this moral hazard problem by raising exit costs through strict withdrawal provisions. Discouraging exit in this way provides a lock-in mechanism, which reduces the incentive for treaty members to leverage unobservable investments for opportunistic renegotiation.<sup>277</sup>

There are a number of ways in which the economic clubs established under EU treaties raise the problem of moral hazard due to unobservable State behavior. For instance, in the Eurozone Greece effectively concealed the extent to which its economic policies and financial condition were consistent with a good faith effort to abide by the Stability and Growth Pact, a set of treaty obligations that were aimed at maintaining macroeconomic homogeneity across the EMU.<sup>278</sup> The Schengen Area presents similar examples. These generally involve a question of whether Schengen members adequately invest in the myriad measures necessary to consolidate the club's common-border infrastructure, or instead take subtle steps to prioritize a more insular focus on domestic policing and security institutions.<sup>279</sup> The same moral hazard dynamics may appear across many non-European club agreements as well, although the degree to which that is the case will depend on the particulars of the treaty structure and policy area at issue.<sup>280</sup>

The other contracting problem that receives short shrift in the law-and-economics analysis of treaty design involves what are known as "relational contracts" and the related concept of asset-specificity.<sup>281</sup> Investments are considered asset-specific if the resources in question have a higher value when deployed in a particular contractual relationship compared to what they would be

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<sup>277</sup> See Massimo Bordignon & Sandro Brusco, *Optimal Secession Rules*, 45 EUR. ECON. REV. 1811 (2001) (arguing that limiting exit options can mitigate the moral hazard issue); see also Ronald Gilson & Alan Schwartz, *Understanding MACS: Moral Hazard in Acquisitions*, 21 J. L. ECON. & ORG. 330 (2005) (same); D. Gordon Smith, *The Exit Structure of Strategic Alliances*, ILL. L. REV. 303 (2005) (same); but cf. Meyer, *supra* note 19, at 413–15 (suggesting that an adverse selection model of information asymmetry may lead to different results).

<sup>278</sup> See *supra* Section III.A; IMF, *Greece: Ex Post Evaluation of Exceptional Access Under the 2010 Stand-By Arrangement*, COUNTRY REPORT NO. 13/156 (June 2013).

<sup>279</sup> A concrete illustration of this problem was when Belgium's policing apparatus proved wholly unprepared to coordinate with French authorities on the various cross-border security issues that were triggered following terrorist attacks in and around Paris. See *supra* Section III.B.i.

<sup>280</sup> On one end of the spectrum, information asymmetry regarding compliance may be relatively high for securitization alliances, such as NATO, as well as democratization treaties, which call for investments in institutional reform that are hard to measure. On the other end is the WTO, where many of the key liberalization obligations, such as the reduction of tariff schedules for imports, are fairly transparent. See SCOTT & STEPHAN, *supra* note 2, at 75, 154–56 (on the observability of States' compliance with WTO rules). The IMF may provide the most extreme case of observable compliance, in the sense that a primary treaty commitment is for members to contribute their "quota" to the common treaty fund, which essentially consists of writing a check to the IMF.

<sup>281</sup> OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

worth when put to an alternative use or otherwise priced on the open market.<sup>282</sup> Asset-specificity creates another avenue for opportunistic renegotiation, referred to as the “hold-up problem.”<sup>283</sup>

Like moral hazard, the hold-up problem can be mitigated by creating barriers to renegotiation that raise the cost of exiting the contractual relationship.<sup>284</sup> While the rational choice literature at times acknowledges that the hold-up problem may be relevant to treaty design, it is often passed over in a brief, issue-spotting manner and treated as a special case.<sup>285</sup> But there is good reason to expect relational contracting will be endemic to club treaties, in large part due to the importance of maintaining a homogeneous membership in economic clubs. An implication is that the issues raised by asset-specificity likely factor into the design of exit provisions for those agreements at least as much as the problem of insuring against uncertainty does.<sup>286</sup>

European club treaties are all analogous to relational contracts that exhibit a high degree of asset-specificity. This is most conspicuously on display in the Eurozone, where members are obliged to dismantle their traditional domestic monetary institutions and bind themselves to the ECB.<sup>287</sup> The Schengen Agreement is also largely an exercise in pooling investments in relation-specific security assets: for example, if Italy decides to pull out of its role of maintaining a large portion of the Schengen Area’s external Mediterranean border, most of continental Europe would be exposed.<sup>288</sup> The Brexit negotiations reflect the logic of relational contracting as well. A major source of speculation in that process is whether London’s financial sector is a relation-specific asset that will lose its global preeminence once the UK is eventually untethered from the EU’s regulatory apparatus.<sup>289</sup>

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<sup>282</sup> See WILLIAMSON, *supra* note 281.

<sup>283</sup> Basically, if I know my counter-party’s investment would be much less valuable outside of our contractual relationship, I can threaten to sever that relationship unless the contract is renegotiated in a way that gives me a greater share of the benefits. Knowing that such a scenario is possible *ex ante* means that the party that may potentially be held-up becomes less willing to invest in the relationship in the first place, to the detriment of both sides. See *id.*; see also David A. Lake, *Anarchy, Hierarchy, and the Variety of International Relations*, 50 INT’L ORG. 1, 14 (1996).

<sup>284</sup> See SPRUYT, *supra* note 2; See Bradley Wimmer & John F. Garen, *Moral Hazard, Asset Specificity, Implicit Bonding, and Compensation: The Case of Franchising*, 35 ECON. INQUIRY 544 (1997); See Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996).

<sup>285</sup> See, e.g., Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010); Laurence R. Helfer, *Exiting Custom: Analogies to Treaty Withdrawals*, 21 DUKE J. COMP. & INT’L L. 65, 67, n.10 (2010); Helfer, *supra* note 18, at 1624; Posner & Sykes, *supra* note 19.

<sup>286</sup> See Bradley Wimmer & John F. Garen, *Moral Hazard, Asset Specificity, Implicit Bonding, and Compensation: The Case of Franchising*, 35 ECON. INQUIRY 544 (1997); Aaron Edlin & Stefan Reichelstein, *Holdups, Standard Breach Remedies, and Optimal Investment*, 86 AM. ECON. REV. 478 (1996).

<sup>287</sup> One striking aspect of Grexit was that it was unclear whether Greece had the printing presses on hand that would be needed to produce drachmas. See *supra* Section II.A.iii.

<sup>288</sup> See *supra* Section II.B.iii.

<sup>289</sup> See *supra* Section II.C.

The extent of relational contracting goes a long way towards explaining the variation in withdrawal provisions across club treaties outside of the EU as well. For example, foreign direct investment (FDI) involves the most extreme form of asset-specificity possible, and investment treaties which involve commitments to protect FDI contain some of the most stringent withdrawal terms that can be found in international agreements.<sup>290</sup> International monetary agreements, which tend to mimic the asset-specific features of the Eurozone, systematically tend toward harsh withdrawal terms as well.<sup>291</sup> Security alliances present an intermediate case that will likely be very context-dependent, and turn on the particular military technologies and strategic environment in question.<sup>292</sup> By contrast, trade agreements—especially when concluded on a multilateral basis pursuant to most-favored-nation principles—will include obligations that call for relatively low levels of asset-specific investments.<sup>293</sup> The tendency for regional preferential trade agreements to be designed with stricter withdrawal terms than those in the GATT/WTO framework provides some tentative empirical confirmation on this final point.

Lastly, asset-specificity may also explain the lack of broad expulsion provisions in club treaties. This is because the stringent accession conditions that accompany club agreements require new entrants to make extensive upfront investments, so that certain of their legal and political institutions are sufficiently homogeneous with those of existing members. Given the large sunk costs incurred in the process of acquiring those relation-specific assets, States that accede to club treaties are particularly vulnerable to being held-up. As a result, acceding States will never commit the resources necessary to join club treaties if existing parties to the agreement can easily threaten expulsion thereafter as a way to opportunistically renegotiate terms with the newer members.<sup>294</sup>

The arguments regarding the design of treaty exit that are presented above have been outlined at a high level and supported with evidence that is anecdotal and suggestive. Nonetheless, they are sufficient to establish several claims that are not widely appreciated. First, although doctrinal international law scholarship is often accused of lacking analytical rigor, there is also a certain faux-sophistication to the reliance on economic contract theory that appears in rational choice research on treaty design. In truth, contract theory supplies a complex family of models—many of which provide indeterminate or conflicting answers about which outcomes should be expected in the real world—and there is not a strong reason to believe that the specific models that law-and-economics scholars tend to select from that family are the ones that contain the most realistic

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<sup>290</sup> See Salacuse, *supra* note 257, at 471–72; Posner & Sykes, *supra* note 19.

<sup>291</sup> KOREMENOS, *supra* note 2, at 142.

<sup>292</sup> See generally Celeste A. Wallander, *Institutional Assets and Adaptability: NATO after the Cold War*, 54 INT'L ORG. 705 (2000).

<sup>293</sup> See, e.g., Meyer, *supra* note 19, at 420–22.

<sup>294</sup> See Joel Demski & David Sappington, *Resolving Double Moral Hazard Problems with Buyout Agreements*, RAND J. ECON. 232 (1991); cf. N.M. Kay, *Markets, False Hierarchies, and the Evolution for the Modern Corporation*, 17 J. ECON. BEHAVIOR & ORG. 315 (1992).

assumptions. Second, the fragility of that theoretical framework provides the best explanation why some of the more emphatic predictions in the treaty design literature are frequently inconsistent with the way international agreements are structured as an empirical matter.<sup>295</sup> Third, the discussion once again highlights how it can often be necessary to undertake a fact-intensive examination of the particular cross-border issues that a treaty has been designed to address in order to understand its legal structure. Most broadly, the bottom-line implication of the foregoing analysis is that, at least with regard to treaty exit, the role of legal flexibility for promoting international cooperation has a more tenuous basis than is conventionally thought.

#### CONCLUSION

This Article has provided an internal critique of research on the economic analysis of international law, meaning that it shares most of the same working assumptions and normative commitments that appear in that literature but argues that they have, at times, been applied in a counterproductive way. One wrong turn in the rational choice scholarship has been its dismissal of the relevance of European integration for other areas of international law. The other wrong turn is its tendency to approach problems of treaty design exclusively from the perspective of public goods, while overlooking a distinct set of dynamics that characterize treaties relating to club goods.

By analyzing these methodological blind spots in conjunction, this Article shows that they can effectively remedy one another, and in doing so provide an array of novel insights into how the international legal system works. Specifically, a club theory framework allows for a unified explanation of all three waves of legal disintegration that have recently swept across the European Union: the Eurozone financial crisis, the collapse of the Schengen Area, and Brexit. In addition, a careful examination of European disintegration yields a uniquely powerful case study for understanding the institutional logic of other international agreements that establish economic clubs. Taken together, the two halves of this Article present a more complete picture of the potential for rational States to construct legal arrangements that facilitate sustainable patterns of international cooperation.

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<sup>295</sup> Cf. Eric Posner, *Economic Analysis of Contract Law After Thirty Years: Success or Failure?* 112 YALE L.J. 829 (2003).



# Resolution of Territorial Disputes in East Asia: The Case of Dokdo

Laurent Mayali & John Yoo\*

*This Article seeks to contribute to solving of the Korea-Japan territorial dispute over Dokdo island (Korea)/Takeshima (Japanese). The Republic of Korea argues that Dokdo has formed a part of Korea since as early as 512 C.E.; as Korea currently exercises control over the island, its claim to discovery would appear to fulfill the legal test for possession of territory. Conversely, the Japanese government claims that Korea never exercised sufficient sovereignty over Dokdo. Japan claims that the island remained terra nullius—in other words, territory not possessed by any nation and so could be claimed—until it annexed Dokdo in 1905. Japan also claims that in the 1951 peace treaty ending World War II, the Allies did not include Dokdo in the list of islands taken from Japan, which implies that Japan retained the island in the postwar settlement. This article makes three contributions. First, it brings forward evidence from the maps held at various archives in the United States and Western Europe to determine the historical opinions of experts and governments about the possession of Dokdo. Second, it clarifies the factors that have guided international tribunals in their resolution of earlier disputes involving islands and maritime territory. Third, it shows how the claim of terra nullius has little legitimate authority when applied to East Asia, an area where empires, kingdoms, and nation-states had long exercised control over territory.*

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### INTRODUCTION

Both the Republic of Korea and Japan claim sovereignty over the island of Dokdo (in Korean) or Takeshima (in Japanese).<sup>1</sup> Korea has exercised continuous control over the island since at least 1946, when the Supreme Allied Command in Japan excluded Dokdo from the territory within Japan's jurisdiction.<sup>2</sup> Today, the island hosts two Korean private citizens and a Korean coast guard unit.<sup>3</sup>

The Republic of Korea argues that Dokdo has formed a part of Korea since as early as 512 C.E., when historical state archives first appear to describe the island.<sup>4</sup> As Korea currently exercises control over the island, its claim to discovery would appear to fulfill the legal test for possession of territory, which we will discuss at greater length below. Conversely, the Japanese government claims that Korea never exercised sufficient sovereignty over Dokdo. Japan claims that the island remained *terra nullius*—in other words, territory not possessed by any nation and so could be claimed—until it annexed Dokdo in 1905.<sup>5</sup> Korea responds that Dokdo could not have retained the status of *terra nullius* due to repeated exercises of authority over the island. Yet Japan claims that in the 1951 peace treaty ending World War II, the Allies did not include Dokdo in the list of islands taken from Japan, which implies that Japan retained the island in the postwar settlement.

Resolution of this legal dispute revolves around three issues. First, which nation had valid title to the island before 1905? Second, did Japan assume

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<sup>1</sup> Jon M. Van Dyke, *Disputes Over Islands and Maritime Boundaries in East Asia*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 46 (Seoung-Yong Hong & Jon M. Van Dyke, eds., 2009).

<sup>2</sup> *Id.*

<sup>3</sup> Sheila A. Smith & Charles T. McClean, *Japan's Maritime Disputes: Implications for the U.S.-Japan Alliance*, in *CNA MARITIME ASIA PROJECT WORKSHOP THREE: JAPAN'S TERRITORIAL DISPUTES* 16 (2013).

<sup>4</sup> See Hoon Lee, *Dispute over Territorial Ownership of Tokdo in the Late Choson Period*, 28 *KOREA OBSERVER* 389, 393 (1997).

<sup>5</sup> Van Dyke, *supra* note 1.

possession of the island by virtue of its 1904 act creating a protectorate over Korea, its 1905 annexation of Dokdo, or its 1910 annexation of Korea? Third, did the 1951 San Francisco Treaty return the island to Korea? This Article addresses the first and second of these questions; a later article will address the third issue.

After considering the historical evidence and reviewing the secondary literature, we conclude that the Republic of Korea has the superior claim to possession of Dokdo. According to the disputed historical material, Korea appears to have discovered the island and exercised effective control over it until at least 1905. International courts have accorded predominant weight to these two factors in resolving recent territorial disputes over islands.<sup>6</sup> This Article presents new evidence on these questions by expanding the pool of relevant maps to those produced and located in European and American archives, which are unlikely to have a bias on the outcome of this issue due to the Western lack of knowledge of Korean-Japanese relations and the relative resistance to contact with the Western world during this period. These maps, which we present in an attached appendix, either do not show the island or display it as falling within Korea's territorial boundaries.<sup>7</sup>

These maps undermine Japan's claim to the island under the international legal doctrine of *terra nullius*. *Terra nullius* cannot apply if a nation has already discovered and maintained control over territory. This Article presents new arguments against the application of *terra nullius* in East Asia. Our analysis shows that nations invoked the doctrine to support Western imperialism in Asia, rather than to describe the discovery of truly unknown or unclaimed territory. We expect that international courts will soon limit or reject the application of *terra nullius* in most territorial disputes in Asia.

Without the availability of the *terra nullius* argument, either as doctrine or as applied to the facts, Japan's account of its acquisition of Dokdo becomes strained. If Korea possessed Dokdo up through the early twentieth century, it could only have come within Japan's possession through the Japan-Korea Annexation Treaty of 1910.<sup>8</sup> While Japan would have enjoyed possession of Dokdo from that time, it would have lost the island at the end of World War II, when Japan was required by the San Francisco Peace Treaty to recognize the independence of Korea. The 1945 Potsdam Declaration set out the terms of peace that the Allies expected of Japan, including the liberation of Korea and the 1943 Cairo Declaration's demand that "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914."<sup>9</sup> As a result, after the formal surrender of Japan on September 2,

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<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* Appendix.

<sup>8</sup> Korea had become a protectorate of Japan in a 1905 Treaty and had voluntarily given up power over internal administration in a 1907 Treaty.

<sup>9</sup> See DECLARATION OF THE THREE POWERS—GREAT BRITAIN, THE UNITED STATES AND CHINA REGARDING JAPAN (Dec. 1, 1943), [www.ndl.go.jp/constitution/e/etc/c03.html](http://www.ndl.go.jp/constitution/e/etc/c03.html); Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT'L L. 157, 182 (2007).

1945, Korea would have returned to its status as a sovereign nation-state and would have recovered the territory it possessed at the time of the 1910 annexation, or, if Japan claimed it had acquired the island after the annexation, it would have to return the island as part of its post-1914 acquisitions.

The only legal argument that could counter the effect of the Potsdam Declaration would necessarily depend on any further rearrangement of territorial boundaries by the 1951 San Francisco Peace Treaty, which formally ended World War II in Asia. The 1951 San Francisco Peace Treaty presents a difficult question, which we will examine in greater detail in future work. Article 2(a) of the treaty declares that “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet” (the Western reference to Ulluengdo).<sup>10</sup> Japan argues that the explicit enumeration of three islands as part of the territory returned to Korea implies the exclusion of any other islands, such as Dokdo.<sup>11</sup> We believe that this question is a closer one because of the negotiating history of the treaty. On first pass, however, the text of Article 2(a) of the 1951 Treaty seems best interpreted to include other islands, such as Dokdo, that were historically Korean territory.

This Article is divided into three parts. Part I discusses the legal and historical context of the dispute and reviews the relevant scholarly literature. Part II sets forth the international law of territorial acquisition as developed by custom and the decisions of international tribunals. It reports on our review of maps held in the Library of Congress in Washington, D.C.; the Vatican Library in the Vatican; the Dutch East India Company records; and the national libraries of Portugal, Spain, and the United Kingdom. Part III discusses the implications of both the law of territory and the facts provided by the maps for Korea’s claim to sovereignty over Dokdo and Japan’s *terra nullius* argument.

## I.

### THE FACTS OF THE DOKDO ISLAND DISPUTE

Korea and Japan have disputed the territory of Dokdo (Korean)/Takeshima (Japanese) for many decades.<sup>12</sup> Some Western sources refer to the islands as the Liancourt Rocks or Hornet Island.<sup>13</sup> Dokdo is located in the East Sea (Sea of Japan), about 88 kilometers from the Korean island of Ulleungdo and 158 kilometers from the Japanese island of Oki.<sup>14</sup> Dokdo is comprised of two islets and about thirty-two smaller rocks that jut from the sea.<sup>15</sup> Under the United

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<sup>10</sup> Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

<sup>11</sup> See Seokwoo Lee & Jon M. Van Dyke, *The 1951 San Francisco Peace Treaty and Its Relevance to the Sovereignty over Dokdo*, 9 CHINESE J. INT’L L. 741, 742 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 743; see also LI JIN-MIEUNG, DOKDO: A KOREAN ISLAND REDISCOVERED 63 (2011).

<sup>14</sup> See Van Dyke, *supra* note 9, at 157, 165.

<sup>15</sup> *Id.* at 157.

Nations Convention on the Law of the Sea, possession of the island implies control over about 16,600 square nautical miles of sea around it.<sup>16</sup>

Section A first discusses the claims to the discovery of Dokdo by Korea and Japan based on the applicable historical materials. Korea makes an earlier claim to sovereignty over Dokdo, which Japan does not seek to disprove by any competing sign of discovery. Section B discusses our review of the maps, both Asian and Western, concerning the location and possession of Dokdo. Section C then reviews the scholarly literature on the dispute.

#### A. *The Historical Claims to Dokdo by Korea and Japan*

The number of available historical documents that mention Dokdo is fairly small. Because of this dearth of conclusive documentary evidence on Dokdo, some scholars have relied on documents on Ulleungdo or other unidentified islands that could possibly be Dokdo, to establish that Dokdo had been under Korean jurisdiction for the last fifteen centuries. The earliest known document that these scholars base their claim on is the *History of the Three Kingdoms* (*Samguk Sagi*), a historical record compiled by historians under the order of the Goryeo Kingdom's King Injong, which was completed in 1145.<sup>17</sup> In 512 C.E., the Kingdom of Silla conquered the State of Usan, which was based on the modern-day Korean island of Ulleungdo and included Dokdo.<sup>18</sup> The relevant passage from the Korean government chronicles declares that:

In June in the 13th year, Usanguk surrendered and has since paid a tribute of staple products each year. Usanguk is an island country in the middle of the sea due east of Myeongju and is also called Ulleungdo. The area is 100 *ri*. The people were fierce and did not surrender, so Ichan Isabu was appointed the lord of Asulnaju to subjugate them . . . the people of Usanguk were terrified of him and soon surrendered.<sup>19</sup>

Dokdo is not specifically mentioned in this record. However, other historical records, appearing as early as the mid-fifteenth century, describe a nearby island named Usando, which appears to be modern-day Dokdo.<sup>20</sup> Korean scholars have argued that Usando (literally meaning Usan Island) was part of Usanguk (literally

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<sup>16</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122; see also Michael McDevitt, *The Sovereignty Dispute over Dokdo/Takeshima (Liancourt Rocks) and Its Impact on ROK-Japan Relations*, in CNA MARITIME ASIA PROJECT WORKSHOP THREE: JAPAN'S TERRITORIAL DISPUTES 49 (2013) ("At stake are economic claims to about 16,600 square nautical miles of sea and seabed, including areas that may hold some 600 million tons of gas hydrate.").

<sup>17</sup> MARK PETERSON & PHILLIP MARGULIES, A BRIEF HISTORY OF KOREA 61 (2009).

<sup>18</sup> Shin Yong-ha, *Korea's Territorial Rights to Dokdo: A Historical Study*, in INSIGHT INTO DOKDO: HISTORICAL, POLITICAL AND LEGAL PERSPECTIVES ON KOREA'S SOVEREIGNTY 73–74 (Korea Herald & Park Hyun-Jin eds., 2009).

<sup>19</sup> *Id.*

<sup>20</sup> See Van Dyke, *supra* note 9, at 165; see also Hee Kwon Park & Jong-In Bae, *Korea's Territorial Sovereignty over Tokdo*, 24 KOREA OBSERVER 121, 134–35 (1998).

meaning State of Usan), and because Usando refers to Dokdo, Dokdo had been part of Korea since Silla's subjugation of Usanguk in 512 C.E.<sup>21</sup> Usando is mentioned in the *Gazetteer of the Annals of King Sejong (Sejong Silok Jiriji)*, completed in 1432, as part of the *Annals of King Sejong* of the Joseon dynasty.<sup>22</sup> Scholars rely on this record to explain that Usando is Dokdo:

The two islands of Usan and Mureung (Ulleungdo) are located due east of the country. As the two islands are in close proximity to one another, they are visible from each other on a clear day. During the Silla period, the island was referred to as "Usanguk." It was also known as "Ulleungdo." Its extent is 100 *ri* (1 *ri* is about 393 meters).<sup>23</sup>

Other Korean geographical records mention Usando as well. For example, in the *Gazetteer of the Annals of Goryo (Jiriji of Goeyousa)*, completed in 1451, Usando and its relation to Ulleungdo is described in a similar way:

Here lies Ulleungdo. The island is located due east of the county. During the Silla period, it was referred to as "Usanguk." The island was also known as "Mureung" or "Ureung." Its extent is 100 *ri* . . . According to some, Usan and Muresung are two separate islands situated adjacent to each other, which are visible from each other on a clear day.<sup>24</sup>

*Sinjeugn Dongguk Yeoki Seungnam*, another geographical record drafted during the Joseon Dynasty in 1530, also mentions Usando:

[Usando and Ulleungdo] This group of two islands is also known as "Mueung" or "Ureung." They are located in a sea area due east of the county . . . According to some sources, the two are one and the same island.<sup>25</sup>

These geographical records lead to a number of conclusions. First, they support the view that the Korean people had been aware of the existence of an island located near Ulleungdo. Korea believed it acquired the island when the kingdom of Silla absorbed Usanguk in 512 C.E. Whether Usando refers to Dokdo in these documents, however, cannot be independently verified by reference to non-Korean legal documents. Usando is most likely Dokdo because the documents refer to its visibility from Ulleungdo on a clear day. This reference implies that Usando is not a small additional formation within the same island cluster, but a separate and distant island. Second, these records support the conclusion that the Korean government considered Ulleungdo and Dokdo as a

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<sup>21</sup>Van Dyke, *supra* note 9, at 165.

<sup>22</sup>See Yong-ha, *supra* note 18, at 87.

<sup>23</sup>SONG BYEONG-KIE, HISTORICAL VERIFICATION OF KOREA'S SOVEREIGNTY OVER ULLEUNGO AND DOKDO 20–21 (Nat'l Assembly Library trans., 2010).

<sup>24</sup>*Id.* at 22.

<sup>25</sup>*Id.*

single administrative unit, rather than as two independent islands. Third, Korean records support the observation that Ulleungdo and a second Korean island were fairly distant from each other, but still within the horizon.

Japanese records do not appear to document contact with Dokdo until the seventeenth century. According to an official Japanese government paper, in 1618 two Japanese merchants received permission from the feudal lord of Tottori, acting on behalf of the Tokugawa Shogunate, to travel to Ulleungdo (known as the Utsuryo island in Japanese).<sup>26</sup> To reach Ulleungdo to harvest abalone, sea lions, and bamboo, merchants (Japanese scholars argue) would have had to stop at Dokdo on the way. According to the Japanese government, these voyagers fished at Dokdo too.<sup>27</sup> The Japanese Ministry of Foreign Affairs observes that the Shogunate's ban on foreign travel in 1653 did not extend to the two islands, implying that the government considered Dokdo to fall within Japanese territory.<sup>28</sup>

In the 1667 *Records of Observations of Onshu (Onshu Shicho Goki)*, Saito Hosen, a retainer of the Izomo domain, inspected Oki Islands on orders of his feudal lord.<sup>29</sup> Hosen drew the Japanese national boundary at Onshu (present-day Oki Island) to the northwest and implicitly recognized that Ulleungdo and Dokdo were *not* part of Japanese territory:

Onshu is in the middle of the North Sea, so it is called Okinoshima . . . If one sails one night and two days in the direction of northwest, one arrives at Matsushima [Dokdo]. Another day's voyage and one will reach Takeshima [Ulleung]. Another name for the island is Isonotakeshima where bamboo, fish and sea lions abound. These two islets are uninhabited, and face the land of Goryeo as Onshu does vis-à-vis Oki. Therefore, it is thought Onshu marks the northwesternmost boundary of Japan.<sup>30</sup>

The first known conflict between Korea and Japan over Dokdo is recorded in the *Annals of King Sukjong (Sukjong Sillok)*.<sup>31</sup> It depicts an incident involving Ahn Yong Bok, a Korean fisherman who was captured and brought to Japan in 1693 while fishing near Ulleungdo. Ahn protested his capture and claimed that Ulleungdo and Dokdo were Korean islands.<sup>32</sup> Records show that he successfully convinced the governors that the islands belonged to Korea, and the Edo Shogun issued an official statement confirming this fact.<sup>33</sup> The existence of this official decree cannot be verified, however, using authoritative English sources.

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<sup>26</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, 10 ISSUES OF TAKESHIMA 5 (2008), <https://www.ro.emb-japan.go.jp/files/000132863.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Yong-ha, *supra* note 18, at 95.

<sup>30</sup> *Id.* at 95–96.

<sup>31</sup> See Park & Bae, *supra* note 20, at 141–42.

<sup>32</sup> See *id.* at 142; see also BYEONG-KIE, *supra* note 23, at 66–68.

<sup>33</sup> Yong-ha, *supra* note 18, at 97.

The Lord of Tsushima attempted to negotiate with the Korean government to ban Korean fishing around Ulleungdo.<sup>34</sup> Tsushima's basic position was that Ulleungdo belonged to Japan because Korea's Joseon Dynasty had neglected the island for centuries. This negotiation failed, however, and the envoy from Tsushima returned to Japan.<sup>35</sup> In 1696, this issue came to the attention of the Edo Shogun, who asked the Lord of the Tottori Domain if Takeshima (Ulleungdo) and Matsushima (Dokdo) were part of either Inaba or Hōki Province. The following lists relevant questions by the Edo Shogun and answers provided by the Lord of Tottori:

Edo Shogun: "Since when has Takeshima (Ulleungdo) as part of Inaba Province and Hoki Province, become under these two's jurisdiction? Is it before or after the year 1632, when the ancestors (Japanese name) was given land . . . ?"

Lord of Tottori: "Takeshima does not belong to Inaba Province or Hoki Province. When (Japanese name) was the Lord (1617~1632), (Japanese names) have been crossing the sea and fishing. I've also heard that this was permitted through an official document issued by government officials I've also heard that these activities had been conducted before that era but this is not confirmed . . . ."

Edo Shogun: "Besides Takeshima (Ulleungdo), are there any other islands that are within the two areas jurisdiction? Do citizens from these two areas exercise their fishing and gathering on the island?"

Lord of Tottori: "There are no other islands belonging to the two prefectures including Takeshima (Ulleungdo) and Matsushima (Dokdo) . . . ."<sup>36</sup>

Based on answers provided by Tottori, the Shogunate issued an official ban on Japanese navigation to Ulleungdo.<sup>37</sup> The ban on navigation, however, did not explicitly mention Dokdo.<sup>38</sup> Korean scholars have argued that because Ulleungdo and Dokdo have historically been considered as a set, it was implicit in the shogun's decision that he also meant to include Dokdo.<sup>39</sup> On the other hand, based on the absence of an express mention of Dokdo, the Japanese government argues that the original permission given by the Tokugawa Shogun in 1618 to sail to Dokdo remained valid.<sup>40</sup>

During the 1870s and 1880s, the Meiji government's perception of Ulleungdo and Dokdo remained unchanged from the Edo period. There are several documents that support this conclusion. Following the establishment of the Meiji government in 1868, the Japanese Ministry of Foreign Affairs sent envoys on a mission to assess the internal situation in Korea. The compilation of

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<sup>34</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 6.

<sup>35</sup> *See id.*

<sup>36</sup> *See* BYEONG-KIE, *supra* note 23, at 85–86.

<sup>37</sup> Van Dyke, *supra* note 9, at 166.

<sup>38</sup> Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 423, 449–50 (1997).

<sup>39</sup> *See generally* Lee, *supra* note 4.

<sup>40</sup> Yong-ha, *supra* note 18, at 93–94.



their mission, *A Confidential Inquiry into the Particulars of Korea's Foreign Relations (Chosenkoku Kosaishimatsu Naitansho)*, contained a section, "How Takeshima and Matsushima Came to Belong to Joseon":

Circumstances under which Takeshima [Ulleungdo] and Matsushima [Dokdo] have become Korean possession:

Regarding this case, Matsushima is an island adjacent to Takeshima and no document has been made on it to date; concerning Takeshima, Korea sent people to settle there for a while after the Genroku period. Then the island became uninhabited as before. Bamboo and ditch reed, which is thicker than bamboo and ginseng, are found there. Besides, the island is said to be fit for fishing . . .<sup>41</sup>

Even though it does not contain substantial information, this report records that the Meiji Government considered Ulleungdo and Dokdo to be part of Korea. On March 20, 1877, the Japanese Supreme Council (Daijo-kan) issued an order stating that:

With regard to Takeshima and another island that was the subject of an inquiry, let it be known that the two islands are unrelated to our country (Japan).<sup>42</sup>

Korean scholars have argued that "another island" mentioned in the order refers to Dokdo, since by this time, the presence of Dokdo had been well known.<sup>43</sup>

After the end of the Joseon Dynasty, the new government under the Empire of Korea (Daehan Jeguk) attempted to fortify its control over Ulleungdo.<sup>44</sup> By this time, the activity of private Japanese citizens on the island had increased.<sup>45</sup> In response, the new Korean government issued Imperial Decree No. 41, which upgraded the status of Ulleungdo to an independent county, Uldo County, and placed Dokdo (referred to as Seokdo) and Jukseodo (referred to as Jukdo) under the jurisdiction of Uldo County:

Article 1:

Ulleungdo shall be redesignated Ulleung County, placed under Gangwon Province; the title of island superintendent shall be changed to county magistrate; it shall be incorporated into the administrative system and the county shall be of grade five.

Article 2:

The county office shall be located at Daehadong; the county shall have under its jurisdiction the whole island of Ulleung, Jukdo and Seokdo.<sup>46</sup>

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<sup>41</sup> *Id.* at 107.

<sup>42</sup> BYEONG-KIE, *supra* note 23, at 209.

<sup>43</sup> *See* Yong-ha, *supra* note 18, at 109–10.

<sup>44</sup> *See id.* at 120–23.

<sup>45</sup> *See id.* at 120–21.

<sup>46</sup> *Id.* at 121–22.

The Empire of Korea reorganized Ulleungdo-Dokdo and announced to the world that Dokdo was under its dominion. Japan argues, however, that Jukdo and Seokdo islands do not refer to Dokdo; yet it is unclear to which islands Jukdo and Seokdo could refer if not Dokdo.<sup>47</sup>

Despite Korea's official proclamations, Imperial Japan annexed Dokdo on February 22, 1905, on the ground that the island was *terra nullius*.<sup>48</sup> During the Russo-Japanese war, Japan recognized the strategic importance of Dokdo, and began to build watchtowers and cables on the island.<sup>49</sup> Around the same time, a Japanese fisherman named Nakai Yozaburo, who wanted to expand his sea lion hunting business through a monopoly on fishing near Dokdo, applied for such permission.<sup>50</sup> The Japanese government initially rejected Yozaburo's application, seemingly believing that Dokdo was a Korean territory. The following is an excerpt from Yozaburo's record of his application process for the fishing permit:

As I thought that the island was Korean territory attached to Ulleungdo, I went to the capital trying to submit a request of the Residency-General. But, as suggested by Fishery Bureau Director Maki Bokushin, I came to question Korea's ownership of Takeshima. And at the end of my investigation into the matter, I became convinced that this island was absolutely ownerless through the conclusion by the then Hydrographic Director Admiral Kimotsuki. Accordingly, I submitted an application through the Home Ministry . . . .

The Home Ministry authorities had the opinion that the gains would be extremely small while the situation would become grave if the acquisition of a barren islet suspected of being Korean territory at this point of time [during the Russo-Japanese War] should amplify the suspicions of various foreign countries that Japan had an ambition to annex Korea. Thus, my petition was rejected.<sup>51</sup>

Yozaburo further stated that, after becoming aware of this situation, the Political Affairs Bureau Director, Yamaza Enjiro, deemed his application as an urgent matter.<sup>52</sup> Enjiro forced the Home Ministry to refer his application speedily to the Foreign Ministry, where the application was quickly approved.<sup>53</sup> Yozaburo's record suggests that, even though the prevalent opinion in Japan at that time was that Dokdo was Korean territory, Japan's imperial policies drove the government to annex Dokdo, without informing the Korean government of

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<sup>47</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 8–9.

<sup>48</sup> BYEONG-KIE, *supra* note 23, at 302–03.

<sup>49</sup> See Yong-ha, *supra* note 18, at 130.

<sup>50</sup> *Id.* at 131–32.

<sup>51</sup> *Id.* at 132–33.

<sup>52</sup> *Id.* at 133.

<sup>53</sup> *Id.*

this fact.<sup>54</sup> In February 1905, the governor of Japan's Shimane Province announced that the island was to be named "Takeshima."<sup>55</sup>

### B. Historical Maps of Dokdo

The main source of historical documentation on Dokdo relies on various sets of maps, numbering in the hundreds, that were printed over a period of several centuries in several countries.<sup>56</sup> These maps are accessible in various national and university libraries.<sup>57</sup> The most comprehensive ones depict the contours and possessions of the States and seas bordering China and Korea, including descriptions of the maritime area between Korea and Japan.<sup>58</sup> Over this long period, there is a great variation in the amount of information the maps provide.<sup>59</sup> Some maps show more detailed description of the shoreline and the physical and political features of the mainland.<sup>60</sup> Some maps focus on distinct areas while others aim at providing a broader picture of a larger area.<sup>61</sup>

An exhaustive comparative analysis of these maps would be a complex and difficult process. It would require far more time and human resources than permitted for our purpose in order to compile a complete list of documents, both manuscripts and printed sources and to assemble, physically or digitally, all the sources of information in one archive. Maps often combine historical, cultural, and political knowledge with geographical evidence. It is possible, however, to access a significant amount of dependable information by relying on printed compilations and archival collections that are currently available in various European and Asian countries. In addition to Korea and Japan, we selected countries with a colonial and commercial tradition that were present in the area prior to the twentieth century. For this research project, we consulted several hundred maps in American, Dutch, French, Portuguese, Spanish, and Vatican libraries. We also consulted printed compilations of maps especially relevant to this issue including but not limited to the compilations published by the Korean Ministry of Foreign Affairs and Trade.

Maps vary in size and scope. They also convey different types of information for their individual purposes.<sup>62</sup> They may reflect different perceptions of space as

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<sup>54</sup> Yong-ha, *supra* note 18, at 133, 137.

<sup>55</sup> *Id.* at 136.

<sup>56</sup> See generally THE HISTORY OF CARTOGRAPHY: CARTOGRAPHY IN THE TRADITIONAL EAST AND SOUTHEAST ASIAN SOCIETIES 235–345 (J.B. Harley & David Woodward eds., 1994) [hereinafter THE HISTORY OF CARTOGRAPHY].

<sup>57</sup> *Id.* at 236–37.

<sup>58</sup> See generally *id.*

<sup>59</sup> *Id.* at 235.

<sup>60</sup> *Id.* at 236.

<sup>61</sup> *Id.*

<sup>62</sup> See CHRISTIAN JACOB, THE SOVEREIGN MAP: THEORETICAL APPROACHES IN CARTOGRAPHY THROUGHOUT HISTORY at xiv (2006) ("If we admit that a part of the power of maps is to convince their users that the world looks as the map displays it, such a power should be understood in its specific social and institutional frame. It reflects the power of specific milieus whether political, clerical,

they express the subjective spatial awareness of their authors and the expectations of the people for whom they were produced. Spatial consciousness, in turn, reflects a people's distinct culture and relationship to its land.<sup>63</sup> It may thus change from one society to another and from one century to another. In the history of a country as defined by its people, maps performed the triple function of a political statement, the textual record of a cultural legacy, and the visual representation of distinct knowledge.<sup>64</sup> Therefore, objective physical details may vary in size and location according to their subjective significance. For instance, ancient maps of Korea locate Ulleungdo and Dokdo closer to the Korean coast, because they reflect the Korean possession of these islands as part of the kingdom regardless of their physical distance.<sup>65</sup>

The treatment of geographical information followed distinct procedural and visual standards that were often copied from one map to another.<sup>66</sup> The sixteenth century's development of printing transformed map production into a straightforward and cheaper procedure without completely modernizing its basic conventions.<sup>67</sup> The printing process allowed for a faster updating of existing maps as new material was gathered, modern States collected strategic information, and efficient techniques brought greater accuracy to geographical data.<sup>68</sup> However, as new data entered the pool of cartographic knowledge, it rarely led to a complete overhaul of existing map frameworks.<sup>69</sup> It is therefore possible to trace distinct patterns through three centuries that accurately reflect the history and geography of the maritime territory of Ulleungdo and Dokdo. Although the maps do not constitute conclusive legal proof of possession of the island by either Korea or Japan, they initially provide relevant and valuable historical context for evaluating Japan's invocation of *terra nullius* in 1905 and the years since.

We may classify these maps into three categories. The first comprises maps that were made, at the demand of—or for the benefit of—Korean and Japanese authorities. We include in this group a few maps resulting from private initiatives but describing the territory in accordance with official views. The second category comprises maps that were sketched by European cartographers on the basis of information provided by Christian missionaries (including Jesuit priests and laymen), merchants, and travelers who visited or briefly resided in these countries. They present a visual record of information gathered through various informants. Although these maps are mostly the product of secondhand knowledge, they include figures and facts from the written reports of firsthand observers. The third category comprises maps that were specifically made for navigational purposes

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administrative, technical or scientific.”).

<sup>63</sup> See generally JERRY BROTTON, A HISTORY OF THE WORLD IN TWELVE MAPS (2012).

<sup>64</sup> See THE HISTORY OF CARTOGRAPHY, *supra* note 56, at 235.

<sup>65</sup> See Van Dyke, *supra* note 9, at 165–66.

<sup>66</sup> See generally THE HISTORY OF CARTOGRAPHY, *supra* note 56.

<sup>67</sup> See *id.* at 293–305.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.*

and sailing voyages. These maps pay more attention to precise cartographic data and the accurate description of sea routes. The time period encompasses several centuries. Although the *terminus a quo* is difficult to identify precisely because the first available maps do not have exact dates, the *terminus ad quem* is the 1905 Japanese annexation of the islands.<sup>70</sup>

In the first category, maps, political objectives, and idealized projections of the States' jurisdiction often prevail over geographic precision.<sup>71</sup> The significance of these maps resides less in their accuracy than in their function as keepers of their country's history because they were used for strategic, administrative, and military purposes.<sup>72</sup> They reflect events and facts kept in the collective memory of the country and its inhabitants. They transform space into a legally defined and politically cohesive area that defines the common identity of a people.

From this perspective, it is important to observe that several early Korean maps, both private and official, show Ulleungdo and Dokdo as part of the Korean kingdom.<sup>73</sup> These maps represent the Korean view of these islands and highlight their connection to the mainland. Given the limited charting technology available at that time, cartographers focused less on the exact location of islands than to name and identify them as part of the Korean kingdom.<sup>74</sup> A good example is the map in Figure 1, the *Paldo Chongdo*, a map included in the 1530 geographic atlas produced by the government. While Figure 1 is not spatially accurate, it depicts two large islands—presumably Ulleungdo and Dokdo—off Korea's east coast.<sup>75</sup>

On the other hand, Japanese maps of the same period rarely depict Ulleungdo and Dokdo.<sup>76</sup> When the islands appear, they are often shown outside of Japan's possessions. Japanese cartographers' indecision reflects in part the varying interpretations of the locations of Takeshima and Matsushima during the sixteenth and seventeenth centuries, as well as the Japanese public authorities' divergent opinions regarding the legal status of the islands.<sup>77</sup> Japan's historical doubts reveal tensions between local administration and the central government that should be considered within the broader Japanese political context and the enforcement of its domestic policies. Japanese central authorities were indeed aware of Korea's jurisdiction over the islands.<sup>78</sup> During the 1870s and 1880s, the new Meiji government's perception of Ulleungdo and Dokdo remained as it had been in the Edo period, namely that they were Korean territories.<sup>79</sup> By the end of the

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<sup>70</sup> See Van Dyke, *supra* note 9, at 177.

<sup>71</sup> See generally THE HISTORY OF CARTOGRAPHY, *supra* note 56.

<sup>72</sup> See *id.* at 236.

<sup>73</sup> Van Dyke, *supra* note 9, at 165–66.

<sup>74</sup> See THE HISTORY OF CARTOGRAPHY, *supra* note 56, at 294–95.

<sup>75</sup> See HAN YOUNG-WOO ET AL., THE ARTISTRY OF EARLY KOREAN CARTOGRAPHY 21 (Choi Byoungyon trans., 2008).

<sup>76</sup> See generally Van Dyke, *supra* note 9.

<sup>77</sup> See *id.* at 165–68.

<sup>78</sup> *Id.* at 166.

<sup>79</sup> *Id.* at 174.

nineteenth century, successive Japanese governments ended the domestic controversy and confirmed the official recognition of Korean jurisdiction.<sup>80</sup>

Cartographic observations do not provide undisputed evidence of Korea's claim. They nevertheless clearly corroborate historical evidence such as administrative reports and governmental inquiries that attest to Korea's longstanding sovereignty over the islands. They also substantiate the claim that the islands were considered part of the Korean kingdom by both countries. Although the International Court of Justice (ICJ) observed in the *Burkina Faso v. Republic of Mali* case that maps are only circumstantial "evidence of varying reliability[.]"<sup>81</sup> it also believed maps to be relevant proof because they reflect a government's intention to claim land as within its territory. And failure to include an island within its territorial boundaries, even only on a map, would reflect a government's belief that it had no claim to possession. In line with this analysis, it should be noted that some of the oldest Korean maps relevant here were drawn at the explicit request of the governmental authorities. Such maps fall into the category identified by the ICJ as the "physical expression of the will of the State" that show evidence of an intention to exercise sovereign control over the territory.<sup>82</sup>

The second category of maps comprises European historical representations of Korea, illustrated by the series of maps that aim broadly at presenting Asia and the Far East to the European elite. Their purpose is not to provide a detailed description of the geographic features of the region but to convey instead a broader sense of their location within a space that remains in part unknown and mysterious. Figure 2 is such a map from an atlas by Henri Hondius printed in 1634.

Joan Blaeu's 1655 map of Japan, which was based on Martino Martini's Atlas of China, illustrates a similar conception. In Figure 3, we can see that Korea is limited to a few features while the main Japanese islands such as Oki are included. There is no marking of Ulleungdo or Dokdo, which is telling because this map provides a detailed depiction of Japan. It is important to observe that while European maps of Korea included occasionally Ulleungdo and Dokdo as islands that are placed close to the Korean shoreline, no European map of Japan from the same period included these two islands. For example, Jacques Nicolas Bellin's *Carte des Isles du Japon*, printed in 1735, depicts Japan in this way in Figure 4. A similar version is found in the *Carte de l'empire du Japon pour servir à l'histoire générale des voyages*, printed in 1752, by the same cartographer, in Figure 5. While Oki and its surrounding islands are clearly identified, no attempt is made to locate any island northwest of Oki. In fact, the area where Dokdo is located is not even present in the map.

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<sup>80</sup> *Id.*

<sup>81</sup> Case Concerning the Frontier Dispute (*Burk. Faso v. Mali*), Judgment, 1986 I.C.J. 554, ¶ 54 (Dec. 22); *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13).

<sup>82</sup> Case Concerning the Frontier Dispute (*Burk. Faso v. Mali*), Judgment, 1986 I.C.J. 554, ¶ 56 (Dec. 22).

In drafting these maps, European cartographers relied in large part on two sources of information. First, eyewitness reports filed by Christian missionaries provided new information. The second and more reliable source, in the view of cartographers of the time, consisted in reproducing earlier maps. These so-called “géographes de cabinet,” or “armchair cartographers,” did not leave their offices in order to take part in geographical surveys and discovery expeditions. They produced maps for an audience that was more curious about the existence of diverse societies than concerned about the exact location of their countries. Historical details and geographical accuracy came second to the general description of the territories, which were often presented as distant lands inhabited by strange people with bizarre customs and a colorful way of life. This political geography reflected Europeans’ preconceived notions of distant countries and their inhabitants;<sup>83</sup> Montesquieu’s theory of climate in *The Spirit of the Laws* (1748) similarly made broad generalizations about the snow people and the sun people with little direct knowledge of the cultures or histories involved.<sup>84</sup>

The maps in Figures 6 through 9 illustrate this sixteenth- and seventeenth-century approach to mapping of the region: Johannes van Keulen, *Nieuwe passaert van Oost Indien* 1680 (Figure 6); and French royal geographer Sanson d’Abbeville, *Royaume de la Chine* (1652) (Figure 7). Other typical examples of this approach include *La partie orientale de l’Asie où se trouvent le grand empire des tartares chinois et celui du Japon* (1705), by the printer and royal geographer Nicolas de Fer, and Guillaume de l’Isle’s *Carte de Tartarie* (1706), printed in Paris, and *Carte des Indes et de la Chine*, reprinted in Amsterdam. These cartographers compiled various information from a variety of sources. Another example is D’Anville’s *Carte générale de la Tartarie chinoise dressée sur les cartes particulières faitessur les lieux par les révérends pères jésuites et sur les mémoires particuliers du père Gerbillon, imprimée en 1732* in Figure 8. The islands are not mentioned at all in the *Carte de Tartarie dressée sur les relations de plusieurs voyageurs de Différentes nations et sur quelques observations qui ont été faites dans ce païs là, Par Guillaume de l’Isle, premier géographe du Roy* (1706) in Figure 9. Maps from these centuries omit many significant geographical features. These maps were reprinted several times over a limited period with no or very little alteration.

Modern types of maps of the Korean coasts and the East Sea do not appear until the voyage of the French explorer Jean-Francois de Galoup, Comte de La Perouse, at the end of the eighteenth century. They are more accurate and conceived as geographical and geological indexes. Although La Pérouse did not sail near Dokdo, his naming of Ulleungdo as Dagelet and his mention of the island’s inhabitants drew the attention of the next generation of cartographers.<sup>85</sup>

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<sup>83</sup> PIERRE BOURDIEU, *CE QUE PARLER VEUT DIRE* 227 (1982).

<sup>84</sup> Robert Shackleton, *The Evolution of Montesquieu’s Theory of Climate*, 9 *REVUE INTERNATIONALE DE PHILOSOPHIE* 317 (1955) (Fr.).

<sup>85</sup> See JEAN-FRANÇOIS DE LA PÉROUSE, 2 *VOYAGE DE LA PÉROUSE AUTOUR DU MONDE* 390 (Louis-Antoine Millet-Mureau ed., Paris, Imprimerie de la République 1797).

La Pérouse implicitly acknowledged that the island was not *terra nullius* because, although he named Ulleungdo as Dagelet, he did not attempt to claim discovery on behalf of France.<sup>86</sup> Following La Pérouse's journey and its reports, maps of the area no longer adopted the traditional cartographic conventions of the previous century. They relied instead on new information provided by European explorers who pursued different interests than those of the missionaries and merchants. A few years later, English naval officer and explorer James Colnett's mistaken location of Dagelet and its naming as Argonaut did not change Ulleungdo's and Dokdo's distinct status. Failure to claim possession indicates that nineteenth century European cartographers considered the islands as part of the Korean kingdom (see Figure 10).

The third category of maps confirms this conclusion. They reflect a different perspective over the previous mainland-based approach as they were used for seafaring. This category includes most of the maps kept in the archives of the Dutch East India Company in the Netherlands and several maps printed in England in the second half of the nineteenth century. Although Dokdo was rarely mentioned, the mistaken juxtaposition of Argonaut and Dagelet followed a pattern that strikingly evokes the geographical configuration of Ulleungdo and Dokdo. Carl Ferdinand Weiland's treatment of these two islands in *Das chinesische Reich und das Kaisertum Japan* (1830 & 1832) in Figure 11 illustrates this mistake while color-coding (blue) the islands as being part of the Korean kingdom.

Subsequent maps maintain the distinction between Argonaut and Dagelet, without attributing them to Japan. Such is the case of Justus Perthes' *Das chinesische Reich mit seinen Schutzstaaten nebst dem japanischen Inselreiche* in Figure 12, printed one year after Weiland's 1832 map. Incidentally, the use of Japanese names for identifying these islands did not imply recognition of Japanese sovereignty.

We can observe a similar approach in successive maps of the area, such as Adrien Bruet's *Carte physique et politique de l'Asie* (reprinted 1850), von Stülpnagel's *China und Japan* (1850), and the corrected reprint of Weiland's map printed by Riepert in 1857. These maps never identify the islands as part of Japan. When Whittingham wrote his *Notes on the late expedition against the Russian settlements in eastern Siberia* (Figure 13), he illustrated his account with a map, printed in 1856, showing the track of his seafaring journey that also placed Argonaut and Dagelet outside Japanese territory.

Close examination of all European maps produced in the nineteenth century reveals a similar understanding. Despite their various origins and purpose, maps of the disputed area display considerable evidence of the historical status of the Ulleungdo group of islands, including Dokdo. This reflects the existence of an international understanding that Korea possessed both islands. Although maps alone do not definitely prove Korean sovereignty over the islands, they strongly suggest that Ulleungdo and Dokdo were neither abandoned nor forgotten by the

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<sup>86</sup> *Id.* at 391.



country that had first asserted its jurisdiction over them—despite their remoteness and difficult access.

### C. Academic Debate Over Dokdo

A review of the contemporary literature shows that a majority of scholars have concluded that Korea has the superior claim to sovereignty over Dokdo.<sup>87</sup> Until recently, however, research into the Korean claims for sovereignty over Dokdo was much less extensive than for the Japanese.<sup>88</sup> Scholars have made a variety of arguments in support of Korea: Korean and Japanese historical records which indicate Korean control before 1905; Korean and Japanese historical maps; the nature of Japan's 1905 annexation of Dokdo; the silence of the 1951 San Francisco Peace Treaty; and Korea's effective occupation and control of Dokdo since the 1950s. Over the years, Japanese arguments have shifted from ones based on annexation, to ones grounded in *terra nullius* and the San Francisco Treaty, to ones focusing on confusion in the relevant historical maps.

Numerous scholars cite several key pieces of historical evidence establishing Korean sovereignty over Dokdo prior to 1905. Nearly all of them first observe that Korean records of Dokdo date back to 512 C.E., far earlier than any Japanese counterparts.<sup>89</sup> Several also note that some of the oldest Japanese records of Dokdo, dating to the seventeenth century, position Ulleungdo and Dokdo beyond Japan's territorial boundaries and within Korea's instead.<sup>90</sup> Another frequently mentioned historical factor is the Ahn Yong-bok incident.<sup>91</sup> Korea followed with regular inspection of the islands for trespassers over several centuries, whereas Japan enforced a travel ban upon its fishermen until as late as 1903.<sup>92</sup>

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<sup>87</sup> In fact, some scholars reach this conclusion when incorporating a survey of the existing literature in their own work. See, e.g., Michael C. Davis, *Can International Law Help Resolve the Conflicts Over Uninhabited Islands in the East China Sea?*, 43 DENV. J. INT'L L. & POL'Y 141 (2015) (noting that the "dominant view in case law and the literature has generally been favorable to the South Korean territorial claim to the Dokdo/Takeshima Islands"); Chen-Ju Chen, *Multipolar Disorder in the East China Sea: Learning From the Experiences in Building the Legal Systems of the Arctic and the Antarctic*, 30 Y.B. INT'L L. & AFF. 111 (2012) ("[I]t has long been considered that Korea's claim over Dokdo is stronger than that of Japan's, according to the historical evidence of its exercise of authority, the connection between Japan's claim of annexation in 1905 and Japanese expansionist activities over the Korean Peninsula, the principle of contiguity, and Korea's actual physical control of the islands during the past half-century.").

<sup>88</sup> See Hoon Lee, *supra* note 4 at 390–91.

<sup>89</sup> See, e.g., Davis, *supra* note 87, at 142–43; Kiran Kim, *Dokdo or Takeshima?*, 2 CLA J. 33 (2014); Yong-ha, *supra* note 18, at 75–91; PILKYU KIM, CLAIMS TO TERRITORY BETWEEN JAPAN AND KOREA IN INTERNATIONAL LAW 53–57 (2014); Van Dyke, *supra* note 9, at 166.

<sup>90</sup> See Lee, *supra* note 4, at 396; Kim, *supra* note 89, at 33–34; Van Dyke, *supra* note 9, at 166.

<sup>91</sup> See *supra* Part I.A.

<sup>92</sup> See Lee, *supra* note 4, at 395–412; Van Dyke, *supra* note 9, at 166, 174; Kim, *supra* note 89, at 33–35; KIM, *supra* note 89, at 53–57, 66–67, 70–71 (specifically noting that an application for a hunting and fishing license for Dokdo by a Japanese fisherman was rejected by the Japanese government because it "recognizes the island as the territory of Korea"); Yong-ha, *supra* note 18, at 75–91; Davis, *supra* note 87, at 142–43; Myung-Ki Kim, *A Study on Legal Aspects of Japan's Claim to Tokdo*, 28 KOREA OBSERVER 363–64 (1997); Kazuo Hori, *Japan's Incorporation of Takeshima into its Territory*

Scholars also point to Japanese government records. They argue that these records explicitly concede Korean ownership of Dokdo, pointing to instances such as the 1869 survey of Japan's territories that the Dajokan (Japan's highest governing body at the time) ordered to give a full accounting of how Ulleungdo and Dokdo came to be Korean territory;<sup>93</sup> a statement by the Dajokan in 1877 that Dokdo was not part of Japanese territory;<sup>94</sup> and a confirmation of this official Japanese position by the Japanese Foreign Ministry in response to an inquiry by the Japanese Ministry of Home Affairs in 1881.<sup>95</sup>

Other arguments rely on Korea's internal government policies. They point to the "vacant island" policy Korea adopted from the fifteenth through the nineteenth century, under which the Korean government prohibited its citizens from settling on Ulleungdo and Dokdo.<sup>96</sup> The Korean government noted that this should not be construed as abandonment of the islands but instead as an exercise of sovereignty itself.<sup>97</sup> Korea reversed the policy as a reaction to perceived encroachment by the Japanese in the late nineteenth century,<sup>98</sup> culminating in Imperial Ordinance No. 41 issued by the Korean government in 1900, and which expressly designated an administrative unit and inspector for Dokdo.<sup>99</sup> Despite the limited number and scope of Korean activities with respect to Dokdo, multiple authors conclude that such activities nonetheless sufficiently establish sovereignty for a small and generally uninhabitable island like Dokdo, since what international law requires depends on the nature of the territory,<sup>100</sup> and they conclude that on balance the history of activities favors Korea.<sup>101</sup>

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in 1905, 28 KOREA OBSERVER 477, 485–86 (1997); see also Lee, *supra* note 4, at 498 (noting Korea's consistent objections to trespassing by Japanese fishermen in 1888, 1895, 1898, and 1899).

<sup>93</sup> SANG HYUNG NA, THE KOREAN-JAPANESE TERRITORIAL DISPUTE OVER DOKDO/TAKESHIMA 36 (2007); Yong-ha, *supra* note 18, at 107–113.

<sup>94</sup> Kim, *supra* note 89, at 35; see also Seokwoo Lee, *Dokdo/Takeshima Islands from a Korean Perspective*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014).

<sup>95</sup> Hori, *supra* note 92, at 494.

<sup>96</sup> Van Dyke, *supra* note 9, at 166.

<sup>97</sup> REPUBLIC OF KOREA, MINISTRY OF FOREIGN AFFAIRS, DOKDO: KOREA'S BEAUTIFUL ISLAND 21.

<sup>98</sup> See Davis, *supra* note 87, at 142; Hori, *supra* note 92, at 498; Kim, *supra* note 92, at 363–64; Lee, *supra* note 4, at 398; Van Dyke, *supra* note 9, at 166, 174–75; KIM, *supra* note 89, at 99–100.

<sup>99</sup> Hee Kwon Park & Jong-In Bae, *Korea's Territorial Sovereignty Over Tokdo*, 29 KOREA OBSERVER 121–63 (1998); Yong-ha, *supra* note 18, at 123.

<sup>100</sup> See Park & Bae, *supra* note 20, at 129–30 (arguing that for a territory like Dokdo all that would be required under international law is for Korea to "genuinely consider [Dokdo] as its own territory and treat it as such with some display of authority"); Phil Haas, *Status and Sovereignty of the Liancourt Rocks: The Dispute Between Japan and Korea*, 15 GONZ. J. INT'L L. 2, 8 (2011) ("Applying case law, Korea can argue that [Dokdo is] remote and that even Korea's 'intermittent and discontinuous' presence on the island establishes its territorial sovereignty over the island."); KIM, *supra* note 89, at 133 (observing that for an island like Dokdo, "international law requires very little in the way of the actual exercise of sovereign rights").

<sup>101</sup> See generally Van Dyke, *supra* note 9; Davis, *supra* note 87; Kim, *supra* note 89; Yong-ha, *supra* note 18; KIM, *supra* note 89; Kajimura, *supra* note 38; Haas, *supra* note 100; Benjamin K. Sibbett, *Tokdo or Takeshima? The Territorial Dispute Between Japan and the Republic of Korea*, 21 FORDHAM INT'L L.J. 1606, 1606–46 (1998); Park & Bae, *supra* note 20. One scholar even suggests that the best way to understand Japanese records is by placing them within the larger historical-

Some researchers also refer to Korean and Japanese maps as additional evidence of Korea's superior claim. Maps published by the Japanese government, the Japanese military, and prominent Japanese scholars in the eighteenth and nineteenth centuries exclude Dokdo from Japanese territory while including it in Korea's.<sup>102</sup> Those citing this cartographic evidence argue that it was highly likely that these maps reflected the territorial consciousness of the Japanese government at the time, as well as that of Japanese fishermen.<sup>103</sup> At least one author has in turn concluded that since Dokdo is depicted in Korean territory consistently by Korean maps and sometimes by Japanese maps, international tribunals would very likely rule in favor of Korea.<sup>104</sup>

Existing literature commonly addresses the implications of the 1905 annexation of Dokdo. Many experts dismiss it as an illegitimate basis for Japan's claim to Dokdo under international law.<sup>105</sup> However, the details of how Japan annexed Dokdo—by printing news of its annexation only in a local Japanese newspaper and without official announcement, resulting in Korea not even being aware of this event until 1906—are cited by several experts as indicative of an awareness by the Japanese government that Dokdo was Korean territory, since a more open and notorious approach would have likely resulted in rebuke by Korea and possibly other nations.<sup>106</sup> One author further supports this theory by pointing to Japanese scholarship from the immediate post-annexation period which continued to recognize the island as Korean territory (albeit now annexed by Japan).<sup>107</sup>

The 1951 San Francisco Peace Treaty is the next major source of authority addressed by the existing literature on Dokdo. The obvious argument here is that Korea is not a signatory to the 1951 Treaty and therefore even if it had definitely determined ownership of Dokdo, such determination would not be binding on

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political context: records of the mid-seventeenth century were first collected into published compilations by the Japanese at a time when the Japanese government was facing a series of international crises brought on by contact with the United States and Russia, which in turn informed a revisionist paradigm that framed prior acts of foreign policy passivity or acquiescence as mistakes that led Japan to the then-current crisis. See Lee, *supra* note 4, at 419–21. Thus, the Japanese “began to write as if Takeshima . . . [was] originally Japanese territory but ceded to [Korea],” exemplifying the policy blunders from the past that Japan needed to avoid in the future. *Id.* at 419–20.

<sup>102</sup> Hori, *supra* note 92, at 487–88; KIM, *supra* note 89, at 58; Van Dyke, *supra* note 9, at 167, 174; NA, *supra* note 93, at 22.

<sup>103</sup> Kim, *supra* note 89, at 36; Van Dyke, *supra* note 9, at 174; NA, *supra* note 93, at 22.

<sup>104</sup> Hyung K. Lee, *Mapping the Law of Legalizing Maps: The Implications of the Emerging Rule on Map Evidence in International Law*, 14 PAC. RIM L. & POL'Y J. 186 (2005) (“[I]nternational tribunals accord more credence to the maps produced by a neutral party . . . if a map produced by a neutral party is deemed to be free of any political bias, then a map produced by the party with adverse interests may receive even greater deference . . . and might prove to be a decisive factor to the outcome of the adjudication if Japan and Korea refer their dispute to an international tribunal.”); see also Haas, *supra* note 100.

<sup>105</sup> See, e.g., Park & Bae, *supra* note 20, at 161; Van Dyke, *supra* note 9, at 165, 180–81.

<sup>106</sup> See NA, *supra* note 93, at 69–70; Yong-ha, *supra* note 18, at 173.

<sup>107</sup> NA, *supra* note 93, at 98–99.

Korea.<sup>108</sup> In addition, after examining the negotiating history and context, many scholars conclude that there was no consensus among the drafters as to which country had the better claim to Dokdo and for that reason and others, the drafters deliberately sidestepped the issue.<sup>109</sup> Much has been made of various statements by US representatives, such as Dean Rusk and William Sebald stating that the United States believed Dokdo belonged to Japan.<sup>110</sup> The United States sought to combat the spread of communism in Asia by binding Japan as a strong ally, particularly given the outbreak of the Korean War and the possibility that Dokdo could end up in the communist sphere.<sup>111</sup> These scholars also observe that the United States began to prefer a shorter version of the 1951 Treaty that intentionally left some matters unaddressed (like Dokdo) in order to facilitate a faster conclusion to the negotiations.<sup>112</sup> Responding to pressing geopolitical issues may well have urged in favor of leaving the Dokdo issue unresolved: the

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<sup>108</sup> See, e.g., KIM, *supra* note 89, at 130; Lee, *supra* note 4.

<sup>109</sup> See Van Dyke, *supra* note 9, at 184 (concluding that the Allies decided not to settle the matter because “not enough information had been provided regarding the historical events surrounding Japan’s incorporation of Dokdo/Takeshima, or because the Allied powers felt themselves to be incapable, or inadequate, adjudicators”); Joshua Castellino & Elvira Dominguez Redondo, *The Title to Dokdo/Takeshima: Addressing the Legacy of World War II Territorial Settlements/Finding the Right Settlement of Dispute Mechanism*, 22 INT’L J. ON MINORITY & GROUP RIGHTS 550, 560–61 (2015) (“Allies believed that the dispute would die a natural death, or be resolved bilaterally or multilaterally by the parties.”); Kimie Hara, *50 Years From San Francisco: Re-examining the Peace Treaty and Japan’s Territorial Problems*, 74 PAC. AFF. 362 (2001) (observing that leaving the Dokdo question unresolved was consistent with how the drafters left a number of other territorial questions unresolved).

<sup>110</sup> See e.g., Lee & Van Dyke, *supra* note 11 at 745–47, 749.

<sup>111</sup> See Hara, *supra* note 109, at 370–71; Lee & Van Dyke, *supra* note 11, at 745–48 (noting that the drafters of the 1951 Treaty switched their positions regarding Dokdo preceding the outbreak of the Korean War, and then avoided the issue except in the final draft, in which they recognized Japan’s sovereignty over Dokdo, following the outbreak of the Korean War); KIM, *supra* note 89, at 129 (noting that recently declassified documents reveal that a US legal adviser for the treaty negotiations even stated that “a thorough study, with guidance of experts in Oriental history, would have to be made,” that Rusk’s statements should not be relied on to interpret the Treaty as they were “political statements,” and that it remained a question “whether the statement made in Mr. Rusk’s letter entails the legal conclusion that the peace treaty leaves Dokdo [Takeshima] to Japan”); see also Kajimura, *supra* note 101, at 461 (“America’s views do not have any definite meaning.”). Seokwoo Lee and Jon Van Dyke also point to Dulles’s reversal of position on letting Korea be a signatory to the 1951 Treaty as further evidence that geopolitical considerations rather than legal assessments dominated the negotiations, since Korea was excluded as a signatory so as to avoid legitimizing or strengthening the legal property positions and benefits that could go to Koreans living in Japan, many of whom were from North Korea and proponents of communism in Japan. See Lee & Van Dyke, *supra* note 11, at 751. Even now, the official US government position is that it takes no side in the Dokdo dispute, that this dispute is one for Korea and Japan to settle bilaterally, and that this has always been the US position since 1952. See WHITE HOUSE OFFICE OF COMM’NS, PRESS GAGGLE BY DANA PERINO AND DENNIS WILDER (Aug. 4, 2008).

<sup>112</sup> Some scholars even theorize that the United States may have intentionally preferred ambiguity in the 1951 Treaty since that would (i) likely put them in a prime position to be the party to solve or broker territorial disputes created by such ambiguities, ultimately resulting in greater US power and leverage over Asia-Pacific countries, and/or (ii) create sources of conflict between Japan and communist Russia and a potentially communist Korea, which would tend to drive Japan closer to the United States. See Hara, *supra* note 109, at 373; Lee & Van Dyke, *supra* note 11, at 748, 750.

faster the negotiations, the faster the resumption of normal diplomatic relations with Japan, and the faster the United States would be able to re-deploy its troops, then stationed in Japan as occupying forces, to fight in the Korean War.<sup>113</sup> Even if the United States had stated a definite position, some authors note that both US negotiating personnel and the information the United States had available were heavily biased in favor of the Japanese.<sup>114</sup> Others also observe that the end result of the 1951 Treaty, including the lack of definite assignment of Dokdo to Korea, speaks more to the significant disparity in influence, experience, sophistication, and resources between Korea and Japan at the time than the relative merits of their claims.<sup>115</sup>

In contrast to the inconclusive nature of the 1951 Treaty, many scholars cite the more recent history of Korean occupation and Japanese reactions as factors that unambiguously weigh in Korea's favor. Such recent historical evidence may carry greater weight because the older history of the island is spottier and contested, while the history of Korea's occupation and control over Dokdo since the 1950s is relatively clear and unbroken.<sup>116</sup> A variation of this argument is that Korea's effective control over Dokdo since the 1950s, combined with the 1965 Normalization Treaty between the two countries, in which Japan arguably acquiesced to Korean control over Dokdo by not raising it as an issue, means the balance should tilt in Korea's favor.<sup>117</sup> One analysis even suggests that

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<sup>113</sup> See Hara, *supra* note 109, at 372; Seokwoo Lee, *The 1951 San Francisco Peace Treaty With Japan and the Territorial Disputes in East Asia*, 11 PAC. RIM L. & POL'Y J. 63, 136 (2002); Lee & Van Dyke, *supra* note 11, at 748.

<sup>114</sup> See YOUNG KOO KIM, A PURSUIT OF TRUTH IN THE DOKDO ISLAND ISSUE 17 (2003) (noting Sebald's influence); SEOKWOO LEE & HEE EUN LEE, THE MAKING OF INTERNATIONAL LAW IN KOREA: FROM COLONY TO ASIAN POWER 57 (stating that the information regarding Dokdo available to the United States at the time was "based for the most part on Japanese language sources available in the Department of State and the Library of Congress, studies prepared by the Department of State, and studies by the Japanese Foreign Office."); see also Hara, *supra* note 109, at 370.

<sup>115</sup> Jung Byungjoon, *Korea's Post-Liberation View on Dokdo and Dokdo Policies (1945-1951)*, 5 J. OF NORTHEAST ASIAN HISTORY 5, 53 (2008) (arguing that Korea was at a severe disadvantage during the negotiations because (i) research and survey reports gathered by the US military government in Korea during the transitional period of 1947-48, which supported the Korean claim, were not transferred to the newly established Korean government; (ii) the Korean government did not have the resources to give extensive attention to Dokdo because of the Korean War, and in light of this, its main priorities were lobbying to become a signatory to the treaty, obtaining economic compensation from Japan, prosecuting war criminals, and being awarded sovereignty over a few other islands it deemed more important; (iii) Korea did not even know Japan was contesting Korea's sovereignty over Dokdo; and (iv) Korea was a new country with far less diplomatic experience and skill than Japan); Lee & Van Dyke, *supra* note 11, at 750 ("President Rhee placed too much attention on an unrealistic demand for Korean sovereignty over Tsushima Island, and did not produce a scholarly, well-documented study of the Korean historical record on Dokdo, which could have offered American drafters an alternative to the Japanese Foreign Ministry's monograph entitled 'Minor Islands in the Sea of Japan.'").

<sup>116</sup> Garret Bowman, *Why Now is the Time to Resolve the Dokdo/Takeshima Dispute*, 46 CASE W. RES. J. INT'L L. 433, 453 (2013). See also Sean Fern, *Tokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute*, 5 STAN. J. EAST ASIAN AFF. 78, 87-88 (2005) (noting that under the *Palmas* and *Clipperton* standards, Korea has a stronger claim to Dokdo based on a comparison of the history of Korea's manifestations of sovereignty with those of Japan).

<sup>117</sup> Lee & Van Dyke, *supra* note 11, at 756-57.

international tribunals could apply the doctrine of *uti possidetis ita possidetis* (as you possess, so you possess), which “privileges the *status quo* by protecting existing arrangements of possession without regard to the merits of the dispute.”<sup>118</sup> Under such a doctrine, Korea would have sovereignty over Dokdo, with Japan perhaps being granted certain use rights with respect to the territory (such as fishing rights).

A minority of scholars contend that Japan has the better claim. Some maintain that Japan has a superior historical record of effective displays of sovereignty, while others argue that Dokdo was *terra nullius* prior to the 1905 annexation.<sup>119</sup> The latter scholars focus on the absence of Dokdo from many of the older Korean records or the inconsistent use of names for Ulleungdo and Dokdo, suggesting that many records meant to support the Korean claim to Dokdo are in fact merely further support for the Korean claim to Ulleungdo (which is not disputed).<sup>120</sup> A less obvious argument is that the United States has sovereignty over Dokdo because (i) the island falls within the territorial sphere controlled by US military authorities following World War II and (ii) the 1951 Treaty did not expressly assign the island to any country in particular, so it remains under US sovereignty as “un-demarcated territory”.<sup>121</sup>

## II.

### THE INTERNATIONAL LAW OF TERRITORIAL POSSESSION

This section reviews the international law of territorial disputes. International law recognizes several ways to gain legal possession of territory. There is no authoritative international agreement or other positive law on this question. Instead, judicial and arbitral decisions, the practice of nations, historic custom, and scholarly commentary have contributed to the definition of territorial acquisition under international law.<sup>122</sup> Due to this decentralized distribution of authority, the international law of possession can and has changed over time. Conquest, or *subjugatio*, for example, used to constitute a commonly accepted method of territorial acquisition. After the U.N. Charter’s prohibition on aggressive war and its guarantee of every member state’s territorial integrity, however, conquest has disappeared.<sup>123</sup> Different bases for legitimate possession can produce conflicting claims by nations over the same territory.

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<sup>118</sup> Castellino & Redondo, *supra* note 109, at 568, 577.

<sup>119</sup> See Hori, *supra* note 92, at 524 (summarizing the majority and minority position); see also Raul Pedrozo, *Sovereignty Claims Over the Liancourt Rocks (Dokdo/Takeshima)*, 28 CHINESE (TAIWAN) Y. B. INT’L L. & AFF. 78–97 (2010).

<sup>120</sup> See generally Pedrozo, *supra* note 119.

<sup>121</sup> Roger C. S. Lin & Richard W. Hartzell, *Final Solution for the Dokdo Dispute*, KOREA TIMES (June 6, 2006), <http://www.taiwanbasic.com/tw/kt-dokdo.htm>.

<sup>122</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt.b, n.2 (explaining bases for development of customary international law).

<sup>123</sup> U.N. Charter art. 2.4 reads: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any

### A. Types of Territorial Acquisition

To summarize different types of acquisition of territory under international law:

1. Historic title. A nation may have possessed territory through an ancient and historic connection with the land.<sup>124</sup>
2. Contiguity. A nation may acquire unclaimed territory that is geographically proximate to land that it already possesses. Contiguity provides the basis for claims to the possession of the territorial sea, continental shelf, and exclusive economic zones in the seas adjacent to land.
3. Discovery & Occupation. A nation may discover land that is unclaimed by any other organized political unit. Such land is considered *terra nullius*. In order to maintain title, a nation must maintain effective occupation of the discovered land.<sup>125</sup> Some international tribunals have defined effective occupation to require acts that a) show an intention to occupy and b) display government authority in a continuous and uncontested fashion.<sup>126</sup>
4. Prescription. A nation can acquire territory that is possessed by another state. It might acquire by prescription if it asserts discovery in good faith and exercises effective control over the territory, even though another actually has title. Even if the acquiring state did not discover the territory in good faith, it can also gain title through long, continuous, uninterrupted, and public possession in which other nations acquiesce.<sup>127</sup> Prescription resembles the common law doctrine of adverse possession or Roman law's *usucapio*.

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other manner inconsistent with the Purposes of the United Nations.”

<sup>124</sup> See, e.g., Phase I: Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen), 114 I.L.R. 2 (Perm. Ct. Arb. 1998).

<sup>125</sup> See, e.g., Island of Palmas (U.S. v. Neth.), 2 R. Int'l Arb. Awards 829, 869 (Perm. Ct. Arb. 1928); Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 (Sept. 5); *Minquiers and Ecrehos* (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47.

<sup>126</sup> See *Island of Palmas* (Neth. v. U.S.), *supra* note 125 (holding that “inchoate” rights created at the time of an island's discovery must be completed through “continuous and peaceful” display of sovereignty). See also *Eritrea v. Yemen*, 22 R. Int'l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998) (“The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis.”); *Case Concerning Land, Island and Maritime Frontier Dispute* (El Sal. v. Hond.), Judgment, 1992 I.C.J. 351, 563 (requiring “peaceful and continuous” exercise of State functions).

<sup>127</sup> L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, VOL. I—PEACE, 400–02 (Sir Ronald Roxburgh ed., 3d ed. 1920).

5. Accretion. A nation may increase its territory due to natural changes in the features of land. Examples can include alteration of the course of a river that serves as a border, expansion of a coastline, or the emergence of new islands.<sup>128</sup>
6. State Secession, or *Uti Possidetis*. New states that come into existence from the dissolution of an empire or larger nation will maintain previous colonial borders.<sup>129</sup>
7. Cession. Nations can transfer possession of territory by treaty or other agreement. Cession can be voluntary through an exchange of lands, financial payment, or even gift.<sup>130</sup> Cession can also occur at the end of war, when the defeated nation (such as Germany at the end of World Wars I or II and Japan at the end of World War II) gives up territory as part of a peace settlement.
8. Conquest. Although now generally considered illegitimate, conquest was a historic means of acquiring territory. It required both defeat of an enemy in war, known as *debellatio*, and subjugation of the territory through annexation.<sup>131</sup>

With island disputes, international courts and arbitral bodies have usually decided possession based on the traditional factors of discovery and continuing occupation.<sup>132</sup> A review of the relevant customs and decisions will provide the proper legal context for the dispute over Dokdo, but it should be clear that the primary factor in such cases is occupation. International authorities often place importance on legal “title” to a territory, but in most cases the nations at odds will dispute title and instead the case will turn on control, or what is sometimes called “*effectivités*.”<sup>133</sup> International courts define control as both the intention to exercise sovereignty and actual, continuous displays of governmental authority.

Under this test, as developed by modern international tribunals, Korea’s continuing and effective display of control over Dokdo grants it legal title to the island even if historical claims over discovery cannot be resolved. This Section reviews the leading cases to show the manner in which international tribunals have resolved competing claims over discovery and how they have refined the concept of *effectivités*.

Perhaps the most widely respected decision on the possession of islands is the *Island of Palmas* arbitration of 1925.<sup>134</sup> The dispute between the United States

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<sup>128</sup> *Id.* at 390–94.

<sup>129</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554, ¶ 54 (Dec. 22).

<sup>130</sup> OPPENHEIM, *supra* note 127, at 376–82.

<sup>131</sup> *Id.* at pp. 394–400; *but see* U.N. Charter, *supra* note 123.

<sup>132</sup> Eritrea v. Yemen, 22 R. Int’l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998).

<sup>133</sup> Case Concerning Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 3, 556–57 (Dec. 22).

<sup>134</sup> The Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January



and the Netherlands revolved around the Island of Palmas, located between the Philippines and Indonesia.<sup>135</sup> As the colonial power over the Philippines at the time, the United States claimed it had acquired the island through cession from Spain in the Treaty of Paris of 1898, which ended the Spanish-American War.<sup>136</sup> The Netherlands claimed ownership of the island as the colonial power at the time over Indonesia. The United States traced its title to the original discovery of the island by Spain, its cession to the United States in the 1898 Treaty, which specifically included the island in its transfer of territory, and its contiguity to the Philippines.<sup>137</sup> The Netherlands claimed that the Dutch East India Company had come into possession of the island as early as 1677 as part of agreements of suzerainty over the local princes of nearby Indonesian islands.<sup>138</sup>

Judge Max Huber of the Permanent Court of Arbitration found that the Dutch possessed the Island of Palmas.<sup>139</sup> Regardless of the American claim to original discovery, the court found that effective displays of sovereignty had to accompany title.<sup>140</sup> Indeed, continuous control expressed the same concept as title. “It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation,” Judge Huber wrote.<sup>141</sup> “So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.”<sup>142</sup> Control has to apply not only at the time of the transfer of title, but at the time that the dispute occurred. Control must be proven by “continuous and peaceful display of the functions of a state.”<sup>143</sup>

According to Judge Huber, Dutch activities on the Island of Palmas met this standard of sovereignty. The Netherlands produced eighteenth century reports of the flying of the Dutch flag by inhabitants, the enforcement of Dutch criminal law on the island, and the inclusion of the island in reports by Dutch colonial officials.<sup>144</sup> In the mid-nineteenth century, Dutch colonial officials presented extensive information on the island and its inhabitants, reported that the inhabitants paid taxes or tribute, and in 1895 a Dutch official was the first European to step foot on the island.<sup>145</sup> While admitting that the Dutch displays of

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23, 1925 *Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas)*, 2 R. Int'l Arb. Award 829 (Perm. Ct. Arb. 1928), *reprinted in* 22 AM. J. INT'L L. 867 (1928).

<sup>135</sup> *Island of Palmas Case (Neth. v. U.S.)*, 2 R. Int'l Arb. Award 829, 836 (Perm. Ct. Arb. 1928).

<sup>136</sup> *Id.* at 837.

<sup>137</sup> *Id.* at 837–38.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 871.

<sup>140</sup> *See id.* at 839–40.

<sup>141</sup> *Island of Palmas Case (Neth. v. U.S.)*, 2 R. Int'l Arb. Award at 839 (Perm. Ct. Arb. 1928).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 840.

<sup>144</sup> *Id.* at 862–63.

<sup>145</sup> *Id.* at 865.

sovereignty were “not numerous” and that there were “considerable gaps in the evidence of” continuity, the court found nonetheless that the displays were “open and public.”<sup>146</sup> Meanwhile, cession to the United States by the 1898 Treaty could “exist only as inchoate title, as a claim to establish sovereignty by effective occupation.”<sup>147</sup> Judge Huber concluded: “[A]n inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.”<sup>148</sup>

A second pre-WWII decision relevant to the Dokdo dispute is the 1931 arbitration over Clipperton Island between Mexico and France.<sup>149</sup> France claimed title to the uninhabited island, which lies 600 miles from Mexico, by discovery in 1858.<sup>150</sup> France, however, had not undertaken significant activity on Clipperton and a concession to develop guano deposits went unexploited.<sup>151</sup> In 1897, a Mexican naval vessel landed and forced three Americans living on the island to lower the US flag. Mexico then contested French sovereignty and claimed title going back to earlier discovery by Spain in the eighteenth century.<sup>152</sup> King Victor Emmanuel of Italy, the chosen arbitrator, ruled in favor of France.<sup>153</sup> He found that Clipperton, because it was uninhabited, was *terra nullius* at the time of the 1858 discovery.<sup>154</sup> But equally as important as discovery, the King declared, were active displays of sovereignty. The King observed that:

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.<sup>155</sup>

A nation meets this standard when it “establishes in the territory itself an organization capable of making its laws respected.”<sup>156</sup> The King found that France had discovered the island and openly established its sovereignty, and that its lack of activity on the island in the following four decades did not indicate “the *animus*

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<sup>146</sup> *Id.* at 867–68.

<sup>147</sup> Island of Palmas Case (Neth. v. U.S.), 2. R. Int'l Arb. Award at 869 (Perm. Ct. Arb. 1928).

<sup>148</sup> *Id.*

<sup>149</sup> Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v. Mexico), Jan. 28, 1931, *reprinted in* 26 AM. J. INT'L L. 390 (1932) [hereinafter Clipperton Arbitration].

<sup>150</sup> MARK JOHN VALENCIA ET AL., SHARING THE RESOURCES OF THE SOUTH CHINA SEA 17 (1997).

<sup>151</sup> *Id.*

<sup>152</sup> Clipperton Arbitration, 26 AM. J. INT'L L. at 390, 392.

<sup>153</sup> VALENCIA ET AL., *supra* note 150, at 17–18.

<sup>154</sup> Clipperton Arbitration, 26 AM. J. INT'L L. at 390, 393.

<sup>155</sup> *Id.* at 393.

<sup>156</sup> *Id.* at 394.

of abandoning the island.”<sup>157</sup> Therefore, the King concluded, Mexico could not disturb France’s exercise of sovereignty over the island.<sup>158</sup>

A third important international decision bearing on the Dokdo dispute is the 1933 *Eastern Greenland* decision by the Permanent Court of International Justice.<sup>159</sup> There, Norway had proclaimed that it would occupy parts of Eastern Greenland on the theory that the land was *terra nullius*.<sup>160</sup> Denmark brought the lawsuit on the ground that Norway was violating Denmark’s existing sovereignty over all of Greenland.<sup>161</sup> Agreeing with the analysis in *Island of Palmas*, the court held that “a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.”<sup>162</sup> According to the evidence, Denmark had begun to settle Greenland as early as the seventeenth century, and no other country had ever claimed sovereignty to any part of Greenland until 1931.<sup>163</sup> While most Danish activity occurred in the western part of the island, the court found that some of Denmark’s governing decrees, such as trading monopolies, extended to all of Greenland.<sup>164</sup> Denmark openly displayed sufficient sovereignty by enforcing a legal exclusion of competitive economic activity over the entire territory, even though its settlements were concentrated in one part of the land.<sup>165</sup>

Facts most similar to the Dokdo dispute arose in the 1953 International Court of Justice decision, the *Minquiers and Ecrehos* case. Each composed of two to three islands, islets, and rocks, the Minquiers and Ecrehos sit in the English Channel between the United Kingdom and France.<sup>166</sup> Both nations claimed an unbroken, ancient title to the islands.<sup>167</sup> British claims derived from the 1066 invasion by William the Conqueror, which united England and the Duchy of Normandy, including the islands.<sup>168</sup> When France expelled the Normans in 1204, William’s descendants retreated from continental France but kept the Channel Islands.<sup>169</sup> France claimed that the 1204 expulsion gained the Minquiers and

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 (Sept. 5).

<sup>160</sup> *Id.* ¶ 64.

<sup>161</sup> *Id.* ¶ 1.

<sup>162</sup> *Id.* ¶ 96.

<sup>163</sup> See generally SOREN RUD, COLONIALISM IN GREENLAND: TRADITION, GOVERNANCE AND LEGACY (2017).

<sup>164</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53 ¶ 108.

<sup>165</sup> *Id.* ¶ 126.

<sup>166</sup> The Minquiers and Ecrehos Case (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, 53 (Nov. 17).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

Ecrehos for the French crown.<sup>170</sup> The International Court of Justice found that neither side could prove its case with subsequent medieval Anglo-French treaties, which reaffirmed the existing possession of islands for each side, but did not identify them by name.<sup>171</sup>

The court treated the Minquiers and Ecrehos separately for purposes of occupation and control. With respect to Ecrehos, it found significant internal orders of the British monarchy granting rights over the islands to vassals during the medieval period.<sup>172</sup> It also deemed important a close administrative relationship between Ecrehos and the island of Jersey, over which the United Kingdom held undisputed sovereignty.<sup>173</sup> British administrative officials on Jersey had exercised criminal jurisdiction over crimes on Ecrehos, built houses, and enforced British tax and customs laws.<sup>174</sup> France claimed sovereignty over the island for the first time in 1886.<sup>175</sup> Before then, and only sporadically, France asserted that Ecrehos might be *terra nullius*.<sup>176</sup> It did nothing to exercise any physical control over the islands.<sup>177</sup> As a result, the court found the Ecrehos belonged to the United Kingdom.<sup>178</sup>

The ICJ adopted a similar approach with the Minquiers. It did not find the assertions of the United Kingdom or France dispositive based on feudal and historic claims.<sup>179</sup> While France had more contact with the island, it also did not declare any claim to sovereignty until 1888.<sup>180</sup> By contrast, the United Kingdom conducted government functions on the Minquiers during the nineteenth and twentieth centuries, such as resolving disputes and enforcing criminal, maritime, and customs laws.<sup>181</sup> The ICJ declared that “[w]hat is of decisive importance . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.”<sup>182</sup> Later courts have similarly read the ICJ decision as privileging current control over an island above historic information.<sup>183</sup> The arbitral court in the *Eritrea-Yemen* case observed “there had also been much argument about claims to very ancient titles,” but it is the relatively recent history of use and possession

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 53–55.

<sup>172</sup> *Id.* at 62.

<sup>173</sup> *Id.* at 63–65.

<sup>174</sup> *Id.* at 65–66.

<sup>175</sup> *Id.* at 59.

<sup>176</sup> *Id.* at 67.

<sup>177</sup> The Minquiers and Ecrehos Case (Fr. v. U.K.), Judgment, 1953 I.C.J. Rep. 47, 67 (Nov. 17).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 70–71.

<sup>180</sup> *Id.* at 71.

<sup>181</sup> *Id.* at 55, 56, 59, 71.

<sup>182</sup> *Id.* at 57.

<sup>183</sup> Castellino & Redondo, *supra* note 109, at 551, 562, 568, 574.

that ultimately proved to be a main basis” of the *Miniquiers and Ecrehos* decision.<sup>184</sup>

International decisions after 1953 have only amplified the fundamental importance of open displays of sovereignty to establish legal possession of disputed islands. Two ICJ decisions applied the doctrine established in the *Miniquiers and Ecrehos* decision. In the 1992 *Gulf of Fonseca* case, Nicaragua and Honduras disputed the possession of islands the Spanish had discovered in 1522, which are located within the gulf that borders both countries.<sup>185</sup> Along with El Salvador, which also borders the Gulf of Fonseca, the three nations had come into existence after the dissolution of the Spanish Empire in the Americas.<sup>186</sup> The three nations inherited the administrative boundary lines from the Empire under the doctrine of *uti possidetis*, but no title benefited any of them because the Spanish colonial system had left the location of the islands within its administrative borders unclear.<sup>187</sup> Conflicting accounts of “colonial *effectivités*”—open displays of control by Spanish imperial officials—prevented the conclusive establishment of title with any of the three nations.<sup>188</sup> The court found that this history made the case less like the *Isle of Palmas* and *Eastern Greenland* cases, which involved the discovery and occupation of *terra nullius*, and more like the *Miniquiers and Ecrehos* decision.<sup>189</sup>

Again, in the case of disputed historical title, the court looked for open displays of sovereignty and whether other nations had objected. Such *effectivités* would not amount to prescription, but instead would confirm the historic title granted at the time of dissolution of the Spanish Empire to one of the three nations. “Possession backed by the exercise of sovereignty may be taken as evidence confirming the *uti possidetis juris* title.”<sup>190</sup> The court recognized one island, El Tigre, to be possessed by Honduras, which had occupied it, enforced its law there for much of the nineteenth century, and made agreements with Britain and the United States for its use.<sup>191</sup> The court found that other nations had acted upon the assumption that Honduras possessed the island.<sup>192</sup> The court awarded a second island to El Salvador because of its enforcement of domestic criminal and civil laws, and construction of government buildings and infrastructure, without objection from Honduras.<sup>193</sup>

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<sup>184</sup> Phase I: Territorial Sovereignty and Scope of the Dispute (*Eritrea v. Yemen*), 114 I.L.R. 2 (Perm. Ct. Arb. 1998) at 312.

<sup>185</sup> Case Concerning Land, Island and Maritime Frontier Dispute (*El Sal. v. Hond.*), Judgment, 1992 I.C.J. 351, 563 (Sept. 11).

<sup>186</sup> *Id.* at 380, ¶ 28.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 563–64.

<sup>190</sup> *Id.* at 566.

<sup>191</sup> *Id.* at 566–70.

<sup>192</sup> *Id.* at 567–69.

<sup>193</sup> *Id.* at 577–90.

An identical analysis prevailed in the ICJ's 2002 decision in a dispute between Malaysia and Indonesia over Ligitan and Sipadan, two small islands off Borneo.<sup>194</sup> Indonesia claimed possession from title originally obtained by the Dutch East India Company and passed to the Netherlands, while Malaysia claimed its right had come to it from Spain to the United States to Great Britain.<sup>195</sup> The court found that none of the treaties that had passed territory down from the colonial powers to Indonesia and Malaysia had clearly included the two islands.<sup>196</sup> As a result, the court turned to *effectivités* again to determine who possessed the islands.<sup>197</sup> Indonesia could offer only a limited number of visits to the islands by the Dutch and Indonesian navies, which the court dismissed because they were not of a "legislative or regulatory character."<sup>198</sup>

By contrast, Malaysia had a better record of displays of sovereignty. According to the ICJ, Malaysia had enforced regulations of native species on the islands as early as 1914, constructed and operated lighthouses and tourist facilities, and enforced its laws within the territory.<sup>199</sup> "The activities relied upon by Malaysia, both in its own name and as successor State of Great Britain, are modest in number but that they are diverse in character and include legislative, administrative and quasi-judicial acts," the court found.<sup>200</sup> "They cover a considerable period of time and show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands."<sup>201</sup> Even though the Malaysian *effectivités* were sparse, Indonesia did not object to Malaysian activity until 1969.<sup>202</sup> Based on this record of unchallenged displays of sovereignty, the court awarded the islands to Malaysia.<sup>203</sup>

### III.

#### INTERNATIONAL LAW AND THE DOKDO ISLAND DISPUTE

This Part applies the international law of territory to the facts of the Dokdo dispute. Under the approach employed by the tribunals discussed in Part II, Korea has a superior claim to Dokdo due to original title and *effectivités*. Korea presents proof of discovery from the sixth century C.E., while Japan's claim arises in the

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<sup>194</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625 (Dec. 17).

<sup>195</sup> See *id.* at 626.

<sup>196</sup> *Id.* at 652–53, 660–62.

<sup>197</sup> *Id.* at 678.

<sup>198</sup> *Id.* at 683, ¶ 137.

<sup>199</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, 681 ¶ 132 (Dec. 17).

<sup>200</sup> *Id.* at 685 ¶ 148.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 627, 678 ¶ 123.

<sup>203</sup> *Id.* at 686 ¶ 150.

seventeenth century.<sup>204</sup> Japan's assertion of discovery contradicts its public justification that the island was *terra nullius* at the time of its 1905 annexation. Even if the historical claims of discovery cannot be resolved, Korea has had stronger *effectivités* for most of the island's history. Japan's claims not only contradict themselves, but the available materials suggest that Japan acquiesced to Korean sovereignty before its 1905 seizure of the island.

On the question of discovery, Korean government documents refer to the island now known as Dokdo beginning in the twelfth century C.E. Those documents describe the Silla dynasty's conquest of the island in the sixth century C.E. from the kingdom of Usan, which first discovered and occupied Dokdo, which was then called Usando.<sup>205</sup> Beginning in the fifteenth century, Korean archival documents record the incorporation of the island of Ulleungdo and an accompanying island, which is referred to as "Usando."<sup>206</sup> Korean sources changed the name of the island from Usando to Dokdo. Title passed to the Silla dynasty upon its conquest of Usan, and then passed to the Joseon dynasty, which ruled Korea until the establishment of the Japanese protectorate in 1905.<sup>207</sup>

Japan's affirmative claim to title contradicts its original ground for annexing Dokdo in 1905. According to a Japanese government 2008 white paper, Japan first discovered and claimed sovereignty over the island in the mid-seventeenth century.<sup>208</sup> It contends that any subsequent Korean interaction with the island, such as the 1693 incident with the Korean fisherman brought to Japan, cannot establish control due to the earlier Japanese discovery.<sup>209</sup> In 1905, however, Japan claimed that it could annex Dokdo because it was *terra nullius*.<sup>210</sup> *Terra nullius* requires that the territory have been unknown and unclaimed at the time of annexation, which, even if one accepts Japan's claim that Korea's records of sixth century discovery are mistaken, is still impossible. Japan's 2008 white paper reports Korean activity on Dokdo and official claims to sovereignty before 1905.<sup>211</sup> Japan's *terra nullius* argument must fail at least because Japan has now discarded it.

Japan, however, must come to grips with the much older pedigree of Korean sovereignty. Japan cannot base its claim on an earlier discovery of the island. Instead, it argues that Korea's references to Dokdo are mistaken, either by conjuring a non-existing island or erroneously confusing Ulleungdo for Dokdo.<sup>212</sup> It seeks to take advantage of the lack of Korean maps meeting modern cartographic standards before the arrival of European explorers. Japan's

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<sup>204</sup> Yong-ha, *supra* note 18, at 95–96.

<sup>205</sup> Van Dyke, *supra* note 9, at 165.

<sup>206</sup> See text accompanying notes 18–25.

<sup>207</sup> *Id.*

<sup>208</sup> See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 3.

<sup>209</sup> *Id.* at 5–6.

<sup>210</sup> BYEONG-KIE, *supra* note 23, at 306.

<sup>211</sup> *Id.* at 205–09.

<sup>212</sup> See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *supra* note 26, at 4.

arguments, however, work against its position. Korean maps during this period sought to symbolize the importance of political and cultural relationships of different lands and peoples, rather than to accurately portray geographic details.<sup>213</sup> Despite their inaccuracies, the non-Western maps show two large islands off the east Korean coast. Meanwhile, our survey of maps in European and American libraries indicates that Japanese maps through the middle of the nineteenth century continue to identify the Japanese border as no further northwest than Oki Island.

Ultimately, Japan's arguments about Korean mistakes in cartography prove too much. Japan could reject any opposing argument over any territorial dispute with Korea, China, or, for that matter, any nation in the region, that was not supported by scientific cartographic techniques. Since Western mapping of East Asia did not arrive until the seventeenth century, Japan's approach would undermine any borders drawn before the time of Western exploration. Japan's own borders would suffer from the same flaw. Japan relies on records about Dokdo that were not geographically verified at the time of alleged discovery using modern cartographic techniques. To undermine Korea's claim of discovery and occupation, Japan must do more than simply allege that other countries' borders are illegitimate unless supported by Western cartography.

Of course, as international decisions make clear, historic title without more does not conclusively prove legal possession. Korea must demonstrate open and continuous displays of sovereignty, or *effectivités*. Several seem to exist. Korean archives record Ulleungdo and Dokdo as falling within the administrative jurisdiction of Uljin County.<sup>214</sup> The Joseon dynasty sent regular inspectors to Ulleungdo.<sup>215</sup> From 1416 to 1881, it prohibited Korean citizens from inhabiting the islands, apparently to prevent them from evading Korean laws and to remove them from the reach of Japanese pirates.<sup>216</sup> During this period, no other country, particularly Japan, appears to have contacted Korea to challenge its sovereignty over the islands.

The case for possession here appears even stronger for Korea than it did for the Netherlands in the *Isle of Palmas* arbitration. In the latter, the tribunal observed that the United States might have the stronger case for original title, due to the Spanish cession of the Philippines at the end of the Spanish-American War.<sup>217</sup> But the title remained "inchoate" because neither Spain nor the United States had undertaken any open displays of sovereignty over the island.<sup>218</sup> Even if its original title were doubtful, the Netherlands had engaged in sufficient *effectivités* over the island.<sup>219</sup> Here, by contrast, Korea enjoys an original title that no other nation can contest. No other country claims that it discovered Dokdo

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<sup>213</sup> See JOHN RENNIE SHORT, *KOREA: A CARTOGRAPHIC HISTORY* 4–5 (2012).

<sup>214</sup> BYEONG-KIE, *supra* note 23, at 20.

<sup>215</sup> Hoon Lee, *supra* note 4 at 398 (citing *The Annals of the Dynasty of Choson*).

<sup>216</sup> Van Dyke, *supra* note 9, at 165.

<sup>217</sup> *Island of Palmas (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 845 (Perm. Ct. Arb. 1928).

<sup>218</sup> *Id.* at 846.

<sup>219</sup> *Id.* at 862–69.



earlier than Korea. Unlike the United States' position in the *Isle of Palmas* case, here there is no earlier or contemporaneous claim of discovery.

Even if another country raised doubt over the original discovery of Dokdo, subsequent actions by Korea would cure inchoate title. These *effectivités* are similar, but more conclusive than those in the *Island of Palmas* case. Even though it had established no permanent or even episodic physical presence on the territory, the Netherlands had taken steps to enforce its laws on Palmas.<sup>220</sup> Of significant relevance to the arbitrator, the Dutch had placed under their suzerainty local leaders who had included Palmas within their boundaries, even though those leaders did not themselves have any permanent outpost on the island.<sup>221</sup> The arbitrator found that Dutch jurisdiction over local governments that claimed sovereignty over the island was sufficient to establish Dutch possession.<sup>222</sup>

Here, Korea incorporated Ulleungdo Island in the sixth century C.E.<sup>223</sup> No other country disputed Korea's discovery or subsequent sovereignty over Ulleungdo. At the time, the Korean government included the second island, Dokdo, within the territory of the principality that it had absorbed.<sup>224</sup> Nevertheless, like Palmas, Dokdo formed part of a larger jurisdiction that indisputably fell within Korea's possession. But unlike the Netherlands' claim over Palmas, Korea did not act indirectly through suzerainty agreements with local princes. Instead, Korea directly exercised sovereignty over the territory. This should render Korea's claim to Dokdo more compelling than the Netherlands' over Palmas. The *effectivités* here merely confirm the validity of the original title.

A critic might respond that Korea displays of sovereignty focus on Ulleungdo, not Dokdo. Japan conceded Korean possession of Ulleungdo in the seventeenth century.<sup>225</sup> Control over Ulleungdo, however, would not extend to Dokdo, which remained uninhabited and hosted no permanent Korean installations. As previous international cases make clear, however, *effectivités* for an isolated island may be more sporadic than for a large landmass.<sup>226</sup> Due to the nature of the land, continual displays in one part of a territory will not amount to a concession over other, more remote portions of the territory to another nation. In *Eastern Greenland*, for example, the ICJ found that Denmark's lack of *effectivités* in eastern Greenland did not render it *terra nullius*.<sup>227</sup> In this case, Denmark's clear discovery of Greenland and its continuous displays of

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<sup>220</sup> *Id.* at 846.

<sup>221</sup> *Id.* at 856.

<sup>222</sup> *Island of Palmas* (Neth v. U.S.), *supra* note 125.

<sup>223</sup> Van Dyke, *supra* note 9, at 165.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 166.

<sup>226</sup> See, e.g., David A. Colson, *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, 97 AM. J. INT'L L. 398, 404 (2003).

<sup>227</sup> *Legal Status of Eastern Greenland* (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at ¶¶ 107-08, 126.

sovereignty in the western part satisfied the test for discovery and occupation.<sup>228</sup> Here, similarly, Korea's title to both Ulleungdo and Dokdo from 512 A.D. and its open, unchallenged displays of sovereignty over the larger island should maintain its possession of the smaller one too.

A critic might also contend that Korea had deliberately abandoned the islands from the fifteenth to the nineteenth centuries, which made them available for occupation by Japan. This claim is not supported by the general understanding of abandonment, which is extremely rare in international law. The history of international law does not support Japan's invocation of *terra nullius* as a justification for the island's annexation by Japan and raises serious doubts about the accuracy and validity of the doctrine as a whole. International law scholars devised the legal principle of *terra nullius* in the eighteenth and nineteenth centuries from the Roman law of possession and its doctrine of *res nullius*,<sup>229</sup> which addressed the question of how to acquire things which belonged to no one. *Res nullius* was often compared with *res communis*, which Roman law defined as a thing that could not be owned by anyone in particular since it belonged to all. These two concepts were part of the general debate on private ownership. International legal scholars, however, later extended their relevance to the delineation of States' sovereignty over unoccupied territory. However, the arguments based on the combination of these separate doctrines were interpreted in favor of a more restrictive conception of States' territorial ambitions.<sup>230</sup>

The Roman doctrine was summarized in the sixth century in the *Institutes*, a legal manual prepared by the commission appointed by the Emperor Justinian to revise and harmonize Roman law.<sup>231</sup> The principle of *terra nullius* was later defined within the broader legal context of the law of nations (*ius gentium*)<sup>232</sup> and adopted in the legal theories of the medieval *ius commune* and the natural law doctrine that provided the foundation for a modern international law in the sixteenth and seventeenth centuries.<sup>233</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> UBALDO ROBBE, LA DIFFERENZA SOSTANZIALE FRA RES NULLIUS E RES NULLIUS IN BONIS E LA DISTINZIONE DELLE RES PSEUDO-MAREIANA 377 (1979).

<sup>230</sup> See generally Andrew Fitzmaurice, *The Genealogy of Terra Nullius*, 38 AUSTRALIAN HIST. STUD. 1 (2007).

<sup>231</sup> JUSTINIAN'S INSTITUTES (Peter Birks & Grant McLeod trans., 1987).

<sup>232</sup> David Boucher, *The Law of Nations and the Doctrine of Terra Nullius*, in WAR, THE STATE AND INTERNATIONAL LAW IN SEVENTEENTH CENTURY EUROPE 63 (Olaf Asbach and Peter Schroder eds., 2010).

<sup>233</sup> Hans W. Blom, *Grotius' res nullius. Ein kosmopolitisher Streit über Eigentum und Allgemeingut*, in RES NULLIUS: ZUR GENEALOGIE UND AKTUALITÄT EINER RECHTSFORMEL 61 (Michael Kempe & Robert Suter eds., 2015).

It is worth quoting a passage from the *Institutes* on this point:

2.1.12

Wild animals, birds, and fish, the creatures of land, sea, and sky, become the property of the taker as soon as they are caught. Where something has no owner, it is reasonable that the person who takes it should have it. It is immaterial whether he catches the wild animal or bird on his own land or someone's else's. Suppose a man enters someone else's land to hunt or to catch birds. If the landowner sees him, he can obviously warn him off. If you catch such an animal it remains yours so long as you keep it under your control. If it escapes your control and recovers its natural liberty, it ceases to be yours. The next taker can have it. It is held to have regained its natural freedom when it is out of your sight or when, though still in sight, it is difficult for you to reach it.

2.1.22

If, as does happen, an island arises in the sea, it vests in the first taker because it has no owner. But when, as commonly happens, an island is formed in a river, if it is in mid stream, it becomes the common property of those with land each side, in shares proportionate to the frontage along the river of each estate; but if it is nearer one side it goes to the owners on that side. If the river turns a man's land into an island by splitting at one point and joining up again lower down, ownership remains unchanged.

2.1.47

The logic of this supports the view that if an owner abandons a thing the property passes straight away to anyone who takes possession of it. The law sees a thing as abandoned when its owner throws it away intending that it shall cease at once to be his property.<sup>234</sup>

This principle of the law of nations (*ius gentium*) recognized “a title to the first occupant of that which had no owner.”<sup>235</sup> Occupation led in turn to possession through the process of acquisitive prescription, which transforms a *de facto* condition into a *de iure* title. In order to be valid, this process required that the thing or land to be taken was not already someone else's property. Absence of good faith resulting from the knowledge that the occupied land already belonged to someone else rendered the prescription null and void.<sup>236</sup> In the Western legal tradition, medieval jurists later expanded the good faith requirement<sup>237</sup> and imposed a much stronger interpretation of this principle. It remained a fundamental component of the doctrine of occupation that international law scholars have developed. As Emmerich de Vattel observed in his commentaries on the law of nations, the slightest suspicion of bad faith would suffice to end any claim of possession.<sup>238</sup> The *terra nullius* doctrine held both objective and

<sup>234</sup> JUSTINIAN'S INSTITUTES 2.1.12, 2.1.22, 2.1.47 (Peter Birks & Grant McLeod trans., 1987).

<sup>235</sup> EMMERICH DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS], Book I ch. 18, fol. 113 (1775).

<sup>236</sup> Jean le Moine, Glossa ordinaria in Librum Sextum 5.13.2, *non praescribit* at 533 (Rome 1584).

<sup>237</sup> *Id.* (“possessor malae fidei ullo tempore non praescribit.”) (The possessor in bad faith can never acquire through prescription.).

<sup>238</sup> VATTEL, *supra* note 235, at 199.

subjective requirements: that the acquirer physically occupy the land with the intent to exercise sovereignty, and that it do so in the good faith belief that the land did not belong to another.

The Japanese government's invocation of *terra nullius* to justify the annexation of Dokdo did not meet either of these two requirements. First, Korea never abandoned Dokdo. Second, the Japanese government was well aware of Korea's sovereignty in 1905, but instead relied upon the declaration of one witness—who applied for economic exploitation rights in the island—to support the conclusion that Dokdo was abandoned. This conflict undermines the credibility of the Japanese fisherman's testimony and invalidates the whole process. Relying on inaccurate statements creates a strong presumption against Japan claiming possession of Dokdo in good faith. In this case, Japan cannot meet either the objective or subjective requirements of the *terra nullius* doctrine.

The invocation of *terra nullius* by various States to justify land conquest during the era of colonization reinforces this conclusion. The doctrine was used to legally justify the policies of colonial expansion and military conquest by various European States, particularly in Africa.<sup>239</sup> By the end of the nineteenth century and the beginning of the twentieth, *terra nullius* had “become shorthand for the doctrine of occupation,” observes Andrew Fitzmaurice.<sup>240</sup> Any claim based on *terra nullius* amounted not only to a denial of any prior State's sovereign rights but also to an “erasure of prior human presence” on the occupied land.<sup>241</sup> For instance, the British authorities invoked *terra nullius* to justify their annexation of Australia and to reject the rights of its indigenous people.<sup>242</sup> These claims and settlements were based on the fiction that these lands were without owners or were inhabited by people living in a primitive state of nature.<sup>243</sup> In the widely-discussed *Mabo* case,<sup>244</sup> the Australian High Court considered the long history of *terra nullius* and clearly rejected its reasoning.<sup>245</sup> A brief analysis of the events leading to the Japanese decision in 1905 following the violation of Korea's rights in the imposition of the protectorate confirms the understanding that *terra nullius*

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<sup>239</sup> See Laurent Benton & Benjamin Staumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 L. & HISTORY REV. 1 (2010).

<sup>240</sup> ANDREW FITZMAURICE, SOVEREIGNTY, PROPERTY AND EMPIRE, 1500–2000 at 302 (2014).

<sup>241</sup> Whitney Bauman, *Creatio Ex Nihilo, Terra Nullius, and the Erasure of Presence*, in ECOSPIRIT: RELIGIONS AND PHILOSOPHIES OF THE EARTH 353, 362 (Laurel Kearns and Catherine Keller eds., 2007).

<sup>242</sup> Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 L. & HIST. REV. 95 (2005).

<sup>243</sup> *Id.*

<sup>244</sup> MICHAEL CONNOR, THE INVENTION OF TERRA NULLIUS: HISTORICAL AND LEGAL FICTIONS ON THE FOUNDATION OF AUSTRALIA, SYDNEY 362 (2005).

<sup>245</sup> *Mabo and Others v. State of Queensland* (1992) 175 C.L.R. 1 (High Ct. Australia). See also ESSAYS ON THE MABO DECISION 212 (1993); Ad Borsboom, *From Terra Nullius to Mabo: Land Rights and Self-Determination in Aboriginal Australia*, in PROPERTY RIGHTS AND ECONOMIC DEVELOPMENT: LAND AND NATURAL RESOURCES IN SOUTHEAST ASIA AND OCEANIA 208, 295 (Toon Van Meijl and Franz Von Benda-Beckmann eds., 1999).

advanced colonial objectives rather than served as a neutral principle of international law.<sup>246</sup>

As to the objective requirement, Dokdo was not abandoned, or *res derelictae*. Living conditions on the islands made a permanent settlement particularly difficult but intermittent occupation does not imply abandonment of possession. As Carl Friedrich von Savigny confirms in his treatise on possession, “the possession of land continues so long as the power of dealing with it at will is not put an end to, and the constant corporal presence of the possessor . . . is not required for this purpose.”<sup>247</sup> A *res derelictae* is considered abandoned when its owner has the “deliberate intention that it shall no longer be part of his property.”<sup>248</sup> Moreover, the longstanding doctrine of *ius gentium* and natural law always considered that, even in dubious cases, abandonment should not be presumed.<sup>249</sup> Korea never manifested an intention to deliberately abandon its sovereignty over the islands. The fact that Japan made no attempt to inform the Korean government of its 1905 decision to annex the island is particularly troubling, given the well-documented history of prior disputes between the two countries. It is not unreasonable to believe that Japan’s failure to publicly announce the annexation of Dokdo was not merely an oversight but rather, the result of a deliberate decision that bordered on bad faith. The events following this declaration further attest to Japan’s hostile behavior and its use of the fiction of *terra nullius* to justify what was nothing other than a process of conquest.

Japan’s invocation of *terra nullius* has neither factual nor legal standing. The island was neither abandoned nor was the existing owner informed and thus given the possibility to oppose the annexation. Acquisitive prescription could not apply since the possessor did not act in good faith. Korea issued an edict evacuating Ulleungdo from 1416 to 1881 to prevent its citizens from escaping its civil and

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<sup>246</sup> Francis Rey, *La Situation Internationale de la Corée*, in *REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC* 40, 46 (1906).

<sup>247</sup> KARL FRIEDRICH VON SAVIGNY, *TREATISE ON POSSESSION OR, THE JUS POSSESSIONIS OF THE CIVIL LAW* 260 (1848).

<sup>248</sup> JUSTINIAN’S *INSTITUTES*, *supra* note 231, at 2.1.47; *see also* Vattel, *supra* note 235, at Book II, ch. VII, 180 (“Tout ce que le pays renferme appartenant à la nation, et personne autre qu’elle même, . . . ne pouvant en disposer, si elle a laissé dans le pays des lieux incultes et déserts, qui que ce soit ne peut s’en emparer sans son aveu.”) (“And everything included in the country belongs to the nation and as none but the nation . . . if she has left uncultivated and desert places in the country, no person whatever has right to take possession of them without her consent.”).

<sup>249</sup> 1 CHRISTIAN FREIHERR VON WOLFF, *INSTITUTIONS DU DROIT DE LA NATURE ET DES GENS, DANS LESQUELLES, PAR UNE CHAÎNE CONTINUE, ON DÉDUIT DE LA NATURE MÊME DE L’HOMME, TOUTES SES OBLIGATIONS ET TOUS SES DROITS* 83 (Elie Luzac trans., Leyden, 1772) (“Comme il est certain que les hommes, à moins qu’ils ne soient privés de l’usage de la raison, aiment leurs choses, & ne veulent pas sans sujet, qu’elles soient à un autre; dans les cas douteux *personne n’est présumé jeter sa chose*.”) (“As it is ascertained that people, unless they no longer are able to reason properly, are keen on keeping their possessions and do not want them to be passed on to someone else without good reason, in dubious cases, no one is presumed to be willing to abandon his possession.”); *see also* Vattel, *supra* note 235, at Book II ch. XI, 203 (“Il est difficile de fonder une légitime présomption d’abandonnement sur un long silence.”) (“It is difficult to base a legitimate presumption of abandonment on a long silence.”).

criminal laws.<sup>250</sup> Japanese fishermen and government officials who visited the island in this period would have found no evidence that it belonged to another country. The absence of civilian establishments, however, cannot convert sovereign territory into *terra nullius*. As international tribunals have made clear as early as the *Isle of Palmas* decision, official actions must not only objectively exercise control over a territory, but they must also be undertaken with the *animus occupandi*, the intention to exercise sovereignty. Similarly, in the unlikely circumstance that a nation wishes to relinquish possession of territory without cession to another, it would have to act with the intention to give up sovereignty.

Indeed, this was exactly the conclusion of the *Clipperton* arbitration. In *Clipperton*, France had discovered the island in 1858, which the arbitrator found to be *terra nullius* at the time.<sup>251</sup> According to the Court, France apparently did nothing on the island until 1887, and a French warship visited in 1897.<sup>252</sup> Even though any other country that landed on the island would have seen no *effectivités* of French control, the Italian King did not find a case of abandonment.<sup>253</sup> The King observed that France had not undertaken any definitive act to return the island to the state of *terra nullius* and that there was no *animus* to abandon present.<sup>254</sup> A long absence of governmental presence does not amount to abandonment of sovereignty, especially over a small island, without an intention to relinquish possession. Here, Korea may have made the sovereign decision to keep Dokdo free from human settlement, but no other nation can show any action that demonstrates Korea's intention to abandon Dokdo.

Another important application of this principle occurred in the *Eastern Greenland* case. International law, the PCIJ observed, must take account of sporadic displays of sovereignty in light of the nature of the territory's environment.<sup>255</sup> In language explicitly relied upon by the ICJ in the *Ligitan and Sipadan* case, the court explained:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.<sup>256</sup>

In the *Ligitan and Sipadan* dispute, "in the case of very small islands which are uninhabited or not permanently inhabited," the ICJ further recognized,

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<sup>250</sup> Kim, *supra* note 89, at 33.

<sup>251</sup> *Clipperton Arbitration*, *supra* note 149, at 390.

<sup>252</sup> *Id.* at 391–92.

<sup>253</sup> *Id.* at 394.

<sup>254</sup> *Id.*

<sup>255</sup> *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at 46.

<sup>256</sup> *Id.*

“*effectivités* will indeed generally be scarce.”<sup>257</sup> The gaps in time between government exercises of authority do not undermine legal title or subsequent control, especially when the island in dispute is inhospitable.

Application of the principle from *Eastern Greenland* and *Litigan and Sipadan* to this case works in Korea’s favor. Dokdo is a small island. Its harsh environment and distance from the mainland make permanent settlement difficult. International law, as international tribunals have developed, does not require a permanent, systematic presence on Dokdo to maintain Korean sovereignty. The small size and difficult environment reduces the number and intensity of displays of authority necessary to maintain possession by the Korean government. However, the absence of continuous physical actions of Korea does not show abandonment.

Japan argues that the long absence of Korean activity on the island shows either that Korea never found the island or that it never intended to occupy it. But Korea’s explicit prohibition on travel to the islands shows the opposite. It demonstrates Korea’s exercise of regulatory and legislative authority over Ulleungdo and Dokdo. Prohibiting civilians from living on the islands and exploiting their natural resources requires a greater exercise of coercive public authority than simply allowing unrestricted travel. The ICJ made a similar point in the *Eastern Greenland* case. The court accepted Norway’s claim that Denmark had not undertaken any public or private activity in Eastern Greenland.<sup>258</sup> Nevertheless, the court found that the absence of activity in the eastern half of the island did not reflect Danish action and intention to abandon the territory.<sup>259</sup> Instead, the lack of activity resulted in part from the Danish restrictions on trade and commerce and in part from the long distance and difficult conditions there. The court concluded that the exercise of sovereign authority by Denmark had produced an absence of activity.

Any absence of human activity on Dokdo during the fifteenth to nineteenth centuries results from a similar exercise of sovereignty as that in Greenland, which should give similar dispositive weight to Korea’s claim to Dokdo. Korea prohibited its citizens from traveling to Ulleungdo and Dokdo to prevent them from escaping Korean law. Korea’s prohibition on its own citizens from establishing homes or businesses on Ulleungdo and Dokdo amounts to *effectivités* on par with the dispositive actions of Denmark in Eastern Greenland. Although Japanese visitors might have concluded that the islands were *terra nullius*, the absence of people in Ulleungdo and Dokdo was instead a result from the valid exercise of Korean sovereignty.

Indeed, a legal rule stating that a prohibition on settlement constitutes an *animus* and act of abandonment would run contrary to recognized and legitimate uses of property. Nations may wish to keep territory free of permanent

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<sup>257</sup> Colson, *supra* note 226, at 404.

<sup>258</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, at 184–85.

<sup>259</sup> *Id.*

installations for a variety of reasons, such as preventing their citizens from settling in dangerous locations, improving the environment, preserving endangered species, or protecting national security. International tribunals have recognized that preservation of the environment itself constitutes a sign of sovereign control over territory. In the *Ligitan and Sipadan* case, for example, the ICJ found that Malaysia had engaged in a dispositive display of sovereignty by limiting the collection of turtle eggs on disputed islands, creating a licensing system for fishing in the waters nearby, and establishing a bird sanctuary.<sup>260</sup> Rather than finding abandonment, the ICJ found these efforts to preserve the natural environment to “show a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands.”<sup>261</sup>

Official Korean maps from this period support Korea’s claim to administrative control over Dokdo. In previous decisions, such as the *Isle of Palmas*, *Gulf of Fonseca*, and *Ligitan and Sipadan* cases, international tribunals have turned to maps as evidence of possession, as demonstrating both a will to possess and a record of the act of possession itself. The most dispositive weight comes in a treaty of cession or one that resolves a territorial dispute, which would prove title. But even where title remains in doubt, maps can help to provide evidence of *effectivités*. International tribunals, particularly those in the *Isle of Palmas* arbitration and the *Ligitan and Sipadan* case, rely on maps to show the extension of government administration and the *animus* to occupy territory. It is worth quoting in full the opinion of the ICJ in the 1986 *Frontier Disputes* case between Burkina Faso and the Republic of Mali, which the court explicitly relied upon in the later *Ligitan and Sipadan* case:

[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.<sup>262</sup>

As this passage makes clear, maps may show the “physical expressions of the will of the State” to extend its sovereignty over a territory even if they do not result from a treaty or mutual agreement between Korea and Japan.

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<sup>260</sup> Colson, *supra* note 226, at 403–04.

<sup>261</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, ¶ 148 (Dec. 17).

<sup>262</sup> Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 554 (Dec. 22).



In 1531, Korean authorities published an atlas of their nation, which included a map of the nation's eight provinces.<sup>263</sup> This atlas itself was derived from a map first drawn up under the reign of King Sejong (ruled 1418–1450). Known as the *Paldo Chongdo*, the atlas shows two large islands off the east coast of Korea. One of them is designated as Ulleungdo and one as Usando, which would later come to be named Dokdo. The map, however, does not employ Western cartographic techniques, and so the relative sizes of different geographic features are distorted and the positions of the two islands are reversed. A second map from 1463, known as the *Dongguk Jido*, also records the two islands off Korea's east coast—though again, because of inaccurate measures, the map depicts the island much closer to the mainland than they are in reality. Similar maps during this period repeat this portrayal of Ulleungdo and Usando as falling within Korean territorial limits, but with their positions reversed and much closer to shore. These include the *Honilgangli Yeokdae Gukdo Jido*, a comprehensive map of the world and the nation's successive capitals, from 1402, and the *Cheonha Daechon Illa Jido* dating from sometime in the seventeenth century.<sup>264</sup> Nevertheless, these maps include the two islands within the territorial jurisdiction of Korea at a time when no Japanese authorities made any claim to the island.

Another important factor to support a claim of possession based on an inchoate or disputed title and subsequent control is whether other nations have acquiesced to a claim of sovereignty. International courts and tribunals have regularly found evidence of acceptance or even silence in the face of another country's exercise of sovereignty to be virtually dispositive in territorial disputes. In *Isle of Palmas*, for example, the arbitral tribunal found highly significant that neither the United States nor any other power had contested the Dutch acts of control over the island in dispute.<sup>265</sup> This served as important support for the exclusive display of Dutch sovereignty.<sup>266</sup> Judge Huber declared that his award of the island to the Netherlands:

[M]ust impose itself with still greater force if there be taken into consideration . . . all the evidence which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which . . . may be regarded as sufficiently proving the existence of Netherlands sovereignty.<sup>267</sup>

Another example arose in the dispute between Malaysia and Indonesia over Ligitan and Sipadan Islands. After rehearsing the *effectivités* undertaken by Malaysia over the two small islands in dispute, the ICJ observed that it “cannot disregard the fact that at the time when these activities were carried out, neither

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<sup>263</sup> See NA, *supra* note 93, at 18.

<sup>264</sup> See MINISTRY OF FOREIGN AFFAIRS AND TRADE TREATIES BUREAU, DOKDO AND OLD MAPS 8–11 (2006).

<sup>265</sup> See *Island of Palmas (Neth v. U.S.)*, 2 R. Int'l Arb. Awards 829, 870–71 (Perm. Ct. Arb. 1928).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 912.

Indonesia nor its predecessor, the Netherlands, ever expressed its disagreement or protest.”<sup>268</sup>

Signs of acquiescence, however, cannot support the acquisition of territory by prescription. Rather, they show acceptance of the first nation’s claim to original title because they reflect the second nation’s understanding that it has no competing legal right. Even if title remains inchoate, acquiescence can also demonstrate that occupation of a territory has been continuous and peaceful. In *Eastern Greenland*, for example, the court found that Denmark’s claim to all of Greenland, combined with the inaccessibility of the eastern part of the island, and “the absence of any claim to sovereignty by another power” was sufficient to give Denmark “a valid claim to sovereignty.”<sup>269</sup> As a result, the court observed the King of Denmark’s “rights over Greenland were not limited to the colonized area.”<sup>270</sup>

Here, Japanese acquiescence to Korean sovereignty over Dokdo occurred in the seventeenth century. In 1693, Japanese and Korean fishermen fought over fishing rights around Ulleungdo and Dokdo.<sup>271</sup> Japanese parties sought a judgment from the Japanese government, which decided that Ulleungdo constituted Korean territory and forbade Japanese fishermen from the island.<sup>272</sup> It appears that the Japanese government recognized that Dokdo was part of Ulleungdo. The Japanese Government today disputes whether the Japanese government included Dokdo within the ban on fishing by its nationals.<sup>273</sup> But the important implication of this incident is that the Japanese government did not make a claim of its own to possession of Dokdo, nor did it contest Korean jurisdiction over the island. At best, historical ambiguity may surround how far Japan’s limitations on its own citizens ran during this period, but Japan’s historical records do not register any disagreement or protest—not to mention extension of sovereignty—by Japan in regard to the island.<sup>274</sup> Instead, it appears that the Japanese government maintained its ban on fishing around the islands until at least 1877. In 1877, in response to a request from Shimane province to include Ulleungdo and Dokdo in the local land registry, the Meiji government stated: “Re Takeshima and another island, it is understood that our country has nothing to do with them.”<sup>275</sup> At this time, the Japanese government referred to Ulleungdo as Takeshima; the phrase “another

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<sup>268</sup> Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, ¶ 148 (Dec. 17).

<sup>269</sup> Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Ser. A/B) No. 53, ¶ 115.

<sup>270</sup> *Id.*

<sup>271</sup> See NA, *supra* note 93, at 16.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 16–17.

<sup>274</sup> See Lee, *supra* note 4 (providing facts of this historical dispute); Yong-Ha Shin, *A Historical Study of Korea’s Title to Tokdo*, 28 KOREA OBSERVER 333 (1997). The Japanese version of events appears in Hideki Kajimura, *The Question of Takeshima/Tokdo*, 28 KOREA OBSERVER 423 (1997).

<sup>275</sup> Myung Chul Hyun, *The Japanese Perception of Tokdo During the Opening of Ports*, 29 KOREA OBSERVER 93 (1998).

island” must refer to Dokdo. Both the 1693 and 1877 events show that Japan neither sought to extend its own borders to include Dokdo nor challenged Korea’s continuing claim to possession. Japan’s acquiescence in Korean displays of sovereignty on Dokdo provides powerful support to Korea’s original title and its record of *effectivités*.

Japan does not make an affirmative claim to Dokdo through historic discovery and occupation. Instead, Japan raises doubt that the Korean official documents do not refer to Dokdo but a smaller island that rests one mile from Ulleungdo. Only by claiming that Korea had neither discovered nor occupied Dokdo can the Japanese government claim to have discovered Dokdo before Korea did. Japan supports its position by claiming that Japanese fishermen at various times made use of the islands, and that the Korean government had abandoned the islands in the fifteenth century. Japan allowed fishermen to fish around Dokdo and in the nineteenth century, authorized the taking of animals on the island, such as sea lions.<sup>276</sup>

Japan’s claims to contact with Dokdo from the seventeenth through nineteenth centuries can only support a claim of prescription. Those claims, however, show intermittent—rather than continuous—displays of control. Until the Russo-Japanese War, the Japanese government did not build any facilities on Dokdo.<sup>277</sup> It did not regularly send government officials nor attempt to enforce its laws on Dokdo.<sup>278</sup> Allowing private citizens to periodically fish off the island does not rise to the level of sovereignty set out in the *Minquiers and Ecrehos* decision. Even if the Japanese government could show continuous displays of control, it has not produced any definitive example of acquiescence by the Korean government during the period when it claims to have administered Dokdo. In fact, during the same period in dispute, Korean archival documents appear to report that the Korean government still considered Dokdo its sovereign territory and that it resisted any Japanese activity on the island.<sup>279</sup>

Prescription is difficult to prove. Indeed, it is arguable that no international tribunal has ever upheld a clear claim of acquisition of territory on that ground. Japan has produced no reliable legal renunciation of possession of Dokdo by Korea. As international courts have observed, occupation need not be continuous, particularly when it involves islands or inaccessible territory. By its own account, Japan took no measures to show intent of establishing sovereignty. Indeed, such arguments contradict its claim of *terra nullius* when it annexed the island in 1905.

Events in the twentieth century provide the true basis for any Japanese claim to Dokdo. After the Russo-Japanese War broke out on February 8, 1904, Japan took a number of steps to establish sovereignty over Korea. On February 23, Japan imposed a series of agreements upon Korea that allowed the presence of Japanese

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<sup>276</sup> See Kanae Taijudo, *The Dispute Between Japan and Korea Respecting Sovereignty Over Takeshima*, 12 JAPANESE ANN. INT’L L. 1 (1968).

<sup>277</sup> See Yong-ha, *supra* note 18, at 130.

<sup>278</sup> See Van Dyke, *supra* note 9, at 175; see also Hori, *supra* note 92, at 511–23.

<sup>279</sup> Hori, *supra* note 92, at 479–88, 504–10.

troops on Korean soil and required Korea to consult with Japanese officials on all matters of foreign affairs and finance.<sup>280</sup> Japanese officials quickly assumed authority in other Korean ministries as well, such as police, defense, education, and the royal household.<sup>281</sup> Because the seas between Korea and Japan assumed strategic importance in the naval struggle with Russia, Japan built observation posts on Ulleungdo and Dokdo.<sup>282</sup> In January 1905, the Japanese government decided to incorporate Dokdo as *terra nullius* because it claimed no other nation had occupied the island.<sup>283</sup> Japan officially incorporated the island into one of its prefectures, which Japan claims to have maintained until the end of World War II.<sup>284</sup> After the end of the Russo-Japanese War in September 1905, Russia, Great Britain, and the United States entered agreements with Japan that recognized Japan's effective control over Korea.<sup>285</sup> At the same time, Japan imposed a treaty upon Korea forcing it to give up its foreign affairs to the control of a Japanese resident-general and making Korea a virtual Japanese protectorate.<sup>286</sup>

These 1904 and 1905 agreements prevented Korea from effectively challenging Japan's annexation of Dokdo as a violation of its territorial rights, because the power to direct Korean foreign affairs formally passed to Japan. This was a prelude to Japan's outright annexation of the entire Korean peninsula. In 1907, it imposed a treaty on Korea that required the approval of the Japanese resident-general for domestic laws, administration, and appointments.<sup>287</sup> In 1910, Japan forced the sitting Emperor of Korea to sign a treaty of cession that annexed the kingdom to Japan.<sup>288</sup> Debate continues over whether the Japan-Korea Treaty of 1910 was legal under the international law of its day.<sup>289</sup> If it is legal, it would have vested Japan with title over Dokdo even without the 1905 claim of *terra nullius*.

Regardless of the legality of the 1910 Treaty, however, the results of World War II completely voided the annexation of Korea. The Allies pursued the explicit goal of setting Korea free. In the 1943 Cairo Declaration, the United States, Great Britain and China declared that they were "fighting this war to restrain and punish the aggression of Japan."<sup>290</sup> As a result, "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914."<sup>291</sup> Although this text might be thought to exclude Dokdo,

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<sup>280</sup> See KIM, *supra* note 89, at 71.

<sup>281</sup> See NA, *supra* note 93, at 41–42 n.141.

<sup>282</sup> See *id.* at 57–59.

<sup>283</sup> See *id.* at 66–67.

<sup>284</sup> See Kanae Taijudo, *supra* note 276, at 7; see also Van Dyke, *supra* note 9, at 158, 194.

<sup>285</sup> Van Dyke, *supra* note 9, at 176–77.

<sup>286</sup> See *id.* at 177 (quoting text of 1905 agreement).

<sup>287</sup> *Id.*

<sup>288</sup> See Editorial, *The Annexation of Korea to Japan*, 4 AM. J. INT'L L. 923, 923–25 (1910).

<sup>289</sup> See, e.g., Van Dyke, *supra* note 9, at 178–79; Pedrozo, *supra* note 119, at 89–90.

<sup>290</sup> Van Dyke, *supra* note 9, at 181.

<sup>291</sup> *Id.* at 181; Sibbett, *supra* note 101, at 1637 n.196.

which Japan seized in 1904, the Allies went further. The Cairo Declaration stated: “Japan will also be expelled from all other territories which she has taken by violence and greed.”<sup>292</sup> The great powers remained “mindful of the enslavement of the people of Korea” and made clear that they were “determined that in due course Korea shall become free and independent.”<sup>293</sup> Cairo made clear that the World War II Allies sought to reverse Japanese territorial gains from its period of imperial expansion, which began at least as early as the first Sino-Japanese War and the cessions in the resulting 1895 Treaty of Shimonoseki. Japan’s annexation of Dokdo, of course, post-dates the Treaty of Shimonoseki and falls within the Cairo Declaration’s reference to territories “taken by violence and greed.”<sup>294</sup>

At the Potsdam Conference in July 1945, the Allies met to decide on the policies to finish the war against Japan. The Allies reaffirmed the principles of the Cairo Declaration and further declared: “Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Shikoku, and such minor islands as we determine.”<sup>295</sup> Both the Cairo Declaration and the Potsdam Declaration might be thought to represent nothing more than war aims, rather than binding international law. However, in signing the Instrument of Surrender on September 2, 1945, Japan agreed to “accept the provisions set forth in the declaration issued” by the Allies at Potsdam, to “carry out the provisions of the Potsdam Declaration in good faith,” and to obey the orders of the Supreme Allied Commander “for the purpose of giving effect to that Declaration.”<sup>296</sup>

Japan’s signing of the Instrument of Surrender legally overturned the annexation of Korea and reversed Japan’s territorial gains in East Asia. There is no indication in the Instrument of Surrender, which incorporated the past declarations about postwar policy toward Japan, that the Allies intended to exclude Dokdo from the general policy of returning Asia to the territorial *status quo* that prevailed before Japan’s imperial aggression. As Supreme Commander for the Allied Powers in Japan, General Douglas MacArthur issued instructions that placed Dokdo outside of Japanese security and economic boundaries.<sup>297</sup> Debate continues over whether the 1951 Treaty of San Francisco, which formally ended the war with Japan, included Dokdo in its return of territory to Korea.<sup>298</sup> Article 2(a) of the Treaty declared: “Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of

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<sup>292</sup> Van Dyke, *supra* note 9, at 181.

<sup>293</sup> *Id.*

<sup>294</sup> *See id.*; *see also* NA, *supra* note 93, at 26.

<sup>295</sup> Lee, *supra* note 11, at 93.

<sup>296</sup> Instrument of Surrender, Sept. 2, 1945, Records of the U.S. Joint Chiefs of Staff, Record Group 218, National Archives, <https://www.archives.gov/files/historical-docs/doc-content/images/ww2-surrender-japan.pdf>.

<sup>297</sup> Van Dyke, *supra* note 9, at 183; *see also* *Occupation and Reconstruction of Japan, 1945-1952*, OFFICE OF THE HISTORIAN, U.S. DEP’T OF STATE, <https://history.state.gov/milestones/1945-1952/japan-reconstruction>.

<sup>298</sup> *See, e.g.*, Van Dyke, *supra* note 9, at 183–84; Byungjoon, *supra* note 115, at 7–9; Castellino & Redondo, *supra* note 109, at 555–60.

Quelpart, Port Hamilton and Dagelet.”<sup>299</sup> The Treaty does not include Dokdo in its list of islands to return to Korea; however, it also does not provide an exhaustive and exclusive list of all territory returned to Korea. The fact that Article 2(a) lists “Quelpart, Port Hamilton and Dagelet” is best read as illustrative and inclusive. An exclusive list would have used explicit language such as “including only the islands of Quelpart, Port Hamilton and Dagelet.”

The drafting history of the San Francisco Treaty provides inconsistent evidence. Several earlier versions had included Dokdo explicitly as part of Korean territory, while others had specifically excluded it.<sup>300</sup> Standing alone, these differing drafts would not conclusively reveal an intention that could overcome any ambiguity in the treaty text. An important piece of the negotiating record, however, rests in the archives of the United States government. In response to a request by the Korean government that the Peace Treaty specifically include Dokdo in the territory to be returned from Japan, Dean Rusk, Assistant Secretary of State, stated, “As regards the island of Dokdo, otherwise known as Takeshima or Liancourt Rocks, this normally uninhabited rock formation was according to our information never treated as part of Korea and, since about 1905, has been under the jurisdiction of the Oki Islands Branch Office of Shimane Prefecture of Japan. The island does not appear ever before to have been claimed by Korea.”<sup>301</sup> Although founded on mistaken information, Dean Rusk’s letter might support an inference that the silence on Dokdo in Article 2(a) of the Treaty implied its retention by Japan. Rusk’s letter, however, was sent only to Korea, which did not even negotiate or sign the San Francisco Treaty, and not to the multiple parties to the agreement.<sup>302</sup> Further historical research in official US archives will help determine whether Rusk’s letter represented the final American understanding of the treaty and the information communicated to the other parties of the multilateral treaty.

Regardless of the implications of these *travaux préparatoires*, there are two possible interpretations of Article 2(a) of the 1951 Treaty. First, the text of the treaty contains a broad understanding of the territory that Japan had to return to Korea. This approach would be consistent with the objectives of the Cairo and Potsdam Declarations. Second, the treaty does not include Dokdo in the list of territory that Japan had to return. If the former interpretation holds, then the question of Dokdo’s current status becomes clear—the Allies and Japan agreed to return the island to Korea. If the second reading prevails, then the treaty returns the analysis to the question whether the Japanese 1905 annexation of Dokdo was valid under international law. The effect of the second alternative is simply to eliminate the effect of the 1910 annexation of Korea and Japan’s other imperial gains of territory up through World War II. Our analysis indicates that the 1905

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<sup>299</sup> Van Dyke, *supra* note 9, at 183.

<sup>300</sup> McDevitt, *supra* note 16, at 16 n.1.

<sup>301</sup> Letter from Dean Rusk, Assistant Sec’y, U.S. Dep’t of State, to Dr. You Chan Yang, Ambassador of S. Kor. (August 10, 1951).

<sup>302</sup> *See id.*

annexation violated international law because Dokdo was not *terra nullius*, due to Korea's original discovery and long occupation of the island.

#### CONCLUSION

This Article seeks to contribute to solving the Korea-Japan territorial dispute in three ways. First, it brings forward evidence from the maps held at various archives in the United States and Western Europe to determine the historical opinions of experts and governments about the possession of Dokdo. Second, it clarifies the factors that have guided international tribunals in their resolution of earlier disputes involving islands and maritime territory. Third, it argues that the claim of *terra nullius* has little legitimacy when applied to East Asia, an area where empires, kingdoms, and nation-states had long exercised control over territory.

Resolution of this dispute between Korea and Japan is important for several reasons. First, it could end a dispute between allies at a time of instability in East Asia. With Dokdo and other disputes behind them, Korea and Japan could engage in cooperation at a political level that could match their already deep ties in the economic sphere. Second, resolution of the dispute could help clarify the international law applicable to other territorial disputes in the region. China and Japan currently disagree over the possession of the Diaoyu/Senkaku Islands, Japan and Russia have not resolved islands seized by the Soviet Union at the end of World War II, and China has laid a claim to broad swaths of maritime territory in the South China Sea, which the Philippines and Vietnam also claim, among many others. Left unresolved, these disputes could cause further discord in the region. By showing that the facts and international law weigh heavily on Korea's side, this Article hopes to contribute to a peaceful resolution of at least one of these disputes.