

## Introduction

### A Joint Publication in Commemoration of Professor David D. Caron '83

As the Editors-in-Chief of *Ecology Law Quarterly* and the *Berkeley Journal of International Law*, we welcome you to this special issue in honor of Professor David D. Caron '83.

This issue reflects a nearly year-long joint effort of law students in both journals coming together to publish scholarship that reflects Professor Caron's dual, and often complimentary, exploration of pressing issues in international and environmental law. It follows from an October 2018 conference at Berkeley Law—*The Elegance of International Law: A Conference in Commemoration of Professor David D. Caron '83*—where his many friends, colleagues, and classmates gathered to discuss his life, his career, and his unique contributions to legal scholarship.

As editors, it has been a privilege to organize the writing you will find here, and during that process, learn about the incredible life and lasting career accomplishments of Professor Caron.

As students of Berkeley Law, it has also been rewarding to honor one of our own. Professor Caron was a student and a teacher at our school. He served as the Editor-in-Chief of *Ecology Law Quarterly* and was the recipient of the very first Stefan A. Riesenfeld Memorial Award, presented by the *Berkeley Journal of International Law*, for his devotion to teaching, the law, and intellectual distinction.

To the Berkeley Law Administration: thank you for organizing the incredible conference from which these pages flow, and for your ongoing support in guiding this issue's development.

To the students who worked on this issue: thank you for your extra work and your dedication in coming together to make this issue possible.

To the many friends and colleagues of Professor Caron who contributed work to this issue: thank you for your unique and compelling reflections on Professor Caron's work and your further development of international and environmental scholarship inspired by that work. This has created—in the following pages—an important collection of interdisciplinary scholarship, of which we know Professor Caron would be proud.

We are honored to work together in Professor Caron's memory.

Stephanie Phillips, Editor-in-Chief, *Ecology Law Quarterly*

Craig Spencer, Editor-in-Chief, *Ecology Law Quarterly*

Lauren Kelly-Jones, Editor-in-Chief, *Berkeley Journal of International Law*

Nathan Keller, Editor-in-Chief, *Berkeley Journal of International Law*

# Foreword

## In Honor and Memory of David Caron

*Erwin Chemerinsky\**

David Caron had an enormous impact on Berkeley Law School and on the field of international law. He is terribly missed. A wonderful conference was held on September 14 and 15, 2018, at Berkeley Law School to honor, remember, and celebrate David. Hundreds of people attended a moving memorial service where colleagues and former students paid tribute. A conference brought together top scholars, practitioners, and judges from the field of international law. The papers from this conference are contained in this volume.

David was a beloved member of the Berkeley Law faculty from 1987 until 2013, when he was appointed Dean of the Dickson Poon School of Law, King's College London. For over a quarter century, he was revered by students and colleagues at Berkeley, teaching and writing about international law. He was named the C. William Maxeiner Distinguished Professor of Law in 1996 and served as Co-Director of the Law of the Sea Institute and Co-Director of the Miller Institute on Global Challenges and the Law. At the memorial service at Berkeley, his former students described David's profound effect on their career paths and their lives. His former colleagues described his unflagging generosity and collegiality. He was affectionately remembered for playing Santa Claus at holiday parties and for singing songs like "Amazing Grades" and "Grade me Tender." Most of all, he was remembered for his mentorship and his constant availability to discuss ideas and help improve the work of others.

David was a prolific and prominent scholar in the field of international law. The essays in this volume explore some of his many ideas and how they have influenced the development of law. David wrote on virtually every aspect of international law, looking especially at public and private international dispute resolution and international courts and tribunals. He also was a pioneer in the

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field of international environmental law, looking at issues such as the law of the sea and climate change.

But David was so much more than just a law professor. In 2015, he was appointed a member of the Iran-United States Claims Tribunal in The Hague. Earlier, from 1996–2003, he was a Commissioner with the Precedent Panel (E2) of the UN Compensation Commission in Geneva resolving claims arising out of the 1990 Gulf War. He also served as counsel for the Marshall Islands Nuclear Claims Tribunal and represented Ethiopia in front of the International Court of Justice. He served as the arbiter in many international commercial disputes.

Throughout his career, David was very active in the American Society of International Law. He held numerous positions and from 2005–2007, he served as Vice President and was President of the Society in 2010–2012. Indeed, he was involved in virtually every major international law organization, such as serving as chair of the Institute of Transnational Arbitration from 2005–2009.

There is no way to really do justice for all that David did, all that he accomplished, and all that he meant to the institutions where he worked and to the people who were blessed to know him. He lives on in many ways, including through his ideas that continue to shape international law and to be debated. This conference focuses on exactly that and especially examines three areas of his work: international dispute resolution, legitimacy in international law and institutions, and the law of the sea and international environmental law.

David's career and life are a wonderful model for all of us, though few will accomplish all that he did. I hope you will enjoy these excellent articles in honor and memory of David Caron.

# Opening Reflection

## The Elegance of International Law

*Laurel E. Fletcher\**

The title for our conference comes from a 2012 talk David Caron delivered at the American Society of International Law Conference when he was president of the society. Titled “Confronting Complexity, Valuing Elegance,” David urged that we approach complex legal problems with the aim of arriving at elegant solutions.<sup>1</sup>

Complexity, for David, was the notion that there are non-obvious relationships embedded in the phenomena we are trying to tackle. Whether it be complexity in nature, like climate change, or man-made complexity, like the technology revolution.

David advised that to surmount the ambiguity and indeterminacy of complex problems, we need to approach the effort with skill and humility; devotion and insight. Even when we cannot fully comprehend our challenge, we must continue on our path of discovery. As David was speaking to colleagues, the destination of that path was to find elegant solutions to legal challenges.

Borrowing from fields as diverse as architecture and mathematics, David argued that an elegant solution was one that solved multiple problems simultaneously—even problems we did not believe to be related. What distinguished a merely adequate solution from an elegant one was that the latter would mask the hard work required to devise it: it would appear to be an effortless achievement.

In reading his words, I was struck by how quintessentially “David” his advice to us was. He relied on a range of literatures, but I felt that the fundamental text he cited to us was his heart. Everything else was derivative.

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1. David Caron, Opening Welcome and Remarks, *Confronting Complexity, Valuing Elegance*, 106 AM. SOC’Y INT’L L. PROC. 214, 21 (2013).

In short, David's meditation on complexity and elegance was autobiographical. His remarks were a blueprint for not just how David pursued his scholarship, but the principles that guided David's brand of leadership, and the quality of his friendship.

We are here because David has enriched our lives in all those capacities. We have benefited individually and collectively from his wisdom. Therefore, I want to take this opportunity to relay some of his advice, that I think is particularly apt to the present moment of remembering and celebrating our friend and colleague.

David wrote that, when it comes to complex legal problems, elegant solutions require that lawyers must "take responsibility for the costs of law and for the workability of our proposals in the face of complexity."<sup>2</sup> In other words, the most worthy plans for legal change entail responsibility and leadership in their implementation. In his roles as scholar, institutional leader, and mentor, David modeled these principles in action and we were the beneficiaries. We read David's work, listened to his ideas, and followed his advice not just because it made sense, but because we knew that he understood what he asked of us and that he stood by us as we moved forward. He accepted responsibility for his ideas and their impact.

He is guiding us still. I could not shake the feeling when I read back over his remarks that David had prepared us for this very moment. He wrote that in confronting complexity with elegance, we must expect and prepare for the "unexpected" and "occasional collapse."<sup>3</sup> None of us thought David would be gone so soon. Neither could we see the relationship between his words at the time he wrote them and our need for them today. However, like complexity, his advice is laden with unobservable relationships.

David wrote that to cope with the unexpected, we needed to build resilience. I can think of no better way to do so than by gathering in community to celebrate David's work pursuing elegant solutions to a wide range of legal problems.

The three panels today do just that. Each addresses an area of David's work: (1) international dispute resolution; (2) legitimacy in international law and institutions; and, (3) law of the sea and international environmental law. These are areas that David worked in deeply, but certainly not exclusively. Our panels are supplemented by two keynotes. Lucy Reed will speak to David's work in international arbitration. Judge Charles Brower will reflect on David's work to build a new theory of international courts and tribunals. Each of today's speakers shares David's commitment to strengthening international law and institutions in service of a better world. We are grateful to them for sharing their insights.

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2. *Id.* at 25.

3. *Id.*

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I will conclude with David's closing words to his 2012 talk in which he observed that "leadership . . . is fundamentally the work of bridging the present with the best of possible futures."<sup>4</sup> This is our task.

Our speakers will articulate their ideas for building elegant bridges to the future. But we are all architects in the same firm. I am honored and humbled to share this effort with you all.

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4. *Id.* at 26.



# The David Caron Rule of X

*Lucy Reed*

Thank you, Neil (Popovic), for the kind introduction. Thank you, Laurel (Fletcher), Karen (Chin) and so many others in the Berkeley community, for all the preparation. I add a special thank you to Susan (Spencer) for your courage.

As I prepared my talk, Professor Stacie Strong wrote to me: “Sadness shared is sadness halved.” I am not sure I agree, but I do know that celebration shared surely is celebration doubled. I am deeply honored and grateful to be invited to speak at this celebratory symposium for David.

## INTRODUCTION

David and I were friends for over 30 years. On the professional side, I followed him as Chair of the Institute for Transnational Arbitration and he followed me as President of the American Society for International Law. We planned many symposia and programs together. One of the things we agreed on was that luncheon talks should be a bit light—substance with humor, “medicine with a spoonful of sugar.” David delivered such talks—as he did so many things—elegantly and (apparently) effortlessly.

To find my bearings—or in David’s Coast Guard terminology, to find a mooring for an appropriate arbitration topic—I thought back to the one time David and I were formal co-authors. This was in 1995, when we wrote on International Centre for Settlement of Investment Disputes post-award remedies.<sup>1</sup> Too dry for lunch, he would say.

So I took a look at what David was writing about recently. I found on SSRN the text of his Opening Lecture of the 2017–2018 MIDS Academic Year, which he delivered in Geneva on September 28, 2017.<sup>2</sup> (MIDS is the prestigious Masters in International Dispute Settlement program at the Graduate Institute in Geneva, headed by Professor Gabrielle Kaufmann-Kohler.) The intriguing title

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1. Lucy F. Reed & David D. Caron, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 *ARBITRATION INT’L* 429 (1995).

2. David D. Caron, *Arbitration and the Rule of X*, King’s College London Dickson Poon School of Law Legal Studies Research Paper No. 2017-41 (Sept. 28, 2017), <https://ssrn.com/abstract=3062537>.

is “Arbitrators and the Rule of X.” The SSRN text is “As delivered.” and I have confirmed that David had not yet developed it further.

Once I read the lecture and understood how David was using the “Rule of X,” I realized that the concept fits squarely with ideas independently percolating with me now that I sit as arbitrator more often. If David were still with us, I surely would have telephoned him and proposed that we co-author something again.

As David is not still with us, I have to develop his “Rule of X” alone. Well, not actually alone, as I seem to have a dialogue going on with him in my head, soon to be put down on paper.

And I have ambitions beyond a paper version of this keynote. My goal is to have the “David Caron Rule of X” become part of the international arbitration lexicon—like the (Alan) Redfern Schedule, the (Neil) Kaplan Early Opening, and the (less well-known) Reed Retreat.

#### THE ARBITRATOR RULE OF X

What is the “Arbitrator Rule of X”?, you want to know. I am sorry, but this being a light luncheon talk, David would want me to keep you in suspense a while longer.

On that day in Geneva, David introduced his topic as the “far-flung array of individuals who serve as international adjudicators, arbitrators, commissioners and judges,” as the people he found “the most difficult group in international courts to predict, to give a logic to.”<sup>3</sup> In particular, because he did not agree that their primary driver is reappointment, his research focus was on their being “reappointed by virtue of their reputation.”<sup>4</sup>

David emphasized that he was just opening this discussion, and his view “presents a much deeper agenda than currently set out.”<sup>5</sup> He acknowledged that arbitration courses (and conferences) address arbitrator ethics and conduct, but only the minimum that the *parties* may expect. In a statement introducing the core of the lecture to come, he said: “Unaddressed to my knowledge is a discussion not of minimums but of *what arbitrators professionally should demand of themselves and each other.*”<sup>6</sup>

David then tackled and dismantled the common charge that international arbitrators constitute a “mafia” or a “club.”<sup>7</sup> He rejected the criticism that there is an organized and closed group of arbitrators working to perpetuate their own

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3. *Id.* at 3. In this connection, David cited his 2011 Lalive Lecture: *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REV. 13 (2011).

4. Caron, *supra* note 2, at 3.

5. *Id.*

6. *Id.* (emphasis added).

7. In this connection, David cited YVES DEZALAY & BRYANT GARTH, DEALINGS IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 10 (1996) and Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUROPEAN J. INT’L L. 425 (2014).

self-interest through repeat appointments, primarily because of the key role of counsel in tribunal selection. This is not a cartel situation, he said, but rather a market in which users select arbitrators with limited information, relying heavily on reputation.

After quoting Shakespeare's Iago—this was David, after all—that “Reputation is an idle . . . imposition, oft got without merit and lost without deserving,”<sup>8</sup> he astutely observed that “no arbitrator can maintain an undeserved reputation for long.”<sup>9</sup>

One can agree or disagree with his impatience with the mafia charge; even he footnoted the problematic “double-hatting” by counsel and arbitrators. But his real impatience was to move beyond the facile mafia argument. He submitted that the simplicity of the argument risks keeping our focus away from more important issues. More provocatively, he argued that “certain aspects of a club [actually] would be desirable to improving both the diversity and conduct of arbitrators.”<sup>10</sup>

David observed that it is the arbitral institutions, which are the most club-like parts of the international arbitration system, that are leading efforts to advance the diversity of the arbitrator pool. They do this by increasingly offering training and by developing—in an admittedly disjointed fashion—standards of conduct for arbitrators.

David's target in Geneva was the arbitrators themselves, in particular the “*disruptive practice*” of over-commitment.<sup>11</sup> It is trite that over-trading can contribute to unnecessary delay. What David added, though, is that over-trading also can contribute to lower quality arbitration and, in extreme cases, to lost opportunities for new arbitrators. I will return to this.

David also added that the disruptive practice of over-commitment is “more nuanced and widespread” than the particularly packed schedules of particularly busy arbitrators.<sup>12</sup> It is also the province of the practitioner with only one or two arbitrations, “which are difficult to mix with the unrelenting demands of clients,” and the academic with only one or two arbitrations, “which are difficult to accommodate within teaching schedules.”<sup>13</sup>

David examined the cause of over-commitment. He said that often it is paranoia—an arbitrator is reluctant to say no to a new appointment, for fear he

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8. William Shakespeare, *Othello*, act 2, sc. 3, 268–70.

9. Caron, *supra* note 2, at 8.

10. *Id.* at 10.

11. See David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 *ARBITRATION INT'L* 375, 386 (2008); DAVID W. RIVKIN, HKIAC ARBITRATION WEEK KEYNOTE ADDRESS: A NEW CONTRACT BETWEEN ARBITRATORS AND PARTIES 6 (Oct. 27, 2015), <https://sccinstitute.com/media/93206/1000973790v2-hkiac-keynote-address.pdf> (last visited Nov. 27, 2018).

12. Caron, *supra* note 2, at 10.

13. *Id.* at 10–11.

or she will not be asked again, will then be moved out of play, and ultimately lose reputation.

Those in the field know that there have been external responses to over-commitment. The International Chamber of Commerce International Court of Arbitration, for example, now requires each arbitrator candidate to disclose how many tribunals he or she is sitting on and chairing, and to block out unavailable dates on a three-year calendar, rather than just making a one sentence declaration “I have capacity.”

However, as David pointed out, the purpose of such institutional efforts is to provide information to the parties to help them make informed choices in arbitrator selection. These tools do not impose uniform limits on service, or specific numbers of cases. Nor could they, for the important reason that, as David said, “the individual circumstances and capacities of arbitrators vary tremendously.”<sup>14</sup>

David’s proposition is that, in addition to such external steps, there is a critical need for *internal* discipline. In his words, arbitrators “need to reflect on the number of appointments they are reasonably able to handle . . . and the needed internal commitment is gained by . . . the Rule of X.”<sup>15</sup>

Now you have it. David’s “Rule of X,” in simple form—Davidesque elegant form—is that each arbitrator should “set a number—X—as the upper limit of cases that he or she is capable of *responsibly* sitting on at the same time.”<sup>16</sup> This of course varies with individual circumstances: experience, age, energy, full versus part time arbitrator service, the nature of other work – practice or academics?, legal culture, use of tribunal secretaries. “X” will also vary over time, and over a career.

One critical variable, or complication, arises with the responsibility of serving as chair. This led David to identify two “X”s: an arbitrator’s total number of arbitrations, and the subset of arbitrations as chair. If he had had more time, no doubt he would have expressly elaborated on more variables: treaty vs. commercial cases, complex vs. modest cases, personal factors like family-life balance, intellectual challenge, the sheer fun that can come with sitting with certain other arbitrators and hearing certain counsel.

But, however many the variables and however subjective the exercise, David considered the consequences of *actually having an “X”* to be profound.

The first consequence: Having an “X” benchmark forces an arbitrator to assess each appointment more carefully, especially when one is at “X-minus-1.” Speaking personally, David said: “I began to think very seriously about the characteristics of the arbitrations I most seek to be part of—is a state or

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14. *Id.* at 13.

15. *Id.*

16. *Id.* (emphasis added).

government agency a party, who are the other arbitrators, the counsel, what is the issue?”<sup>17</sup>

Arbitrators at “X,” or close to “X,” turn down arbitrations that are smaller or otherwise no longer of substantial interest to them. The follow-on consequence is that those arbitrations can go to the next generation of arbitrators. This, said David, is “the opportunity that may increase the pool – and increase the diversity of the pool of arbitrators.”<sup>18</sup>

The second consequence: If an arbitrator with X arbitrations applies the “Rule of X” rigorously, and turns down appointments, the “good news for arbitration and the parties in the X arbitrations is that [he or she] will have a clear strong incentive to more promptly finish some of the X arbitrations.”<sup>19</sup>

The third consequence: Following the personal “Rule of X” leads arbitrators to serve with “a more robust conception” of the role, and thereby to improve the quality of their own arbitrations and arbitration in general.<sup>20</sup> David connected this to the *true* cost of over-commitment, namely that “over-commitment in the number of arbitrations is under-commitment to any particular arbitration.”<sup>21</sup>

David concluded his lecture in Geneva with a description of the virtuous circle that could be unleashed with the “Rule of X”: “[fewer] cases in the hands of a few, and a few cases in the hands of many, with new arbitrators rising from more diverse backgrounds.”<sup>22</sup>

MIDS Professor Zachary Douglas reported that David’s lecture resonated well, not surprisingly with most impact on the arbitrators present. Zachary wrote to me that the core message reflected the sort of person David was: “he described one of the evils of arbitrators accepting more appointments than their appropriate ‘number’ is that it prevents a younger generation of arbitrators from gaining the requisite experience as there are less cases to go around.”<sup>23</sup>

Perhaps David’s diversity prediction is overly optimistic, and it certainly is a long-term proposition. The other benefits of the “David Caron Rule of X”—and that is what it should be called from now on—would be apparent more quickly. By this I mean the benefits of *self-imposed* restrictions on the number of cases each arbitrator can manage, not just reasonably, but also with *excellence*.

All I can really add to David’s MIDS lecture is my recent experience that the algebra of “X” is not artificial, but natural. As I said, before I read the lecture, I had independently realized that I had found an equilibrium in my own arbitrator

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17. *Id.* at 12.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* In connection with diversity issues, David cited Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429 (2015); and Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PENN. J. INT’L L. 431 (2014).

23. Email from Professor Zachary Douglas to the author, 20 August 2018.

caseload. David and I had many discussions about the rewards and responsibilities of being an academic and sitting as arbitrator—but it seems he forgot to caution me against taking on too many cases at one time. I did that and, because they were all new cases on similar timetables, it proved very difficult to balance the work.

Just this spring, walking to campus, I—without knowing it—applied the “David Caron Rule of X” and found I was (pretty much) at “X.” I found myself saying to myself, I now have the right number of cases. I am both challenged by and comfortable with my caseload of treaty and commercial cases, with my cases as presiding and co-arbitrator. The hearings fit well with my other work and teaching schedule, and leave priority time for family and friends.

To maintain this equilibrium, I will have to continue to turn down appointments. Like David, I will be thinking carefully about the legal interest and importance of the cases, the balance of my caseload, my looming calendar, the (at least) double work of presiding, and other factors like the place of arbitration. I admit it: all other things being equal, the opportunity for a hearing in a country new to me is attractive enough to get me from “X-minus-1” to “X,” while returning to a familiar venue is not.

In turning down appointments, do I fear not being asked again? No. I explain that I lack the capacity, which prompts more appreciation than criticism. What I fear is not being able to perform the arbitrator work I already have to David Caron professional standards and compromising my reputation. I acknowledge that I am in a privileged position to be approached so often to serve as arbitrator and to be able to say no—and genuinely hope that David will prove right, and these cases will go to more diverse up-and-coming arbitrators.

I agree with David that “X” has to be subjective. For me right now, as a professor and director of an international law research center, it is a maximum of eight to ten cases, in different stages and permutations. For the legendary Pierre Lalive, it was five or six cases.<sup>24</sup> I sit with some arbitrators with notoriously high caseloads, and find them absolutely on top of our shared case and quick to share informed positions on all issues. I work with others, with either low or high caseloads, who clearly are not doing the heavy work themselves. Others are attentive but slow, a trait I think they should take into account in setting their own “X” factors.

There may be many permutations for “X”—but *all* require the type of self-awareness, self-discipline, and professional pride that David flagged in his lecture.

Going forward, I will be raising the “David Caron Rule of X,” in terms, with colleagues. This does not mean asking others for a numerical “X”—that is

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24. *Q&A with Professor Pierre Lalive*, 3 GLOBAL ARBITRATION REV. 3 (Nov. 1, 2008), [https://www.arbitration-icca.org/media/4/68645270843168/media01231910475880008\\_10\\_14\\_gar-pla\\_interview.pdf](https://www.arbitration-icca.org/media/4/68645270843168/media01231910475880008_10_14_gar-pla_interview.pdf).

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understandably variable and private—but instead urging potential arbitrators to identify the relevant factors and run their own “X” equations.

This will be my way to honor David’s intentions, expressed in his MIDS lecture, to develop his concept of the “Rule of X” in international arbitration and, perhaps more ambitiously, to start work on a lecture with recommendations on *ad hoc* International Court of Justice judging.

I hope the “David Caron Rule of X” catches on. If it does, it will be one more way to keep David with us.

Thank you.

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# Navigating the Judicialization of International Law in Troubled Waters: Some Reflections on a Generation of International Lawyers

Charles N. Brower and Daniel Litwin\*

## INTRODUCTION\*\*

It has become a familiar trope to recite that we live in an era marked by an unprecedented growth in international courts and tribunals.<sup>1</sup> Besides its empiricist overtones and familiar focus on the evolution of international law, this ritualized incantation serves to signal the increased importance of international

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\* Judge Charles N. Brower has been a Judge of the Iran-United States Claims Tribunal since 1983, where David D. Caron was his first law clerk; has served as Judge *ad hoc* at the Inter-American Court of Human Rights; currently serves as Judge *ad hoc* in three cases at the International Court of Justice; and is an Arbitrator Member of Twenty Essex Chambers in London. Daniel Litwin has been a Legal Adviser at the Iran-United States Claims Tribunal since 2016. He has served in this function as David D. Caron's first legal adviser and subsequently as legal adviser to Sir Christopher Greenwood GBE GMG QC. Daniel is a graduate of McGill University and the University of Cambridge.

\*\* This Article is an extension and elaboration of the Keynote Address entitled "David D. Caron: The Theoretician of International Courts and Tribunals" delivered by Judge Brower at the closing dinner on September 15, 2018 of UC Berkeley Law School's "David D. Caron Memorial and Conference" held September 14–15, 2018.

1. The formulaic consistency of this type of introductory remark in the opening sentences of the literature is remarkable. *See, e.g.*, Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 3 (2005) ("[i]n the last few years, international dispute settlement has assumed an unprecedented prominence in international politics."); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 778 (2012) ("[t]he past half-century has seen the development of a rich, highly diverse field of international adjudication."); Gleider I. Hernandez, *The Judicialization of International Law Reflections on the Empirical Turn*, 25 EUR. J. INT'L L. 919, 919 (2014) ("[t]he proliferation of international courts and tribunals in the last two decades has been an important new development in international law"); Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals The Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13, 13–14 (2017) ("[i]n recent years, there has been a proliferation in the number and type of international courts and tribunals.").

adjudication to the life of international lawyers.<sup>2</sup> An entire generation of international law scholars and practitioners—of which David D. Caron was a leading representative—has been shaped by this new landscape of international adjudication that has departed from familiar professional reference points. They have spent most of their careers grappling with and seeking conceptually to abstract it. After over three decades of burgeoning literature on this development, it appears timely to take stock of it from the perspective of a generation’s shared professional experience navigating the “judicialization of international law.”<sup>3</sup>

This Article focuses on international lawyers and how they represent and create the architecture of international adjudication during a period of great change. It is a reflexive analysis that begins with the internal perspective of international lawyers rather than with the more traditional formalist approach that sees international adjudication as an abstracted external given.<sup>4</sup> After all international adjudication is shaped in material respects by what international lawyers actually think, feel, and do.<sup>5</sup> Relying on a dyad of opposites, this Article investigates how a generation of international lawyers have reacted to the multiplication of international courts and tribunals and the professional disorientation it engenders with the familiar and contradictory human sentiments to great change: faith and nostalgia.<sup>6</sup> The experiences of the past no longer provide sufficient guidance to the present, which gives rise to chronocentrism,<sup>7</sup> an aggrandizement of the present (faith), or a longing for the past (nostalgia). These sentiments overlap and structure the literature as international lawyers draw continuities and discontinuities between the past and the present in order to

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2. This Article uses the terms international courts and tribunals and international adjudication interchangeably.

3. See the theme of the 2014 European Society of International Law Annual Meeting and the resulting volume. See, e.g., ANDREAS FOLLESDAL & GEIR ULFSTEIN, *THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING?* (Oxford University Press 2018).

4. See generally INTERNATIONAL LAW AS A PROFESSION (Jean d’Aspremont eds., Cambridge University Press 2017) (analyzing international law as a professional activity) [hereinafter D’ASPREMONT]. See also on how this reflexivity can manifest itself in the writing of a treatise, Bruno Simma & Daniel Litwin, *International Law in a Transcivilizational World*, by Onuma Yasuaki, 61 JAPANESE Y.B. INT’L L. 351 (2018) (book review).

5. A re-articulation of Martti Koskenniemi’s adage that international law is “what international lawyers do and how they think.” See Martti Koskenniemi, *The Fate of Public International Law Between Technique and Politics*, 70 MODERN L. REV. 1, 8–9 (2007).

6. A dichotomy that is found or hinted at across the literature. It also has some echoes of the fragmentation debate where “international lawyers have described the development of specialized norms and/or institutions as trustworthy or as to be feared, depending on their perception of the international legal project as a whole.” See Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22 LEIDEN J. INT’L L. 1, 2 (2009).

7. Also known as “the belief that one’s own times are paramount, that other periods pale in comparison.” Jib Fowles, *On chronocentrism*, 6 FUTURES 65, 65 (1974).

privilege perspectives of nostalgia or faith.<sup>8</sup> The resulting literature reflects these layered temporalities<sup>9</sup>—the past and the present—each with its own expectations of future developments. Thus, investor-state arbitration must, for example, either be reformed along nostalgic lines of the past (e.g., replaced by a court) or faith should be placed in the hands of the present (e.g., left to its own devices to develop in “spontaneous order”<sup>10</sup>).

This Article looks behind the elaborate formal constructs about international adjudication developed over the past several decades to its subjective roots and conditions of production. It is an investigation into how international lawyers think about international adjudication—how familiar intellectual tropes are structured around opposite and overlapping sentiments about multiplication. Thus, the familiar and stale oppositions of “backlash” and “progress” or “critics” and “supporters” are reframed as expressions of faith in the present and nostalgia for the past. The claim is that an investigation into the structure of this literature from the perspective of international lawyers may provide an understanding of some of the underlying forces and assumptions that shape and delimit recent thinking about international adjudication.<sup>11</sup> In turn, this exercise may encourage dialogue and engagement between these opposite positions, pointing to their spaces of overlap, but also creating emancipatory room beyond their confines.

In Part I, this Article briefly discusses its approach to this perspective and the boundaries—periods, actors, and methods—that determine its analysis. It then continues with discussion of the opposition between faith and nostalgia. In Part II, faith in the present is observed through the building of discontinuities between the past and the present. In practice, this means that the literature is busy building new conceptual constructs (e.g., functions) and crafting a narrative of progress benchmarked to empirical developments so as to create distance with the past. In Part III, nostalgia for the past is observed through the elaboration of a continuity with the past and the search for familiar reference points. This also translates into a series of constructions that attempt to give a sense of order and coherence to multiplication, in the process grounding these new practices with the legitimacy and authority of the past.

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8. An eminent commentator articulated this tension not as an exercise in self-reflection about the underlying structure of the literature, but as the actual embodiment of how this tension is used to explain the practices of international courts and tribunals. See James Crawford, *Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture*, 1 J. INT'L DISPUTE SETTLEMENT 3 (2010).

9. On the idea of multiple temporalities, see generally REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* (Keith Tribe trans., Columbia University Press 2004).

10. See Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System*, 29 ICSID REV. 372, 375 (2014) (trying to overcome a duality between top-down reform and status quo by introducing the notion of complex adaptive system).

11. See generally Martti Koskenniemi, *What is Critical Research in International Law? Celebrating Structuralism*, 29 LEIDEN J. INT'L L. 727 (2016).

## I. A BOUNDED ANALYSIS

To take the perspective of the international lawyer during this period is to attempt to ground in shared professional experience the disparate expressions and attitudes of international lawyers about international adjudication. In adopting this perspective, this Article avoids looking at the literature of the past three decades in the way that it usually presents itself, that is, as an assembly of discrete writings that may reflect the diverse personal and political contexts of international lawyers and the variety of specialized international courts and tribunals. Thus, its ambition is not to map exhaustively debates and schools of thought in order to render accurately the heterogeneity of this body of writing. Rather, this Article attempts to capture parts of the structure that underlies the positions taken by a generation of international lawyers in response to the multiplication of international courts and tribunals. These statements merit several additional clarifications, as they direct one to how the boundaries of this analysis—what is left in and what is left out—are constructed.

The first boundary is that of the community of international law professionals. The point of view that is examined in this Article is the socially constituted field of international lawyers with symbolic capital—authority, prestige, reputation—that have written about international courts and tribunals. This field is constituted of individuals who often interchangeably take on the different roles of professor, judge, counsel, and international civil servant. But they also are members of a professional group that shares a particular language, knowledge, experience, and history. Through a process of socialization,<sup>12</sup> of interacting with other members of this “community of practice,”<sup>13</sup> they become acquainted with the dominant argumentative techniques and doctrines of law.<sup>14</sup> This socialization occurs *inter alia* through education, which includes the reading of textbooks and scholarship, training, and academic or professional conferences. By virtue of this form of socialization, international lawyers develop a basic consciousness shared with those who have been trained in the same way.<sup>15</sup> This conclusion is not meant to deny the plurality that exists within this community, its subdisciplines, and the way professional roles or geographical affiliations affect different understandings of international law. Nevertheless, a shared basic understanding allows international lawyers to understand and communicate with each other and participate in a common disciplinary venture. It is this shared basic consciousness about international

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12. See Pierre Bourdieu, *The Force of Law Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 850 (1987).

13. See generally JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (Cambridge University Press 2010).

14. See D'ASPREMONT, *supra* note 4, at 33.

15. *Id.* at 34.

adjudication that is confronted by the multiplication of international courts and tribunals, that becomes insufficient to explain the new reality of multiplication, and that moves international lawyers towards a collective response of faith or nostalgia.<sup>16</sup>

In the process of engaging with this community of professionals in international law, reference must be made to the singular biographical experiences of David D. Caron. This turn to biography, to the practitioner-academic, already has been used productively in the literature to explain the practices and argumentative techniques of international lawyers more generally.<sup>17</sup> The choice of David reflects his position as a leading representative of his generation who closely experienced the multiplication of international courts and tribunals. Throughout his career, David participated, in various capacities, in the operations of a range of international courts and tribunals, both those that were newly created, and those that experienced a resurgence.<sup>18</sup> David began his professional career in 1983 as a law clerk at the Iran-United States Claims Tribunal, an institution that arguably formed part of the earliest iteration of this multiplication. He entered the academy as a faculty member of the Berkeley School of Law in 1989 and ended his career in institutions that embody continuity and discontinuity, as a Judge *ad hoc* of the International Court of Justice (ICJ)<sup>19</sup> and as a titular member of the Iran-United States Claims Tribunal. David's lectures at the Hague Academy took stock of this experience, as he put forward a political theory to "make sense of the wide array of international courts and tribunals now populating the global scene."<sup>20</sup>

The second boundary framing this analysis is a period: the focus of this Article is on a generation of international lawyers writing during a specific period. The framing of this period will be detailed in Part II. At present, however, suffice it to note that this period is meant to align with the multiplication of

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16. Thomas Skouteris finds "coherence" across these texts in the idea that "the turn to adjudication constitutes a moment of disciplinary progress." See Thomas Skouteris, *The New Tribunalism: Strategies of (De)Legitimation in the Era of International Adjudication*, 17 FINNISH Y.B. INT'L L. 307, 308 (2006).

17. See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (Cambridge University Press 2002).

18. As an arbitrator in proceedings administered by the Permanent Court of Arbitration, ICSID, and elsewhere, as well as a commissioner for the United Nations Compensation Commission, as counsel before the Eritrea-Ethiopia Claims Commission and the Marshall Islands Nuclear Claims Tribunal, and latterly as a judge of the Iran-United States Claims Tribunal and a judge *ad hoc* in two cases at the International Court of Justice.

19. David was a judge *ad hoc* in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia) and in *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America). See generally *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicar. v. Colom.), Dissenting, 2016 I.C.J. at 74 (Mar. 2016); *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. ¶ 4 (Feb. 2019).

20. DAVID D. CARON, *A POLITICAL THEORY OF INTERNATIONAL COURTS AND TRIBUNALS*, RECUEIL DES COURS (forthcoming).

international courts and tribunals, at least as it is commonly understood in the literature. This choice is dictated by the approach taken in this Article, which is to examine the reaction of international lawyers to multiplication. The precise moment when that began is itself a subject of some debate.<sup>21</sup> As a result, any reference to multiplication in this Article is meant to cover the early period of multiplication in the 1980s, its burgeoning at the turn of the twentieth century, and its continued multiplication today.

As noted previously, the period in which multiplication occurred is loosely defined in the literature, but the way it confronts the profession's socialized shared consciousness, its dominant ideas about what is international adjudication, is undeniable. In that sense, the multiplication of international courts and tribunals can be described as international adjudication's own Kuhnian revolution,<sup>22</sup> which makes it a particularly fertile area of analysis. Thomas Kuhn explained that scientific disciplines go through periods of normal science and scientific revolution. During normal science, a central set of ideas and beliefs (or paradigm) is used to explain a field—here, international adjudication. Periods of scientific revolution begin when this central set of ideas and beliefs becomes incapable of explaining certain situations, i.e., when anomalies in the paradigm occur. As a result, the dominant paradigm is questioned, and competing paradigms begin to appear, until one of them becomes the new dominant set of ideas and beliefs within the field, engendering a paradigm shift. With the multiplication of international courts and tribunals, the paradigm that previously dominated international adjudication is contested, as it is incapable of entirely explaining this new reality. Accordingly, the generation of international law scholars and practitioners that arose during the period of great multiplication were busy putting forward new competing paradigms, paradigms whose potency was due not only to their explanatory reach, but also to their ability to speak to the opposing temporalities (the past and the present) of international lawyers.

Finally, the third boundary is the focus on the structuring role of faith and nostalgia. This focus examines how a period or generation is encapsulated by its relationship to multiple temporalities—the past, present, and future. Different groups of international lawyers navigate different ideas of historical time even if they exist in the same geographic and chronologic space.<sup>23</sup> More broadly, this

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21. Compare Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle* 31 NYU J. INT'L L. & POL. 709, 709 (1999), with Skouteris, *supra* note 16.

22. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (describing the idea of scientific revolutions as episodic rather than cumulative). See also as applied to international law more generally, Thomas Schultz, *Life Cycles of International Law as a Noetic Unity: The Various Times of Law-Thinking*, in *INTERNATIONAL LAW AND TIME: NARRATIVES AND TECHNIQUES* (2017).

23. See KOSELLECK, *supra* note 9, at 2.

approach also attempts to strike a balance between structure and agency. Thus, it can be associated loosely with structuralist analysis, which looks to the operation of hidden determinations for a better understanding of how the visible and familiar rules, policies, and intellectual tropes are produced.<sup>24</sup> But it also is aligned with the recent turn to sociology and its focus on “the production of meaning and the exercise of power by international lawyers themselves.”<sup>25</sup>

These three boundaries set the stage for the analysis that follows in this Article. It is an analysis that (1) takes the view of the community of professionals in international law; (2) examines their reaction to the multiplication of international courts and tribunals within a given period; and (3) focuses on the resulting effects of their opposing reactions in the literature.

## II. FAITH (DISCONTINUITY)

### A. *Periodization and Progress*

Faith in the present as a reaction to the multiplication of international courts and tribunals is communicated through a progress narrative that the literature constructs in two steps.<sup>26</sup> First, it stresses discontinuity with the past alongside the period when multiplication occurred—a period often referred to as the “post-1980” era or the “post-Cold War” moment.<sup>27</sup> Second, it qualifies this discontinuity with a positive designator giving it its chronocentric character. Thus, the literature readily notes that developments in international adjudication over the past three decades are different and separate from what came before (delineating periods), indicative of a historical break that marks an important evolution in international law (attribution of a positive designator). These periodization decisions organize knowledge through the construction of a contrast between the past and the present, a contrast that serves to put forward a positive interpretation of multiplication and thus the present.<sup>28</sup>

A result of this interpretation is the way the chosen periods reinforce an understanding of international adjudication along empirical lines—they are

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24. See Koskenniemi, *supra* note 11, at 733.

25. Wouter Werner, *Concluding Remarks The Praxis of International Law*, in INTERNATIONAL LAW AS A PROFESSION 429 (Jean d’Aspremont eds., Cambridge University Press 2017).

26. See generally Skouteris, *supra* note 16 (providing a far more detailed exposition of these progress narratives).

27. See, e.g., Eric de Brabandere, *International Dispute Settlement—from Practice to Legal Discipline*, 31 LEIDEN J. INT’L L. 459, 460 (2018) (providing a recent example).

28. See generally Oliver Diggelmann, *The Periodization of the History of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., Oxford University Press 2012) (discussing the use of periodization in international law); see also Ignacio de la Rasilla, *The Problem of Periodization in the History of International Law* 37 L. & HISTORY REV. 275 (2019).

determined principally along a new empirical reality, i.e., the quantity of new international courts and tribunals and resurgent caseloads. This perspective supports research agendas on international courts and tribunals increasingly attuned to empirical frameworks.<sup>29</sup> Although these frameworks provide useful grids of analysis, they also tend to privilege general explanations over normative and institutional critiques. This might provide some explanation as to why multiplication has not led to a multitude of new theories of international adjudication<sup>30</sup>—David D. Caron’s political theory being one of the few exceptions.<sup>31</sup>

Empiricism finds resonance in the oft-used designator for this period: proliferation,<sup>32</sup> a term that directly refers to quantification. In practice, the term “proliferation” directs one to two empirical trends. First, it points to the quantifiable increase in the resort to international adjudication and in the creation of new international courts and tribunals.<sup>33</sup> Typically cited examples of this increase include the expanded caseload of the ICJ and the boom in investor-state arbitration with its resulting increase in the activity of the Permanent Court of Arbitration and the International Centre for Settlement of Investment Disputes.<sup>34</sup> Also cited are the creation of new international courts and tribunals such as the Iran-United States Claims Tribunal, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Tribunal for Lebanon, the Kosovo Specialist Chambers, and the International Criminal Court, as well as the adoption of treaties that provide for international dispute settlement such as the World Trade Organization, the North American Free Trade Agreement, the International Tribunal for the Law of the Sea, and the Energy Charter Treaty.<sup>35</sup> Second, proliferation may also refer to the diversification of the structural characteristics of international courts and tribunals. This includes diversification in scope, jurisdiction, and enforcement

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29. See Hernandez, *supra* note 1.

30. See Martti Koskenniemi, *The Ideology of International Adjudication and the 1907 Hague Conference*, in TOPICALITY OF THE 1907 HAGUE CONFERENCE, THE SECOND PEACE CONFERENCE 127 (Yves Daudet ed., Brill Academic Publishers 2008) (“[t]he past years have seen an unprecedented increase in the number of international courts and tribunals . . . [b]ut no new theory has accompanied these”).

31. See David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401 (2006); see also CARON, *supra* note 20.

32. The term was principally used in the late 1990s and early 2000s. See, e.g., Romano, *supra* note 21, at 679; Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT’L L. 267, 267 (2001).

33. See, e.g. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 75 (2009).

34. See generally Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203 (James Crawford & Martti Koskenniemi eds., Cambridge University Press 2012) (providing a review of these developments).

35. *Id.*

mechanisms, which one commentator summarized as a “dizzying array of different forms.”<sup>36</sup> These developments lead to an equally exponential increase in the output of international courts and tribunals—decisions, judgments, and awards—that serves to reinforce the immediacy of the present and create more distance with the past.

These periods are also reflected in the discontinuity present in the literature. The literature is structured as a before and after. Whereas it was broadly generalist before multiplication, the literature has increasingly turned to narrow discussions of specialized regimes and subdisciplines.<sup>37</sup> The broad subject of “international courts and tribunals” is compartmentalized by specialization and institution and largely analyzed from these perspectives. Thus, there are now vast quantities of writings on the adjudication of international criminal law, investment law, World Trade Organization law, and human rights law, all of them notably self-referential.<sup>38</sup> Similarly, edited volumes that claim to discuss “international adjudication” or the “judicialization of international law” contain chapters that mostly deal with its subdisciplines.<sup>39</sup> Discontinuities are reinforced as international adjudication’s past has little relevance to international lawyers working in newly constituted and self-referential regimes—these lawyers are busily crafting new historical narratives and genealogy in order to assert the regimes’ newfound autonomy and authority.

The literature reinforces these periodization decisions and the underlying empirical developments to which they refer with a variety of rhetorical and analytical devices. It is replete with hyperbolic references to a “significant transformation,”<sup>40</sup> an “enormous expansion,”<sup>41</sup> a “marked change,”<sup>42</sup> a “brave new world,”<sup>43</sup> an “unprecedented prominence,”<sup>44</sup> and a “paradigm change.”<sup>45</sup> This hyperbole also is put forward in the form in which these developments are described, within “a single breathless paragraph,” to use the words of David D.

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36. See Hernandez, *supra* note 1, at 931.

37. This arguably evokes a more general cultural trend towards specialization “where knowledge is conceived as an incremental process of acquisition of additional skills in a given domain.” See Andrea Bianchi, *On Asking Questions*, in *THEORY AND PHILOSOPHY OF INTERNATIONAL LAW* xiii (Edward Elgar, 2017).

38. Not all disciplines may be closed to outside views, however. See generally Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT’L L. 875 (2011) (discussing in context of international investment law).

39. See, e.g., FOLLESDAL, *supra* note 3.

40. See Shany, *supra* note 33, at 75.

41. See Romano, *supra* note 21.

42. See Born, *supra* note 1, at 782.

43. See generally Crawford, *supra* note 8.

44. See Posner, *supra* note 1, at 3.

45. KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* 3 (Princeton University Press 2014).

Caron.<sup>46</sup> The effect is to draw a separation between a static past and a present in movement, an impression that is reinforced by a focus on the novel aspects of the international courts and tribunals themselves. A typical example of such an approach is one commentator's identification of a series of "new-style" international courts as moving away from "old-style" courts.<sup>47</sup> The distinction between "new-style" and "old-style" courts is crafted using a list of criteria such as the existence of compulsory jurisdiction and access for non-State actors that pre-determine the outcome of this categorization exercise: the only possible resolution is a marked difference between new and old entities.<sup>48</sup> Another distinction emphasizes the depoliticized nature of new international courts and tribunals as compared to the politicized nature of those of the past.<sup>49</sup> In sum, these devices leave the reader with a sense of wonder at the sheer scope, novelty, and depth of these new developments. They put forward the present and accentuate the idea of discontinuity as a type of progress.

In the second step of the progress narrative, this constructed contrast between the past and the present is associated expressly with the development and maturation of international law.<sup>50</sup> Thus, references by the literature to an objective empirical reality are generally followed by statements that qualify these developments positively. In these accounts, proliferation is equated with "the advancement of international law into new and improved levels of effectiveness."<sup>51</sup> It is also "a sign of maturity and [the] growing importance of the rule of law . . . [and] is characterized as a development that contradicts the claims of skeptics who argue that international adjudicator mechanisms, and international law more generally, are ineffectual and seldom used."<sup>52</sup> This particular affection for international courts and tribunals has been summarized as an "[u]nwavering trust of international lawyers in the beneficial and civilizing

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46. David D. Caron, *Framing Political Theory of International Courts and Tribunals Reflections at the Centennial*, 100 AM. SOC'Y INT'L L. 55, 29 (2006).

47. See ALTER, *supra* note 45, at 81–82.

48. *Id.*

49. See, e.g., Christoph H. Schreuer, *Investment Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., Oxford University Press, 2013).

50. See generally Thomas Skouteris, *The Idea of Progress*, in THE OXFORD HANDBOOK ON THE THEORY OF INTERNATIONAL LAW 949 (Anne Orford & Florian Hoffman eds., Oxford University Press 2016) ("[p]roliferation is typically seen as progress in two different ways. First, as a process of internal maturation, marking the completion of international law's institutional structure (the missing 'third pillar' of the international division of powers), thus leading to more cases resolved before the courts, more case law, more determinate rules, more certainty and predictability, more precedent, more thickening of the texture of the legal fabric. Second, as the hallmark of a new rule-oriented approach, widely regarded as an absolute and necessary condition for social progress.").

51. YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 5 (Oxford University Press 2003).

52. See Born, *supra* note 1, at 778.

power of international courts and tribunals in a world of otherwise untamed sovereigns.”<sup>53</sup> The resulting progress narratives tend to affirm (if not create) the idea, discussed next, that international courts and tribunals wield outsized influence and are “important tools of international governance.”<sup>54</sup> They effectively shelter these institutions from a more fundamental critique—there is hardly any inquiry as to whether there should be a resort at all to international courts and tribunals to resolve a given issue, but rather, which of the international courts and tribunals is most effective at resolving it.

### B. Functions and Legitimacy

Faith in the present through the literature’s periodization decisions and progress narratives is asserted by reference not only to the increased number of international courts and tribunals, but also to what they do. Thus, together with the multiplication of international courts and tribunals arose a voluminous literature on the functions undertaken by these entities. In a poignant summary of the function-oriented mission of scholars during this period of multiplication, commentators noted that “the functions of international courts need to be reformulated in times of global governance and in light of the remarkable trajectory of international adjudication over the past two decades.”<sup>55</sup> International courts and tribunals traditionally were thought of as pursuing a single function: the peaceful settlement of international disputes.<sup>56</sup> This has changed over the course of the past decades, as the literature now expends great energy contrasting this single function with ever more complex lists of the diverse “functions” or “roles” undertaken by the growing number of international courts and tribunals.<sup>57</sup> An exhaustive appraisal of these lists is outside the scope

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53. Jochen von Bernstorff, *Specialized Courts and Tribunals as the Guardians of International Law? The Nature and Function of Judicial Interpretation in Kelsen and Schmitt*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW? A MIXED BLESSING?* 9 (Andreas Follesdal & Geir Ulfstein, eds., Oxford University Press 2018).

54. Cesare P.R. Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues, and Players*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 15 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany, eds., Oxford University Press 2013).

55. Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts An Appraisal in Light of Their Burgeoning Public Authority*, 26 *LEIDEN J. INT’L L.* 49, 50 (2013).

56. As Armin von Bogdandy and Ingo Venzke note, “[t]his contribution presents international judicial institutions as multifunctional actors against the background of a traditional understanding, which sees just one function: settling disputes.” *See id.* at 49. The traditional position that can still be discerned from the pronouncements of the ICJ. *See, e.g.*, *LaGrand (Germany v. U.S.), Request for the Indication of Provisional Measures*, Order, 1999 I.C.J. Rep. 9, 15 ¶ 25 (Mar. 3) (“the function of this Court is to resolve international legal disputes between States . . . and not to act as a court of criminal appeal”).

57. *See, e.g.*, von Bogdandy, *supra* note 55; José E. Alvarez, *What are International Judges For? The Main Functions of International Adjudication*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 159 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany, eds., Oxford University Press 2013); Shany, *supra* note 40, at 75.

of this Article, but a sample of these approaches should give a sense of their multiplicity and heterogeneity. One commentator, for example, enumerates the functions undertaken by international courts and tribunals as dispute resolution, norm support, regime support, and legitimation.<sup>58</sup> Other commentators find that, beyond dispute settlement, the relevant functions also include stabilization and development of normative expectations and control of legitimate public authority.<sup>59</sup> Yet another commentator explains that States have delegated to courts the function not only of dispute settlement, but also compliance assessment, enforcement, and legal advice.<sup>60</sup> Finally, a recent volume on the judicialization of international law explains that courts focus on dispute resolution, rule development, and substantive justice.<sup>61</sup>

The effect of these “militant” accounts of functions is to craft a narrative (of progress) in which new and revitalized international courts and tribunals must be taking on more responsibility and playing a larger role in international law than in the past. These function-centric accounts are said to create a framework in which it is possible to “appreciate the many different contributions [International Courts] make to international politics.”<sup>62</sup> Yet this diverse range of functions has led some commentators to lament the resulting “terminological confusion.”<sup>63</sup> David D. Caron described many of these functions as “indeterminate and therefore both contestable and subject to strategic exploitation.”<sup>64</sup> One example of such a risk of exploitation is that a novel empirical reality framed as a progress narrative creates the conditions for attributing ever more expansive functions to international courts and tribunals. In the process, the conception and identification of these discrete sets of functions reinforce the roles that international lawyers writing during this period imagine international courts and tribunals should be undertaking. In that sense, these functions are at risk of being grounded merely in idealist aspirations put forward under the cover of scientific empirical observation.

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58. See YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 49 (Oxford University Press 2014).

59. Von Bogdandy, *supra* note 55, at 49–50.

60. See Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHICAGO J. INT'L L. 537, 539 (2009).

61. HARLAN GRANT COHEN ET AL., *Legitimacy and International Courts—A Framework*, in LEGITIMACY AND INTERNATIONAL COURTS 15 (Nienke Grossman et. al. eds., Cambridge University Press 2018).

62. See ALTER, *supra* note 45, at 17.

63. Alvarez, *supra* note 57, at 160.

64. David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. 231, 235 (2017).

After having drawn up the lists of new functions undertaken by international courts and tribunals and describing these courts and tribunals in such lofty terms as “deciding disputes with implications for our planet and its people,”<sup>65</sup> commentators are faced with an accounting. They must explain and justify the great power that they have ascribed to these entities, a power that fuels particularly virulent backlash against new international courts and tribunals. Backlash is felt with acuity by the international criminal court<sup>66</sup> and investor-state arbitration,<sup>67</sup> entities that do not benefit from a large shadow of the past and are thus more fully exposed to nostalgia. As a result, a large portion of the literature is preoccupied with the idea of legitimacy and its association with international courts and tribunals.<sup>68</sup> Admittedly, the examination of the legitimacy of international courts and tribunals is not an unimportant pursuit. However, the claim being made here is that the investigation of legitimacy is rendered more urgent by the literature’s enthusiastic assignment of ever-increasing functions to international courts and tribunals.

The legitimacy of international courts and tribunals is studied from several different perspectives. For some, legitimacy is found in the hands of the international judiciary, since “international judges and arbitrators ought to be tasked with ensuring the legitimacy of the international judicial system.”<sup>69</sup> For others, legitimacy is rooted in democratic theory and the conceptualization of international adjudication as an exercise of public authority.<sup>70</sup> And yet others might explain legitimacy as being connected to a court’s or a tribunal’s effectiveness as measured by the extent to which it has achieved its aims or goals as described by its founders.<sup>71</sup> This plurality of approaches to legitimacy is not surprising, as legitimacy has been recognized as a “notoriously slippery concept.”<sup>72</sup> In some ways, it is fitting that a concept known for being indeterminate and malleable is used to rationalize the equally indeterminate and malleable functions said to be wielded by international courts and tribunals.

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65. COHEN, *supra* note 61, at 1.

66. See, e.g., Darryl Robinson, *Inescapable Dyads Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT’L L. 323, 323 (2016).

67. See David D. Caron & Esme Shirlow, *Dissecting Backlash The Unarticulated Causes of Backlash and its Unintended Consequences*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW? A MIXED BLESSING?* (Oxford University Press 2018) (speaking about a range of differing motivations and concerns for backlash).

68. See generally COHEN, *supra* note 61.

69. See Boisson de Chazournes, *supra* note 1, at 14–15.

70. See Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 EUR. J. INT’L L. 7, 8 (2012).

71. Shany, *supra* note 51.

72. See generally COHEN, *supra* note 61, at 4.

## III. NOSTALGIA (CONTINUITY)

A. *Order and Systematization*

Much of the literature has embraced the multiplication of international courts and tribunals as a novel and discontinuous development that holds promise for the advancement of international law (faith in the present). In the process, it has offered new explanatory paradigms for this multiplication. Simultaneously, however, the literature also has continued to impart a sense of continuity to this development in order to render it intelligible, offering new paradigms under the guise of continuing past practices and intermingling the past with the present (nostalgia for the past). Thus, a complex social reality is reduced to familiar and easily identifiable reference points. Here, continuity is experienced through the creation of order and systematization to assuage the disorientation occasioned by the chaotic, even anarchical, nature of multiplication.

Characterized in another way, the construction of proliferation as the novel and progressive development of international law collides with the international legal profession's persistent desire for order. This search for order reflects a need inherent in the internal logics of international law and the international legal profession. Since the nineteenth century, international lawyers have "sought to explain how an apparently 'anarchic' aggregate of self-regarding sovereigns could still be united as 'order' at some deeper level of existence."<sup>73</sup> To build order and organize the multiplication of international courts and tribunals, the literature has relied on system-building—the construction of broad frames of thinking that can be applied to a large number of new as well as resurgent international courts and tribunals. This type of systematization diminishes the impression that proliferation is unpredictable and chaotic; it attenuates the distinction between new and old international courts and tribunals.

The most overt of these attempts at systemic thinking are "mapping" exercises that aim to create a repertoire of international courts and tribunals on the basis of a determined set of categories. These categories, as much as they act to create differences (as discussed in Part II), simultaneously eliminate differences between courts and tribunals through the use of criteria that strive for broad commonalities. For example, the Project on International Courts and Tribunals has prepared a synoptic chart that lists all "international judicial

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73. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 556 (2002).

bodies.”<sup>74</sup> Inclusion within this category is based on five criteria.<sup>75</sup> These criteria result in a chart that includes over forty-three entities classified as international judicial bodies. The chart thus draws continuities between past and present courts and tribunals—the International Court of Justice is included alongside the International Tribunal for the Law of the Sea.<sup>76</sup> With these entities all safely situated under the umbrella of “international judicial bodies,” the appearance of discontinuity and confusion dissipates.

Similarly, continuities are built into the structure of the literature. An increasing number of writings attempt to treat international courts and tribunals as a unitary object of study. They conflate entities of the past and the present and build heterogeneity, not along temporal lines (old and new entities), but rather by employing criteria such as how effective these entities are.<sup>77</sup> Predictably, however, these analyses come to normative conclusions that the growth in international courts and tribunals has mainly been a positive development,<sup>78</sup> falling back on implicit temporal divisions. David D. Caron’s framing political theory of international courts and tribunals evoked something of this unitary approach to international adjudication.<sup>79</sup> An approach also evidenced in a slew of new journals and edited volumes whose titles—*Journal of International Dispute Settlement* or *Legitimacy of International Courts*—suggests a coherent and unitary object of study.<sup>80</sup> As noted in the discussion about the response of faith, however, this façade of unity quickly devolves into compartmentalized discussions of subdisciplinary specializations.<sup>81</sup>

The literature relies on a number of additional approaches to craft a sense of order. Earlier in this Article mention was made of a tendency in the literature to denote a separation between the functions and roles undertaken by

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74. See Cesare P.R. Romano, *The International Judiciary in Context*, THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS (2001), cesareromano.com/wp-content/uploads/2015/06/synop\_c4.pdf.

75. These entities: “a) are permanent institutions; b) are composed of independent judges; c) adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization; d) work on the basis of predetermined rules of procedure; and e) render decisions that are binding.” *Id.*

76. *See id.*

77. *See, e.g.,* SHANY, *supra* note 58.

78. *See* Hernandez, *supra* note 1 at 919, 923.

79. *See generally* Caron, *supra* note 46.

80. *See, e.g.,* J. INT’L DISP. SETTLEMENT (a journal that addresses “fundamental and lasting issues of international dispute settlement”); CESARE P.R. ROMANO, KAREN J. ALTER, & YUVAL SHANY, EDs., OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (Oxford University Press 2013) (a handbook on international adjudicative bodies).

81. *See, e.g.,* ROMANO et al., *supra* note 80. Despite its title, numerous individual chapters deal with particular specializations. There is thus a chapter on international criminal courts (Chapter 10), international human rights courts (Chapter 11), investment tribunals (Chapter 15) and claims and compensation bodies (Chapter 13). *See id.*

international courts and tribunals past and present. To think of international courts and tribunals as multifunctional, however, and to move away from the singular function of settling disputes, is also an attempt to offer a comprehensive grid of analysis, a measure of structure and continuity, of what a new plurality of international courts and tribunals do. This functionalist approach thus is used to draw a distinction with the past—the old and new functions—while at the same time providing new stable reference points and structures to explain international courts and tribunals of the present. Other approaches oriented to the creation of order and structure include large framing projects such as the constitutionalist project<sup>82</sup> or the project of Global Administrative Law.<sup>83</sup>

David D. Caron spent a considerable part of his career attempting to order and make explicable the new landscape of international courts and tribunals. His own version of order was the search for a broad theoretical foundation to the operation of international courts and tribunals.<sup>84</sup> In an article published in 2006, David identified a “lack of an adequate framing theory for study of courts and tribunals”<sup>85</sup> and started laying the groundwork for his theory. As he noted, “a theory requires some agreement about what is being explained or understood by the theory.”<sup>86</sup> Thus, he first identified “a divide amongst courts and tribunals that flows not from formal criteria but rather from the identification of different driving forces . . . [in consequence of which] it would not make sense to compare the creation of courts and tribunals in the interstate model with those in the transnational model.”<sup>87</sup> Second, he concluded that

the identification of the transnational set of courts and tribunals as a distinct group opens another tradition of theorizing, in particular theories of courts within national systems . . . [which view] courts not only as providers of conflict resolution, but also as a means of social control and a source of law making—and that these multiple functions can be in conflict with one another—can be helpful to our exploration of courts and tribunals.<sup>88</sup>

Third, and finally, David concluded:

[T]he assertion that the two models exist in a dynamic relationship . . . suggests that the perspective of these two models offered allows for a general revisiting of the history of courts and tribunals in the international arena . . .

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82. See, e.g., Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT'L L. & POL'Y 753 (1999); see also Shalev Roisman, *Constraining States: Constitutional Lessons for International Courts*, 55 VA. J. INT'L L. 729 (2015) (providing a more recent example).

83. See, e.g., Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

84. See generally Caron, *supra* note 31.

85. Caron, *supra* note 46.

86. *Id.*

87. *Id.* at 61–62.

88. *Id.* at 62.

. [T]he future of international courts and tribunals will be determined by changes in the surrounding political context and the major change in this regard will be the wider presence of the rule of law. It is the rule of law domestically that will allow for greater coordinated sovereignty.<sup>89</sup>

In a later article, David D. Caron qualified his contribution as “crystalizing [his] thoughts as to a theory of international courts and tribunals.”<sup>90</sup> In that article he introduced “the bounded strategic space theory of international courts and tribunals,” namely

that the structure and operation of international courts and tribunals can be understood as the result of interactions of five or less groups of actors [“specifically, the parties, the adjudicators, the constitutive community, the secretariat and other interested parties”] *within* and *against* the bounded strategic space defined by the constitutive instrument establishing the international court or tribunal.<sup>91</sup>

David continued: “In this sense, the rules of procedure employed in the bounded strategic space may be viewed as the legal expression of the political efforts of these groups to control the influence of each other in the operation of the court or tribunal.”<sup>92</sup> By 2009, David had refined, and apparently perfected, his theory, entitling his series of lectures at the Hague Academy of International Law, now simply and definitively, “A Political Theory of International Courts and Tribunals.”<sup>93</sup>

### B. Narratives of the Past

The literature also seeks to narrativize present developments within the familiar reference points of the past, thus drawing overt continuities. As David D. Caron explained in his study of the Hague Peace Conference of 1899, “[t]o go forward, it is often wise, and sometimes necessary, to go back.”<sup>94</sup> References in the literature to the past are not part of self-standing historical inquiries. Rather, they serve to insert the multiplication of international courts and tribunals within a larger tradition—an invented tradition—that is generally dated back to the eighteenth or nineteenth century.<sup>95</sup> A typical assertion of continuity refers to

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89. *Id.* at 30.

90. Caron, *supra* note 31. Note his progress from “framing” his theory, then moving “towards” it, his thoughts “crystallizing” in the process, hence not yet fully formed. *Id.*

91. *Id.*

92. *Id.*

93. CARON, *supra* note 20.

94. See David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 5 (2000).

95. A form of invented tradition also found in international adjudication’s iconography. See Daniel Litwin, *Stained Glass Windows, the Great Hall of Justice of the Peace Palace*, in INTERNATIONAL LAW’S OBJECTS (Jessie Hohmann & Daniel Joyce eds., Oxford University Press 2019).

major historical signposts in the history of international courts and tribunals. Thus, the literature is replete with summary references to the Hague Peace Conferences of 1899 and 1907 and their resulting Conventions.<sup>96</sup> These references are typically found in the introductory sentences of articles or treatises.<sup>97</sup> Commentators may also choose to stress continuity with debates, ideas, or figures of the past through, for instance, regular references to the professions' heroic figures.<sup>98</sup>

Thus, at the same time as the literature enthusiastically notes discontinuities with the past, it simultaneously refers to the past, pointing to continuities as a means to assuage unease and build legitimacy for the new landscape of international courts and tribunals. The past is thus used as a means "to go forward" by creating a sense of continuity in a present where the multiplicity of international courts and tribunals can appear disorienting.

David D. Caron gave expression to his interest in the past by writing biographies and examining historical signposts. As early as 1991, he wrote a lengthy introduction to the *Elements of International Law* that discussed the life of Henry Wheaton and his role in "extending a shared conception of international law around the globe."<sup>99</sup> At this early stage of his career (and of multiplication), he already was signalling that the past was sufficiently important and deserving of examination. David drew more overt continuities in the context of international courts and tribunals in his article on the legacy of the Hague Peace Conference of 1899.<sup>100</sup> Besides writing about this well-known historical signpost at a moment when scholars were publishing extensively on proliferation, David also expansively referred to and resuscitated an earlier literature on international courts and tribunals.<sup>101</sup> As he explained, his goal was to "recapture that which drove our predecessors to desire . . . [international] courts and tribunals."<sup>102</sup>

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96. See, e.g., Crawford, *supra* note 8, at 9; Born, *supra* note 1, at 795; ARMIN VON BOGDANDY & INGO VENZKE, *IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 1* (Oxford University Press 2014); Posner, *supra* note 1, at 7.

97. See de Brabandere, *supra* note 27, at 460 (providing a recent example); see also VON BOGDANDY, *supra* note 96 (providing a book-length treatment that has an entire introductory chapter devoted to these historical signposts).

98. Sir Hersch Lauterpacht being a favorite here. See de Brabandere, *supra* note 27, at 463.

99. David D. Caron, *Introduction*, in *ELEMENTS OF INTERNATIONAL LAW 25* (Henry Wheaton ed., 1991).

100. Caron, *supra* note 94, at 5.

101. See *id.* at 6 n.12, 9 n.28–29 (referencing works such as William Ladd, *Essay on a Congress of Nations for the Adjustment of International Disputes without Resort to Arms* (1840); Jackson Ralston, *International Arbitration From Athens to Locarno* (1929); and Thomas Willing Balch, *The Alabama Arbitration* (1900)).

102. See David D. Caron, *International Court and Tribunals: Their Roles amidst a World of Courts*, 26 *FOREIGN INV. L.J.* 1, 3 (2011).

Continuity with the past also is expressed in the literature in terms of structural or judicial hierarchy. This form of continuity was on display by successive presidents of the ICJ, who asserted an image of international adjudication as a relatively formal and centralized activity.<sup>103</sup> In the context of what they perceived to be the risk of fragmentation arising from the growth of international courts and tribunals, this image was articulated, for instance, as the possibility of “enabling other international tribunals to request advisory opinions of the ICJ on issues of international law that arise in cases before those tribunals.”<sup>104</sup> This suggested a hierarchy of international courts and tribunals with the ICJ at its apex, drawing soothing parallels to the domestic context and to received ideas about the structure of the international judiciary from the past. One commentator described this, however, as an attempt “to re-establish the old order of things . . . [that] ignores the very reasons that have occasioned the new decentralisation.”<sup>105</sup>

Discussions about the functions of international courts and tribunals also have an underlying sense of continuity to them. Despite bringing forward an array of different functions undertaken by these new institutions, the literature, with remarkable consistency, faithfully refers to the age-old function of settling international disputes. As one commentator observed, the “intertwined functions of settling disputes and maintaining peace, self-evident to those at the turn of the nineteenth century, continue to explain the function of today’s diverse courts and tribunals.”<sup>106</sup> David D. Caron evoked a similar continuity with the function of settling international disputes. In his writings, he advocated for a distinction between function and task:<sup>107</sup> the function of the international judge, his judicial task, is the resolution of disputes.<sup>108</sup> It is in performing this task that he indirectly would further other functions.<sup>109</sup>

Continuity also is expressed, rather self-evidently, through the standard terms used to describe international courts and tribunals. Though the literature may enthusiastically describe the diversity in the structure and functions of new international courts and tribunals, it is incapable of relying solely on the conceptual products of this discontinuity—it refuses to abandon the well-trodden

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103. See, e.g., Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L COMP. L.Q. 848, 862 (1995) (advocating for a more centralized form of international adjudication).

104. U.N. GAOR, 54th Sess., 39th plen. mtg. at 3, U.N. Doc. A/54/PV.39 (Oct. 26, 1999) (containing address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen M. Schwebel, President of the International Court of Justice).

105. See Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT’L & COMP. L. Q. 121, 122 (2001).

106. Alvarez, *supra* note 57, at 159.

107. See Caron, *supra* note 64, at 231.

108. See *id.* at 235.

109. See *id.*

concepts and categories of the past. Thus, international courts still are “courts,” even if they now exert public authority or allow non-State actors to bring cases. International arbitration is still “arbitration,” even when it is now considered part of a global constitutionalist structure. This language inevitably imparts continuity to the operations of the new landscape of international courts and tribunals (we are still dealing with “courts” and with “arbitration”), a continuity that obfuscates the way concepts such as court or arbitration take on different meanings across time.<sup>110</sup> This strategic use of conceptual continuity to assuage anxiety can also be found in recent initiatives such as the European Commission’s proposal for a Multilateral Investment Court—a proposal that equally could be construed as a court taking the guise of arbitration (discontinuity) or as arbitration taking the guise of a court (continuity). In his discussion on the nature of the Iran-United States Claims Tribunal, David D. Caron elaborated on the dangers of using existing conceptual tools and categories. As he explained it, commentators had struggled over whether the Tribunal was an international tribunal in the historical or conventional sense, or something else entirely.<sup>111</sup> He encouraged scholars to abandon their struggle to categorize the Tribunal and instead to recognize the evolutionary process it signaled.<sup>112</sup> For David, “to squeeze innovative efforts into categories is to constrain society’s ability to adapt . . . [S]ubtle doctrinal predispositions will only frustrate objective interpretation and the experimentation necessary to the growth of the international system.”<sup>113</sup> An international lawyer may thus be forgiven for thinking, even though she or he is told that international courts and tribunals now undertake a multiplicity of new functions and represent a form paradigm shift, that they are still “courts” and “arbitral tribunals” of old.

#### CONCLUSION

This Article has argued that the literature on international courts and tribunals in the past several decades has been structured by the opposing reactions of international lawyers to the multiplication of international courts and tribunals. Thus, behind the veneer of sophisticated frameworks and systems of knowledge, the literature has been shaped by the simultaneous responses of faith in the present and nostalgia for the past to the disorientation brought about by multiplication. Each of these responses is privileged by drawing continuities or discontinuities between the past and the present under the guise of familiar tropes

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110. See generally REINHART KOSELLECK, *THE PRACTICE OF CONCEPTUAL HISTORY: TIMING HISTORY, SPACING CONCEPTS* (Stanford University Press 2002).

111. See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure on International Dispute Resolution*, 84 AM. J. INT’L L. 104, 128 (1990).

112. See *id.*

113. See *id.*

such as functions or systematization. These contradictory sentiments often are held at the same time. Faith expressed through assertions of discontinuity is simultaneously met with assertions of continuity to alleviate nostalgia. The resulting layered temporalities have contributed to the specificity and complexity of the literature of this period.

Throughout this Article, David D. Caron's writings have acted as a guide to the contours of this body of writing: David embodied Virgil in a version of the *Divine Comedy* that took place in the world of international courts and tribunals that he so cherished. As a leading representative of this generation, he attempted to instill order into the world of international courts and tribunals by crafting a framing theory that nevertheless would leave room for experimentation and growth.

The next generation of international lawyers will have been born into a world of already multiplied international courts and tribunals. They may start to look at that established order as natural or necessary, a dominant paradigm with a single temporality, the present. They risk forgetting the personal struggles involved in creating it and making sense of it. In that way, the body of writing that has emerged in the past three decades, with its tensions, struggles, and temporal contradictions, serves as a reminder to the next generation of the possibilities of international adjudication, and that things do not have to be as they always have been.

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# Legitimacy in International Law and Institutions: Carrying Forward the Work of David D. Caron

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David D. Caron's scholarship on the legitimacy of international law and international institutions was ground-breaking, expansive in its reach and its impact, and elegant in its analysis, form, and structure. The questions of legitimacy that he addressed in his writing represent some of the most urgent and important matters of international law, and some of the most difficult. They are questions about how power can be exercised fairly, how justice can be achieved in a diverse international community, and how institutions can be deployed to mitigate the world's greatest challenges.

Grappling carefully with these complex questions, Caron examined the meaning and function of legitimacy in international law across a range of contexts in international law, from the Security Council,<sup>1</sup> to arbitration,<sup>2</sup> to international dispute resolution more broadly,<sup>3</sup> and beyond.<sup>4</sup> One might be tempted to call him a generalist, except that such a label would belie his deep expertise in so many areas of international law. His ability to both dig deeply in individual contexts and look across specialized fields, across the expanses of

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1. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993).

2. See David D. Caron, *Investor State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32 SUFFOLK TRANSNAT'L L. REV. 513 (2009); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

3. See David D. Caron, *Comparative Analysis of International Dispute Resolution*, 85 AM. SOC'Y INT'L L. PROC. 64, 65-70 (1991).

4. See, e.g., David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183 (2002); David D. Caron, *The International Whaling Commission And The North Atlantic Marine Mammal Commission: The Institutional Risks Of Coercion In Consensual Structures*, 89 AM. J. INT'L L. 154 (1995).

public and private law and all that lies at their intersections, and to assess international law more broadly, made his work in legitimacy especially powerful. Moreover, Caron's scholarship did not merely work from inside the concept of legitimacy to assess its meaning; it also took a step back and questioned the appropriateness and significance of the rise of attention to legitimacy in international law. "Is this discussion justified?" Caron asked, then still in the early years of the academy's attention to this concept. "Does the presence or absence of legitimacy really matter? Why do we care, and is our concern justified?"<sup>5</sup>

The contributions of David Caron to the field of international law are of course not confined to scholarly writing. David had a rich life in international law outside the academy, and his ideas on the concept of legitimacy of international law and international institutions were reflected in the work he did as an eminent practitioner of international law, including as a judge *ad hoc* in the International Court of Justice and a member of the Iran-United States Claims Tribunal, both esteemed positions he held at the end of his life. David understood and cared deeply about the power of institutions, whether law schools or arbitral tribunals or professional associations or international courts.<sup>6</sup> He built and shaped and led institutions deftly. He thought carefully about constructing processes and making decisions that had "integrity, that may be trusted," to use his words from *The Legitimacy of the Collective Authority of the Security Council*,<sup>7</sup> one of his most celebrated scholarly writings on legitimacy. He thought carefully about ensuring "that an institution is faithful to the promise of the organization, that is, that it acts with integrity."<sup>8</sup>

David's untimely passing is a massive blow to the development of international law and to the institutions of international law. But his contributions to the field are prolific and indelible. He has left us with a wealth of wisdom and insight, with the lasting gifts of his intelligence, his diligence, his energy, his curiosity, and his openness; and the scholars who continue to work in the fields David shaped carry forward his work in their own.

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5. David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC'Y INT'L L. PROC. 303, 304 (1993).

6. One example of this devotion is in the following passage of Caron's piece on legitimacy and the Security Council, which in turn is quoted poignantly in David Kaye's essay in this volume:

Challenges to power framed in terms of the illegitimacy of that power cannot be dealt with merely on the level of general principles. Rather, the means of confronting the challenges to legitimacy must be institutionalized. This conclusion places a heavy emphasis on process, not because I believe justice is merely procedural, but because I believe our diverse global community is more likely to find its vision of substantive justice through a process involving debate.

David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 588 (1993).

7. *Id.* at 561.

8. *Id.*

This much is clear in the contributions of the four panelists who participated in the session on Legitimacy in International Law and Institutions, during the symposium entitled *The Elegance of International Law* that was held to honor David Caron. In her essay, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, Lori Damrosch offers her thoughts on the question of economic sanctions as countermeasures, in what she describes as “an installment of what would have been a continuing conversation with David D. Caron . . . on themes that engaged both of [them] across multiple phases of [their] intersecting careers.”<sup>9</sup> In *International Courts and Democratic Backsliding*, Tom Ginsburg assesses the capacities of courts to do the work of democracy preservation, drawing on the distinction Caron articulated in the 2017 Charles N. Brower Lecture on International Dispute Resolution between the functions of courts and the tasks of adjudicators,<sup>10</sup> the misalignment of which, Caron noted, harms “both the identity of a court and the legitimacy that is accorded to courts.”<sup>11</sup> In *Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron’s Study of the UN Security Council*, David Kaye uses Caron’s four principles that enable an institution, process, or decision to avoid illegitimacy<sup>12</sup> to assess why state-driven models of global internet governance are perceived as illegitimate, while non-state governance models have been more accepted by both states and civil society.<sup>13</sup> Finally, Bernard Oxman writes in *Nonparticipation and Perceptions of Legitimacy* on the issue of the impact on legitimacy of nonparticipation of states in dispute resolution proceedings, which he uses to address the broader question of what is needed “to encourage behavior that is consistent with the kind of international order under which we would like to live.”<sup>14</sup>

While each essay addresses a distinct—and crucial—area of international law, the four are unified as well. Each contribution demonstrates traits of legal scholarship that Caron’s work exemplified: careful doctrinal analysis alongside idealism and hope about the prospects for the future of law; rigorous theoretical work informed by a realistic assessment of politics on the ground; facility with and appreciation of interdisciplinarity, from the social sciences to humanistic

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9. Lori Fisler Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 46 *ECOLOGY L.Q.* 95, 95, 37 *BERKELEY J. INT’L L.* 249, 249 (2019).

10. Tom Ginsburg, *International Courts and Democratic Backsliding*, 46 *ECOLOGY L.Q.* 111, 111–13, 116–32, 37 *BERKELEY J. INT’L L.* 265, 265–66, 268–86 (2019); See David D. Caron, *The Multiple Functions of International Courts and the Singular Function of the Adjudicator*, 111 *AM. SOC’Y INT’L L. PROC.* 231 (2017).

11. Caron, *supra* note 10, at 236–37.

12. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 *AM. J. INT’L L.* 552, 561 (1993).

13. See generally David Kaye, *Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron’s Study of the UN Security Council*, 46 *ECOLOGY L.Q.* 135, 140–47, 37 *BERKELEY J. INT’L L.* 289, 294–301 (2019).

14. Bernard H. Oxman, *Nonparticipation and Perceptions of Legitimacy*, 46 *ECOLOGY L.Q.* 81, 82–92, 37 *BERKELEY J. INT’L L.* 235, 236–46 (2019).

methods and beyond. Each of these scholars was not only a colleague and collaborator of David Caron, but also a friend. And each of these contributions demonstrates not only the creativity and analytical muscle of the authors, but also their devotion to sustaining the work of David D. Caron, to continuing the conversations to which he so vibrantly, powerfully, and beautifully gave his voice.

# Goldilocks and International Dispute Settlement

Joan E. Donoghue\*

In his lectures and scholarly writings, David Caron was fond of conjuring images. Last September, he opened a lecture in Geneva by recalling an inscription over an entrance to this law school.<sup>1</sup> In his *American Journal of International Law* article on the 1899 Hague Peace Conference, he described a rather grim statue on the grounds of the Peace Palace in The Hague called “The Spectre of War.”<sup>2</sup>

These are sober images, befitting the serious topics that David addressed. The title of my presentation also brings to mind an image, but this image is that of little girl, the heroine of a children’s story. I am not sure that David would have approved of this frivolity. In my defense, however, I point to something that David observed when he wrote about the Hague Peace Conference—that there was not a single female at that important meeting.<sup>3</sup>

I am often shocked and disappointed at how little has changed in this regard since I graduated from this law school in 1981. The World Court that was envisioned at the 1899 Hague Peace Conference has been in existence for about a century. During that time, only four women have been Members of the Court. Looking at the number of women participating in this symposium, however, we can see among David’s colleagues and former students a group of women who have made and will continue to make important contributions to international law. David surely would have been pleased.

So why do I invoke Goldilocks?

In reading legal scholarship, I sometimes think of Goldilocks. On the one hand, some legal writings are by and for practitioners, and these can be very

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\* Judge, International Court of Justice.

1. David D. Caron, *Arbitrators and the Rule of X 2*, King’s College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-412-3 (2017).

2. David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 7 (2000).

3. *Id.* at 8.

practical, detailed, and technical, but they often cover a topic without locating it in a larger frame. On the other hand, law journals are full of abstract and theoretical articles that often seem disconnected from practical constraints or technical details, perhaps even deliberately indifferent to them. So, like Goldilocks, I often find one bowl of porridge too hot and the other too cold. That is why, whenever I discover that David has written on a particular topic, I feel a sense of relief, like Goldilocks when she proclaims the third bowl of porridge to be “just right.” On topic after topic, David’s porridge was “just right.”

My reflections on David’s writings lead me to three variations on the Goldilocks story that I shall address today:

1. Goldilocks as a shorthand for synthesis and integration in legal writing (illustrated by David’s scholarship);
2. Goldilocks as a representation of the choice of a middle ground in adjudication; and
3. Goldilocks as an impulse that should sometimes be resisted, because in certain situations, the right answer is to choose the hot porridge or the cold porridge, rather than being drawn to something in the middle.

#### I. DAVID CARON’S “JUST RIGHT” WRITINGS

Over the course of today’s panels, there will be numerous references to David’s scholarship that illustrate David’s capacity to integrate the larger questions and the smaller details. One such example is his article on the 1899 Hague Peace Conference that I mentioned earlier. David began by reminding the reader that, “[t]o go forward, it is often wise, and sometimes necessary, to go back.”<sup>4</sup> David insisted that modern international lawyers reflect on what really was motivating those conferences, reminding us that, even though we think of those conferences as the birthplace of contemporary institutions of dispute settlement (the Permanent Court of Arbitration and the International Court of Justice), many conferees were focused on very different issues—the arms race in Europe and the laws of war.

After a careful study of the competing views that contributed to the failure to establish a World Court at the 1899 and 1907 Hague conferences, David reminded us of the continued relevance of those views in the present day, observing that “there is no reason to believe that the range of beliefs and personalities involved in the 1899 conference was basically any different from those that can be seen in play today.”<sup>5</sup> The success of institutions such as dispute settlement mechanisms depends not only on aspiration and inspiration but also on the nuts and bolts of adjudication. David, like the participants in the Hague Peace Conferences, identified precisely those details that have proven to be

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4. *Id.* at 5.  
5. *Id.* at 23.

important. As he stated, “[t]he quality of the judges as individuals and the process by which they collectively reach a judgment reside at the core of both the respect accorded the Court and the willingness of states to consent to its jurisdiction.”<sup>6</sup>

David held himself to the same high standards in his writings as an adjudicator, both in arbitral decisions and awards and in his capacity as a Judge *ad hoc* at the International Court of Justice (ICJ), weaving together the conceptual framework and the details of the particular case. (I had the great fortune of serving briefly with David both on the ICJ and as a member of an arbitral tribunal.)

I offer two examples of David’s writing as an adjudicator.

As the Judge *ad hoc* appointed by Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, David was the lone dissenter in a judgment in which the Court rejected Colombia’s jurisdictional objections.<sup>7</sup> This was a case in which the parties invoked many facts in support of their respective views on jurisdiction, including numerous diplomatic exchanges and reports of encounters at sea.

I hasten to point out that I joined the majority in this case, and thus disagreed with David’s conclusion. However, I have only praise for his approach. His dissenting opinion opens with his perspective on questions at the very foundation of the Court’s legitimacy and jurisdiction, such as the way in which the requirement of a “dispute” limits the Court’s competence in contentious cases.<sup>8</sup> It then extensively surveys the evidence that led David to conclude that there was no dispute in that case, and thus that the Court lacked jurisdiction.<sup>9</sup> The reader has no doubt that David has considered both the law and the facts with great care. There is no mystery about the reasons for David’s conclusions.

Another example of David’s writing as an adjudicator is an arbitral decision on jurisdiction that I read with great interest soon after it was made published in spring of 2017. David was the President of an International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Kim v. Uzbekistan*.<sup>10</sup> In that case, the Respondent objected to jurisdiction on a variety of grounds, all of which the Tribunal rejected.<sup>11</sup> Two of these grounds were of particular interest to me—an objection based on a treaty provision of a sort often described as a “legality” provision<sup>12</sup> and the respondent’s contention that the arbitration was barred by corruption on the part of the claimants.<sup>13</sup>

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6. *Id.* at 26.

7. *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*, Judgment, 2016 I.C.J. Rep. 3, ¶ 74 (Mar. 17) (dissenting opinion by Judge *ad hoc* Caron).

8. *Id.* ¶¶ 5–27.

9. *Id.* ¶¶ 28–53.

10. Vladislav Kim v. Republic of Uzb., ICSID Case No. ARB/13/6, Decision on Jurisdiction (Mar. 8, 2017), <https://www.italaw.com/cases/5403>.

11. *Id.* ¶ 640.

12. *Id.* ¶¶ 358–542.

13. *Id.* ¶¶ 543–617.

I have had reason to consider the legality provisions of investment treaties in several contexts over the years, and I have found much to be lacking in the analysis of tribunals, especially because of the tendency not to differentiate among differently-worded provisions. When I read the decision in *Kim v. Uzbekistan*, however, I was so impressed that I immediately wrote to David to compliment him.

In *Kim v. Uzbekistan*, the Tribunal states that it does not find past analysis to be satisfactory, having been “constructed without reference either to the text of the treaty in question or to underlying principles.”<sup>14</sup> By contrast, we see David’s handiwork in that decision, which both marches carefully through the interpretation of key words and phrases in the treaty and offers an overall substantive framing of the legality test.<sup>15</sup> As in David’s dissent in *Nicaragua v. Colombia*, the reader understands how the Tribunal took into account both the governing policy considerations and the specific provisions.

## II. GOLDILOCKS AS A SHORTHAND FOR THE CHOICE OF A MIDDLE GROUND

Many of you are undoubtedly familiar with the idea of a “Goldilocks principle” or “Goldilocks effect.” The phrase is amenable to various definitions. For example, the “Goldilocks principle” can be understood as a shorthand for the calibration of variables that is necessary to achieve the “just right” outcome. The dosage of a drug must be set “just right” to balance benefits against side effects. To achieve the desired economic outcomes, interest rates must be neither too high nor too low.

One permutation of the “Goldilocks effect” is the idea that there can be some inherent attraction to a middle ground. Seasoned bureaucrats know, for example, that when presenting a memorandum setting out options to a minister or a head of state, it can be advantageous to bracket one’s preferred option between two other options, each of which might appear too extreme.

In the context of international dispute settlement, the Goldilocks effect may call to mind the notion of compromise as between the positions of two parties. We sometimes hear observers suggest that compromise is a key driver of outcomes in arbitration. The traditional structure of arbitration, with each party choosing one of three arbitrators, fuels the expectation of compromise as the decision paradigm.

I have come to believe that compromise as an explanation for the behavior of international courts and tribunals is overstated. In any group, solutions that reduce friction and maintain harmony have some appeal. However, when I reflect both on the outcomes and the course of numerous confidential deliberations within the ICJ, I conclude that factors other than compromise drive our decisions.

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14. *Id.* ¶ 385.

15. *Id.* ¶ 404.

In interstate adjudication, parties often appear hesitant to advance fallback positions, whether as to law or to facts. Quite often, however, neither party's maximalist position convinces the adjudicators. In addition, substantive law often drives a decision towards an intermediate outcome. When one party says that an indeterminate treaty term means "yellow" and the other says it means "red," the rules of treaty interpretation may point to "orange."

In maritime delimitation, the applicable law calls expressly for an outcome that takes into account both parties' interests. The United Nations Convention on the Law of the Sea creates a presumption in favor of a median line in territorial sea delimitation<sup>16</sup> and calls for an "equitable solution" in delimiting the exclusive economic zone and the continental shelf.<sup>17</sup> When the boundary established by a court or tribunal appears on a map, it may look like a "split the baby" compromise, but the outcome is driven by the law as applied to the parties' coastlines. The treaty, not the spirit of compromise, is often the more convincing explanation for outcomes that appear to accommodate the interests of both parties.

There is, however, a more specific context in which it seems to me that the Goldilocks effect may play an important role in international adjudication. I have in mind the way that it could influence judicial appreciation of complex argumentation presented by parties, especially on scientific and technical issues.

Here I draw on research about attention and perception.<sup>18</sup> Scientists in the Brain and Cognitive Sciences Department at the University of Rochester presented infants with visual stimuli with varying degrees of complexity—some wildly complex, some very bland and some in-between. The scientists observed that the attention of the babies was not held very long by either the bland images or the very complex ones. They concluded that "infants appear to allocate their attention to maintain an intermediate level of complexity."<sup>19</sup>

I reflected on this inquiry into the Goldilocks effect as I thought about the way that parties present evidence to adjudicators, the way that adjudicators assimilate evidence, and the way that we present our conclusions in judgments and awards. Take, for example, expert evidence on scientific matters or the quantum of damages. Typically, each party retains an expert who presents a written report. Frequently, these expert reports include concepts, charts, graphs and equations that can be daunting. The expert of each party comments on the views of the other expert. There may be oral testimony and the experts are usually cross-examined by opposing counsel and questioned by the court or tribunal. We

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16. United Nations Convention on the Law of the Sea, art. 15, Dec. 10, 1982, 1833 U.N.T.S. 397. Article 15 permits departures from a median line based on historic title or other special circumstances.

17. *Id.* arts. 74(1) & 83(1).

18. Celeste Kidd, Steven T. Piantadosi & Richard N. Aslin, *The Goldilocks Effect: Human Infants Allocate Attention to Visual Sequences That Are Neither Too Simple Nor Too Complex*, PLoS ONE 7(5): e36399 (2012), <https://doi.org/10.1371/journal.pone.0036399>.

19. *Id.* at 6.

lawyers are often accused of writing in “legalese,” but experts can also be faulted for communicating in “expertise,” that is, using terms and concepts that may be easily understood by another expert, but not necessarily by a non-expert, such as a judge or arbitrator.

I certainly invest effort to understanding complex technical reports. Indeed, I may be more open to doing so than some of my colleagues, having endured enough scientific study to have received a bachelor’s degree in biology. However, at the risk of proving that my own facilities for comprehension have not advanced since infancy, I have to admit that overly complex presentations have only a limited effect on me. When I am overwhelmed by the complexity of an expert report, my response is not very different from that of the babies in the study. My instinct is to look away. But at the same time, overly simplistic assertions by counsel sustain my interest no more than the bland images retained the babies’ attention.

I doubt that my experience is unique. Instead, my interactions with colleagues convince me that both excessive complexity and over-simplification can cause adjudicators to lose interest in a party’s proposition. We start looking elsewhere in the case file. In the words of the Rochester scientists, we “allocate our attention” somewhere else.

The baby’s story ends when he or she looks away from the boring image or the overly complicated picture. Adjudicators may also be inclined simply to look away from excessive complexity. However, we cannot do so. Eventually, we have to make a decision and to state our reasons for it. So how do we proceed?

Sometimes we are able to circumnavigate complexity in our decisions. The sequence in which we set out our reasoning often means that we need not address all points of disagreement between the parties. A decision on one point of law can obviate the need to make a decision on a tricky point of evidence, and vice-versa. If a claimant loses a case on jurisdiction or liability, the tribunal does not have to struggle through complicated quantum reports.

When decisions on complex issues of evidence cannot be avoided, we often see adjudicators using a variety of techniques to manage the complexity without directly deciding a scientific or technical issue. They rely heavily on the burden of proof rather than making an explicit choice between the conclusions of dueling experts. They employ a variety of techniques, which I have elsewhere called “second-order indicators”<sup>20</sup> to judge the reliability of expert evidence and opinion. These include reliance on agreement between the parties and/or their experts, negative inferences drawn from the unexplained failure to present certain evidence, and gaps and inconsistencies in methodological logic. Through these techniques, adjudicators shift the inquiry to an intermediate level of complexity. The conclusion of a court also often has an intermediate character.

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20. Joan E. Donoghue, *Expert Scientific Evidence in a Broader Context*, 9 J.INT’L DISP. SETTLEMENT 379, 383-84 (2018).

Instead of making a direct finding for or against an expert's scientific assertion, a court may, for example, conclude only that the party "failed to provide sufficient evidence" of a fact.

If my intuition about the Goldilocks effect is right, it has implications for parties. When complex facts are in dispute in adjudication and arbitration, the task of a party is to convince adjudicators that the party has better evidence, using concepts and words that we can understand and that we can reflect in our judgment. A conclusory assertion does not suffice, but, on the other hand, we are unlikely to draft judgments or awards containing pages and pages of charts and equations. We are most likely to be persuaded by narratives that have a sufficient level of detail to lend credence and legitimacy to conclusions and that are within the range of judicial comprehension and reasoning.

### III. GOLDILOCKS MAY NOT ALWAYS BE RIGHT

My third invocation of Goldilocks is a reminder that the middle option is not always the right one. Perhaps a wily bureaucrat has managed to position his or her preferred option as a center point between two extremes, but that does not mean that the middle option should be chosen. Indeed, if there is a tendency to be drawn towards middle options, we should be especially cautious when we find ourselves being pulled towards the center and we should ask whether, in a particular situation, the best choice is actually the scalding porridge or the cold porridge.

Cold porridge certainly does not sound very inviting. Although David certainly never referred to breakfast foods in his writings, his scholarship on dispute settlement offers examples of situations in which we should resist the temptation to improve cold porridge by combining it with hot cereal.

David understood the importance of preserving and respecting the limits of various mechanisms of international dispute settlement. In his 2012 article on ICSID annulment committees,<sup>21</sup> he observed that annulment committees sometimes go beyond the confines of annulment to offer broader observations or to comment on the substance of a tribunal's decisions. He asked what would impel them to do so and suggested that committees may feel a sense of responsibility for the correctness of the award, "possibly in hopes of instructing and improving subsequent awards."<sup>22</sup> They may, he said, have a concern for the integrity of the system of ICSID arbitration as a whole.<sup>23</sup> For David, this was an impulse to be suppressed.

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21. David D. Caron, *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. & MEDIATION REV. 173 (2012).

22. *Id.* at 192.

23. *Id.*

David's observations about the behavior of ICSID annulment committees call to mind comments that Judge Thomas Buergenthal made about the ICJ<sup>24</sup> in the case brought by the Democratic Republic of the Congo against Rwanda. The context was one of enormous tragedy and loss of life. Despite the ongoing violence, the Court found that it lacked *prima facie* jurisdiction and thus declined to impose provisional measures. Judge Buergenthal voted in favor of the Court's order. But, in a declaration, he criticized the Court for making a series of statements about the rights and obligations of the Parties, observing that "the Court's function is to pronounce itself on matters within its jurisdiction," not to make what he called "feel good" pronouncements.<sup>25</sup>

David and Tom, each of them not only a distinguished scholar but also an experienced jurist, understood the impetus on the part of adjudicators to do more than is prescribed by their specific mandate. They recognized why adjudicators feel responsibility for the entire system, why, in my terms, they might want to add just a bit of hot porridge to make a cold, lumpy gruel a little more palatable. However, David and Tom admonished adjudicators not to give in to these frustrations, and instead to adhere to their respective institutional limits.

As David observed in his Brower Lecture at the 2017 ASIL Annual Meeting, in the absence of robust machinery for international governance, international courts "are the only tool available; they are screwdrivers that have been asked not only to place screws but also to hammer nails." He cautioned, however, that, if courts are used excessively as hammers, they will cease to function well as screwdrivers.<sup>26</sup>

When I have reflected on this admonition by David, I have thought about how it might tie to his observations on what he described as the "elegance of international law."<sup>27</sup> For David, an elegant solution in law was one that takes responsibility for its consequences. At first blush, this might suggest that adjudicators take responsibility by doing more by pressing the boundaries of their mandate to tackle the underlying problem, whether that is the loss of life in the Great Lakes region of Africa or errors in an arbitral award. However, it seems to me that the idea of elegance may instead call for humility and self-restraint on the part of adjudicators. International courts and tribunals have been created by states and can be undermined or eliminated by them. To maintain them as means for the peaceful settlement of disputes, adjudicators must be faithful to their

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24. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Order, 2002 I.C.J. Rep. 219, 257 (July 10) (declaration by Buergenthal, T.).

25. *Id.* at 258.

26. David D. Caron, *Fifth Annual Charles N. Brower Lecture on International Dispute Resolution: The Multiple Functions of International Courts and The Singular Task of The Adjudicator*, 111 AM. SOC'Y INT'L L. PROC. 231, at 236, 239 (2017).

27. David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 AM. SOC'Y INT'L L. PROC. 21 (2012).

mandates. We must take responsibility for the consequences of doing the task assigned to us, while leaving it to others to fight broader battles.

For those of us working in the field of international dispute settlement, this is a busy and challenging time. As David said in Geneva about a year ago, “international dispute settlement mechanisms are paradoxically being employed in an unprecedented fashion and to an unprecedented extent while simultaneously also being subject to intense criticism and thus seeking sounder footing.”<sup>28</sup> To establish and maintain the legitimacy and credibility of dispute settlement mechanisms, adjudicators must honor the vision that inspired the Hague Peace Conference through the best work that we can do, mindful of the mandate assigned to us. We must always be self-reflective and must take into account both the big picture and the nitty gritty details. In short, we must approach our work as David approached his.

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28. Caron, *supra* note 1, at 3.

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# ISDS Reform and the Proposal for a Multilateral Investment Court

*Lee M. Caplan*

It is my great privilege to speak on this panel today in honor of David Caron, a brilliant scholar, a thoughtful jurist, a caring mentor, and a dear friend.<sup>1</sup> As this conference shows, David's interests and expertise in international law were broad and varied. One area that attracted David's attention was Investor-State Dispute Settlement, or "ISDS." My topic for discussion today is "ISDS reform and the proposal for a Multilateral Investment Court."

"ISDS," as many of you may know, stands for "Investor-State Dispute Settlement," and refers to the current system of *ad hoc* arbitration that foreign investors and host States use to resolve their investment disputes. Because the system is *ad hoc*—in other words, the disputing parties pick the arbitrators and the arbitrators decide only the case before them—it has come under increasing attack. Critics say that the one-off approach produces inconsistent results across similar cases and encourages arbitrators to act self-interestedly in search of their next appointment.<sup>2</sup>

What I would like to talk about today is the proposal to scrap the current *ad hoc* arbitration system in favor of a permanent, multilateral investment court. This initiative has been heavily driven by the European Commission (EC), which has already provided for bilateral investment courts in its latest free trade agreements, and the proposal is now in the early stages of consideration by the UN Commission on International Trade Law (UNCITRAL).<sup>3</sup>

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1. These remarks were presented on a panel entitled "International Dispute Resolution" as part of *The Elegance of International Law: A Conference in Commemoration of Professor David D. Caron*, Berkeley, California, September 15, 2018.

2. For an overview of the main criticisms of the current system, see GABRIELLE KAUFMANN-KOHLER & MICHELE POTESTÀ, CAN THE MAURITIUS CONVENTION SERVE AS A MODEL FOR THE REFORM OF INVESTOR-STATE ARBITRATION IN CONNECTION WITH THE INTRODUCTION OF A PERMANENT INVESTMENT TRIBUNAL OR AN APPEAL MECHANISM?: ANALYSIS AND ROADMAP 10–15 (Jun. 3, 2016), [http://www.uncitral.org/pdf/english/CIDS\\_Research\\_Paper\\_Mauritius.pdf](http://www.uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf).

3. For works of UNCITRAL in this area, see UNCITRAL WORKING GROUP III, 2017 TO PRESENT: INVESTOR-STATE DISPUTE SETTLEMENT REFORM, [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

As everyone knows, David was a thought leader in the field of ISDS and, while he did not (as far as I know) write directly on the topic of a proposed investment court, he did address the issue of ISDS reform with his characteristic insightfulness. My comments today, oriented around David's writings, will touch on two issues: first, the challenges to investment policymaking posed by the current backlash against ISDS and, second, the pragmatism with which we should approach and test the investment court proposal.

### I. BACKLASH AGAINST ISDS AND ITS CHALLENGES

Let me start with the issue of backlash and David's wonderful article he published with one of his PhD students at the time, Esmé Shirlow. The article is entitled: *Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences*.<sup>4</sup> It examines the phenomenon of backlash against ISDS as expressed through the surging anti-globalist and populist movements.

Among other examples, he cites Senator Elizabeth Warren's now famous (perhaps infamous) *Washington Post* editorial in which she demonizes ISDS at the time when the U.S. Congress was beginning to consider ratification of the Trans-Pacific Partnership Agreement ("TPP"). You may recall that she wrote:

Who will benefit from the TPP? American workers? Consumers? Small businesses? Taxpayers? Or the biggest multinational corporations in the world? . . . Agreeing to ISDS in this enormous new treaty would tilt the playing field in the United States further in favor of big multinational corporations. . . . ISDS would allow foreign companies to challenge U.S. laws – and potentially to pick up huge payouts from taxpayers – without ever stepping foot in a U.S. court.<sup>5</sup>

The point made by David and his co-author in referencing Senator Warren's comments was to show how broader fears about the effects of globalization often translate into criticism of ISDS, because ISDS, it is argued, is often the most tangible and readily available target. They wrote:

We would suggest that investment arbitration has attracted such strong critique because it forms a focal point for the articulation of concerns about globalization. Globalization, as a diffuse force, does not itself form a concrete enough target . . .<sup>6</sup>

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4. David D. Caron & Esmé Shirlow, *Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences*, in *THE JUDICIALIZATION OF INTERNATIONAL LAW A MIXED BLESSING?* 159 (Andreas Follesdal & Geir Ulfstein eds., 2018).

5. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html?utm\\_term=.dfa41e206caf](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.dfa41e206caf).

6. Caron & Shirlow, *supra* note 4, at 165.

They also note the irony inherent in these fears in that “[m]any parts of [free trade agreements] will have far greater social impact than the [ISDS] arbitration scheme or the worst possible single [ISDS] arbitration one can imagine.”<sup>7</sup>

David and Esmé then end with two important notes of caution. First, they observe that reform of ISDS, in fact, may not address broader and deeper concerns about globalization. Second, they add that it is therefore necessary to separate out the motivations of backlash from its focal point before one is able to identify appropriate responses.<sup>8</sup>

In addition to these astute observations, I bring your attention to three factors that, in my view, have further aggravated the backlash against ISDS. First, for the first time in the history of their investment treaty programs, Western European countries, including Germany, Belgium, and Spain, have been the target of ISDS claims.<sup>9</sup> This has set off alarm bells in capitals around the EU, revealing the risks of ISDS for even developed countries that are no longer exclusively capital exporters. Second, after the Lisbon Treaty, the EU assumed competence over significant aspects of its members’ investment policies,<sup>10</sup> but without much, if any, hands-on experience defending against ISDS claims. Third, in the context of negotiating the Trans-Atlantic Trade and Investment Partnership, the EC engaged in a very broad, online stakeholder outreach process that resulted in an avalanche of public criticism about ISDS.<sup>11</sup> Most of it was from NGOs that generated approximately 145,000 of the 150,000 responses from citizens who, despite their concerns, likely had little specific understanding of the ISDS system.

These three aggravating factors may not only have fueled the backlash against ISDS, but they also may be clouding rational investment policymaking by the EC. Let me provide one concrete example of the problem. In a speech given in June 2018 by one of the senior EC officials spearheading the investment court initiative, the following argument was made in support of a permanent court:

Just as it would strike . . . *the man on the street* as strange that permitting the disputing parties to appoint judges in a constitutional case . . . , so it should

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7. *Id.*

8. *Id.* at 165–66.

9. *See, e.g.*, Vattenfall AB and others v. Fed. Rep. of Germany, ICSID Case No. ARB/12/12, <https://www.italaw.com/cases/1654>; Ping An Life Ins. Co., Ltd. & Ping An Ins. (Grp.) Co, Ltd. v. Gov’t of Belgium, ICSID Case No. ARB/12/29, <https://www.italaw.com/cases/3088>; Antin Infrastructure Serv. Luxembourg S.à.r.l. & Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31, <https://www.italaw.com/cases/2319>.

10. Note, for example, that the Court of Justice of the European Union, arguably strengthened this authority in its 2018 decision holding that the arbitration provisions in intra-EU investment treaties were incompatible with EU law. *See, e.g.*, Case C-248/16, *Slowakische Republik (Slovak Republic) v. Achmea BV.*, ECJ 2018 E.C.R., <http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2690705>.

11. *See* CONSULTATIONS, EUROPEAN COMMISSION, [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179) (last updated Mar. 27, 2019).

strike us as strange that in [an ISDS] case dealing with similar issues it should be possible for the disputing parties to appoint adjudicators. It certainly strikes *the ordinary member of the public as strange*.<sup>12</sup>

Frankly, I find this argument somewhat strange. While at the U.S. State Department, I was deeply involved in the U.S. government's extensive review of its own investment treaty policy, which ended in 2010 after three years of intense, but controlled, stakeholder outreach. I certainly appreciate the importance of public input, especially because ISDS cases often involve significant issues affecting the public interest. However, putting too much emphasis on addressing the perceptions of "ordinary member[s] of the public" may unhelpfully distort an understanding of the true extent of the problem and may impede rational and effective investment policymaking in response.

This brings me back to David and Esmé's prescient point about how critical it is to dissect the motivations of backlash from its target in order to identify appropriate responses.

## II. A CAREFUL ASSESSMENT OF ILLEGITIMACY

The second point I would like to raise is, in the fog of backlash, how do we accurately assess the proposal for a permanent investment court? Here, again, David's scholarship provides invaluable guidance, particularly his article entitled: *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*.<sup>13</sup> In this piece, David thoughtfully writes:

A critique of legitimacy is an argument for reform of an accepted system; a critique of illegitimacy is a plea for reform necessary to ensure the viability of a questioned system. Thus, I find it helpful to approach critiques of legitimacy also as assertions of illegitimacy . . . . The value of a focus on illegitimacy follows from the fact that legitimacy implies moving closer and closer to the center of a target where there is not always agreement as to what is the center. Illegitimacy in contrast asks whether the target is missed entirely . . . .<sup>14</sup>

David's wise words offer a useful way of thinking about the investment court proposal, which calls for the complete elimination and replacement of the current *ad hoc* system of arbitration. Its underlying premise, thus, seems undeniably that ISDS, in its current form, is completely *illegitimate*—in other words, it misses the target entirely.

But the evidence stands generally to the contrary. While a small number of States have taken steps to exit the system altogether, most have not. And while

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12. COLIN BROWN, THE 3D VIENNA INVESTMENT ARBITRATION DEBATE: THE EUROPEAN UNION'S APPROACH TO INVESTMENT DISPUTE SETTLEMENT (June 22, 2018), [http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc\\_157112.pdf](http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157112.pdf).

13. David D. Caron, *Investor-State Arbitration: Strategic and Tactical Perspectives on Legitimacy*, 32(2) SUFFOLK TRANSNAT'L L. REV. 513 (2009).

14. *Id.* at 515.

many States are reconsidering and revising the content of their model investment treaties, most of these models still include basic provisions for ISDS. In this light, it arguably makes sense to view the investment court proposal more in terms of how legitimate it can be, as opposed to whether it is completely illegitimate. In other words, does it move us closer to the center of a generally agreed upon target, that is, the resolution of investment disputes by *some* type of third-party adjudicator?

One way to approach the question is to test each of the basic premises on which the investment court proposal rests, and ask whether a court would, in fact, remedy the problem posed (and whether it would do so in the most efficient manner) or whether it would create new problems. In other words, does a rigorous cost-benefit analysis favor a court over arbitration?

One basic premise is that a permanent court would produce more consistent and predictable outcomes than an *ad hoc* system of arbitration.<sup>15</sup> Critics have argued that the current system has generated different results across cases involving similar facts and law. This raises a number of important questions:

What are the sources of inconsistency? Is it only the arbitrators? The outcomes across similar cases would seem to depend, at least in part, on the way the parties frame the legal and factual arguments for decision. Would a court change the approach of the parties? Moreover, in my mind, the greatest source of inconsistency is the underlying investment protection norms, some of which (particularly in early-generation investment treaties) are intentionally broad and vague in order to afford arbitrators wide discretion to reach a just result. Would a court be expected to redefine the content of these norms by fulfilling a greater law-making function, or would it find them only capable of application on a case-by-case basis, which might in the end still produce seemingly inconsistent results?

How much inconsistency currently exists and how much is too much? There are about 580 known ISDS awards<sup>16</sup> and a relatively small subset of these are the subject of regular criticism. I am not aware of any study that has assessed the scope of the issue comprehensively. Without such a study, how can we really understand if there is a problem and, if so, the extent of it?

What might States lose in the transition from an *ad hoc* system of arbitration to a court? Take, for example, the U.S. experience before the International Court of Justice on the question of whether the so-called essential security provisions in its treaties were self-judging. Based on the ruling in the *Nicaragua* case under

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15. *A New System of Resolving Disputes Between Foreign Investors and States in a Fair and Efficient Way*, A Multilateral Investment Court, State of the Union 2017, European Commission 3 (2017) [hereinafter *A New System*], [http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc\\_156042.pdf](http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf).

16. See INVESTMENT DISPUTE SETTLEMENT NAVIGATOR, UNCTAD, <https://investmentpolicyhub.unctad.org/ISDS> (last visited Feb. 18, 2019).

one treaty,<sup>17</sup> the United States appeared to be limited, at least as a matter of litigation strategy, in its ability to raise the same point of interpretation under another treaty in the *Oil Platforms* case<sup>18</sup>—even though as a matter of law and policy, the U.S. position had never changed. Consistency, achieved in the context of a court through a system of precedent, might restrict a State’s ability to re-argue points of law and policy, and for some States on some issues, it may be important to have a second bite at the apple.

Finally, we might ask if there are any less onerous alternatives to a court, such as ways in which States can directly clarify and refine standards of investment protection through more expedited treaty-making. Might it be worth considering whether older-generation standards of protection could be replaced or sharpened, on an à la carte basis, by way of a multilateral convention in the same vein as the Mauritius Convention on Transparency?<sup>19</sup>

Another key premise is that judges on a permanent court, with longer tenures, would be more impartial and independent than *ad hoc* arbitrators.<sup>20</sup> This premise should also be fully tested.

Is it really possible to appoint judges to an investment court in an apolitical manner? The Honorable Charles Brower argues very forcefully in a recent article criticizing the court proposal that it cannot be done, as demonstrated by the politicized appointment practices of many existing international courts, including the International Court of Justice.<sup>21</sup> Further, is it possible to select a truly independent judiciary when that judiciary would ultimately be beholden to the States that created it for political and financial support? And, does the current *ad hoc* system, in which each party has the right to select one arbitrator, not balance the interests more evenly?

Also, again, what do States lose by moving to a court? The right to choose one’s own adjudicator has long been held as a highly valued attribute of international arbitration. This may be particularly so in the context of investor-State disputes where specialized knowledge not only of international law, but also of the host State’s law and the workings of the host State’s government, may enrich the deliberative process to the benefit of the respondent State. Are States really ready to submit to a panel of judges with no connection to or specialized knowledge of their own sensitivities?

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17. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 222 (June 27, 1986).

18. Oil Platforms (Iran v. U.S.), Preliminary Objection, 2003 I.C.J. 161, ¶ 20 (Dec. 12, 1996).

19. See UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2015), as adopted by G.A. Res. 69/116, U.N. Doc. A/68/496 (Dec. 10, 2014), [www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf).

20. *A New System*, *supra* note 15, at 3.

21. Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41(4) FORDHAM INT’L L. J. 791, 809 (2018).

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Finally, again, are there less onerous alternatives? A stringent code of conduct for arbitrators may go a very long way, and is a lot less expensive than establishing a court.

CONCLUSION

Let me conclude with an expression of hope that these and many other questions will be approached and answered carefully by the international investment community in the coming months as it considers a multilateral investment court. David very sadly can no longer help guide us through the issues. However, his legacy of scholarship and pragmatic reasoning in this area and many others still inspire us to find thoughtful solutions to international law challenges.

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# The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?

*Christina G. Hioureas*

## INTRODUCTION

This Article is part of a special joint issue of *Ecology Law Quarterly* and the *Berkeley Journal of International Law* in honor of the late Professor David Caron, based on presentations made at a conference in his commemoration organized by the Berkeley School of Law.

When it came to almost any emerging issue in international law, Professor Caron was at the forefront and, in many cases, had already written about it. We saw this with issues ranging from the minimum standard of treatment in *Glamis Gold v. United States of America*, in which he served as arbitrator, to the effects of rising sea levels on baselines, on which he published in the 1990s before the issue was at the forefront of discussions.

Professor Caron saw the value in alternative forms of dispute resolution, and I think he would have taken a keen interest in some of the recent developments taking place at the United Nations (UN) on the use of mediation for the resolution of international disputes. And that is the topic of my presentation: the recent uptick in the dialogue about international mediation and whether mediation could emerge as a viable alternative or complement to international arbitration—particularly in the context of the recent entry into force of the Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention on Mediation)<sup>1</sup> and Model Law on International Commercial Mediation and International Settlement Agreements

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1. See United Nations Convention on International Settlement Agreements Resulting from Mediation, *open for signature* Aug. 7, 2019, U.N. Doc. A/73/17, [https://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex\\_I.pdf](https://www.uncitral.org/pdf/english/commission/sessions/51st-session/Annex_I.pdf) [hereinafter Singapore Convention].

Resulting from Mediation (which amends the UNCITRAL Model Law on International Commercial Conciliation, 2002) (the Model Law).<sup>2</sup>

Whether inside or outside of the international commercial context, there has been an increasing interest in mediation and conciliation as an international dispute resolution mechanism. International mediation and conciliation is envisaged in Article 33 of the Charter of the United Nations. Under this framework, conciliation played a significant role in resolving a recent State-to-State dispute. In September 2017, through the Conciliation Commission, Timor-Leste and Australia agreed on the central elements of their maritime boundary delimitation in the Timor Sea.<sup>3</sup> These proceedings were significant: they marked the first time that conciliation proceedings were initiated under Annex V, Section 2 of the UN Convention on the Law of the Sea. The process has largely been viewed as a success, and it is an example of how conciliation can be used for the pacific settlement of disputes.

This interest in advancing the use of mediation and conciliation has also been prevalent before the UN. On August 29, 2018, the UN Security Council held an open debate to provide its member States with an opportunity to consider the UN's role in both leading and supporting mediation and the ways in which the Security Council and the member States can best support these efforts.<sup>4</sup> The open debate followed on the heels of a speech by the Secretary General in January 2017, asking the Security Council to make greater use of the options laid out in Chapter VI of the UN Charter on pacific settlement of disputes, including mediation. The Secretary General announced his intention to "launch an initiative to enhance the United Nations mediation capacity, both at Headquarters and in the field, and to support regional and national mediation efforts."<sup>5</sup>

In the context of international investment arbitration, in June 2017, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) held a special training course for mediators tailored to investor-State disputes.<sup>6</sup> In July 2016, the Energy Charter Conference adopted a "Guide on

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2. See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002), U.N. Doc. A/73/17, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex\\_ii.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf).

3. Press Release, Permanent Court of Arbitration, Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (Sept. 1, 2017), <https://pcacases.com/web/sendAttach/2230>.

4. President of the U.N. Security Council, *Annex to the letter dated 3 August 2018 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, Concept note for the Security Council's open debate entitled "Maintenance of international peace and security: mediation and settlement of disputes"* (29 August 2018), U.N. Doc. S/2018/586 (Aug. 14, 2018).

5. U.N. Secretary-General, *United Nations Activities in Support of Mediation*, U.N. Doc. A/72/115 (June 27, 2017).

6. Considering the Future of Investor-State Mediation, INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES,

Investment Mediation,”<sup>7</sup> designed to encourage States and investors to consider mediation for investor- State disputes (the Guide). The Guide covers several matters, including the rules that may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement. The Guide also canvasses the key differences among existing mediation rules and conciliation rules.

The increasing attention toward mediation as a method of international dispute resolution in the context of international commercial as well as investment disputes has its roots in the debate regarding the increasing costs and time involved in international arbitration. The flexibility involved in mediation eliminates many of the hurdles of arbitration, including bypassing disclosure and preserving the parties’ commercial relationship.

However, historically mediation has not been as commonly used for the resolution of international commercial and investment disputes. Some practitioners and commentators have speculated that this may be due in part to the fact that once a mediated agreement has been reached, there was no comprehensive legal framework for the enforcement of international settlement agreements. The result is that parties have been required to attempt to enforce such agreements in domestic courts, typically as ordinary breach of contract claims. Thus, when a party to a mediated settlement agreement of an international dispute reneged on its obligations or otherwise refused to uphold the terms of the agreement, the other party had to commence separate proceedings in court or through arbitration to enforce the agreement. This has essentially meant initiating a new legal action after resolving the underlying one, adding increased costs and delay.<sup>8</sup>

The creation of a clear and uniform framework for the recognition and enforcement of agreements resulting from mediation of international disputes may ultimately increase the predictability of settlements achieved through this method. The Singapore Convention on Mediation—which was signed by forty-six States on August 6, 2019 and entered into force that same day—provides that framework.<sup>9</sup> This stage marks an important development in international dispute resolution, both in creating a legal framework for agreement recognition and enforcement, and in promoting the use of mediation at an international level.

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<https://icsid.worldbank.org/en/Pages/resources/ICSID%20NewsLetter/2017-Issue3/Considering-the-Future-of-Investor-State-Mediation.aspx> (last visited Apr. 2, 2019).

7. See Int’l Energy Charter, Decision of the Energy Charter Conference, CCDEC 2016 12 INV (July 19, 2016), <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>.

8. See S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L. & POL’Y 11 (2014).

9. See Singapore Convention, *supra* note 1.

## I. BACKGROUND ON THE SINGAPORE CONVENTION

On February 9, 2018, after more than three years of negotiations in New York and Vienna, the United Nations Commission on International Trade Law (UNCITRAL) Working Group II concluded negotiations on a convention and model law regarding the enforcement of settlement agreements of disputes reached through international commercial conciliation or mediation.<sup>10</sup> The instruments were finalized by UNCITRAL during the fall 2018 session, and on December 20, 2018, the UN General Assembly adopted a resolution opening the Singapore Convention for signature.

Data from a 2015 survey by Professor S.I. Strong of the University of Missouri suggests that international mediation and conciliation may be developing along the same path as international commercial arbitration, which at one time was extremely rare.<sup>11</sup> After the adoption of the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 1958, the number of arbitration proceedings significantly increased. Seventy-four percent of the respondents in Professor Strong's study revealed that they believed that an international treaty concerning enforcement of settlement agreements arising out of international mediation could have a similar effect to increase the number of mediations in their home jurisdictions.<sup>12</sup>

While it is not clear if the limited popularity of mediation of international disputes is due to a concern for lack of enforceability, the same could have been asked of international arbitration in the period before the wide ratification of the New York Convention. Was it that parties were not agreeing to arbitrate disputes out of concerns that the arbitral awards would not be enforceable? Or did the New York Convention simply encourage its use by raising arbitration to the forefront as an option for resolving international commercial disputes?

The wide ratification of the Singapore Convention on Mediation could serve as the catalyst for the use of mediation in both the commercial as well as investment arbitration contexts, particularly in this broader environment of encouraging mediation as detailed above.

More importantly, and perhaps an additional motivation behind the concept, the Singapore Convention and Model Law could serve as a way to streamline the domestic laws of States with respect to breach of contract claims and settlement

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10. The Singapore Convention encompasses both recognition and enforcement of settlement agreements. See Article 3(1) of the Singapore Convention, which provides for the use of a mediated settlement as a complete defense against a claim.

11. S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation*, University of Missouri School of Law Legal Studies Research Paper Series Research Paper No. 2014-28, 45 (Nov. 17, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2526302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302).

12. *Id.*

agreements, serving essentially as a rule of law measure to increase predictability for foreign commercial parties.

## II. CREATING AN ENFORCEABLE FRAMEWORK

Generally, international arbitration has been preferred over international mediation. This is in part because the widely adopted New York Convention provides a predictable framework for the recognition and enforcement of arbitral agreements and awards. Under the New York Convention, arbitral awards enjoy the same protection as domestic court decisions, and deference is given to agreements to arbitrate.

Similar efforts have been made regarding the enforcement and recognition of court judgments that result from domestic litigation. The Hague Conference on Private International Law has taken substantial steps toward realizing the conclusion of an international convention to provide a framework under which parties will be required to recognize and enforce judgments rendered by a court in one country, in another country. In fact, the final draft of the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters was completed in late 2018 during the meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments, which was attended by 180 participants from 57 States.<sup>13</sup> The diplomatic session to adopt the treaty took place on July 2, 2019 and the convention is open for signature.<sup>14</sup>

Through the creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution. In fact, given that mediation may often be less expensive and speedier than arbitration—and perhaps better preserves the relationship between the parties, parties may prefer to mediate their disputes once they have the reassurance that their settlement agreements can be enforced easily.

## III. THE CONTENT OF THE SINGAPORE CONVENTION AND MODEL LAW

The Singapore Convention will apply to all international agreements resulting from mediation and concluded in writing by parties to resolve commercial disputes.<sup>15</sup> There is no limitation as to the nature of the remedies or

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13. See Hague Conference on Int'l Law, *Conclusion of the third meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgements* (Nov. 21, 2017), <https://www.hcch.net/en/news-archive/details/?varevent=578>.

14. 2019 Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters, *opened for signature* July 2, 2019 (not yet in force), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.

15. See Singapore Convention, *supra* note 1.

contractual obligations that can be reflected in the international agreements for the Singapore Convention and Model Law to apply. Thus, the agreement can involve both pecuniary and non-pecuniary remedies.

To seek the application of a mediated settlement agreement, parties will be required to furnish the competent authority of a contracting State with the signed settlement agreement and with evidence that the agreement was the result of international mediation. Each contracting State will then be required to enforce settlement agreements in accordance with its rules of procedure and the conditions set forth in the instruments.

The Singapore Convention allows contracting States to tailor their participation by making certain reservations or later withdrawing from the Singapore Convention by a formal written notification. Once a contracting State adopts the Singapore Convention, the contracting State will be required to enforce settlement agreements in accordance with its own rules of procedure and the conditions set forth in the convention and model law.

Similar to the New York Convention, the Singapore Convention and Model Law set forth several narrow grounds for judicial review and non-recognition of a settlement agreement. Two of these grounds may be raised *sua sponte* by the court or other competent authority of the contracting State where the agreement is sought to be enforced. Those grounds include if the subject matter of the dispute is not capable of settlement by mediation under the domestic law of the contracting State, or if granting relief under the agreement would be incompatible with the public policy of the contracting State. It is for this reason that enacting the model law in parallel with the Singapore Convention will be important to promoting its consistent application.

The remaining grounds are factual and depend on the manner in which the settlement agreement was drafted. These grounds must be invoked by the party against whom the settlement agreement is sought to be enforced, and require proof from that party that:

- A party to the agreement was under some incapacity;
- The agreement is null and void, operative or incapable of being performed, or the obligations of the agreement have been performed;
- The agreement is not binding or final, has subsequently been modified, or is conditional so that the obligations have not yet arisen;
- The agreement is not capable of being enforced because it is not clear and comprehensible;
- There has been a serious breach by the mediator of standards applicable to the mediator or the mediation; or
- There has been a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence.

Exceptions to the application of the Singapore Convention include disputes arising out of transactions relating to personal, family, or household purposes, transactions relating to family or inheritance matters, or employment law issues.<sup>16</sup> In addition, the instruments would not cover settlement agreements that are approved by a court or have been concluded in the course of proceedings before a court, or those that have been recorded and are enforceable as arbitral awards.

Lastly, and perhaps most significantly, although not expressly stated in the Singapore Convention, the convention would not apply to settlement agreements that contain exclusive jurisdictional clauses referring disputes regarding the settlement terms to arbitration as this would conflict with the New York Convention.

The inapplicability of the Singapore Convention to this last category—settlement agreements that contain exclusive jurisdiction clauses—may serve as a limitation to the Singapore Convention’s use in practice. Diligent legal counsel negotiating and concluding settlements on behalf of their clients would and should advise their clients to insert exclusive jurisdiction clauses (and better yet, arbitration clauses) into any settlement agreement to ensure predictability of fora for any dispute arising thereunder and to limit the risk of parallel proceedings.

But the very act of inserting such an arbitration clause would mean that most settlement agreements would actually fall outside of the scope of the Singapore Convention; deference would have to be given to agreements to arbitration under the New York Convention and thus the Singapore Convention would be inapplicable. That is, unless counsel inserted carefully crafted clauses providing for the Singapore Convention’s application in certain circumstances: that any dispute arising from or relating to the settlement agreement will be resolved by international arbitration under a specified law, unless the location where a party serves to challenge the validity of the settlement agreement or enforce it is a party to the Singapore Convention. Careful attention will have to be paid to drafting such clauses—as well as how domestic courts interpret them—to actually benefit from the Singapore Convention.

#### IV. WHAT COULD LIE AHEAD: MEDIATION IN INVESTOR-STATE ARBITRATION?

As addressed by Lee Caplan in *ISDS Reform and the Proposal for a Multilateral Investment Court*,<sup>17</sup> various parties including the European Union and Canada have raised concerns with investor-State dispute resolution (ISDS), including the significant cost and time, lack of consistency and predictability in

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16. *Id.*

17. Lee M. Caplan, *ISDS Reform and the Proposal for a Multilateral Investment Court*, 46 *ECOLOGY L. Q.* 53, 37 *BERKELEY J. INT’L L.* 207 (2019).

arbitral awards, and potential bias in arbitral appointments.<sup>18</sup> These concerns have led UNCITRAL Working Group III to be tasked with a broad directive to develop a possible reform of ISDS. Discussions on the matter have continued to advance, including most recently in April 2019 during the second phase of the Working Group III negotiations.<sup>19</sup>

While some States have advocated for systemic reform, including the possible creation of a permanent multilateral court to adjudicate investor-State disputes,<sup>20</sup> this is hotly debated and such reform will not materialize overnight. Others have argued for incremental reform. But such reform may not go far enough.

International mediation could emerge as a mechanism to address some frustrations associated with both commercial *and* investment arbitration, which could compliment the current Working Group III negotiations irrespective of the approach ultimately adopted by the body. That is because the Singapore Convention potentially extends to investment disputes so long as they relate to a commercial matter, such as an expropriation of a real estate development or mine.<sup>21</sup>

At a basic level, perhaps the promotion of the Singapore Convention and mediation more generally could encourage parties to better utilize the cooling-off periods provided under many investment treaties. Claimants often do not take into account that by the time the relevant notice of dispute has been transmitted to the appropriate ministry and been vetted, the negotiation period has lapsed. Once a Request for Arbitration has been made public, the position of the parties often hardens as public criticism could result from settlement. Attempting to bypass the amicable negotiation period could serve as a missed opportunity in many cases.

At a broader level, the framework for mediation of investor-State arbitration already exists although, until now, not as a comprehensive enforcement mechanism. The International Bar Association Investor-State Mediation Rules already provide a legal framework specifically designed for mediation in the investor-State context, offering a helpful starting point for parties interested in

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18. U.N. Comm'n on Int'l Trade Law, Possible Reform of Investor-State Dispute Settlement (ISDS), ¶¶ 22–25, U.N. Doc. A/CN.9/WG.III/WP.142, at 6 (Sept. 18, 2017), <https://daccess-ods.un.org/TMP/486511.215567589.html>.

19. See U.N. Comm'n on Int'l Trade Law, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019), A/CN.9/970 (April 9, 2019).

20. European Commission, Trade Policy Committee (Services and Investment), UNCITRAL Working Group III, at 1, WK 3675/2018 INIT (Mar. 26, 2018).

21. See T. Schnabel, *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, 19 PEPP. DISP. RESOL. L.J. 1, 22 (“The scope of the term [commercial dispute] could thus include at least some investor-state disputes in areas such as construction or national resource extraction.”).

pursuing investment mediation. And, of course, conciliation processes are provided under the ICSID and UNCITRAL conciliation rules.

An enforcement mechanism (the lack of which was the concern in the commercial context) also exists under certain rules: should the parties reach an amicable settlement through mediation, they may request that the tribunal incorporate their settlement into a consent award under ICSID Arbitration Rule 43(2).<sup>22</sup> But such a process still requires the parties to commence and fund the arbitration process, at least until the tribunal is constituted and has rendered the consent award. If an arbitral tribunal were to be constituted after a settlement agreement is reached, some courts have found that such consent awards are not enforceable because there was no “dispute” before the tribunal for the purposes of jurisdiction.<sup>23</sup>

Mediation is already being encouraged in investment disputes. The Comprehensive Economic and Trade Agreement, which came into force in 2017, expressly provides for mediation of investor- State disputes (Article 8.20).<sup>24</sup>

In 2016, the Republic of the Philippines agreed to mediate a dispute with Systra SA and its local subsidiary Systra Philippines Inc. arising out of allegedly long overdue invoices for services and work performed on infrastructure projects (including metro and rail projects) for various government agencies of the Philippines. The dispute was filed under the France-Philippines bilateral investment treaty. This appears to have been the first time in which an investor and a host-State used the IBA Rules to solve an investment dispute.<sup>25</sup>

The adoption of the Singapore Convention and the implementation of Model Law might further promote the inclusion of mediation and conciliation as an option in more investment treaties and may encourage parties to take that route to resolve disputes.

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22. ICSID Convention, Regulations and Rules, Rules and Procedures for Arbitration Proceedings, Rule 43(2), Apr. 10, 2006, ICSID/15, <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partfchap05.htm#r43> (“If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.”).

23. See, e.g., *Castro v. Tri Marine Fish Co. LLC*, 921 F.3d 766, 772–76 (9th Cir. 2019) (finding that a settlement agreement reached by parties, who then constituted a tribunal for the purposes of converting the settlement agreement into an arbitral award, did not “transform” the agreement into an arbitral award that could be enforced under the New York Convention).

24. European Commission, *CETA Chapter-by-Chapter* (Aug. 24, 2018), <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

25. Luke Eric Peterson, *In An Apparent First, Investor and Host-State Agree to Try Mediation under IBA Rules to Resolve An Investment Treaty Dispute*, IA REPORTER (Apr. 14, 2016), <https://www.iareporter.com/articles/in-an-apparent-first-investor-and-host-state-agree-to-try-mediation-under-iba-rules-to-resolve-an-investment-treaty-dispute/>.

## CONCLUSION: MEDIATION AS A WAY FORWARD

Irrespective of whether the Singapore Convention will actually be used in practice in light of its inapplicability to settlement agreements that contain agreements to arbitrate, there are many benefits to the Singapore Convention and Model Law. More than anything else, the instruments may ultimately assist in the propagation of the use of international mediation to resolve disputes and serve as a rule of law measure to promote the development of more uniform domestic laws on contractual interpretation. Additional benefits of international mediation include:

Avoiding the Need to Engage the Arbitration Process: As the Singapore Convention would offer a mechanism for enforcement, parties would not be burdened with the need to engage the arbitral process to convert a settlement agreement into a consent award to guarantee enforcement.

Reducing the Cost/Length of Proceedings: Because the selection of only one mediator is required and the role of the mediator is not to opine on the law or the merits of the dispute, mediation could reduce costs in researching the backgrounds of arbitrators and negotiating with the other side to reach agreement on the chairperson. Moreover, it would obviate disclosure proceedings and eliminate the need for a lengthy written decision. The few ICSID conciliation proceedings that have been held show these benefits.<sup>26</sup>

Narrowing Issues: Even where mediation does not replace arbitration, it can still supplement arbitral proceedings by refining the issues to be addressed in the arbitral proceeding.

Preserving the Commercial Relationship: Resolving a dispute through mediation enables the parties to maintain positive relationships so as to continue their contractual arrangement or future projects or investments.

The drafters of the Singapore Convention aimed to encourage greater predictability for parties opting to resolve disputes through international mediation. Discussions encouraging the use of mediation are already taking place in the context of State-to-State, investor-State, and commercial disputes.

Ultimately, the Singapore Convention may raise the profile for mediation, just as the New York Convention did for international arbitration, and increase the number of States adopting and implementing mediation legislation. As more countries ratify the convention and adopt mediation laws, an increasing number of parties will become aware of the benefits of resolving their disputes through mediation. In this sense, it may serve as a complement to the existing international arbitration framework.

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26. For example, in the *Tesoro Petroleum Corporation v. Trinidad and Tobago* case, the parties had agreed on a conciliator within four months, and the dispute was settled in two years. Lester Nurick & Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, ICSID REVIEW-FOREIGN INV. L.J., 340-53 (Oct. 1, 1986), <https://academic.oup.com/icsidreview/article/1/2/340/705483>.

# Finding Elegance in Unexpected Places

*John R. Crook*

The theme of Berkeley Law's September 2018 Symposium honoring the memory of Professor David Caron was "The Elegance of International Law." This intriguing theme was taken from David's opening address, entitled "Confronting Complexity, Valuing Elegance," at the Annual Meeting of the American Society of International Law in April 2012.<sup>1</sup> His address opens with an analysis, drawing on a daunting array of sources and disciplines, probing the challenging notion of complexity. David then turns to examining the rule of elegance in devising solutions to complex problems. His reflections conclude with an admonition that "we should distrust complex solutions to complex problems and seek instead those that are elegant."<sup>2</sup>

Good lawyers have an intuitive sense of what David was talking about. They know that some examples of legal craftsmanship—analysis, writing, advocacy, or combinations of the three—have an intangible characteristic that sets them apart. These pieces of lawyering seem to render complicated matters simple. They impose structure and clarity upon what seem to be jumbles of facts and arguments. They somehow have the aura of being obvious, compelling, even graceful. They explain. The good lawyers, assessing these characteristics of clarity, grace, and simplicity and searching for a word to describe them, might conclude that they are *elegant*.

But, to borrow from Cole Porter,<sup>3</sup> what is this thing called elegance? And what does it have to do with international law? It's a complicated question. "A list of elegant things, like a list of obscene things, includes not a single trait in common across its members."<sup>4</sup> However, as good international lawyers, we can

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1. David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 AM. SOC. INT'L L. PROC. 21 (2012).

2. *Id.* at 25.

3. "What is this Thing Called Love" was written by Cole Porter in 1929 for the musical review *Wake Up and Dream*. See Cole Porter, *What Is This Thing Called Love*, WIKIPEDIA, [https://en.wikipedia.org/wiki/What\\_Is\\_This\\_Thing\\_Called\\_Love%3F](https://en.wikipedia.org/wiki/What_Is_This_Thing_Called_Love%3F) (last visited Oct. 10, 2018).

4. Patrick House, *What is Elegance in Science?*, THE NEW YORKER (Aug. 17, 2015), <https://www.newyorker.com/tech/elements/what-is-elegance-in-science> [hereinafter House].

start trying to unpack it by looking at its ordinary meaning.<sup>5</sup> The word “elegance” is a noun, but the frayed student dictionary on my desk begins with its adjectival sibling “elegant,” for which one definition is “cleverly apt and simple.”<sup>6</sup> The more contemporary Oxford Internet Dictionary defines elegance as “the quality of being pleasingly ingenious and simple; neatness,” as in “the simplicity and elegance of the solution.”<sup>7</sup> The grande dame of English-language dictionaries, the multi-volume Oxford English Dictionary, offers multiple definitions, two relevant here. “Elegance,” say the Oxford English Dictionary’s scholarly compilers, can mean “tasteful correctness, harmonious simplicity in the choice and arrangement of words,” or perhaps more to the point, “ingenious simplicity, convenience, and effectiveness.”<sup>8</sup> In all of these definitions, one hears echoes of William of Ockham and his razor: the idea that, in general, a simple solution is to be preferred over the more complex one.

Many fields—art, engineering, physics, architecture—have their own conceptions of “elegance.” Software engineers strive for elegant code: one technology writer regards “software elegance” as “the ability to deliver software value with less code complexity.”<sup>9</sup> Another finds elegant software to be “simple, obvious, straightforward and [to require] very little intellectual effort to understand immediately.”<sup>10</sup> A Harvard astrophysicist offered another explanation of elegance:

There is something about the way things fit together, a kind of fluidity. If it is done right, and elegantly, you do not see all the individual parts, because they all fit together in a way that looks like a whole.<sup>11</sup>

Engineers apply the notion. In the world of civil engineering, “elegant” solutions to design and process problems are “those that meet user needs with minimal complexity. Whereas elegance can appear simple in hindsight, it represents a deeper understanding of the actual problem.”<sup>12</sup> That’s an interesting and important insight: Elegance represents a deeper understanding of the problem.

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5. Article 31(1) of the Vienna Convention on the Law of Treaties directs that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty . . .” Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

6. *Elegant*, WEBSTER’S NEW WORLD DICTIONARY AND THESAURUS 198 (1st ed. 1996).

7. *Elegance*, ENGLISH OXFORD LIVING DICTIONARIES (2018), <https://en.oxforddictionaries.com/definition/elegance> (last visited Sept. 27, 2018).

8. *Elegance*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 842–43 (1st ed. 1971).

9. Michael Muller, *Software Elegance*, CAST, <https://doc.casthighlight.com/software-elegance/> (last visited Sept. 4, 2018).

10. Joseph Dickerson, *What is software elegance?*, QUORA, <https://www.quora.com/What-is-software-elegance> (last visited Sept. 27, 2018).

11. Alyssa Goodman discussing tennis, in House, *supra* note 4.

12. Tripp Shealy & Leidy Klotz, *Encouraging Elegant Solutions by Applying Choice Architecture to Infrastructure Project Delivery*, CONSTRUCTION RESEARCH CONGRESS 574 (2014), <https://ascelibrary.org/doi/abs/10.1061/9780784413517.059>.

Roman lawyers had a somewhat different notion of elegance, but one that resonates with our contemporary notions. We are told that that for Roman jurists, the concept had a sort of aesthetic function, conveying the idea that a legal task was performed in a correct manner:

According to Hans Wieling of the University of Trier, *elegantia* is an aesthetic, not a legal term. The positive connotation of *elegantia* is that of fine and graceful conduct. But when the Roman jurists said that a case had been judged *elegantier*, they meant that the judgment was good and fair; and if they said that a jurist's opinion was *elegans*, it meant that he had handled the case accurately and properly.<sup>13</sup>

Thus, there are multiple aspects to the word: notions of neatness, of simplicity, that elegance lies in doing something accurately and properly, and—importantly—that it comes from deeper understanding of a problem.

As his writings demonstrate, David Caron thought deeply about the roles and functions of international dispute settlement. He wrote about tribunals, including several with which he was personally involved.<sup>14</sup> He theorized about tribunals' work.<sup>15</sup> He wrote about the law they apply.<sup>16</sup> He wrote as well about the process of decision-making and its limits.<sup>17</sup> David was himself an accomplished arbitrator and judge, serving on the tribunals in four concluded International Centre for Settlement of Investment Disputes arbitrations and several others underway at the time of his death,<sup>18</sup> as well as twice serving as a judge ad hoc on the International Court of Justice.<sup>19</sup>

All of these notions of elegance are at work in an area of law that played an important part in David's work on international dispute settlement—the United

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13. Luiz Fabiano Corrêa, *The Elegant but Indefinable Legal Art*, in SOUTHERN AFRICAN SOCIETY OF LEGAL HISTORIANS AND UNISA PRESS 212–13 (2013), [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1021-545X2013000200002](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-545X2013000200002).

14. See, e.g., David D. Caron, *International Claims and Compensation Bodies*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 279 (Cesare Romano et al. eds., 2014); *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. & MEDIATION REV. 173 (2012); *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REV. - FOREIGN INV. L.J. 1 (2011); *The Profound Significance of the UNCC for the Environment*, in GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENT LIABILITY 265 (Cymie Payne & Peter Sand eds., 2011).

15. See, e.g., David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401 (2006); David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections on the Centennial*, 100 AM. SOC'Y INT'L L. 55 (2006).

16. See, e.g., David D. Caron, *The Interpretation of National Foreign Investment Law as Unilateral Acts Under International Law*, in ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 649 (Mahnoush Arsanjani et al. eds., 2011); David D. Caron, *The United Nations Compensation Commission for Claims Arising out of the 1991 Gulf War: The "Arising Prior to" Decision*, 14 J. TRANSNAT'L L. & POL'Y 309 (2004).

17. See, e.g., David D. Caron, *Regulating Opacity: Shaping How Tribunals Think*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 379 (David D. Caron et al. eds., 2015).

18. *Arbitrators, Conciliators and Ad Hoc Committee Members*, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, <https://icsid.worldbank.org/en/> (last visited Sept. 27, 2018).

19. *All Judges ad hoc*, INTERNATIONAL COURT OF JUSTICE, [www.icj-cij.org](http://www.icj-cij.org) (last visited Oct. 9, 2018).

Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. David arrived at the Iran US Claims Tribunal in The Hague in 1983 when the UNCITRAL Rules (the “Rules”), which were designed for use in international commercial arbitration, were relatively new. Over the following years, the Rules were tested in complex and often-heated Tribunal proceedings. They passed admirably, as successive Tribunal cases generated a body of practice and precedent. David collected the Tribunal’s orders and decisions, deploying another of his skills—as an archivist (or, as some friends thought, a packrat). He and his co-authors Lee Caplan and Matti Pellonpää used this material as a launch point for the first edition of their important commentary on the Rules.<sup>20</sup> As the Rules took hold and gained traction in additional settings, particularly in international investment arbitration, David and Lee Caplan produced an expanded second edition in 2013.<sup>21</sup>

What are these Rules? Why did David care about them? And why should we care? Rules of procedure are not very sexy. For many international law scholars, they are dull, mere mechanics undeserving of serious study. (One can search the tables of contents and indices of major international law treatises in vain for references to “procedure.”) But rules of procedure are essential for creating a stable space in which contending legal views can be presented and disputes decided in a coherent way. Procedure is what makes reasoned dispute settlement possible.<sup>22</sup>

However, constructing systems of adjudication that are both respected and effective is particularly challenging in the case of international legal disputes. The participants often come from different legal cultures. They bring with them different expectations about how legal proceedings should be conducted. Their disputes can take many forms and involve a variety of actors in a variety of combinations. They may involve natural and legal persons, government entities, and states. Any of these may be either claimants or respondents in a given case.

For many participants, international proceedings are unfamiliar and viewed with suspicion. This stands in contrast with national legal systems, where participants usually are familiar with their expected roles and have similar understandings of what is supposed to happen as a case progresses. Thus, international proceedings require procedures that are comprehensible and acceptable to participants from different legal traditions, sturdy enough to

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20. David D. Caron, Lee M. Caplan & Matti Pellonpää, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2006).

21. David D. Caron & Lee M. Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2nd ed. 2013) [hereinafter Caron & Caplan].

22. In his lecture *Understanding Why International Courts and Tribunals Look and Act as They Do*, David developed a related idea, concerning the role of tribunals’ constitutive documents as creating a space essential for dispute resolution. *Understanding Why International Courts and Tribunals Look and Act as They Do*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, [http://legal.un.org/avl/ls/Caron\\_CT.html#](http://legal.un.org/avl/ls/Caron_CT.html#) (last visited Oct. 10, 2018).

channel contentious litigation, but also flexible enough to accommodate the needs of particular parties and disputes.

The work of UNCITRAL has played a key role in meeting this need for efficient and flexible dispute settlement procedures acceptable across cultural boundaries. UNCITRAL is a small and relatively little known United Nations body established by the UN General Assembly in 1966 “to promote . . . the progressive harmonization and unification of the law of international trade.”<sup>23</sup> Its creation was “a component of the effort at that time to change the direction of the international economic order, to open it up to more actors.”<sup>24</sup> Member countries are elected to staggered six-year terms by the General Assembly with the stated objective of reflecting different legal traditions, levels of economic development, and different geographic regions.<sup>25</sup>

Over the years, UNCITRAL has developed a reputation for apolitical professionalism and technical competence:

Only a handful of social actors in the field of international arbitration have both the legitimacy and the ability to bring together a large number of actors with substantially different views in order to generate a consensus or at least a compromise . . . . [T]he most prominent of all unquestionably is UNCITRAL, which has evidenced its capacity to invite to the same working session actors with widely different agendas, and to generate norms that make room for the different positions . . . .<sup>26</sup>

Negotiations in UNCITRAL in the 1960s and 1970s led to a set of dispute settlement rules intended to work across legal and cultural boundaries. UNCITRAL provided a forum for participants to hammer out procedural rules intended to be acceptable across diverse legal traditions, including civil law, common law, and Soviet law. This negotiating process led to the General Assembly’s adoption in December 1976 of a resolution endorsing arbitration “as a method of settling disputes arising in the context of international commercial relations” and recommending use of the Rules, confirming the value of rules “acceptable in countries with different legal, social and economic systems.”<sup>27</sup>

The Rules were the result of “extensive deliberations and consultations with various interested international organizations and leading arbitration experts” under UNCITRAL’s auspices.<sup>28</sup> They were conceived of as an alternative to existing arbitration institutions, such as the International Chamber of Commerce Court of Arbitration, which some, at the time, saw as too expensive and as

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23. GA. Res. 2205 (XXI), United Nations Commission on International Trade Law (Dec. 17, 1966).

24. Caron & Caplan, *supra* note 21, at 2.

25. GA. Res. 2205 (XXI), United Nations Commission on International Trade Law (Dec. 17, 1966).

26. Emmanuel Gaillard, *Sociology of International Arbitration*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 187, 202 (David D. Caron et. al. eds., 2015).

27. G.A. Res. 31/98 (Dec. 15, 1976).

28. *UNCITRAL Arbitration Rules*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/uncitral-arbitration-rules/> (last visited Oct. 10, 2018).

potentially reflecting subtle pro-western bias.<sup>29</sup> The Rules provide for a free-standing dispute settlement process that does not require the services of a supporting institution.<sup>30</sup> They envision a largely documents-based process, with detailed memorials and supporting written evidence filed prior to hearings, and a restricted role for oral hearings and oral testimony.<sup>31</sup> This overall approach is today the most common form for international arbitral proceedings.<sup>32</sup>

While the Rules were initially intended to serve in resolving international commercial disputes, they soon proved able to serve another significant function as a framework for resolving interstate disputes. At the time of the Hostage Crisis between the United States and Iran from 1979 to 1981, the rules “still had yet to experience wide usage.”<sup>33</sup> The Iran-US Claims Tribunal was their first big test.

A crucial element of the negotiations to end the Hostage Crisis was the need for an acceptable mechanism to address the parties’ legal claims.<sup>34</sup> Rather than trying to negotiate procedural rules, the negotiators grafted the Rules into the institutional DNA of a new arbitral institution, the Iran-United States Claims Tribunal.<sup>35</sup> Article II(2) of the Claims Settlement Declaration creating the Tribunal thus provides that it “shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law,” except as the parties or Tribunal might modify them.<sup>36</sup> With limited modifications reflecting the Tribunal’s unusual role and characteristics, the Rules have been used successfully in addressing a large and complex caseload. Judge Howard Holtzmann, a leading expert on the Rules and a long-serving judge on the Tribunal, observed:

The experience of the Tribunal demonstrates the remarkable effectiveness and flexibility of the UNCITRAL Rules. They have been comprehensive enough to provide firm procedural guidance in almost all circumstances that have arisen, notwithstanding the tense atmosphere—and occasional crises—that have characterized life at the Tribunal. Moreover, their flexibility has

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29. See Caron & Caplan, *supra* note 21, at 4.

30. Caron & Caplan, *supra* note 21, at 4.

31. See *UNCITRAL Arbitration Rules*, *passim*; see also Gary B. Born, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 165 (2012).

32. Judith Gill, *The Development of Legal Argument in Arbitration*, in *PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION* 398, 400–01 (David D. Caron et. al. eds., 2015).

33. Charles N. Brower & Jason D. Brusechke, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 17 (1998).

34. See Roberts B. Owen, *The Final Negotiations and Release in Algiers*, in *AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS* 303–04 (Paul H. Kreisberg ed., 1985).

35. There is extensive literature on the Tribunal. For a substantial bibliography, see *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION* 477–99 (David D. Caron & John R. Crook eds., 2000) [hereinafter Caron & Crook].

36. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 ILM 223, 230 (1981); 1 Iran-US CTR 9 (1983); 75 AJIL 422 (1981).

permitted the leeway necessary to implement innovative solutions devised to meet the unique problems of the Tribunal . . . .<sup>37</sup>

In short, the Tribunal experiment demonstrated that the Rules work. They provide a fair and flexible framework for resolving disputes between parties from different legal worlds, often in the face of stress and tension. This lesson was taken on board by a cohort of young professionals associated with the Tribunal, including David, Lucy Reed, and Lee Caplan. Many of these lawyers have subsequently become leaders in the international dispute settlement community.

Buoyed by their success at the Tribunal, the Rules are now utilized in many commercial and investment disputes. With slight modifications, they are also used in interstate disputes and by major international arbitration institutions. Adapted to varying degree, they provide the basis for the rules of a number of prominent arbitral institutions, including the Inter-American Arbitration Commission,<sup>38</sup> the Cairo International Commercial Arbitration Centre,<sup>39</sup> the Asian International Arbitration Centre (formerly the Kuala Lumpur Regional Centre for Arbitration),<sup>40</sup> the Hong Kong International Arbitration Centre,<sup>41</sup> and the American Arbitration Association's International Centre for Dispute Resolution.<sup>42</sup>

The Permanent Court of Arbitration (PCA) has utilized the Rules with limited adjustments as the foundation for several sets of optional rules for use by states involved in different kinds of disputes. The introduction to the earliest of these, the PCA's 1992 Optional Rules of Arbitrating Disputes Between Two States, explains the logic of this approach:

Experience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes between States concerning the interpretation, application and performance of treaties and other agreements, although they were originally designed for commercial arbitration.<sup>43</sup>

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37. Howard Holtzmann, *Drafting the Rules of the Tribunal*, in Caron & Crook, *supra* note 35, at 94 [hereinafter Holtzmann].

38. *Rules of Procedure of the Inter-American Arbitration Commission*, FOREIGN TRADE INFORMATION SYSTEM, [http://www.sice.oas.org/dispute/comarb/iacac/rop\\_e.asp](http://www.sice.oas.org/dispute/comarb/iacac/rop_e.asp) (last visited Oct. 9, 2018).

39. THE CAIRO REGIONAL CENTRE FOR INTERNATIONAL COMMERCIAL ARBITRATION RULES, <http://www.crcica.org> (last visited Oct. 9, 2018).

40. *AIAC Arbitration Rules, 2018*, ASIAN INTERNATIONAL ARBITRATION CENTRE, <http://www.aiac.world> (last visited Oct. 9, 2018).

41. The Hong Kong International Arbitration Centre has separate provisions for both administered and ad hoc arbitrations under the UNCITRAL Arbitration Rules. See HONG KONG INTERNATIONAL ARBITRATION CENTRE, <http://www.hkiac.org> (last visited Oct. 9, 2018).

42. Caron & Caplan, *supra* note 21, at 6-7.

43. *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, "Introduction"*, PERMANENT COURT OF ARBITRATION, <http://www.pca-cpa.org> (last visited October 9, 2018).

Other PCA rules based on the Rules include the PCA Arbitration Rules 2012<sup>44</sup> (designed for use in disputes involving various combinations of states, state entities, international organizations, and private parties), as well as optional rules for arbitration involving international organizations and states, between international organizations and private parties, and for disputes relating to natural resources and the environment.<sup>45</sup> A relatively recent addition is the PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. The chairman of the group that developed these rules explained the logic of basing them on the Rules:

The UNCITRAL Rules are the most widely used set of procedural rules in international commercial arbitration. They are an attractive model because their provisions have generated, since the adoption of their first version in 1976 by the UNCITRAL, an amount of case law and academic commentary much larger than that inspired by any other set of procedural rules for arbitration. By relying on the phrasing of the UNCITRAL Rules—whenever a departure from their provisions was not called for by some unique aspect of space-related disputes—we tapped into a wealth of precedent, thus enhancing the degree of predictability in the interpretation and application of the Outer Space Rules.<sup>46</sup>

The PCA's optional rules have also been utilized in disputes between states, including *Republic of Ecuador v. United States*, *Croatia/Slovenia*, and the *Iron Rhine Arbitration* (Belgium/Netherlands). They were also employed in *Government of Sudan/Sudan People's Liberation Movement/Army*, the Abyei Arbitration. They have also been used in cases involving claims against international organizations, including *Mohamed Ismail Reygal v. UN High Commissioner for Refugees* and *District Municipality of La Punta (Peru) v. UN Office for Project Services*.<sup>47</sup>

The Rules have also been used in disputes between states and investors conducted either ad hoc or with the assistance of the PCA and other institutions. These have included such widely-noted cases as *Financial Performance Holdings B.V. (Netherlands) v. the Russian Federation*, in which a PCA-administered tribunal rendered a \$50 billion (US) award in claims growing out of the demise of Yukos Oil Company. Thus, as a leading arbitrator sums up the Rules' impact, "[t]heir influence on arbitration rules and practice generally cannot be overestimated . . ."<sup>48</sup>

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44. *PRC Arbitration Rules*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/> (last visited Oct. 10, 2018).

45. PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org> (last visited Oct. 9, 2018).

46. Fausto Pocar, *An Introduction to The PCA's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities*, 38 J. SPACE L. 171, 180 (2012).

47. Information regarding the cited cases can be found at <https://pca-cpa.org>.

48. Allan Phillip, *A Century of Internationalization of International Arbitration: An Overview*, in THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 25 (Martin Hunter et al. eds., 1995).

What does any of this have to do with elegance, simple solutions, and deeper understanding? I submit that an important factor in the Rules' success is that they are often elegant, in the several senses considered earlier. In the span of few simply worded pages, they lay out a self-contained system. Not much can be taken out, but not much more is needed in order to conduct many international proceedings. The Rules accomplish this with a clarity and economy of language that makes some complex and controverted matters seem simple and self-evident. (Since the Rules were drafted in the 1970s, the male gender dominates, but they perhaps can be forgiven for that.) As Judge Holtzmann observed in the context of the Iran-US Claims Tribunal, "It is noteworthy that the drafting of the UNCITRAL rules is clear enough that there have been few, if any, arguments of their meaning, even when the text is being interpreted by persons with different mother tongues."<sup>49</sup>

A full analysis of the Rules is beyond the scope of this note, but a few of their provisions—some that seem quite simple, even naïve—quietly accomplish a great deal.

To begin, the structure of the Rules embodies a careful and harmonious, if not always obvious, balancing of the flexibility of arbitration with due process guarantees and other control mechanisms to assure that flexibility does not lead to arbitrariness or incoherence.<sup>50</sup> Article 1(1) makes clear that parties can amend the Rules to meet their particular needs, as often occurs. However, Article 1(2) makes clear that the Rules must yield to any mandatory provisions of applicable national law. Article 15(1) affirms a tribunal's broad authority to "conduct the arbitration in such manner as it considers appropriate," but Article 15(2) makes this broad grant of authority subject to important constraints: the UNCITRAL Rules themselves and two fundamental due process requirements. The parties must be "treated with equality" and at "any stage of the proceedings each party is given a reasonable opportunity of presenting its case." Other brief provisions confirm specific rights necessary to assure fairness, including parties' right to be represented by persons of their choice,<sup>51</sup> to receive copies of documents supplied to a tribunal,<sup>52</sup> and to be given advance notice of oral hearings.<sup>53</sup> Article 33(1) requires that Tribunals apply a designated law to the dispute; it can decide on the basis of non-legal considerations only when specifically authorized. Thus, throughout, autonomy is carefully balanced with restraint.

Other provisions quietly resolve long-standing problems. Article 9 requires that "A prospective arbitrator shall disclose . . . in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his

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49. Holtzmann, *supra* note 37, at 94.

50. See INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 264–65 (Howard Holtzmann & Edda Kristjánsdóttir eds., 2007).

51. UNCITRAL Arbitration Rule 4.

52. UNCITRAL Arbitration Rule 15(3).

53. UNCITRAL Arbitration Rule 25(1).

impartiality of independence.” Article 10 then provides that an arbitrator can be challenged if such circumstances exist. These few words quietly preclude the non-neutral arbitrator in international proceedings governed by the Rules. This puts a stake into the heart of a character who haunted many interstate mixed tribunals in the past, as fiercely partisan party-appointed arbitrators often deadlocked, leaving a beleaguered umpire to exercise the sole power of decision.<sup>54</sup> (The non-neutral arbitrator was still common in U.S. domestic arbitration in the 1970s as the Rules were being developed; she persists today in insurance, labor, and some other types of disputes.<sup>55</sup>)

The Rules also provide the means to solve a significant potential vulnerability of international arbitration—the non-cooperating party who does not respond to a notice of arbitration, appoint an arbitrator, or pulls the arbitrator appointed out of a proceeding.<sup>56</sup> In a few sentences, the Rules provide for an outside appointing authority, able to fill the void if a party does not play by the rules and fails to appear or make necessary appointments, or if party-appointed arbitrators are unable to agree on a presiding arbitrator. The Rules thus provide a mechanism for ensuring that a non-cooperating party cannot block proceedings. As a result, they significantly reduce the temptation for refusing to participate. The provisions authorizing the appointing authority have been applauded as a key characteristic of the Rules.<sup>57</sup>

More can be said, but these examples from the Rules should convey the point. Sometimes elegance lurks in pedestrian and unexpected places, even in places as unexpected as the Uniform Commercial Code.<sup>58</sup> A phrase, an argument, a law review article, or even a procedural rule looks simple and self-evident. But sometimes it isn't. It instead reflects a great deal of effort and craft. It “represents a deeper understanding of the problem.”

It is elegant.

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54. See A.H. FELLER, *THE MEXICAN CLAIMS COMMISSIONS 1923–34: A STUDY OF THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 40–41 (1935); MANLEY O HUDSON, *INTERNATIONAL TRIBUNALS* 19–20 (1944).

55. The American Arbitration Association's 2004 Code of Ethics for Arbitrators in Commercial Disputes observes that “parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral . . . .” Under the AAA Code, such arbitrators “may be predisposed toward the party who appointed them” and may communicate with the party that appointed them.

56. On the challenges posed by non-cooperating parties and the absent or non-cooperating arbitrator, see STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* 61–296 (1987).

57. See Jacomijn J. Van-Haersolte van Hof, *Commentary: UNCITRAL Arbitration Rules*, in BABIK BARIN, *CARSWELL'S HANDBOOK OF INTERNATIONAL DISPUTE RESOLUTION RULES* 28 (1999).

58. See Irving Younger, *In Praise of Simplicity*, 62 A.B.A.J. 632, 633 (1976). (“Beauty may exist in a legal system as well as in a saltcellar by Cellini. We should seek beauty everywhere and take pleasure in it wherever we find it, even in a statute.”) The author finds Section 2-302(1) of the Uniform Commercial Code to be “a thing of beauty.”

# Nonparticipation and Perceptions of Legitimacy

Bernard H. Oxman \*

*The view that participation by the respondent state enhances the perceived legitimacy of international judicial or arbitral proceedings may play a significant role in a decision not to participate. Such a decision may be prompted by political rather than legal considerations. The object of nonparticipation may be to facilitate exercise of a political option of noncompliance with the judgment or award, notwithstanding prior agreement that it is legally binding. If so, then the basic issue is not nonparticipation as such, but rather noncompliance with a legally binding award or judgment, as well as a legally binding commitment to arbitrate or adjudicate disputes. This raises fundamental questions regarding the role of legitimacy, and indeed the rule of law, in international affairs.*

International law requires the consent of the respondent state to the submission of a dispute to international arbitration or adjudication resulting in an award or judgment that is binding upon the states party to the case. Such consent may be granted before or after a dispute arises. This essay examines the role of perceptions of legitimacy in a respondent's decision not to participate in state-to-state arbitration or adjudication, notwithstanding the fact that such consent was granted in advance by treaty.

In his influential book, *The Power of Legitimacy Among Nations*, Thomas Franck analyzed the role of perceptions of legitimacy in what he styled the "compliance pull" of rules in an international setting.<sup>1</sup> As between states, that

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1. Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* 42 (1990).

setting generally lacks the elements of compulsion found in municipal legal systems. In this regard, Franck observed, “Someday, perhaps, the international system will come to have law and legal institutions that resemble their domestic counterparts, although a world of five billion persons could (and should) never have a centralized legal system mirroring that of the nations.”<sup>2</sup> Franck added, “In any event, that is not the condition of the global rule system now, and it is not likely to be in the foreseeable future.”<sup>3</sup>

David Caron’s penetrating analysis of particular aspects of legitimacy expressly acknowledged the contribution made by Franck’s seminal study.<sup>4</sup> Caron was not alone in citing Franck’s research. The group includes even those who, like me, are not entirely persuaded by a sharp dichotomy in which compulsion accounts for obedience to law in the municipal system while perceptions of legitimacy account for the compliance pull of rules in the international system: they too are likely to recognize the significance of Franck’s insights on the role of legitimacy in the functioning of the international system itself.

For my part, I take my cue from David Caron and try to focus the object of my inquiry more sharply. That object is participation in dispute settlement proceedings between states—or to be more precise, nonparticipation and perceptions of legitimacy.

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The classic model of binding third-party settlements between states is one in which they agree to submit a particular dispute to such settlement after the dispute has arisen.<sup>5</sup> Under that model, the time between the compromissory

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2. *Id.* at 39–40.

3. *Id.* at 40.

4. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 556 n.19 (1993) (describing Franck’s book, *supra* note 3, as “[a] central part of the recent international law discussion”). Caron’s article is directed to the question of perceptions of legitimacy concerning a political organ, namely the UN Security Council. The fact that the Council is endowed by the UN Charter with the authority to make decisions that are binding on all UN member states raises issues that are in some respects analogous to those addressed in this essay, and that are of no less importance to the international system.

5. Citations to such a case may use a “/” between the parties’ names rather than the letter “v” to signal that both parties have submitted the dispute and, in that sense, there is no applicant or respondent. In this situation, there is often a period of months or years during which the parties have attempted to resolve a legal dispute through negotiation, but have failed to do so. Then, if they are both in agreement on this course of action, they may submit the dispute to a “third party” that may be a particular individual or group or institution. Article 33 of the Charter of the United Nations spells out a wide range of choices. The agreement may seek assistance (such as mediation) or nonbinding recommendations (such as conciliation). Where the parties agree to seek a binding decision, the “third party” may be a standing international court or tribunal such as the International Court of Justice (ICJ) (the principal judicial organ of the United Nations, whose members are elected by the UN General Assembly and Security Council) or the International Tribunal for the Law of the Sea (ITLOS) (established by the UN Convention on the Law of the Sea, whose members are elected by the parties to the Convention). *See* Statute of the International Court of Justice, arts. 92–96; U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982,

agreement and the proceedings is typically brief, and buyer's remorse, if any, might be expected to emerge only after the judgment or award.

The practice of affording an aggrieved party a unilateral right of access to binding third-party dispute settlement processes finds its origin in municipal law.<sup>6</sup> In statecraft if you will. Among the many reasons for affording such a right of access is perhaps the most basic one of maintaining public order. Unresolved disputes and accumulation of grievances can disrupt public order and undermine social cohesion.

Maintenance of public order is of course relevant to the international system as well. The UN Charter expressly acknowledges the link to settlement of disputes between states.<sup>7</sup> While the desirability of promoting resolution of disputes between states did yield a new norm requiring peaceful settlement of disputes, no general international norm of conduct emerged requiring arbitration or adjudication of unresolved disputes between states at the request of either party.<sup>8</sup> Rather, the technique used to effect the latter change is expressly consensual and specific, namely a treaty that affords one party the right to submit

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1833 U.N.T.S. 397, Part XV, sec. 2; U.N. Convention on the Law of the Sea, Annex VI. Alternatively, it may be an *ad hoc* arbitral tribunal comprised of a member or members selected by the parties or a designee pursuant to agreed rules, for which a standing institution such as the Permanent Court of Arbitration may perform registry functions. The World Trade Organization's Dispute Settlement Body utilizes a combination of an *ad hoc* panel and a standing appellate body. See World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art 1; Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1867 U.N.T.S. 154.

6. See, e.g., LEGES DUODECIM TABULARUM, tbl. I, law I, available at [http://avalon.law.yale.edu/ancient/twelve\\_tables.asp](http://avalon.law.yale.edu/ancient/twelve_tables.asp) (stating "[i]f the plaintiff summons the defendant to court the defendant shall go. If the defendant does not go the plaintiff shall call a witness thereto. Only then the plaintiff shall seize the defendant").

7. Article 2, paragraph 3, of the Charter of the United Nations requires all UN members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 33 of the Charter obliges the parties to seek a solution of "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security." Well before the drafting of the UN Charter, there were prominent Americans who believed that creating a new standing international court to settle disputes between states would help avert war. In 1916, Charles Evans Hughes argued,

We know the recurrence of war is not to be prevented by pious wishes. If the conflict of national interests is not to be brought to the final test of force, there must be the development of international organization in order to provide international justice and to safeguard so far as practicable the peace of the world. . . . There should be an international tribunal to decide controversies susceptible of judicial determination, thus affording the advantage of judicial standards in the settlement of particular disputes and the gradual growth of a body of judicial precedents.

Charles Evans Hughes, *Address in Accepting the Republican Nomination for President (July 31, 1916)*, ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, pp. 8, 33–34 (2d ed. 1916).

8. Neither Article 2, paragraph 3, nor Article 33 of the UN Charter requires arbitration or adjudication as such. Article 33 requires the parties to seek a solution to the dispute "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. Charter art. 33.

certain future disputes with another party to a specified tribunal whose decision is accepted in advance as binding.

There is nothing novel or unusual about using contract or treaty to make advance commitments. In this regard it is presumably understood that a legal regime rooted in consent can function only if consent has consequences.

Yet the notion has persisted that arbitration or adjudication of disputes between states is best used where the parties agree to do so after the dispute arises.<sup>9</sup> This classic perception rears its head most obviously when a state is sued, and deploys its lawyers to suggest that submission of the dispute to arbitration or adjudication against the current will of the respondent is inappropriate, and indeed, illegitimate.<sup>10</sup>

Arguments in support of that conclusion can be, and typically are, presented before the tribunal itself in the form of objections to jurisdiction and admissibility. The best known cases of refusal to participate contain something more: the basis of jurisdiction asserted by the applicant is an instrument in which advance consent to jurisdiction was granted by the respondent well before the particular dispute ripened.<sup>11</sup>

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9. See Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: A Myth?*, 49 INT'L & COMP. L.Q. 251, 257 (2000).

10. For example, in the context of publicly explaining its decision not to participate in the *South China Sea* arbitration, a Chinese Foreign Ministry spokesperson stated, *inter alia*, "China always stands that, with regard to the relevant disputes between China and the Philippines in the South China Sea, a true solution can only be sought through bilateral negotiation and consultation." That statement was enclosed with a letter from the Chinese Ambassador to the Netherlands reiterating that, "China does not accept or participate in this arbitration." The letter was delivered by the Chinese embassy to the registry of the arbitral tribunal (the Permanent Court of Arbitration in The Hague). *S. China Sea Arb. (Phil. v. China)*, Award, Perm. Ct. Arb. Case No. 2013-19, ¶97 (July 12, 2016), available at <https://pca-cpa.org/en/cases/7/> (visited Dec. 22, 2018).

11. In the original *Nuclear Tests* cases, in which France declined to appear, the alternative bases of jurisdiction invoked by Australia were the General Act of 1928 as well as the Australian and French declarations under Article 36(2) of the ICJ Statute. *Nuclear Tests (Austl. v. Fr.)*, Interim Protection, 1973 I.C.J. Rep. 99, ¶ 14 (June 22). The Australian and French declarations cited by Australia were registered respectively on February 6, 1954 and May 20, 1966. See Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, Austl., 186 U.N.T.S. 77 (Feb. 6, 1954); Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, Fr., 562 U.N.T.S. 71 (May 16, 1966). In the *South China Sea* and *Arctic Sunrise* arbitrations, in which China and Russia respectively declined to appear, the basis of jurisdiction was section 2 of Part XV of UNCLOS, notably Articles 286 to 288. *S. China Sea Arb.*, Award, *supra* note 10, at ¶ 60; *Arctic Sunrise (Neth. v. Russ.)*, Case No.22, Provisional Measures Order, 2013 ITLOS REP. 230, ¶ 36 (Nov. 22, 2013) available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/published/C22\\_Order\\_221113.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf); *Arctic Sunrise (Neth. v. Russ.)*, Award on Jurisdiction, PCA Case No. 2014-02, ¶ 49 (Nov. 26, 2014) available at <https://pcacases.com/web/sendAttach/1325> (last visited Dec. 22, 2018). The dates on which the parties to the respective arbitrations ratified UNCLOS are as follows:

*South China Sea*: Philippines - May 8, 1984, China - June 7, 1996;

*Arctic Sunrise*: Netherlands - June 28, 1996, Russia - March 12, 1997.

See U.N. Division for Ocean Affairs and the Law of the Sea, Status of the United Nations Conventions on the Law of the Sea [. . .] as at 31 March 2019, *Table recapitulating the status of the Convention and of the related Agreements*, [http://www.un.org/Depts/los/reference\\_files/status2018.pdf](http://www.un.org/Depts/los/reference_files/status2018.pdf).

Acceptance of such compromissory instruments used to be exceptional, but that is changing. The United Nations Convention on the Law of the Sea (UNCLOS) is one such compromissory instrument.<sup>12</sup> The Convention's substantive reach is very broad. The United Nations website now lists 168 parties.<sup>13</sup> Since its entry into force in 1994, many cases have been arbitrated and adjudicated under the Convention's compulsory jurisdiction provisions with the participation of both parties to the case.<sup>14</sup>

This pattern of participation was interrupted in 2013. China declined to participate in the *South China Sea* arbitration initiated by the Philippines in January of that year.<sup>15</sup> In the *South China Sea* arbitration, the Philippines asserted that there was no valid basis for China's claims that it was entitled to sovereign rights and jurisdiction over maritime areas off the Philippine coast, and that China's construction of artificial islands and installations and other actions pursuant to those claims violated Philippine sovereign rights and jurisdiction under UNCLOS as well as China's duties under UNCLOS with respect to navigation safety, fishing, and protection and preservation of the marine environment.<sup>16</sup>

Then Russia declined to participate in the *Arctic Sunrise* arbitration initiated by the Netherlands in October of the same year.<sup>17</sup> In that case, the Netherlands asserted that the freedom of navigation guaranteed by UNCLOS was violated by Russia's boarding of a Netherlands flag vessel (the *Arctic Sunrise*) in its exclusive economic zone, and subsequent detention at Murmansk of the ship and

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12. U.N. Convention on the Law of the Sea, *supra* note 5, at Part XV, sec. 2.

13. Status of United Nations Convention on the Law of the Sea, *supra* note 11, at 1–9.

14. As of December 2018, both parties had appeared in twenty-four cases before ITLOS and in eleven cases before arbitral tribunals constituted under Annex VII of UNCLOS. Five of the ITLOS cases concerned provisional measures pending the constitution of an arbitral tribunal under Annex VII. *See* CONTENTIOUS CASES, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (last visited Dec. 14, 2018), <https://www.itlos.org/en/cases/contentious-cases>; ARBITRATION SERVICES – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, PERMANENT COURT OF ARBITRATION (last visited Dec. 14, 2018), <https://pca-cpa.org/en/services/arbitration-services/unclos/>; Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, Aug. 4, 2000, Arbitral Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea, at 2–4, *available at* [https://icsid.worldbank.org/en/Documents/icsiddocs/Award on Jurisdiction and Admissibility of August 4\\_2000.pdf](https://icsid.worldbank.org/en/Documents/icsiddocs/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204%202000.pdf) (last visited Dec. 14, 2018).

15. *S. China Sea Arb.*, Award on Jurisdiction and Admissibility, Perm. Ct. Arb. Case No. 2013-19, at ¶ 10, *available at* <https://pca-cpa.org/en/cases/7/> (visited Dec. 22, 2018).

16. *S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 7–10. I had the honor of serving as counsel for the Philippines in the *South China Sea* case. That relationship ended with the arbitration. I alone am responsible for the views expressed herein and for the summary of the lengthy award to be found in my previous article. *See* Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIAMI INT'L & COMP. L. REV. 235 (2017) (discussing the award).

17. *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at ¶¶ 2, 9, 43, 46, 65. Russia also declined to participate in the provisional measures proceedings instituted by the Netherlands before ITLOS pending constitution of the arbitral tribunal. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, 2013 ITLOS REP. ¶ 48.

the persons on board, against whom charges were filed.<sup>18</sup> The ship was chartered by Greenpeace, and had carried out a protest at a Russian offshore oil platform before being boarded and detained.<sup>19</sup>

In both of these cases, the dispute submitted to arbitration arose after UNCLOS entered into force for the parties, the compulsory dispute settlement provisions of UNCLOS were the asserted basis of jurisdiction, and the nonparticipating respondent asserted that jurisdiction was lacking under UNCLOS for the reasons it indicated.<sup>20</sup>

Then in 2018, asserting that “the Court manifestly lacks jurisdiction,” Venezuela declined to appear in the International Court of Justice (ICJ) in a case brought by Guyana regarding a territorial dispute over the area between the

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18. *Arctic Sunrise* (Neth. v. Russ.), *supra* note 11, Provisional Measures Order, at ¶¶ 59, 90 (Nov. 22, 2013).

19. *Arctic Sunrise*, Award on the Merits, *supra* note 11, at ¶¶ 3, 4 (Aug. 14, 2015). Some observers may have found Russia’s failure to participate somewhat surprising because Russia had previously participated as both applicant and respondent in cases brought under the compulsory dispute settlement provisions of the Convention. *Volga* (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 2002 ITLOS Rep. 10; *Hoshinmaru* (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 2005-2007 ITLOS Rep. 18; *Tomimaru* (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 2005-2007 ITLOS Rep. 74. Russia then resumed its earlier pattern of participation under the Convention. See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukr. v. Russ.), Case No. 2017-06, Procedural Order No. 3 (Perm. Ct. Arb. 2018), <https://pcacases.com/web/sendAttach/2446> (procedure for addressing Russia’s jurisdictional objections). However, in connection with Ukraine’s request to ITLOS for provisional measures pending the constitution of an arbitral tribunal under UNCLOS Annex VII in another case subsequently submitted by Ukraine, Russia informed ITLOS “of its decision not to participate in the hearing on provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.” *Case Concerning the Detention of Three Ukrainian Naval Vessels* (Ukr. v. Russ.), Case No. 26, Provisional Measures Order, 2019 ITLOS Rep. at ¶ 8 (May 25, 2019) available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_26/C26\\_Order\\_25.05.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf). Russia submitted written observations shortly thereafter on jurisdictional and other requirements for provisional measures. Memorandum of the Government of the Russian Federation, May 7, 2019, available at [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_26/Memorandum.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf). These were more detailed than the reasons communicated in *Arctic Sunrise*, *supra* note 11. (Reference to the *Detention of Three Ukrainian Naval Vessels* case was added only to certain footnotes because the relevant events in the case occurred when the processing of this manuscript was at an advanced stage.)

20. Russia’s concise communication of its jurisdictional reasons for not participating was delivered at the outset of provisional measures proceedings. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶ 9. In the *South China Sea* case, China’s jurisdictional arguments were spelled out in detail in a position paper that the foreign ministry made public and transmitted to the arbitrators shortly before the deadline for submission of a counter-memorial. *S. China Sea Arb.*, Award, *supra* note 10, at ¶ 13. In both cases the respective arbitral tribunals treated the jurisdictional positions presented by the nonparticipants as pleas on jurisdiction. *Id.* at ¶¶ 14–15; *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at ¶¶ 5–6. Both tribunals considered and ruled on the respondents’ jurisdictional objections before proceeding to the merits, although certain jurisdictional issues were deferred for consideration in connection with the merits in the *South China Sea* arbitration. *S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 45, 60 (H), (I); *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at sec. V. Years earlier, in the *Nuclear Tests* cases, France had spelled out the basis for its jurisdictional conclusions in a letter informing the Court of its reasons for declining to participate. *Nuclear Tests*, Interim Protection, *supra* note 11, at ¶ 15.

Essequibo River and the boundary drawn by an 1899 arbitral award.<sup>21</sup> Albeit with some temporary lapses, such nonappearance has not occurred in the ICJ in many years.<sup>22</sup> Guyana predicates jurisdiction in the case on a decision choosing the ICJ as the next means for settlement of the dispute that was made by the UN Secretary-General in January 2018 in the exercise of his functions under a 1966 agreement to which Guyana and Venezuela are party.<sup>23</sup> One difference between this case and the other recent cases is that, although the asserted basis for the respondent's consent to jurisdiction is an agreement concluded over one half-century earlier, this agreement was reached after the dispute had arisen and for the specific purpose of finding means to resolve it.<sup>24</sup>

In considering the motivations for a state's decision not to appear in proceedings instituted by another state, an interesting underlying question is whether the reasons for nonparticipation are legal or political. As previously noted, the respondent may assert that it declines to appear because the court or tribunal lacks jurisdiction. But in a case between states in an international tribunal, the jurisdictional requirement is consent, which is typically manifested by prior agreement and does not depend on actual appearance. Indeed, procedural rules may specifically contemplate the respondent's absence.<sup>25</sup> Moreover, a liberal position on the right of a state to decline to appear may facilitate its acceptance of compulsory jurisdiction in the first place. There may be reasons for nonparticipation in a particular case that are not necessarily anticipated or made known. With this in mind, let us take a closer look at what may be the objectives of nonparticipation in many situations, albeit not all.

Where a dispute between states has been submitted by one party to an international court or tribunal, the respondent that believes there is no jurisdiction may be concerned that an appearance to contest jurisdiction legitimates the

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21. See *Arbitral Award of 3 October 1899 (Guy. v. Ven.)*, Order, 2018 I.C.J. Rep. (June 19), available at <https://www.icj-cij.org/en/case/171> (visited Dec. 18, 2018).

22. France declined to appear in the original Nuclear Tests cases, which were concluded in 1974. *Nuclear Tests*, *supra* note 11, Judgment, 1974 I.C.J. Rep. 253, at ¶ 14 (Dec. 20). The United States, after participating in the provisional measures and jurisdictional phases, withdrew in January 1985 from further participation in the case brought against it by Nicaragua. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 10–11, 17 (June 27).

23. *Arbitral Award of 3 October 1899*, *supra* note 21, Application, paras. 14–25; see also Statement attributable to the Spokesman for the Secretary-General on the border controversy between Guyana and Venezuela (Jan. 30, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-01-30/statement-attributable-spokesman-secretary-general-border>.

24. *Agreement to Resolve the Controversy Between Venezuela and the United Kingdom of Great Britain and Northern Ireland Over the Frontier Between Venezuela and British Guiana*, Feb. 17, 1966, 561 U.N.T.S. 323. The agreement's object is solution "of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void." *Id.*, art. I. The agreement was negotiated by the United Kingdom "in consultation with the Government of British Guiana." *Id.* at preamble. Upon attainment of independence, Guyana became a party to the agreement. *Id.*, art. VIII.

25. See Statute of the International Court of Justice, art. 53; see also U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VII, art. 9, Annex VIII, art. 4.

proceedings. While the respondent's jurisdictional arguments are doubtless legal in nature, the underlying concern prompting nonparticipation may be more political than legal. The respondent's appearance does not in itself concede jurisdictional objections. But the respondent's prior consent to jurisdiction may well have included consent to the jurisdiction of the court or tribunal to resolve a dispute as to its jurisdiction. Many compromissory agreements expressly or impliedly confer jurisdiction on a tribunal to determine its own jurisdiction, whether or not the respondent appears.<sup>26</sup>

Another reason why parties may choose not to participate, or may withdraw at a later stage of proceedings, is that the time available to the respondent to make a decision as to participation may be limited, at least with respect to the initial phases of the process. This may in part explain the nature of early decisions on the matter. The United States withdrew from participation in the case brought against it by Nicaragua regarding military activities only after the ICJ had rendered its order on provisional measures and its judgment on jurisdiction.<sup>27</sup> On the other hand, in the *South China Sea* case, China took less than a month to reject the arbitration and return the notification and statement of claim to the Philippines.<sup>28</sup> Russia similarly rejected the submission of the *Arctic Sunrise* dispute to arbitration in less than a month; it did so a day after the Netherlands requested the International Tribunal for the Law of the Sea to prescribe provisional measures pending constitution of the arbitral tribunal.<sup>29</sup>

The right of an applicant to request provisional measures pending a final judgment or award may influence a decision to decline participation. The fact that urgency is a typical characteristic of such situations has important consequences. Commencement of proceedings in respect of a request for provisional measures may be all but simultaneous with submission of the dispute.<sup>30</sup> And a decision on provisional measures is not dependent upon a

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26. Statute of the International Court of Justice, art. 53; *Id.* at art. 36, ¶ 6; U.N. Convention on the Law of the Sea, *supra* note 5, at art. 288, ¶ 4. "This power, known as the principle of 'Kompetenz-Kompetenz' in German or 'la compétence de la compétence' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done." Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

27. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 10–11, 17 (June 27).

28. *S. China Sea Arb.*, Award, *supra* note 10, Perm. Ct. Arb. Case No. 2013-19 at ¶ 29 (July 12, 2016).

29. *Arctic Sunrise*, *supra* note 11, at 11; Provisional Measures Order, at ¶ 9.

30. In the Military and Paramilitary Activities case, Nicaragua's request for provisional measures was simultaneous with the submission of the case on April 9, 1984. The United States participated in the provisional measures and jurisdictional phases of the proceedings, but withdrew from participation following the Court's determination that it had jurisdiction and did not participate in the proceedings on the merits. *Military and Paramilitary Activities*, *supra* note 22, at ¶¶ 10, 11, 17. In the *Nuclear Tests* cases, Australia filed its application on May 9, 1973 and its request for provisional measures on the same day.

definitive determination of jurisdiction by the tribunal; the existence of an instrument that appears, *prima facie*, to afford a possible basis on which jurisdiction might be founded may be sufficient.<sup>31</sup> While decisions on provisional measures, as a legal matter, are without prejudice to adjudication of issues of jurisdiction or the merits, provisional measures ordered by an international tribunal are legally binding under the express text of UNCLOS<sup>32</sup> and under the Statute of the ICJ as interpreted by the Court.<sup>33</sup>

Accordingly, a provisional measures order presents the respondent with a choice between compliance with a tribunal decision and breach of a legal obligation to comply. As a legal matter, the order is binding whether or not the respondent participates in the proceedings. There is, moreover, little if any evidence that nonappearance reduces the risk that a tribunal will order provisional measures.<sup>34</sup> We may therefore conclude that, to the extent nonappearance is rooted in concerns regarding provisional measures, those concerns also may be more political than legal.

Even where provisional measures are not sought, the question of participation may arise quickly for the respondent. If the dispute has been submitted to arbitration, the parties typically have a limited period of time in which to appoint arbitrators, after which the arbitrators are named by the appointing authority specified in the compromissory instrument.<sup>35</sup> While participation in the appointment process does not imply acceptance of jurisdiction, it may be perceived as conferring legitimacy on the submission of the dispute to arbitration. Moreover, there may be a perception that, as a political matter, it is more difficult to decline to comply with a decision by a panel if one participates in its appointment. In both the *South China Sea* arbitration and the

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*Nuclear Tests*, Interim Protection, *supra* note 11, at ¶ 1. In the *Arctic Sunrise* case, the Netherlands submitted the dispute to arbitration on October 4, 2014 and submitted its request for provisional measures to ITLOS on October 21, a few days more than the two-week minimum specified in UNCLOS art. 290, para. 5. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶¶ 36–38. Similarly, the respective dates were March 31 and April 16, 2019 in the *Detention of Three Ukrainian Naval Vessels* case, *supra* note 19, at preamble, ¶ 1. There was no request for provisional measures in the *South China Sea* arbitration, although the Notification and Statement of Claim expressly reserved the right to request such measures. See *S. China Sea Arb.*, *supra* note 10, Phil. Mem'l Vol. 3, Annex 1, ¶ 43, Annex 5, ¶ 46; see also *S. China Sea Arb.*, Award on Jurisdiction and Admissibility, *supra* note 15, at ¶ 44.

31. Fisheries Jurisdiction (U.K. v. Ice.), Interim Protection Order, 1972 I.C.J. 12, ¶ 17 (Aug. 17).

32. U.N. Convention on the Law of the Sea, *supra* note 5, at art. 290, para. 6.

33. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶¶ 99–109 (June 27). See *Fisheries Jurisdiction*, *supra* note 31, at ¶ 20.

34. Provisional measures were sought and ordered in the *Nuclear Tests*, *Arctic Sunrise* and *Detention of Three Ukrainian Naval Vessels* cases. *Nuclear Tests*, Interim Protection, *supra* note 11, 1973 I.C.J. Rep. at 106; *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, 2013 ITLOS Rep. at ¶ 105; *Detention of Three Ukrainian Naval Vessels*, Provisional Measures Order, *supra* note 19, 2019 ITLOS Rep. at ¶ 124. The United States participated at the provisional measures stage of the *Military and Paramilitary Activities* case. See *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 30, at ¶ 17.

35. See U.N. Convention on the Law of the Sea, *supra* note 5, Annex VII, art. 3.

*Arctic Sunrise* arbitration, the respondents did not participate in the appointment of the members of the respective arbitral tribunals.<sup>36</sup>

Reasons for nonparticipation in a case are of course not limited to jurisdictional concerns. The respondent's main concern may be losing on the merits. It may be tempting to suppose that nonparticipation reduces the likelihood or severity of an adverse outcome on the merits. While it is of course difficult to know what would have happened had the respondent participated fully in the proceedings, this argument does not appear to find a great deal of support in the results of the two recent cases of nonparticipation. The applicant prevailed in both cases. This suggests that the underlying objective of nonparticipation in many circumstances may be to strengthen the option of noncompliance with an adverse judgment or award on the merits. Since the judgment or award is legally binding under the compromissory instrument to which the nonparticipating party adhered, here too the reason for nonparticipation may be more political than legal.<sup>37</sup>

Are there perhaps procedural advantages that may suggest nonparticipation? It is evident that nonparticipation by the respondent, even if it does not alter the burden of proof as legal matter, may increase the burdens on the applicant<sup>38</sup> and the tribunal as practical matter.<sup>39</sup> Like the ICJ Statute,

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36. U.N. Convention on the Law of the Sea Annex VII provides that appointments not made by the parties within the specified time period are to be made by the ITLOS president. *Id.* In both the *Arctic Sunrise* and *South China Sea* arbitrations, the applicant appointed one arbitrator and the ITLOS president appointed the remaining four. A few Chinese critics complained that the ITLOS president who made those appointments in the *South China Sea* case was a former Japanese diplomat. See Jesse Johnson, *Beijing Turns on Japanese Judge as Hague Tribunal Ruling Over South China Seas Nears*, JAPAN TIMES (July 8, 2016), <https://www.japantimes.co.jp/news/2016/07/08/national/politics-diplomacy/beijing-turns-japanese-judge-hague-tribunal-ruling-south-china-sea-nears/#.XO88uS2ZM5h>. Of course any discomfort within China in this regard might have been avoided by participation in the appointment process. See U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VII, art. 3(c)–(e).

37. The fact that the respondent's government may be under internal pressure to decline to participate does not in itself alter the analysis. That said, in some cases internal constitutional constraints may complicate the calculus. It might be noted in this regard that great care was taken to minimize the risk of noncompliance with an ultimate judgment or award in the *Gulf of Maine* case (in which I participated on the U.S. side). The United States Senate was actively engaged in the formulation of the final text of the treaty with Canada submitting the Gulf of Maine maritime boundary dispute to a chamber of the ICJ constituted for that purpose (the first time this was done) or to arbitration in the event that a chamber whose composition was satisfactory to the parties was not established. Maritime Boundary Settlement Treaty, Can.-U.S., Mar. 29, 1979, 33 U.S.T. 2797; see also S. REP. NO. 96-1, at 4 (1981).

38. See Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 230–31 (1991). The principal burdens relate to the conduct of the arbitration or adjudication. In the case of an arbitration, the costs of the arbitral tribunal itself may be implicated as well. Unless otherwise agreed by the parties or specified by the tribunal, remuneration and expenses of an arbitral tribunal are ordinarily borne equally by the states parties, as are the advance deposits. However, the nonparticipating respondents in the two recent arbitrations did not pay their deposits. As a result, in order to cover the costs of the tribunal, each applicant had to pay the deposits due from both parties, with uncertain prospects for recouping the respondent's share later pursuant to the final award.

39. The preamble of a 1991 resolution of the Institute of International Law noted:

UNCLOS does not provide for default judgments: it specifies that, in the absence of the respondent, the tribunal “must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”<sup>40</sup> There is however little, if any, evidence that the shift of burdens to the applicant and the tribunal inures to the ultimate benefit of the nonparticipant. Even if nonparticipation forces one’s opponent and the tribunal to work much harder, the end result may be a more thorough and persuasive opinion rejecting the nonparticipant’s position. Once again, the reasons for nonparticipation would appear to be political, not legal.

Nonparticipation also presents an issue regarding duties of the parties that is arguably independent of the question of nonparticipation as such.<sup>41</sup> The *South China Sea* award acknowledges the respondent’s option not to appear and articulates its duties as a party to the case in the following terms:

China has been free to represent itself in these proceedings in the manner it considered most appropriate, including by refraining from any formal appearance, as it has in fact done. The decision of how best to represent China’s position is a matter for China, not the Tribunal. China is not free, however, to act to undermine the integrity of these proceedings or to frustrate the effectiveness of the Tribunal’s decisions. The Convention and general

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the difficulties that non-appearance of a party may present in some circumstances for the other party or parties and for the Court itself, especially with regard to:

- a) the full implementation of the principle of the equality of the parties; and
- b) the acquisition by the Court of knowledge of facts which may be relevant for the Court’s pronouncements on interim measures, preliminary objections or the merits.

Institute of International Law, *Non-Appearance Before the International Court of Justice*, at 2 (1991), [http://www.idi-ii.org/app/uploads/2017/06/1991\\_bal\\_01\\_en.pdf](http://www.idi-ii.org/app/uploads/2017/06/1991_bal_01_en.pdf).

40. U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VI, art. 28; *see also id.* at Annex VII, art. 9, Annex VIII, art. 4. These provisions are based on Article 53, paragraph 2, of the ICJ Statute. In the *Arctic Sunrise* arbitration, Russia’s nonparticipation deprived the tribunal of potentially important information and perspectives regarding Russia’s interpretation of its laws and the measures it took. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶¶ 19, 54. In the *South China Sea* arbitration, both the applicant and the tribunal went to great lengths to identify and probe all potential legal and factual issues. The Award expressly addresses the legal and practical consequences of China’s nonparticipation. *S. China Sea Arb.*, Award, *supra* note 11, at ¶¶ 116–144.

41. In the United States, the defendant’s decision on whether to appear in a civil action to defend the case is ordinarily addressed strictly in terms of the defendant’s interests, if any, in risking a default judgment, with little if any suggestion of a duty to appear to defend. Students of international law learn that France under Napoleon refused to appear to defend an action in a U.S. court regarding a French warship detained in a civil action. Writing for the Supreme Court, Chief Justice Marshall ruled on grounds of immunity from jurisdiction that the ship must be released, with no suggestion that France was under a duty to appear. *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 143 (1812). While modern statutes on sovereign immunity have added considerable nuance to the applicable law and procedure, it remains doubtful that a foreign sovereign is considered to be under a duty to appear in a municipal court. The restrictions on default judgments in the U.S. Foreign Sovereign Immunities Act suggest that nonappearance is not regarded as improper. 28 U.S.C. § 1608(e) (2018).

international law limit the actions a party may take in the course of ongoing dispute resolution proceedings.<sup>42</sup>

Judges and arbitrators have not always taken such a liberal view of the right of the respondent to decline to appear. Some years earlier, in their joint separate opinion with respect to the provisional measures prescribed by International Tribunal for the Law of the Sea in the *Arctic Sunrise* case, Judges Wolfrum and Kelly linked the question of nonparticipation with the question of the duties of a party to the case. They wrote:

[N]on-appearance is contrary to the object and purpose of the dispute settlement system under Part XV of the Convention. . . . Judicial proceedings are based on a legal discourse between the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process. As Sir Gerald Fitzmaurice put it in his article on “The Problem of the ‘Non-Appearing’ Defendant Government” (BYIL (1980), vol. 51 (1), p. 89 at 115), non-appearance leaves the “outward shell” of the dispute settlement system intact but washes away the “core.”<sup>43</sup>

It is evident that in many if not most instances, nonparticipation by the respondent is focused on the question of the legitimacy of the proceedings. At a minimum it is designed to avoid enhancing that legitimacy.<sup>44</sup> But to what end? It is by no means clear that nonparticipation is likely to produce an outcome in the proceedings that is more favorable to the respondent.

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The foregoing analysis suggests that nonparticipation may be a way of signaling to one’s opponent, other governments, the tribunal, and the public not to expect compliance. The object is to avoid prejudicing the option to refuse to comply with a legally binding judgment or award, and perhaps to discourage other states from exercising their right to sue the respondent. Those objectives in turn require us to think hard about visions of the international system that render such tactics plausible.

The fundamental issue is not nonparticipation. Nor is it agreement or disagreement with a tribunal’s reasoning or decision. The issue is noncompliance with a legally binding judgment or award, and with a legally binding commitment to afford an aggrieved party the right to seek such a judgment or award. Whether we articulate the principle at stake as the rule of law in

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42. *S. China Sea Arb.*, Award, *supra* note 10, Perm. Ct. Arb. Case No. 2013-19 at ¶ 1180 (July 12, 2016).

43. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, Sep. Op. Wolfrum & Kelly, JJ., at para. 6. Since Judge Wolfrum subsequently served as a member of the arbitral tribunal in the *South China Sea* case, it is interesting to consider whether his views on the subject evolved. *See supra* note 42 and accompanying text.

44. In this connection, one might wonder what prompted the decision of the United Kingdom to decline to send an observer to the proceedings in the *South China Sea* arbitration after the Tribunal granted its request for “neutral observer status” at the hearing on the merits. *See S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 67–68.

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international affairs, or we deploy the conceptual vocabulary of Thomas Franck, the question is the same: What do we need to do to encourage behavior that is consistent with the kind of international order under which we would like to live?

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# The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts

Lori Fisler Damrosch\*

## INTRODUCTION

This essay offers an installment of what would have been a continuing conversation with David D. Caron, a close colleague in the field of international law, on themes that engaged both of us across multiple phases of our intersecting careers. The issues are fundamental ones for both the theory and the practice of international law, involving such core concerns as how international law can be enforced in an international system that is not yet adequately equipped with institutions to determine the existence and consequences of violations or to impose sanctions against violators; and how to ensure that self-help enforcement measures in a largely decentralized and still incomplete system are consistent with the principles and values underlying the international legal order. David Caron was uniquely positioned to speak and write on these issues, not only with a mature scholar's authority, but also with the authoritativeness conferred by the judicial appointments he held in recent years and the cases on which he would have deliberated and rendered judgments, but for his untimely death. Without his eloquent voice to provide wisdom and reach decisions in the context of concrete disputes, I venture still-evolving thoughts on what may well seem unanswerable questions.

The topic of economic sanctions as countermeasures for internationally wrongful acts provides the opportunity to revisit questions that I encountered for the first time as a brand-new international lawyer in the Office of the Legal Adviser of the U.S. Department of State; these questions would later engage David Caron's interest as well. Two of my earliest cases—an aviation dispute between the United States and France, arbitrated in 1978;<sup>1</sup> and the *Tehran Hostages* dispute between the United States and Iran, pending at the International

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1. *Case Concerning the Air Services Agreement of 27 March 1946* (U.S.-France), 54 I.L.R. 304 (Arbitral Trib. 1978).

Court of Justice (ICJ or the Court) between 1979 and 1981<sup>2</sup>—both involved the application by the United States of economic sanctions as countermeasures in response to breaches of international obligations; and in both cases, the tribunal was invited to consider the legality or legitimacy of the U.S. countermeasures. In the aviation arbitration, France asked the tribunal to rule on the merits that the United States had engaged in illegal unilateral self-help which could not be justified under the international law of countermeasures; the tribunal rejected France’s claim and upheld the U.S. measures.<sup>3</sup> In the *Hostages* case, in which Iran refused to appear—instead, it sent a message urging the Court not to decide the case—two judges maintained in a separate opinion that the United States had disqualified itself from seeking judicial remedies by resorting to self-help measures while the case was pending;<sup>4</sup> the other thirteen members of the Court, however, found that the United States had applied economic sanctions “in response to what the United States believed to be grave and manifest violations of international law by Iran”<sup>5</sup>—a belief vindicated when the Court unanimously ruled in favor of the United States at both the provisional measures and merits phases—and thus was entitled to judicial relief.

As a then-novice in the field of international law, assigned to research novel questions about an area where there were few if any precedents at the time, I found no ready answers in jurisprudence or in scholarship. The questions continued to intrigue me even after the cases were resolved, and I decided not only to tackle them in my first scholarly article,<sup>6</sup> but to return to them in a more systematic way from time to time after I entered legal academia.<sup>7</sup>

From the 1980s onward, I found that I was increasingly hearing about, and then meeting, and then collaborating with, David Caron, who had served with the inaugural group of law clerks at the Iran-United States Claims Tribunal from 1983 to 1986 and then returned to his alma mater, Berkeley, to teach law starting from 1987.<sup>8</sup> David and I had many overlapping interests—among them, the acute and still chronic problems in U.S.-Iranian relations, for which the Iran-United

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2. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 I.C.J. 7 (Dec. 15); Merits, 1980 I.C.J. 3 (May 24).

3. See Lori Fisler Damrosch, *Retaliation or Arbitration – Or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT’L L. 785 (1980) [hereinafter Damrosch, *Retaliation*].

4. U.S. v. Iran, Merits, 1980 I.C.J. at 51, 52-55 (May 24) (dissenting opinion by Morozov, J.); U.S. v. Iran, 1980 I.C.J. at 58, 63-65 (May 24) (dissenting opinion by Tarazi, J.).

5. U.S. v. Iran, 1980 I.C.J. 27-28, para. 53.

6. Damrosch, *Retaliation*, *supra* note 3.

7. See Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 COLL. COURSES HAGUE ACAD. INT’L L. 9, 41-101 (1997) [hereinafter Damrosch, *Hague Lectures*]; see also INTERNATIONAL LAW: CASES AND MATERIALS, ch. 8, sec. 6 on Countermeasures (Lori F. Damrosch & Sean D. Murphy eds., 7th ed. 2019).

8. We had a shared mentor, Stefan Riesenfeld, a long-time member of the Berkeley law faculty. Riesenfeld had been Counselor on International Law in the State Department when I served in the Office of the Legal Adviser and pointed me toward research materials on countermeasures in the *Air Services* arbitration and the *Hostages* case.

States Claims Tribunal has served as one forum for potential resolution;<sup>9</sup> peaceful settlement of disputes through arbitration and adjudication in many other contexts;<sup>10</sup> and the international law applicable to (and generated by) United Nations organs, including the Security Council,<sup>11</sup> the ICJ, and the UN International Law Commission.<sup>12</sup> Over the years, we joined together in many conferences and collaborative projects to debate and write about these and other interconnected themes and intractable problems—for example, the theory and practice of harnessing the collective authority of the Security Council in order to compensate victims of aggression or to control weapons of mass destruction.<sup>13</sup>

I will return to Caron's enduring contributions to problems of legitimacy throughout this essay, which proceeds as follows. Part I offers definitions and conceptual tools for understanding "legitimacy" and the other terms in the title—"economic sanctions," "countermeasures," and "wrongful acts"—illustrated with examples from economic sanctions against Iran and Iraq. Part II then highlights controversies over legitimacy of economic sanctions against violations of international law, as framed by the decades-long debates resulting in the adoption by the UN International Law Commission in 2001 of Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA or ILC Articles),<sup>14</sup> which deal in Articles 49-54 with countermeasures. The last Part concludes.

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9. See David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104 (1990).

10. See David D. Caron & Galina Shinkaretskaya, *Peaceful Settlement of Disputes Through the Rule of Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA, at 309 (Lori F. Damrosch, Gennady Danilenko & Rein Müllerson eds., 1995).

11. See David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993) [hereinafter Caron, *Legitimacy*]. Versions of the Legitimacy article were presented at a conference in Moscow in 1992 (of which I was co-organizer); see 87 AM. J. INT'L L. 552, 552 n. \*, and at a panel I chaired at the annual meeting of the American Society of International Law in 1993 (see David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC'Y INT'L L. PROC. 303 (1993)). Rereading the article at a quarter-century's distance brings back a vivid memory of taking the night train with David from Moscow to Minsk at a time of great turmoil within the post-Soviet geographic space, yet also at a time of optimism that persistent Cold War divisions within the Security Council might finally be relegated to history.

On the continuing relevance of Caron's original ideas to problems of Security Council authority in the current period, see Jean Galbraith, *Ending Security Council Resolutions*, 109 AM. J. INT'L L. 806, 806-07, 812-13 (2015) (engaging with Caron's proposals for termination mechanisms for Security Council resolutions, in the subsequent context of suspending and terminating Council-mandated sanctions against Iran).

12. See David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857 (2002) [hereinafter Caron, *State Responsibility*].

13. See, e.g., our respective contributions to a symposium issue on *The Impact on International Law of a Decade of Measures Against Iraq*: David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183 (2002); Lori F. Damrosch, *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq "Precedent"?*, 13 EUR. J. INT'L L. 305 (2002).

14. G.A. Res. 56/83, Articles on Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) [hereinafter ARSIWA].

Parts I and II draw on illustrative controversies over economic sanctions as countermeasures, focusing in particular on two pending cases between Iran and the United States, involving U.S. economic sanctions against Iran. The U.S. sanctions respond to what the United States has alleged to be Iran's sponsorship of terrorist acts and noncompliance with obligations concerning nuclear nonproliferation. Iran denies the U.S. allegations and insists, to the contrary, that the United States has violated treaty obligations owed to Iran.

Between 2016 and 2018, Iran brought two applications to the ICJ against the United States under a 1955 Treaty of Amity, Economic Relations, and Consular Rights,<sup>15</sup> claiming that the United States has violated Iran's treaty rights through economic sanctions. In the first case, *Certain Iranian Assets*, which involves measures of execution against Iranian state assets under the "terrorism exception" to the U.S. Foreign Sovereign Immunities Act (FSIA),<sup>16</sup> the United States had designated David Caron to serve as an ICJ judge *ad hoc* (in lieu of the judge of U.S. nationality who sits as an elected member of the Court but had recused herself from the case in question).<sup>17</sup> The second case, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*,<sup>18</sup> involves economic sanctions imposed by the United States against Iran in 2018, following the U.S. withdrawal in May 2018 from a 2015 multilateral agreement, the Joint Comprehensive Plan of Action,<sup>19</sup> which had suspended most nonproliferation-related sanctions against Iran as of January 2016. Although the second case was brought after Caron's death, the issues it raises resonate with longstanding themes in his scholarship on legitimacy.

## I. TERMINOLOGY AND CONCEPTS: LEGITIMACY, ECONOMIC SANCTIONS, COUNTERMEASURES, AND WRONGFUL ACTS.

### A. Legitimacy

As Bernard Oxman has pointed out in his contribution to the present symposium,<sup>20</sup> the fundamental scholarship of Thomas Franck is a reference point for any treatment of legitimacy in international law.<sup>21</sup> According to Franck's theory of legitimacy, rules of international law vary in their capability to attract compliance in relation to several indicators, including the extent to

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15. 8 U.S.T. 899, 284 U.N.T.S. 93.

16. 28 U.S.C. § 1605A.

17. *Certain Iranian Assets* (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. (Feb. 13), para. 4.

18. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Iran v. U.S.), Provisional Measures, 2018 I.C.J. (Oct. 3).

19. Joint Comprehensive Plan of Action, S.C. Res. 2231 (2015), Annex A.

20. Bernard H. Oxman, *Nonparticipation and Perceptions of Legitimacy*, 46 ECOLOGY L.Q. 81, 37 BERKELEY J. INT'L L. 235 (2019).

21. Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

which they operate within a coherent framework of principles of general applicability:<sup>22</sup>

Coherence legitimates a rule . . . because it provides a reasonable connection between a rule, or the application of a rule, to (1) its own principled purpose, (2) principles previously employed to solve similar problems, and (3) a lattice of principles in use to resolve different problems.<sup>23</sup>

Whereas Franck's theory is addressed to the legitimacy of rules from the point of view of voluntary compliance rather than coercive sanctions, Caron focused as well on the legitimacy of application of coercive power, whether by institutions authorized to act on behalf of an organized community or by other actors. Both Franck and Caron were concerned, among other questions, with legitimacy of process—in Franck's case, the "pedigree" by which a rule has been adopted; in Caron's case, such attributes as representativeness, transparency, and fair procedure.<sup>24</sup> Beyond process considerations, both Franck and Caron also emphasized substantive justice as a component of legitimacy. Their legitimacy frameworks can guide our inquiry into the legitimacy of economic sanctions as countermeasures against violations of international law.

## B. Economic Sanctions

### 1. General Considerations, with Iran Sanctions Example

As a predicate for evaluating legitimacy of economic sanctions, I give a functional definition first and then illustrate problems of economic sanctions with examples drawn not only from economic sanctions against Iran, but also from the Iraq sanctions of 1990-2003.

For definitional purposes, I use the term "economic sanctions" generically to refer to any type of economic detriment (as distinct from diplomatic or military sanctions, or from positive rewards or incentives), which could be imposed against a target State by another State acting unilaterally, by a group of States in coordination, or by a multilateral institution like the United Nations.<sup>25</sup> Article 41 of the UN Charter gives an illustrative catalogue: "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication." Examples from U.S. legislation could include export or import controls, blocking of assets, suspension or termination of foreign assistance, and denial of access to programs such as government credit

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22. The property of coherence identified in the text is one of Franck's four indicators of legitimacy: the others are determinacy, symbolic validation, and adherence.

23. Franck, *supra* note 21, at 147-48; see also Caron, *Legitimacy*, *supra* note 11, at 556 n.19, 559 n.28 (on preserving belief in legitimacy of institutions as well as rules).

24. Caron & Morris, *supra* note 13, at 190-91 (one means of assessing legitimacy is to inquire into procedural fairness).

25. For taxonomy and examples, see Damrosch, Hague Lectures, *supra* note 7, at 43-54.

or loan guarantee programs.<sup>26</sup> One of the most comprehensive recent programs of U.S. economic sanctions is the Iranian Transactions and Sanctions Regulations, as re-imposed and strengthened in May through November of 2018. The Iranian Transactions and Sanctions Regulations broadly prohibit almost all transactions with Iran and threaten negative consequences for U.S. and third-country nationals and companies who engage in such dealings.<sup>27</sup>

While many economic sanctions are imposed for reasons of foreign policy rather than as instruments of law enforcement, the sanctions of concern for this essay have the purpose of enforcing international law by inducing the target to come into compliance with its legal obligations. Economic sanctions for enforcement purposes are measures taken by a State that perceives itself aggrieved by a breach of international law to affirm its own rights, impose costs on the alleged violator, deter future violations, and potentially provide a means to make itself whole, for example by sequestering funds from which reparations for injuries could ultimately be paid. The economic sanctions applied by the United States against Iran during the hostage crisis of 1979-1981 were enforcement measures in this sense.<sup>28</sup>

Until the 1990s, most applications of economic sanctions were essentially unilateral in character, albeit occasionally undertaken by like-minded States acting in cooperation with each other or through an available regional institution. Starting from 1991, the UN Security Council opened a new era in sanctions practice, with comprehensive sanctions adopted to respond to the situations in Iraq, former Yugoslavia, and Haiti in the early 1990s, as well as arms embargoes and other limited sanctions for certain other situations. Thereafter the Council refined its sanctions practice toward more precisely targeted sanctions for numerous other situations, taking account of lessons learned from the painful experiences of the first major sanctions episodes.

A large and growing literature in several disciplines (international relations, international political economy, and ethics, as well as law) now addresses the effectiveness and the legitimacy of unilateral and collective economic sanctions, in specific cases and in general.<sup>29</sup> Particular sanctions episodes, especially if prolonged over an extended period of time with adverse humanitarian effects on

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26. See, e.g., Arms Export Control Act of 1976, Pub. L. 94-329, 90 Stat. 729; International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq.; Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151 et seq.

27. 31 C.F.R. § 560 (2019). See discussion below.

28. The enforcement dimension of the 1979-1981 Iran sanctions and subsequent measures through the mid-1990s is discussed in Damrosch, Hague Lectures, *supra* note 7, at 78-91.

29. On effectiveness, the leading reference work is Gary Clyde Hufbauer, Jeffrey Schott & Kimberly Ann Elliott, *ECONOMIC SANCTIONS RECONSIDERED* (3rd ed. 2007). On the long-running efforts to influence Iranian behavior through the application of U.S. economic sanctions, see Richard Nephew, *THE ART OF SANCTIONS: A VIEW FROM THE FIELD* (2018). On legality and legitimacy of sanctions from various perspectives, see generally *Symposium on Unilateral Targeted Sanctions*, 113 AM. J. INT'L L. UNBOUND 130 (2019).

the population of the target, have been widely criticized as illegitimate—if not in initial conception or objectives, then in their indiscriminate and excessive application to the detriment of civilians who bear little or no responsibility for the wrongdoings of regimes and are powerless to bring about changes in the behavior of elites. The collective sanctions in place against Iraq from 1990 until 2003 exemplify these legitimacy concerns.

## 2. *Iraq Sanctions 1990-2003: UN Measures*

Robust sanctions imposed by the UN Security Council in response to Iraq's invasion of Kuwait in August of 1990,<sup>30</sup> which were maintained in the April 1991 ceasefire,<sup>31</sup> had legitimate objectives—to induce Iraq to withdraw from Kuwait; to put in place measures to secure the reparation of injuries unlawfully inflicted by Iraq; to ensure the elimination of its programs for weapons of mass destruction—but the prolongation of draconian sanctions for more than twelve years produced not only a humanitarian disaster but a crisis of legitimacy.

Toward the end of the Iraq sanctions regime, David Caron—who was serving at the time as a commissioner of the United Nations Compensation Commission (UNCC) established to adjudicate claims of individuals, companies, and governments directly injured by Iraq's invasion of Kuwait—co-authored an article responding to unease expressed in some quarters that the UNCC, notwithstanding its compensatory purpose, “should instead be viewed as a part of the system of international economic sanctions.”<sup>32</sup> After reviewing prior work (including his own) on the meaning of the term “sanction” in international law,<sup>33</sup> Caron and his co-author distinguished between a mechanism created to award compensation and one designed to mete out retribution or punishment. The UNCC, being the former rather than the latter, “is not an economic sanction as that term is understood in international relations and law.”<sup>34</sup> Caron's analysis is persuasive in respect of the UNCC, a rare institution that came into existence to implement a compensation program resulting from Security Council sanctions but not itself an enforcement organ exerting coercive power against Iraq.

## 3. *U.S. Iraq Sanctions and the State Terrorism Exception to Sovereign Immunity*

The second military operation against Iraq in spring 2003 led to a new legal regime and the lifting of all UN sanctions and most unilateral sanctions against

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30. S.C. Res. 661 (Aug. 6, 1990); S.C. Res. 665 (Aug. 25, 1990); S.C. Res. 670 (Sept. 25, 1990).

31. S.C. Res. 687 (Apr. 3, 1991).

32. Caron & Morris, *supra* note 13, at 183.

33. *Id.* at 185 n.4.

34. *Id.* at 185.

Iraq.<sup>35</sup> U.S. economic sanctions against Iraq had been imposed under a number of U.S. laws and regulations, including those applicable to state sponsors of terrorism—a designation given to Iraq in September 1990, a few weeks after its invasion of Kuwait. One effect of that designation was to lift Iraq’s immunity from suit in U.S. courts under the “terrorism exception” to the FSIA,<sup>36</sup> and several lawsuits against Iraq under that exception were pending in early 2003.<sup>37</sup> After the U.S.-led coalition initiated military action in 2003, which soon resulted in the collapse of Saddam Hussein’s regime and a period of occupation by coalition forces, U.S. policy objectives shifted toward the stabilization and reconstruction of Iraq. With that policy transformation, the longstanding U.S. economic sanctions against Iraq were no longer useful, and Congress and the Executive moved speedily to lift them.

Among other developments, Congress enacted a measure authorizing the President to “make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism”—in other words, to lift the application of terrorism sanctions to Iraq.<sup>38</sup> The President exercised that authority in May 2003.<sup>39</sup> However, a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit concluded that the authority conferred by the act did not extend to restoration of the sovereign immunity that Iraq had been denied during the period of its designation as a state sponsor of terrorism.<sup>40</sup> Congress in the meantime conferred on the President further authority to waive Iraq sanctions, which was promptly and fully exercised; and Iraq asked the Supreme Court to resolve whether the terrorism exception to sovereign immunity was among the “sanctions” that had now been effectively lifted by a combination of congressional and presidential action. In a passage of relevance to the present inquiry into definition of “sanctions,” the Court observed:

Allowing lawsuits to proceed certainly has the extra benefit of facilitating the compensation of injured victims, but the fact that [the terrorism exception] targeted only foreign states designated as sponsors of terrorism suggests that the law was intended as a sanction, to punish and deter undesirable conduct. Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of munitions (both of which are explicitly mandated by § 586F(c) of the Iraq Sanctions Act). The application of this sanction affects

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35. S.C. Res. 1483 (May 22, 2003) (lifting UN sanctions); S.C. Res. 1546 (June 8, 2004) (lifting occupation regime).

36. See 28 U.S.C. § 1605A.

37. *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (two cases brought by different sets of claimants, involving (1) American nationals who alleged they had been captured and mistreated by Iraqi officials during the 1991 Gulf War, and (2) children of Americans allegedly abused by Saddam Hussein’s regime in the aftermath of that war).

38. Emergency Wartime Supplemental Appropriations Act, 117 Stat. 559, § 1503 (2003).

39. 68 Fed. Reg. 26459 (2003).

40. *Acree v. Iraq*, 370 F.3d 41, 48 (D.C. Cir. 2004).

the jurisdiction of the federal courts, but that fact alone does not deprive it of its character as a sanction.<sup>41</sup>

We will return later to the application of the terrorism exception to sovereign immunity, in the context of the pending dispute between Iran and the United States over the import of that exception for lawsuits against Iran and execution of judgments against Iranian assets in the United States.<sup>42</sup>

#### 4. *Economic Sanctions at the ICJ*

Within the last few years, several legal disputes involving economic sanctions have reached the ICJ. As already noted, Iran has initiated two such cases against the United States, the first involving sovereign immunity in 2016, and the second involving the sanctions re-imposed or added when the United States withdrew from the Joint Comprehensive Plan of Action in 2018. Iran's application in the latter case asks the Court to order the United States to terminate all such sanctions. In its provisional measures order of October 3, 2018, the Court for unexplained reasons puts the term "sanctions" between quotation marks dozens of times throughout the decision (without defining it, but apparently intending to refer to all the measures of which Iran complains in its application).<sup>43</sup> Still another case, outside the scope of the present essay, has been brought by Qatar against the United Arab Emirates, claiming that an economic embargo and other coercive measures imposed against Qatar by the UAE and other Gulf States violate rights of Qatar and Qatari nationals under a treaty prohibiting racial discrimination.<sup>44</sup>

#### C. *Countermeasures*

The focus of this essay is only a subset of the broad category of economic sanctions described in the prior section—namely, those economic sanctions constituting countermeasures for internationally wrongful acts. The UN International Law Commission, in its extensive treatment of State responsibility in international law,<sup>45</sup> has clarified the legal concept of countermeasures under the heading of "Circumstances Precluding Wrongfulness": that is, an act that would otherwise be wrongful toward another State is not considered wrongful if and to the extent that it is taken against that State in order to induce it to comply with its own obligations and furthermore comports with the limits and conditions on countermeasures set forth in the chapter of the ILC Articles addressed to that

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41. *Republic of Iraq*, 556 U.S. at 859-60.

42. *Certain Iranian Assets*, *supra* note 17.

43. *Certain Iranian Assets*, *supra* note 17, ¶¶ 16, 18-22, 31, 33, 37, 55-61, 72, 80, 84, 86.

44. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. U.A.E.), Provisional Measures, 2018 I.C.J. (July 23).

45. ARSIWA, *supra* note 14.

topic.<sup>46</sup> The ILC's articulation of those limits and conditions will be addressed in Part II below.

The conceptualization of countermeasures in the ILC Articles has replaced the prior terminology of "reprisal" in international law. Earlier generations maintained a traditional distinction between "reprisals" and "retorsion," according to which "retorsion" is an unfriendly (but not otherwise illegal) act taken in response to an unfriendly or illegal act; "reprisal" is an otherwise illegal act rendered justifiable because of a prior violation of legal obligation on the part of the State to which it is directed.<sup>47</sup> Economic sanctions as discussed in the prior section may be unfriendly but are not necessarily otherwise illegal ("retorsion"); or they may be otherwise illegal but justified as a response to a prior illegal act ("reprisal" in the earlier terminology; "countermeasures" in contemporary usage). We are concerned here only with the justification as countermeasures of otherwise illegal acts, aimed at restoring a state of legality by imposing lawful consequences in response to prior illegal acts.

#### D. *Wrongful Acts*

The ILC Articles likewise provide a convenient starting point for the concept of internationally wrongful acts. Article 2 specifies:

*Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

Breaches of an international obligation can arise from customary international law—for example, the obligation of States to refrain from sponsoring terrorism—or from treaties—for example, the obligation of States parties to treaties on terrorism or nonproliferation to comply with the obligations thereunder, or the obligation of members of the United Nations to carry out decisions of the Security Council or to comply with judgments of the International Court of Justice in accordance with the UN Charter.<sup>48</sup> As the ILC has underscored, "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."<sup>49</sup>

We turn now to the analysis of economic sanctions as countermeasures for internationally wrongful acts, with reference to the criteria developed by the ILC for appraisal of countermeasures.

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46. ARSIWA, *supra* note 14, arts. 22, 49-54.

47. Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 185-86 (1991).

48. U.N. Charter arts. 25, 94.

49. ARSIWA, *supra* note 14, art. 12.

## II. COUNTERMEASURES UNDER THE ILC'S CRITERIA

A. *The Status and Authority of the ILC Articles*

Before taking up the specific criteria that the ILC has elaborated as limits and conditions on countermeasures, it is necessary to place in context the status and authority of the ILC Articles, with reference to David Caron's insightful treatment of those questions in an influential symposium piece.<sup>50</sup> By contrast to other sets of articles formulated by the ILC over the years, many of which became the working drafts for intergovernmental negotiations leading to widely adopted multilateral treaties,<sup>51</sup> the ILC Articles were never put forward as a draft treaty, nor was a diplomatic conference ever convened at which States might have negotiated over their specific terms. Although lacking formal treaty status, they have enjoyed a high degree of authority in their reception by the ICJ and other international tribunals, which were already citing early drafts of what would become the Articles even prior to their final adoption and continue to do so. While acknowledging the great influence that the Articles had already had and would continue to have in international jurisprudence, Caron cautioned against treating the text of the ILC Articles as if it were a treaty: it is not. Attempting to parse the words of the Articles as if they were treaty terms would lead to the double errors of "false concreteness" and "false consensus." He expressed concern over the tendency of international tribunals to take the Articles as a shortcut, without subjecting their formulations to critical scrutiny or making serious inquiries into whether their formulations reflect state practice as it actually is, rather than what scholars and arbitrators or judges might wish it to be.<sup>52</sup> I share his concern.

Nowhere is the problem more visible than with the Articles' treatment of criteria for legitimate countermeasures. In its efforts to formulate propositions expressing limits on unilateral self-help measures, the ILC endeavored to strike a balance between arguably irreconcilable positions. On the one hand were the views of States that understood countermeasures as a necessary instrument of enforcement against violators, while on the other hand were the desires of others to place significant limitations on self-help remedies, which many saw as a tool too often abused when exercised by powerful States against weaker ones. The countermeasures articles thus embody a series of uneasy compromises, which in

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50. See Caron, *State Responsibility*, *supra* note 12, in a symposium of the American Journal of International Law published the year after the ILC adopted ARSIWA and forwarded ARSIWA to the UN General Assembly, which took note of the Articles and commended them to the attention of states. In the same symposium, and of particular interest for the present inquiry into countermeasures, see David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817 (2002).

51. E.g., the Vienna Convention on the Law of Treaties, to which ARSIWA is often compared.

52. See, e.g., Caron, *State Responsibility*, *supra* note 12, at 861 (the way that tribunals are treating ARSIWA as if it were a treaty will result in the Articles "inappropriately and essentially accorded the authority of a formal source of law").

some respects appear to go beyond the limits actually observed in state practice.<sup>53</sup> While some of the criteria are well-founded at least in principle, others call for closer scrutiny. For illustration, I turn to the pending issues in dispute between Iran and the United States, as evidenced by the *Certain Iranian Assets* and *Alleged Violations of the 1955 Treaty of Amity* cases.

*B. Denial of Sovereign Immunity as a Countermeasure Under the ILC Criteria*

Recall that ever since 1984, in the aftermath of the 1983 bombing of the U.S. barracks in Beirut, Iran has been designated by the U.S. Secretary of State as a state sponsor of terrorism, thereby becoming subject to a variety of economic sanctions under U.S. antiterrorism laws. Among other consequences, since the adoption more than twenty years ago of a “terrorism exception” to the FSIA,<sup>54</sup> States designated as sponsors of terrorism are denied the immunities from suit and execution to which they would otherwise be entitled. Several States, including Iraq and Libya, that had formerly been so designated have had their sovereign immunities restored after the Secretary of State was able to conclude that they were no longer engaged in state sponsorship of terrorism.<sup>55</sup> Iran, however, continues to be viewed as an active state sponsor of terrorism and thus falls under the full range of U.S. antiterrorism sanctions, including the removal of otherwise-applicable sovereign immunities, which the U.S. Supreme Court has treated as a “sanction” in the context of the now-suspended Iraq sanctions.<sup>56</sup>

Plaintiffs claiming to be victims (or family members of victims) of terrorist acts sponsored by Iran have invoked the FSIA’s terrorism exception quite a few times, winning default judgments against Iran amounting to hundreds of millions of dollars. To facilitate their ability to collect such judgments against assets of Iran located in the United States, Congress made further amendments to the FSIA, easing the FSIA’s provisions on immunity from execution (separate from the terrorism exception). The U.S. Supreme Court rejected Iran’s challenge to the constitutionality of the latter amendments in April 2016 in *Bank Markazi Iran v. Peterson*.<sup>57</sup> A few weeks later, Iran initiated the *Certain Iranian Assets* case at the ICJ, claiming (as noted in the Introduction) that by depriving it of sovereign

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53. See Damrosch & Murphy, *supra* note 7, at 482-83 (expressing doubt that the articles on countermeasures actually reflect state practice in certain respects).

54. Enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 and codified at 28 U.S.C. § 1607 from 1997 to 2008; currently codified at 28 U.S.C. § 1605A.

55. On the removal of Iraq’s designation and restoration of its immunity, see *Republic of Iraq v. Beatty*, discussed *supra* note 37, text at notes 37-41. On Libya’s renunciation of terrorism and settlement of litigation brought by the families of victims of the Pan Am 103 explosion over Lockerbie, Scotland, see Jonathan B. Schwartz, *Dealing with a “Rogue State”*: *The Libya Precedent*, 101 AM. J. INT’L L. 553 (2007).

56. See discussion of *Republic of Iraq v. Beatty*, *supra* note 37.

57. *Bank Markazi Iran v. Peterson*, 578 U.S. \_\_\_\_ (2016).

immunity and subjecting its assets to execution, the United States had violated Iran's treaty rights.

When the Court reaches the merits of *Certain Iranian Assets*, it may well be confronted with questions of first impression concerning the potential justification of alleged U.S. treaty violations as countermeasures against prior wrongful acts of Iran. Although the United States has interposed several objections to the jurisdiction of the Court and admissibility of the claims, the Court's ruling on preliminary objections has upheld jurisdiction at least in part; and thus the parties will complete their briefing on the merits and the Court will eventually be called upon to rule on Iran's claim on the merits and any defenses that the United States may put forward at the merits phase. Several such defenses have already been suggested in the preliminary pleadings, though issue has not yet been joined on a potential countermeasures defense. In essence, the countermeasures defense would take the following form: assuming *arguendo* that the United States had violated rights to which Iran was entitled under the Treaty of Amity, any such violations were justified as lawful countermeasures to Iran's prior wrongful acts.

Commentators writing about the Supreme Court's decision in *Bank Markazi Iran v. Peterson* and the pending *Certain Iranian Assets* case at the ICJ have speculated about the viability of a potential countermeasures defense to Iran's claims and have not discerned much prospect that such a defense could be successful. Naturally enough, the starting point for such inquiries has been the articulation of limits on countermeasures in the ILC Articles. Two examples will suffice. In a short blog post, one commentator asserted:

Under international law, to set aside immunity from execution, without prejudice to the protection of diplomatic or consular properties, a State can only resort to a countermeasure as defined in the 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts. Assuming that the US really was an injured State and could act in this way, its distribution of frozen assets would clearly infringe the law of countermeasures by preventing the reversibility of the measure.<sup>58</sup>

In a more detailed treatment, two co-authors alluded to the reversibility issue and other possible objections to a countermeasures defense in the following terms:

Alternatively, the US might argue that its measures were justified as a countermeasure taken in response to internationally wrongful acts of Iran. Even if terrorist groups' actions are not attributable to Iran, financial and material support to them probably amounts to a prohibited intervention in the internal affairs of other States. However, apart from procedural rules, that

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58. Victor Grandaubert, *Is there a place for sovereign immunity in the fight against terrorism? The US Supreme Court says 'no' in Bank Markazi v. Peterson* (May 19, 2016), available at <https://www.ejiltalk.org/is-there-a-place-for-sovereign-immunity-in-the-fight-against-terrorism-the-us-supreme-court-says-no-in-bank-markazi-v-peterson/>.

defence might prove problematic on the requirement that the effects of countermeasures should be, as far as possible, reversible. Again, the issue lies with allowing execution into the assets of Iranian entities. While financial damages are generally considered to be reversible, this might be doubtful with regard to execution against blocked real property.<sup>59</sup>

Now, what is the basis for the contention that countermeasures must (per the first author), or at least should (per the second ones), be reversible? The ILC expressed the idea of reversibility in Article 49 of ARSIWA, quoted in full in the footnote.<sup>60</sup> The key concepts are (with emphasis added): (1) that the object of countermeasures is “to *induce*” a wrongdoing State to comply with its obligations, thus not to punish it (nor to coerce it beyond the goal of bringing about compliance); (2) that the measures “are limited to the non-performance *for the time being*” of the obligations of the State taking countermeasures, thus they are to be temporary; and (3) that the measures “shall, *as far as possible*, be taken in such a way as to permit the resumption of performance of the obligations in question”—that is, they are to be reversible, though this is a relative rather than absolute condition.

In the application of the ILC’s articulated “limits” to the measures at issue in *Certain Iranian Assets*, we see the prescience of David Caron’s warning against trying to parse the words of the ILC Articles as if they were treaty obligations, when they manifestly do not enjoy the same type of authority as treaty requirements. The ILC may have provided sensible guidance for appraisal of degrees of “legitimacy” of countermeasures, using the quoted term in a sense that blurs the line between moral-political evaluation and legality *stricto sensu*. It did not, and could not have, laid down hard-and-fast rules by which to judge whether exceptional measures denying treaty rights to a State responsible for terrorist acts are legally prohibited.

### C. Human Rights and Humanitarian Limitations on Countermeasures

The ILC Articles quite properly underscore that countermeasures are illegitimate to the extent that they inflict harm on human beings who are not

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59. Philipp Janig & Sara Mansour Fallah, *Certain Iranian Assets: The Limits of Anti-Terrorism Measures in Light of State Immunity and Standards of Treatment*, 59 GERMAN Y.B. INT’L L. 355, 388 (2016) (footnotes omitted; citations include ARSIWA art. 49(3) and James Crawford, *Counter-Measures as Interim Measures*, 5 EUR. J. INT’L L. 65, 68 (1994)).

60. *Article 49*

*Object and limits of countermeasures*

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

themselves committing internationally wrongful acts. This principle is expressed in Article 50(1), quoted in full in the footnote.<sup>61</sup> It finds an echo in the ICJ's ruling on Iran's request for provisional measures in the *Alleged Violations* case, which is not strictly speaking a countermeasures case (or at least the issues have not yet been framed that way) but entails similar legitimacy considerations. There the Court unanimously found that the requirements for prescribing urgent measures to prevent irreparable injury under ICJ jurisprudence had been met, and it ordered the United States to put in place humanitarian exceptions to its Iranian sanctions program, in particular with respect to foodstuffs, medicines, and aircraft spare parts. Even if, as the United States asserts (and Iran denies), its economic sanctions are necessary responses to Iranian noncompliance with nonproliferation obligations, measures interfering with basic human needs like food, medicine, and transportation safety are illegitimate, thereby justifying the ICJ in making a binding order requiring the United States to refrain from such measures.

#### CONCLUSION: COHERENCE AND LEGITIMACY

The overview of legitimacy theories in the Introduction took note of Tom Franck's persuasive claim that in order for rules to be perceived as legitimate and therefore attract compliance, they should cohere with a lattice of principles connecting them to other rules. In that sense, certain of the ILC criteria for appraisal of countermeasures—for example, the requirement of compliance with human rights, humanitarian obligations, and peremptory norms—are principled and therefore legitimate. For similar reasons, the criterion of proportionality coheres with numerous other contexts in which responses to illegal acts must be proportional to the underlying illegality—for example, the requirement that justified force in self-defense must be proportional to the unlawful attack to which it responds.<sup>62</sup> The legitimacy of economic sanctions as countermeasures for internationally wrongful acts properly depends on coherence with principles in the deepest senses. Some of the U.S. sanctions against Iran may meet those tests, but others surely do not.

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61. *Article 50*

*Obligations not affected by countermeasures*

1. Countermeasures shall not affect:

- (a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) Obligations for the protection of fundamental human rights;
- (c) Obligations of a humanitarian character prohibiting reprisals;
- (d) Other obligations under peremptory norms of general international law.

62. For the requirement of proportionality in countermeasures, see ARSIWA, *supra* note 14, art. 51.

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# International Courts and Democratic Backsliding\*

*Tom Ginsburg*

## INTRODUCTION

In his 2017 Charles N. Brower Lecture on International Dispute Resolution at the Annual Meeting of the American Society of International Law, David Caron considered the role of international adjudicators in dealing with the various social functions that are implicated by courts.<sup>1</sup> Drawing on ideas associated with Martin Shapiro, he noted a fundamental distinction between the *functions* of courts—which scholars have characterized as including lawmaking, social control, legitimation, and regime construction, among many others—and the *task* of adjudicators, whose core job is resolving the dispute before them on the basis of the relevant law. There is a great temptation, as Shapiro noted, for adjudicators to take broader social functions into account, but there are also great risks when there is a misalignment between these functions and the limited task of dispute resolution, in which judges are to some extent agents of the parties. Caron urged adjudicators to focus on the *task* rather than the *functions*, arguing that only by doing so could they preserve the integrity of the institutions they inhabit. It is a call, in some sense, for professionalism, self-awareness, and humility, virtues David embodied but which are in painfully short supply today.

Caron's paradigm was a classical one of which he was fond, and the world he inhabited was the classic international law domain of interstate dispute resolution. Like Judge Thomas Buergenthal, David critiqued dicta in which the International Court of Justice expressed its sympathy for human rights victims, and urged the court to focus on the immediate legal task at hand.<sup>2</sup> This seems correct to me, especially when coming from a dispute resolution perspective. But we must also recognize that in some fields, the task of judges is not adjudicating between sovereign equals, but rather explicitly developing the law. Human rights

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\* In Memory of David Caron

1. David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC'Y INT'L L. PROCEEDINGS 231, 231 (2017).

2. *Id.* at 237.

law is one such area in which the law itself is open-ended and often vague. The job of judges is not just to adjudicate, but rather to develop the law and to make sure it tracks evolving understandings of rights. In such cases, the task and the function of judges tend to converge.

In this Article I examine one specific function of international courts, namely the promotion, support, and disciplining of democracy. It might seem odd to consider this as a kind of core function of international law, which, as classically defined, does not inquire into the internal political or governance arrangements of states.<sup>3</sup> Yet it is also the case that the expansion of international institutions, including courts, has typically occurred at moments of profound democratization, namely after World War II and the Cold War. While not all international institutions are democratic or liberal ones by any means, it is a longstanding view among international relations scholars that democracies are more likely than nondemocracies to cooperate across borders, an idea that can be traced all the way back to Immanuel Kant.<sup>4</sup> Because such governments would seek to rule justly, in Kant's view, they would cooperate to create international organizations that could extend just rule, and even "Perpetual Peace" (the title of Kant's essay) outside their own borders.<sup>5</sup>

As a preliminary matter, my definition of democracy is a simple one, drawn from my work with Aziz Z. Huq: government characterized by competitive elections, in which the modal adult can vote and the losers concede;<sup>6</sup> in which a minimal set of rights to speech, association, and the ability to run for office are protected; and in which the rule of law governs administration.<sup>7</sup> So defined, it is clear that some kinds of international institutions, chiefly but not limited to international human rights agreements, are designed in part to safeguard democracy. The question is whether they can actually do so. In David Caron's sense, I am suggesting that for some courts, the *task* is to preserve democracy, and they should engage in it. But what are their capacities to do so?

This Article will examine how international courts have done in securing the democratic gains of national polities. This is, I hope, a timely inquiry for at least a couple of reasons. Most notably, the rich industrial democracies of the world and many other countries have been facing a rise in populism, which has taken as its primary target the international institutions associated with

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3. See, e.g., U.N. Charter art. 2(4) ("[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state").

4. See generally IMMANUEL KANT, PROJECT FOR A PERPETUAL PEACE (1796); ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2018) (examining Kantian constitutional theory and the European system of right protection).

5. See KANT, *supra* note 4.

6. See ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 10 (1991) ("[d]emocracy is a system in which parties lose elections").

7. See TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 10 (2018).

globalization. European populists rail against Brussels; Venezuelans attack the Inter-American Court of Human Rights in Costa Rica. Donald Trump and Steve Bannon criticize “globalism.”<sup>8</sup> The antiglobalist backlash is, very largely, a backlash against the imposition of norms that originate from outside the territorial nation state, to be deployed by cosmopolitan elites at the expense of the decisional freedom of the sovereign people. Shadowy agreements made in shadowy foreign capitals are soft targets for political demagogues, and international institutions have thus far shown a mixed record at best in being able to defend themselves.

More broadly, as Huq and I have documented, democracy is in trouble in many kinds of countries.<sup>9</sup> The number of democracies in the world peaked in 2006, and has been steadily declining, a trend that may even be accelerating in the last couple of years.<sup>10</sup> Further, this process is proceeding through what we call erosion, a series of small and incremental steps that, on their own, may appear innocuous but add up to qualitative change.<sup>11</sup> Will international law facilitate or retard democratic decline? How have international courts handled the challenges of maintaining democracy? If international law is mainly a project of democracies, and we are entering an increasingly illiberal era, then we ought to be pessimistic about the prospects of international law. This invites an inquiry into whether the assumptions of liberal internationalism were in fact correct.

I proceed first in Part I by reminding the reader of the liberal theory of international law, which is the backdrop against which the inquiry proceeds. I then survey the developments in several supranational courts and legal regimes around the world. Part II looks at the European Court of Human Rights, and Part III considers the role of the various institutions of the European Union. Next, in Part IV, I look at the Inter-American Court of Human Rights and in Part VI examine the African Court on Human and Peoples’ Rights. I argue that, perhaps counterintuitively, it has been the African Court that may have been most successful to date, although I do not here develop a rigorous measure of success. The last Part draws preliminary conclusions.

## I. LIBERAL THEORY, INTERNATIONAL LAW, AND DEMOCRACY

Let us begin with a quick review of liberal theory as it has been applied to international law. Drawing on Kant’s ideas and the empirical studies of the

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8. See *Remarks to the United Nations General Assembly in New York City*, 2018 DAILY COMP. PRES. DOC. 4 (Sept. 25, 2018); see also David Weigel, *Steve Bannon’s Rise Points to Aggressive, Anti-‘globalist’ Trump Media Strategy*, WASH. POST (Nov. 14, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/11/14/steve-bannons-rise-points-to-aggressive-anti-globalist-trump-media-strategy/?utm\\_term=.c9f068760c5c](https://www.washingtonpost.com/news/post-politics/wp/2016/11/14/steve-bannons-rise-points-to-aggressive-anti-globalist-trump-media-strategy/?utm_term=.c9f068760c5c).

9. GINSBURG & HUQ, *supra* note 7, at 26–30.

10. *Freedom in the World 2018: Democracy in Crisis*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (last visited Nov. 21, 2018).

11. GINSBURG & HUQ, *supra* note 7, at 43–47.

“democratic peace” (the finding that democracies do not go to war against each other), some modern thinkers have suggested that international law is likely to be particularly effective among democratic governments. This theory (known as liberalism in international relations) has been most developed in studies of European integration, and indeed, in one article two leading scholars argued that Europe provided a model for the future of international law, whose successes might be imitated.<sup>12</sup> Europe’s democracies, scholars have argued, joined together in the period immediately after World War II not only to integrate their economies and provide regional security but also to protect their own democracies from backsliding.<sup>13</sup> The European Convention on Human Rights makes specific reference to democracy as a predicate for human rights protection.<sup>14</sup> The European Union, while focused on trade, also served to protect democracy by tying economies together. In recent decades, each of these two important regimes has deepened its formal commitments to democratic governance, and has contributed to the spread of democracy in the region and beyond.<sup>15</sup> In short, democracies in Europe used international law to deepen their cooperation, and in turn helped guarantee their own democratic survival and spread democratic norms. Trade, human rights, and democracy were all mutually reinforcing.

Liberal theory in the international sphere draws on the logic of “commitment.” By protecting fundamental rights and removing certain issues from ordinary politics, the logic goes, governments can focus on the kinds of issues for which ordinary politics are most effective.<sup>16</sup> This is captured by the famous metaphor of Ulysses and the masts: in order to ensure that he is not tempted by the harpies, Ulysses binds himself to the mast as he sails past, and in this way is able to achieve something by *limiting* his choices.<sup>17</sup> This function is central to the theory of constitutionalism, but also to the theory of international

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12. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 387 (1997) (discussing a “checklist” of imitable features from Europe).

13. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 6–8 (2010) (noting European Convention was focused on protecting democracy and to serve as an “alarm bell” against totalitarianism).

14. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] (“[r]eaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend . . .”).

15. See generally WOJCIECH SADURSKI, *CONSTITUTIONALISM AND THE ENLARGEMENT OF EUROPE* (2012) (discussing how the eastward enlargement of the Council of Europe and the European Union fostered the “constitutionalization” of both structures).

16. On constitutionalism, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 195–240 (Jon Elster & Run Slagstad eds., 1988); Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 637–38 (1991).

17. See generally JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1984) (expanding on the metaphor of Ulysses and limiting one’s choices).

legal commitments, whether it be in the field of human rights, investment law, or others.

In our context, consider a new democracy, like those that emerged in Eastern Europe after the fall of the Soviet Union. Led by young new leaders who support human rights, the government might promise not to commit the mistakes of the past. But even if their citizens believed them, why would they be confident that the *next* government that followed would be equally solicitous of human rights and democracy? After all, the only thing certain in democracy is that eventually the ruling party will be replaced. Faced with uncertainty about policy and the quality of local institutions, young democracies may seek to cooperate with each other so as to “lock in” their policies, and to make sure subsequent governments would not abuse their citizens.<sup>18</sup> Institutions like regional human rights courts were designed to impose costs on countries that deviated from promised protections. The costs could include financial penalties, reputational penalties, and even trade sanctions in extreme cases. The prospect of these costs, in turn, makes the promises more credible in the first place, allowing governments to achieve through international cooperation what they would be unable to on their own. The example above focuses on human rights, but the same logic applies to trade and investment.

Liberal theory had something of a teleological quality in terms of its predictions. As the number of democracies expanded, and as their economies became more integrated, liberal theory assumed that there would be further incentive for other states to join the club. The view suggested that international law would contribute to the expansion of democracy itself. When viewed from our current moment, this aspect of liberal theory appears naive. While the European Union soldiers on, it has faced unanticipated challenges in the past decade: financial crisis, waves of immigration, and populism that resulted in large part from the first two. The United Nations is in a financial crisis of its own, and seems to be reducing its footprint rather than expanding it.<sup>19</sup> The great international law project of the late 1990s, the International Criminal Court, is suffering from a backlash and defections. Several countries in Africa, for example, are threatening to withdraw from the jurisdiction of the Court.<sup>20</sup>

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18. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 NYU J. INT'L L. & POL'Y 707, 757 (2006); Andrew Moravcsik, *A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 537 (1997).

19. Conor Foley, *The UN's Own Financial Crisis*, GUARDIAN (July 22, 2009), <https://www.theguardian.com/commentisfree/2009/jul/22/un-budget-shortfall-aid>; Mattha Busby, *UN is Running out of Money and Member States Should Pay What They Owe, Warns Secretary-General*, INDEP. (July 27, 2018), <https://www.independent.co.uk/news/world/un-budget-deficit-united-nations-money-cash-flow-member-states-antonio-guterres-a8465906.html>.

20. See Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia*, 29 CRIM. L. FORUM 63, 63–64 (2018). See generally Philomena Apiko & Faten Aggad-Clerx, *The International Criminal Court, Africa and the African Union: What way forward?*, Maastricht: ECDPM Discussion Paper 201 (2016).

## II. THE EUROPEAN COURT OF HUMAN RIGHTS

We now turn to examining how several international and regional courts have dealt with the challenges of our current era to democracy. We first examine the European Court of Human Rights, the principal judicial organ of the Council of Europe, and the main adjudicative body responsible for interpreting the European Convention on Human Rights. It is perhaps not too much to say that, like many of the international legal institutions that are central to the postwar era, the European Convention system was designed as a defense of democracy. The Convention declares in its very preamble that rights and freedoms are best maintained by effective political democracy.<sup>21</sup> As Ed Bates has shown, the creation of the Convention in 1950 was very much designed to help protect against the collapse of democracy.<sup>22</sup> Not only was it hoped that the Convention would serve as a basic membership criteria for a club of European democracies, but it was, to quote Sir David Maxwell-Fyfe, “a beacon to those at the moment in totalitarian darkness and will give them hope of return to freedom.”<sup>23</sup> Originally without any required right of individual petition, the Convention was not a particularly ambitious instrument—instead it was a kind of programmatic statement of aspiration, in keeping with the early Cold War context of its founding. It was also initially characterized by significant disagreement about the nature of the rights it enshrined.

It took several years for the States parties to set up the European Court of Human Rights (ECHR). After it was finally set up in 1959, the Court and its allies in national contexts gradually constructed a regime of rights, characterized by Alec Stone Sweet as a “Cosmopolitan Legal Order.”<sup>24</sup> As more countries came to join the Council of Europe, the European Court built up its jurisprudence, primarily in dealing with established democracies. The end of the Cold War prompted many new entrants into the Council of Europe regime, and the ECHR played a critical role in the hands-tying promoted by liberal theory.<sup>25</sup>

Of course, to play a role in hands-tying, the European Convention regime required someone to determine when a violation of fundamental rights had actually occurred, and this was the role played by the Court. In determining when rights violations occurred, the Court did more than indirectly police democratic institutions; it also played a critical role in *defining* the space of democratic deliberation in the negative, namely through its jurisprudence on limitations of

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<https://ecdpm.org/publications/international-criminal-court-african-union/> (analyzing the current relationship between the ICC and the AU).

21. European Convention on Human Rights, *supra* note 14, at 5.

22. BATES, *supra* note 13, at 6–8.

23. *Id.* at 5.

24. *See generally* STONE SWEET & RYAN, *supra* note 4.

25. *Id.* at 100–01; *see also* SPREADING DEMOCRACY AND THE RULE OF LAW?: THE IMPACT OF EU ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS 27, 28 (Wojciech Sadurski et al. eds., 2006).

rights. Five core articles of the European Convention, namely those on the right to a public trial, private and family life, freedom of thought, conscience and religion, freedom of expression, and freedom of association, are explicitly subject to restrictions imposed by the state, to the extent the restrictions can be justified as necessary in a democratic society.<sup>26</sup>

In choosing these articles to be subject to a limitation clause, the Convention regime has allowed states some ability to experiment with restrictions on the rights, and has implicitly delegated to the Court the role of defining exactly what the outer limits of democracy are. Democracies cannot torture or deny anyone the right to fair trial, but other rights are subject to a kind of balancing between the rights of the individual and those of the society as a whole. In policing these boundaries, the European Court has come to utilize the proportionality test, which essentially requires democratic decision making to allow maximal possible freedom for the right-holder, while still advancing goals that are within the realm of democracy.<sup>27</sup> In so doing, the Court has also advanced the judicial role within national spheres that were not traditionally known for activist judiciaries. Since Article 13 of the Convention requires that everyone whose rights are breached has access to a judicial remedy, the ECHR has encouraged national courts to adopt their own proportionality analysis to evaluate restrictions. In this way, courts have become the boundary keepers of democracy throughout Europe.<sup>28</sup> Scholars believe that in doing so, they not only contribute to the functioning of the system, but the legitimacy of the European Court itself.<sup>29</sup>

Since its first case dealing with a limitations clause, the *Handyside* case of 1976,<sup>30</sup> the Court's jurisprudence in this area gives a large "margin of appreciation" to states to craft their own policies. The margin of appreciation is an idea that originated in German administrative law and has been applied by the Court in early cases dealing with states' invocation of emergency powers.<sup>31</sup> As it has developed, the margin of appreciation implies that there are core elements to a right, restriction of which will be disallowed. The Court's approach here is

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26. European Convention on Human Rights, *supra* note 14, at 9, 11–13.

27. See STONE SWEET & RYAN, *supra* note 4, at 103–08. See generally ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH* (2019) (presenting a theory of proportionality that explains why constitutional judges embraced it).

28. See STONE SWEET AND RYAN, *supra* note 4, at 105 (discussing the UK's adoption of the proportionality standard after reversals at the European Court and noting that "the [European] Court became a powerful agent in [the proportionality test's] diffusion into national legal orders").

29. See generally KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 143–76 (2015) (exploring the legitimacy of the Court and its judgments).

30. *Handyside v. United Kingdom*, App. no. 5493/72, A/24, Eur. Ct. H.R. 5 (1976).

31. *The Margin of Appreciation: Introduction*, COUNCIL OF EUROPE, [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp) (last visited June 6, 2019).

generally a comparative law inquiry into the standards of other states in the Convention regime.<sup>32</sup> In the *Sunday Times* case of 1979, the Court identified “a fairly substantial measure of common ground” in states’ approaches to enjoining publications.<sup>33</sup> Insisting that the necessity criterion was to be judged at the European level, the inquiry then became a normative exercise in comparative law, by which European-wide standards on which a consensus had been achieved were identified, and outliers could be disciplined.<sup>34</sup> As articulated in the representative case of *A, B & C v. Ireland*, the margin will be wider when “there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly when the case raises sensitive moral or ethical issues.”<sup>35</sup> Part of the logic of the comparative law exercise is that democratic standards are transnational: if most states in the system are able to achieve a policy goal without restricting the right, then presumably the restrictions are not “necessary in a democratic society.”<sup>36</sup>

Stone Sweet and Ryan have documented the implementation of the margin of appreciation under Articles 8 through 11 of the European Convention, and have shown that the Court has found violations in around half of cases.<sup>37</sup> They find that the European Court has gradually become more consistent over time in their analysis of consensus.

For the most part, the Court has expanded the protection of minority rights, including the rights of the Roma, homosexuals, and transsexuals.<sup>38</sup> It has been less willing to protect religious minorities or to discipline state displays of Christian symbols.<sup>39</sup> Gradually the Court has come to play a role in policing the practice of democracy itself, including the structure of separation of powers, particularly judicial independence. The ECHR has developed an extensive jurisprudence under the right to a fair trial enshrined in Article 6.<sup>40</sup> Some of these considerations go to rule of law principles, like a public hearing and a timely proceeding. Others go to the independence of the tribunal, vis-à-vis other branches of government and the parties themselves.<sup>41</sup>

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32. This idea was first articulated in Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium (Merits), App. No 1474/62, 11 Y.B. Eur. Conv. on H.R. 832 (1968).

33. *The Sunday Times v. United Kingdom*, 2 Eur. Ct. H.R. 245, ¶ 59 (1979).

34. *Id.* at ¶ 59.

35. *A, B & C v. Ireland*, 53 Eur. Ct. H.R. 429 (2010).

36. European Convention on Human Rights, *supra* note 14, at 9, 11–13. See STONE SWEET & RYAN, *supra* note 4, at 163.

37. STONE SWEET & RYAN, *supra* note 4, at 165.

38. *See id.* at 6.

39. *See id.* at 186–90.

40. *See generally* EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2019), [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf).

41. *See id.* at 39–43.

In terms of decisions that directly affect the functioning of democracy, the key norm comes from Article 3 of Protocol 1 of the European Convention, which entered into force in 1954. Article 3 states that “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”<sup>42</sup> In its jurisprudence on these political rights, the Court has distinguished between the right to vote (“passive” electoral rights) and the right to run for office (“active” electoral rights).<sup>43</sup> Relying on this provision, it has insisted on the extension of the franchise to prisoners,<sup>44</sup> those placed under guardianship for psychiatric care,<sup>45</sup> and those in the midst of bankruptcy proceedings.<sup>46</sup> It also held, in response to a complaint by a Turkish Cypriot who had been denied voter registration under a constitutional provision in Cyprus, that Cyprus had to allow Turks to vote after nearly forty years of disenfranchisement.<sup>47</sup> But the Court has not found a violation in limitations on expatriate or nonresident voting.<sup>48</sup>

In general, countries have complied with the ECHR’s decisions and modified their legislative frameworks in accordance with its orders. There are some exceptions however: The United Kingdom government introduced legislation to comply with the ruling in *Hirst v. United Kingdom* that prisoners have the right to vote.<sup>49</sup> However, the legislation failed in parliament and has not been passed. This seems to be a case in which national democracy has triumphed over a regionally defined right. Still, until recently, the core trajectory of rights adjudication seemed to be upward, and, from the point of view of our own narrow definition of democracy, adequate to count as backstopping democracy.

Still, it is not clear that the ECHR is in a position to effectively staunch large-scale backsliding because of its own backlog of more than 50,000 cases.<sup>50</sup> This has itself been the result of the inclusion of countries to the East, like Russia and Turkey, with poor records on human rights.<sup>51</sup> Furthermore, implementation of decisions is inconsistent. Formally, decisions are effectuated by the

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42. European Convention on Human Rights, *supra* note 14, at 7.

43. EUROPEAN COURT OF HUMAN RIGHTS, RIGHT TO VOTE (2016), [https://www.echr.coe.int/Documents/FS\\_Vote\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Vote_ENG.pdf).

44. *Hirst v. United Kingdom* (No. 2), 42 Eur. Ct. H.R. 849 (2006).

45. *Alajos Kiss v. Hungary*, 2010 Eur. Ct. H.R. 692 (2010).

46. *Albanese v. Italy*, App. No. 77924/01, Eur. Ct. H.R. (2006).

47. *Aziz v. Cyprus*, 41 Eur. Ct. H.R. 164 (2004).

48. *Oran v. Turkey*, App. No. 28881/07, Eur. Ct. H.R. 108 (2014).

49. *Prisoners to Get the Right to Vote*, GUARDIAN (Nov. 2, 2010), <https://www.theguardian.com/uk/2010/nov/02/prisoners-vote-european-court-human-rights>.

50. EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN FACTS AND FIGURES 3 (2017), [https://www.echr.coe.int/Documents/Facts\\_Figures\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf) (noting there were 56,250 pending applications as of December 31, 2017).

51. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141, 160–62 (2016).

Committee of Ministers,<sup>52</sup> but at the end of last year, there were more than 7000 matters on the Committee of Ministers' docket for failure to comply with ECHR judgements.<sup>53</sup> The Council of Europe's Parliamentary Assembly can call on countries to implement judgements and to undo backsliding reforms.<sup>54</sup> But at the end of the day, the system lacks teeth. In short, there may be an asymmetry at work: the European Convention regime is better at inducing up-front commitments that draw countries to *deepen* their democracy, than it is at enforcing commitments on the back-end.

There are several other procedural steps available to ECHR judges. Under Rule 61 of the Statute, the ECHR can use the so-called "pilot-judgment procedure" to take a sample case that stands for certain systemic and structural problems in the Member States.<sup>55</sup> During the resolution of the pilot case, other cases are put on hold. These have been used in contexts such as criminal justice and punishment, and seem to be available to help with backsliding issues like purges of judges or bureaucrats. But we do not yet have examples of their use.

### III. THE EUROPEAN UNION

The European Union (EU) has not been particularly effective at confronting backsliding either. Article 2 of the Treaty on the European Union lays out fundamental values, but provides a very weak enforcement machinery that was developed in the aftermath of Austria's election of a far-right-wing government in 2000.<sup>56</sup> The Treaty of Nice introduced a process, outlined in Article 7, which has three escalating stages for disciplining Member States that violate core principles.<sup>57</sup> The first is a finding of a "Clear Risk of Serious Breach" of EU values, found by either the Commission, Parliament, or one-third of Member States. If such a finding is approved by two-thirds of the European Parliament, the country is then called before the European Council, which can identify a breach by a four-fifths vote. If that breach is then deemed "serious and persistent" the European Council can, by unanimous vote save the country concerned, so declare it. This step then allows a vote by a qualified majority to suspend rights

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52. European Convention on Human Rights, *supra* note 14, at 27.

53. COUNCIL OF EUROPE, SUPERVISION OF THE EXECUTION OF JUDGEMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: 11TH ANNUAL REPORT OF THE COMMITTEE OF MINISTERS 62 (2017), <https://rm.coe.int/annual-report-2017/16807af92b>.

54. *See, e.g.*, COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, RESOLUTION 2188: NEW THREATS TO THE RULE OF LAW IN COUNCIL OF EUROPE MEMBER STATES: SELECTED EXAMPLES (2017), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24214&lang=en>.

55. EUROPEAN COURT OF HUMAN RIGHTS, RULES OF COURT: RULE 61, at 31–33 (2018), [https://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

56. Consolidated Version of the Treaty on European Union art. 2, Oct. 26, 2012, O.J. (C 326) 17 [hereinafter Treaty on the European Union].

57. Treaty of Nice, amending the Treaty of the European Union art. 7, Feb. 26, 2001, O.J. (C 80/01).

of the accused country.<sup>58</sup> (There is no specification of exactly which rights could be suspended but they presumably include voting through the European Council and participation in governance, and possibly some trade benefits managed through the EU).<sup>59</sup>

With the advent of populist governments in Hungary and later Poland, these mechanisms have slowly been triggered. A 2015 proposal to use the mechanism in Hungary failed, but in September 2018 the European Parliament voted to call for action against Hungary.<sup>60</sup>

In Poland, the government undertook judicial reforms that lowered the retirement age of Supreme Court justices from 70 to 65, leading to the potential replacement of 27 of the 72 members of the court.<sup>61</sup> The Polish system allowed judges to appeal to the president of the country to extend their terms, which was perceived to introduce potential for political loyalty tests. In reaction, in December 2017, the European Commission triggered Article 7 out of concern for the erosion of separation of powers.<sup>62</sup> This led to a finding of a Clear Risk of Serious Breach against Poland. The action is ongoing, but complicated by the fact that a unanimous vote in the Council of Ministers will be impossible given multiple backsliding governments. Rights will not be suspended under this mechanism, as a realistic matter.

The critical development with regard to Poland was the bringing of an action against it by the Commission in July 2018, for violation of Article 19(1) of the EU Treaty and Article 47 of the Charter of Fundamental Rights.<sup>63</sup> Article 19(1) requires Member States to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law[.]”<sup>64</sup> while Article 47 includes a right to a fair trial for European rights.<sup>65</sup> The idea underlying both Articles is that a threat to judicial independence will undermine judicial cooperation among EU Member States, as well as the implementation of EU law

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58. Treaty on the European Union, *supra* note 56, at art. 7.

59. *Suspension Clause*, EUROPEAN UNION, EUR-LEX GLOSSARY, [https://eur-lex.europa.eu/summary/glossary/suspension\\_clause.html](https://eur-lex.europa.eu/summary/glossary/suspension_clause.html) (last visited June 6, 2019).

60. See R. Daniel Keleman, *Europe’s Hungary Problem*, FOREIGN AFF. (Sept. 20, 2015), <https://www.foreignaffairs.com/articles/europe/2015-09-20/europes-hungary-problem>; see also Alistair Macdonald, *EU Parliament Pushes Hungary Sanctions Over Orban Policies*, REUTERS (Sept. 12, 2018), <https://www.reuters.com/article/us-eu-hungary/eu-parliament-opens-punitive-action-against-hungary-for-damaging-democracy-idUSKCN1LS1QS>.

61. Michal Broniatowski, *Warsaw Defies EU with Proposed Changes to Judiciary*, POLITICO (Dec. 1, 2017), <https://www.politico.eu/article/poland-supreme-court-warsaw-defies-eu-with-proposed-changes-to-judiciary/>.

62. Maia De La Baume, *Brussels Puts Warsaw on Path to Sanctions over Rule of Law*, POLITICO (Dec. 20, 2017), <https://www.politico.eu/article/frans-timmermans-brussels-puts-warsaw-on-path-to-sanctions-over-rule-of-law/>.

63. Joe Stone, *EU Launches Legal Action Against Poland for Undermining Independence of its Courts*, INDEP. (July 2, 2018), <https://www.independent.co.uk/news/world/europe/eu-poland-court-independence-government-control-populist-government-a8427106.html>.

64. Treaty on the European Union, *supra* note 56, at art. 19(1).

65. Charter of Fundamental Rights, art. 47, Dec. 18, 2000, O.J. (C 326/01) 20.

in Poland. The Commission focused on Poland's introduction of the mandatory retirement age for judges. In response to the Commission's request, the European Court of Justice (ECJ), which had led the Transformation of Europe in the 1970s and 1980s,<sup>66</sup> ordered the suspension of the law on the judiciary that had purged the courts.<sup>67</sup> A few weeks later, Poland introduced amendments to the law on the judiciary in parliament, essentially backing down on this particular issue.<sup>68</sup> However, other aspects of Poland's capture of the judiciary had not been directly at issue. The governing party had already appointed the majority on the Constitutional Tribunal, and had essentially taken control of the National Council of the Judiciary, which was responsible for nominating judges.<sup>69</sup>

In short, the idea of judicial independence has been an important hook for international intervention to limit backsliding. Two other cases are relevant in this regard. One case had been brought by Portuguese judges, who argued that the pay cuts they received in the aftermath of the financial crisis undermined the rule of law.<sup>70</sup> The ECJ rejected this claim on the grounds that the measures were general in character and not targeted at judges, but provided some dicta about the importance of judicial independence within the EU, which provides a unified legal system.<sup>71</sup>

Following this first case, in March 2018, an Irish judge declined to enforce a request under the common European Arrest Warrant to send a suspect to Poland because of the country's lack of judicial independence.<sup>72</sup> The case was referred to Luxembourg, and a judgement was rendered in July 2018 in the so-called *Celmer* case.<sup>73</sup> The legal issue in the case involved something called "the principle of mutual trust" between Member States, which underpinned the European Arrest Warrant framework. The principle provides a presumption of trust in the quality of another country's rules and regulations, based on the

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66. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2413 (1991) (arguing that the European Court led the transformation of Europe toward more integration, including by "constitutionalizing" Europe).

67. Matthew Day, *EU Court tells Poland to Reinstate Judges or Face Fines*, DAILY TELEGRAPH (Oct. 19, 2018), <https://www.telegraph.co.uk/news/2018/10/19/eu-court-tells-poland-reinstate-judges-face-fines/>.

68. Matthew Day, *Poland Bows to EU Pressure on Controversial Judicial Reforms*, DAILY TELEGRAPH (Nov. 21, 2018), <https://www.telegraph.co.uk/news/2018/11/21/poland-bows-eu-pressure-controversial-judicial-reforms/>.

69. *Poland Reverses Law on Removing Judges Following EU Court Ruling*, BBC (Nov. 21, 2018), <https://www.bbc.com/news/world-europe-46296859>; see also *Beating a 'Tactical Retreat' over Judges is Just the Eye of the Storm. What's Next for Poland?*, EURONEWS (Nov. 23, 2018), <https://www.euronews.com/2018/11/22/beating-a-tactical-retreat-over-judges-is-just-the-eye-of-the-storm-what-next-for-poland-v>.

70. Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, 2018 E.C.R. 117.

71. *Id.* at ¶¶ 32–37.

72. *Minister for Justice and Equality v. LM* [2018] I.E.H.C. 154 (H. Ct.) (Ir.) [hereinafter *Celmer*].

73. Case C-216/18 PPU, *Minister for Justice and Equality v. LM*, 2018 E.C.R. sec. V [hereinafter *Celmer E.C.R.*].

assumption that all EU Member States shared fundamental values. There were, to be sure, some exceptions, as an earlier line of cases involving Hungary and Romania had provided for minimal levels of human rights notwithstanding the principle of mutual trust.<sup>74</sup> But in the *Celmer* case, the ECJ emphasized that Article 7 of the Treaty for European Union, with its emphasis on the role of the European Council, was the primary mechanism for monitoring and enforcing democracy and the rule of law.<sup>75</sup> Courts were thus dependent on findings of the Council with regard to the principle. Absent a general finding of the Council suspending the presumption of mutual trust, or a showing of judicial nonindependence in a particular case, the arrest warrant would have to be executed. The Court asserted that the litigant asking the Court to deny the arrest warrant provide the information showing the lack of independence and impartiality. While this was not a major limitation on a government that was in the process of attacking its own courts, the decision did have some significance in terms of providing a roadmap for the Council. Of course, the need for unanimity at the Council, save the state concerned, under Article 7(2) is a threshold unlikely to be reached at this point in the life of the EU.

The bottom line is that EU institutions have been relatively slow to respond to attacks on core features of democracy in backsliding countries. Attacks on the judiciary have been the primary terrain on which there has been significant action, and the response has been mixed. Certainly, a country that was considering following the path of Hungary and Poland would now know that some actions—for example, lowering the retirement age of judges—are unacceptable, but that others, such as subtly targeting judicial appointments in favor of political allies, are within the bounds of acceptable behavior. The mechanisms available to the EU institutions are relatively limited, and difficult to calibrate to the magnitude of the threat of democratic erosion.

#### IV. THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND DEMOCRACY

After a wave of democracy began to take hold in the region in the 1980s and 1990s, the Inter-American Court of Human Rights emerged as a robust defender of human rights in the Americas and became a prominent player in the region's democratic development.<sup>76</sup> The Court was established to implement the American Convention on Human Rights, initially adopted in 1948, but it took several decades for a robust system of rights protection to emerge in practice.<sup>77</sup> The Court has played a very active role in the region, even going so far as to find,

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74. See Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, 2018 EU:C:2016:198.

75. *Celmer E.C.R.* at para. 37–45.

76. See generally THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE (Yves Haeck et al. eds., 2015) (exploring crucial developments before the Inter-American Court).

77. American Convention on Human Rights, "Pact of San Jose, Costa Rica," at ch. 4, Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter American Convention].

in one case, a Chilean constitutional provision incompatible with the Convention.<sup>78</sup> In other cases it has ordered the revision of national laws, including amnesty laws in several countries.<sup>79</sup>

How has the Court done as a defender against democratic backsliding? Of particular relevance in terms of democratic quality is Article 23 of the American Convention on Human Rights, which provides for the right to political participation. Article 23(1) grants every citizen the rights:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
- c. to have access, under general conditions of equality, to the public service of his country.<sup>80</sup>

Each of these three prongs has its own jurisprudence, both at the Inter-American Court and at the domestic level in several countries that hold the Convention to be directly binding. National courts that are partial to incumbents have used these rights to upend term limits,<sup>81</sup> and have held that term limits interfere with the international rights to political participation and to be elected.<sup>82</sup> In Honduras, for example, the country's Supreme Court noted that since the American Convention preceded the Honduran Constitution, the country was bound to observe the Convention in its formulation of all national law, and thus struck a constitutional provision on the basis of international human rights law.<sup>83</sup> A similar decision striking constitutional term limits on the basis of the regional right has been adopted in Bolivia.<sup>84</sup> Remarkably, in Bolivia, the Plurinational Constitutional Tribunal went to the original draft of the Constitution, and rejected term limits on the grounds that they had only been agreed to as a political compromise.<sup>85</sup> These decisions, while sounding in the preservation of

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78. Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile (Merits, Reparations, and Costs), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 73, ¶ 103(4) (Feb. 5, 2001).

79. JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 322 (2013).

80. American Convention, *supra* note 77, at art. 23.

81. Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion* (unpublished manuscript) (on file with author).

82. See, e.g., Supreme Court of Justice, Constitutional Chamber, Decision of Apr. 22, 2015 [Hond.], <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

83. See *The President of Honduras Starts His Second Term under a Cloud*, *ECONOMIST* (June 27, 2018), <https://www.economist.com/the-americas/2018/01/27/the-president-of-honduras-starts-his-second-term-under-acloud>.

84. Tribunal Constitucional Plurinacional, Sentencia Constitucional Plurinacional No. 0084/2017, Nov. 28, 2017, at 3 (Bol.). See Versteeg et al., *supra* note 81, at 39–40.

85. Tribunal Constitucional Plurinacional, Sentencia Constitucional Plurinacional No. 0084/2017, at 3.

democracy, in fact may pose a threat to it, as they are being used to facilitate executive entrenchment by particular individuals.

Article 23(c) on its face might not seem to touch on political participation directly, so much as the public service institutions. The provision implicitly recognizes that some element of the rule of law in public administration is essential for democratic participation. The Inter-American Court cases regarding this provision to date have focused on judicial independence, particularly efforts by “Bolivarian” governments to pack the courts with their own supporters by dismissing judges appointed in prior regimes. But as will be shown below, the cases that come to the Court tend to be individual cases brought after particular dismissals, and do not go to the deep structural problems faced by the judiciaries as a whole.

Venezuela was the harbinger of Bolivarian success, and the drama has now played out with the end of democracy as we know it, leading to censure from the heads of state of the Organization of American States.<sup>86</sup> The judiciary was an early target of Hugo Chavez. After passing a new Constitution in December 1999, Chavez’s allies in Congress created a Commission for Functioning and Restructuring the Judicial System (CFRJS) which had the power to appoint and discipline judges.<sup>87</sup> This provided Chavez and his allies a sword to hold over the head of the judiciary. By 2014, a vast majority of judges held their office under temporary mandates.<sup>88</sup>

On September 12, 2000, five justices—Juan Carlos Apitz Barbera, Ana Maria Ruggeri Cova, Evelyn Margarita Marrero Ortiz, Luisa Estela Morales, and Perkins Rocha Contreras—were appointed to the First Court of Administrative Disputes.<sup>89</sup> They heard a variety of cases during their tenure, occasionally issuing rulings which displeased the administration at the time. This is reflected in comments made about the First Court by then-president Hugo Chavez, who urged the public to disregard the First Court’s “Plan Barrio Adentro” ruling and advocated for the plurality that made the decision to be removed.<sup>90</sup>

The tension between the judges and the administration came to a head in June of 2002 when the judges handed down a unanimous decision annulling an administrative act issued in the state of Miranda.<sup>91</sup> Under Venezuelan law, a judicial Chamber for Political and Administrative Matters (CPAM) has the authority to remove cases from the First Court under certain circumstances.<sup>92</sup>

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86. Nicholas Casey, *O.A.S. Issues Rebuke to Venezuela, Citing Threats to Democracy*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/06/01/world/americas/venezuela-oas-maduro.html>.

87. INTERNATIONAL COMMISSION OF JURISTS, VENEZUELA: COURT STRUCTURE (Nov. 26, 2014), <https://www.icj.org/cijlcountryprofiles/venezuela/venezuela-introduction/venezuela-court-structure/>.

88. *See id.*

89. Jenna Eyrich, *Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela*, 36 LOY. L.A. INT’L & COMP. L. REV. 1477, 1480 (2014).

90. *Id.* at 1481.

91. *Id.*

92. *Id.* at 1482.

This is an extreme measure in Venezuelan law, and it is generally reserved for cases in which the ruling directly affects the public interest or is flagrantly unjust. Nonetheless, the Chavez administration asked the CPAM to declare the First Court's judgment null and void, and it did so claiming that the justices of the First Court made an inexcusable legal error in their interpretation. The case was then sent on to the Inspectorate General of Courts (IGC) to determine if the judges should face punishment for their error.<sup>93</sup>

The IGC opened an investigation into the judges on July 17, 2003, and gave the judges of the First Court notice that they would be investigated by September 12 of the same year.<sup>94</sup> On October 30, 2003, at the recommendation of the IGC, the CFRJS removed four out of the five justices from the First Court over their judicial error in the Junior Registrar's Office case.<sup>95</sup> Judge Marrero and Judge Morales, who dissented in part in the judgment in question, had their sanctions suspended once they agreed to retire from the First Court.<sup>96</sup> They were later appointed to the Supreme Court.

Mr. Apitz Barbera and Mr. Rocha Contreras petitioned the Supreme Court to reconsider their removal, on the grounds that the CFRJS did not have authority to remove them from office.<sup>97</sup> They also filed an administrative appeal and measure for *amparo*, a special remedy to overturn rights violations in individual cases,<sup>98</sup> with the CPAM for an annulment of their removal, to no effect. In light of these circumstances, Mr. Apitz Barbera, Mr. Rocha Contreras, and Ms. Ruggeri Cova (the third justice sanctioned) brought a case before the Inter-American Court of Human Rights.

In *Apitz Barbera et al. v. Venezuela*, the Court found that Venezuela violated Article 23(1) of the Convention by dismissing several judges from the First Court of Administrative Disputes. However, in this case, the Court did not find a violation of the individual right to political participation. Instead, the decision rested on the failure of Venezuela to provide fair judicial recourse to the judges, as required by Articles 8 and 25 of the Convention. Article 8 of the Convention provides a right to judicial hearings, while Article 25 provides for a right to judicial protection of fundamental rights.<sup>99</sup> The case thus held that the

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93. *Id.*

94. *Id.*

95. *Id.* at 1483.

96. *Id.* at 1484.

97. *Id.*

98. See ALLAN R. BREWER-CARÍAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 85–86 (2009).

99. American Convention, *supra* note 77, at art. 8 (“[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”); *id.* at art. 25 (“[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention”).

law which led to the dismissal was itself acceptable, so long as it was applied fairly and equally, under general conditions of equality.<sup>100</sup>

The Court did not find that the petitioners had a “right to democracy” that had been violated by the actions of Venezuela, as the petitioners claimed under Article 29 of the Convention. Article 29(c) requires that the Convention be interpreted in a manner so as not to preclude any “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>101</sup> Arguing that the erosion of the judiciary as a whole had contributed to the dismissal of the petitioners, the judges claimed that Venezuela had denied the petitioners’ rights by eroding democracy and the rule of law through their “ideological cleansing” of the Courts, violating the guarantees put forth in Article 29(c) of the Convention.<sup>102</sup> Though the Convention was developed to protect democratic values, the Court held that the protections afforded to the petitioners under the aforementioned articles were sufficient to protect those values. Furthermore, the Court noted that there was no precedent for affording individuals a “right to democracy” in prior rulings involving Article 29.<sup>103</sup> In this way, the argument of the representatives under Article 29(c) was wholly rejected. The Court’s framework then, focused on individual cases rather than the overall structure of the judiciary

This decision cited and followed *Constitutional Court v. Peru* which had dealt with a similar fact pattern: some justices were removed from the Peruvian Constitutional Court after making a decision that limited President Fujimori’s ability to remain in power for multiple terms.<sup>104</sup> The case concerned itself with the dismissal of three justices—Manuel Aguirre Roca, Guillermo Rey Terry, and Delia Revoredo Marsano—from the Constitutional Court of Peru over their handling of a decision regarding Peruvian Law No. 26,657, which dealt with presidential term limits.<sup>105</sup> President Fujimori’s allies sought to use this law to influence the interpretation of the Constitution, which limited the President to two terms, so as to allow him to run again. When members of the Lima Bar Association challenged the law at the Constitutional Court, the justices decided that the law was inapplicable, with two of the justices abstaining.<sup>106</sup> An

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100. Eyrich, *supra* note 89, at 1496.

101. American Convention, *supra* note 77, at art. 29(c).

102. Apitz Barbera et al. (“First Court of Administrative Disputes”) v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 216 (Aug. 5, 2008) [hereinafter Apitz Barbara].

103. *Id.* at ¶ 223.

104. Calvin Sims, *Peru’s Congress Is Assailed Over Its Removal of Judges*, N.Y. TIMES (May 31, 1997), <https://www.nytimes.com/1997/05/31/world/peru-s-congress-is-assailed-over-its-removal-of-judges.html>.

105. *Constitutional Court v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 55, ¶¶ 56.1–56.5 (Jan. 31, 2001).

106. *Id.* at ¶ 56.10.

investigation committee was formed and the justices were impeached on May 28, 1997.<sup>107</sup> Their request for *amparo* was ultimately denied.<sup>108</sup>

The justices alleged violations of Article 8 and Article 25, and the Inter-American Commission agreed with them. With regards to Article 8, the justices argued that they had been denied due process during their impeachment proceedings.<sup>109</sup> Regarding Article 25, they argued that a delay in proceedings violated their rights and that in Peru impeachment was not subject to *amparo* because it was a political act.<sup>110</sup> Finally the Commission argued that Article 23 was implicated by the wrongful dismissal.<sup>111</sup>

Drawing on the United Nations Principles on Judicial Independence and case law from the European Court of Human Rights, the Court ultimately decided that the Peruvian justices were denied their right to a fair trial, and that Peru had violated its obligations under Articles 8 and 25 of the Convention.<sup>112</sup> It noted that some of the members of Congress who had been involved in the impeachment proceedings had themselves communicated with the Court during the case's hearing.<sup>113</sup> And it found a violation of Article 25 in Peru's assertion that impeachment proceedings were not protected by rights to defense.<sup>114</sup> However, the Court rejected the Article 23 argument. Dismissal under these circumstances did not violate the rights of petitioners to hold public office under conditions of equality.<sup>115</sup> Together with *Apitz Barbera et al. v. Venezuela*, wherein the Court cited *Constitutional Court v. Peru* as the source for the legal requirement that States "conceive[] strict procedures for both the judges' appointment and their removal,"<sup>116</sup> these decisions suggest that the Inter-American Court views the rule of law as instantiated in an independent judiciary primarily through the lens of one's right to a fair trial under Articles 8 and 25 of the American Convention. These rights are lynchpin rights, necessary for the protection of other rights under the Convention.<sup>117</sup>

Consider also the situation in Ecuador. In a pair of cases in 2013, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* and *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, the Inter-American Court clarified its standards under Article 23(1)(c) with regards to the dismissal of judges. The

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107. *Id.* at ¶¶ 56.19–56.27.

108. *Id.*

109. *Id.* at ¶ 4.

110. *Id.* at ¶110.

111. *Constitutional Court v. Peru*, at ¶ 4.

112. See Chelsea Zwart, *Constitutional Court v. Peru*, 36 LOY. L.A. INT'L & COMP. L. REV. 2703, 2716 (2014).

113. *Constitutional Court v. Peru*, at ¶ 56.11.

114. *Id.* at ¶¶ 88-97.

115. *Id.* at ¶ 207.

116. *Apitz Barbera*, at ¶ 44 ("the authority in charge of the procedure to remove a judge must behave impartially and allow the judge to exercise the right of defense").

117. See generally Zwart, *supra* note 112 (overview of the decision).

Court found that under Article 23(1)(c), governments must observe the tenure of judges and not treat them arbitrarily, as acting otherwise would violate the judges' right to serve in public office.<sup>118</sup> The cases arose nearly a decade ago, when in November of 2004, President Lucio Gutiérrez was facing impeachment charges for the crime of embezzlement, but Gutiérrez's party, the Patriotic Society Party, did not hold a majority in Congress at the time.<sup>119</sup> In addition, the head of the Ecuadorian Roldosist Party (PRE) and former President Abdalá Bucaram had recently fled to Panama to escape an arrest warrant issued by the Supreme Court of Justice. The Inter-American Court was informed (and the State did not contest) that because of these circumstances, President Gutiérrez cut a deal with a coalition of political parties (including PRE) to dismiss the judges currently sitting on the Supreme Court in exchange for ending impeachment proceedings.<sup>120</sup> He also announced the intention of the government to restructure the Constitutional Tribunal, the Supreme Electoral Tribunal, and the Supreme Court of Justice through congressional action.<sup>121</sup> Two days later, Ecuador's Congress adopted a resolution terminating the duties of the judges of the Supreme Court of Justice, claiming that their appointment was made in violation of Article 209 of the Ecuadorian Constitution.<sup>122</sup> On the same day, six judges were removed from the Constitutional Tribunal over the alleged illegality of their initial appointments.<sup>123</sup>

After their removal, various judges filed *amparo* motions over their treatment.<sup>124</sup> However, on December 2, 2004—before these motions were heard by the trial courts, the Constitutional Tribunal—now filled with new appointees—decided that it alone had the power to suspend a parliamentary resolution over claims of unconstitutionality, and so the *amparo* motions were

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118. The Court also found Ecuador in violation Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection) of the Convention. Arguments regarding Articles 9 (freedom from ex post facto laws) and 24 (equal protection) of the Convention were heard and dismissed by the Court in both cases. Constitutional Tribunal (Camba Campos et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 268, ¶ 222 (Aug. 28, 2013) [hereinafter *Camba Campos*].

119. *Ecuador Impeachment Drive Dropped*, BBC (Nov. 10, 2004), <http://news.bbc.co.uk/2/hi/americas/4001367.stm>.

120. Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 266, ¶ 64 (Aug. 23, 2013) [hereinafter *Quintana Coello*]. See also *Camba Campos*, at ¶ 55.

121. *Quintana Coello*, at ¶ 65; *Camba Campos*, at ¶ 56.

122. *Quintana Coello*, at ¶ 65.

123. *Camba Campos*, at ¶ 61. These judges on the Constitutional Tribunal were already facing censure charges over two unpopular decisions they had made previously: the “fourteenth salary” case and the “D’Hondt method decision.” However, none of these charges were heard before their termination, and they failed to pass when they were first heard by Congress. The Constitutional Tribunal judges were only formally impeached on December 5, 2004, after President Gutiérrez ordered a special Congressional session to vote on the impeachment procedures again. *Id.* at ¶¶ 74–98.

124. Shushan Khorozyan, *Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, 40 LOY. L.A. INT’L & COMP. L. REV. 1547, 1550 (2017).

denied accordingly over the course of the following weeks.<sup>125</sup> Judges from both courts filed independent petitions with the Inter-American Commission of Human Rights by February of 2005.<sup>126</sup>

Besides finding that the judges had been denied their right to a fair trial, the Inter-American Court also found that Ecuador arbitrarily enacted punishments against the petitioners in both cases, violating their right to hold public office under Article 23(1)(c) of the Convention.<sup>127</sup> The reasoning of the Court focused heavily on the political deal struck between President Gutiérrez and the Congress. Because the State did not contest the charge (and because of ample corroborating evidence), the Court took it as fact that a deal was made to remove the judges in exchange for the end of impeachment proceedings against President Gutiérrez.<sup>128</sup> This explanation for the judges' removal made it clear that the measures taken against them were aimed at weakening the judiciary as a whole, and that the legal explanations provided were pretextual. All this led the Court to conclude that the removal of the judges in both cases amounted to arbitrary legal action, violating their right to hold public office under Article 23(1)(c).<sup>129</sup>

Comparing the Ecuadorian Court decisions to the *Apitz Barbera* decision generates some insights into how the Inter-American Court applies Article 23 to the issue of judicial independence, and thus the connection between political rights and courts. In the *Apitz Barbera* case, the Court found the evidence supporting the petitioners' contention—that the removal of the judges from the First Court was politically motivated—was generally insufficient. Accordingly, the Court showed deference to Venezuelan domestic law and ruled that Venezuela had not violated Article 23 through its actions.<sup>130</sup> Though the process by which the judges were removed had its defects, the laws that affected the judges after their removal were applied fairly, preserving the “general conditions of equality” required of access to public office.<sup>131</sup> Conversely, in the 2013 Ecuadorian Court cases, the claim that the judges' dismissal was politically motivated was almost accepted as fact in light of Ecuador's failure to contest the charge.<sup>132</sup> Consequently, the Court treated the State's legal explanations for the dismissal with suspicion and eventually ruled that it had violated Article 23.<sup>133</sup> Based on these decisions, one could reasonably infer that an Article 23 violation of a right to hold public office becomes more likely when the dismissal is

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125. *Quintana Coello*, at ¶¶ 68–73; *Camba Campos*, at ¶¶ 99–108.

126. *Quintana Coello*, at ¶ 2; *Camba Campos*, at ¶ 2.

127. See Khorozyan, *supra* note 124, at 1557–58.

128. *Id.* at 1551.

129. *Quintana Coello*, *supra* note 120, at ¶¶ 177, 180; *Camba Campos*, *supra* note 120, at ¶¶ 219, 222.

130. *Apitz Barbera*, at ¶ 207.

131. *Id.* at ¶ 206. See also American Convention, *supra* note 77, at art. 23.

132. *Quintana Coello*, at ¶¶ 177, 180; *Camba Campos*, at ¶ 327.3.

133. *Quintana Coello*, at ¶ 284.3; *Camba Campos*, at ¶ 124.

apparently politically motivated. This obviously has implications for processes of democratic backsliding, which frequently target the courts.

#### V. THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court was established under the Protocol to the African Charter on Human and Peoples' Rights. As of January 2018, thirty states had ratified the Protocol, and eight of these have made special declarations under Article 34(6) to allow individual access to the Court.<sup>134</sup> While the Court was slow to get rolling, it has now become more expansive, and has quietly built up a jurisprudence on democracy. At the same time, the African Union has expanded its own normative framework related to democracy. At this writing, the African Charter on Democracy, Elections and Governance (ACDEG) has been signed by forty-six out of fifty-five Member States, and ratified by thirty-one.<sup>135</sup>

In one case the African Court has even found a constitutional provision to be a violation of the African Charter.<sup>136</sup> The legal hook for this was a provision of the Court protocol to issue "appropriate orders," a very expansive formulation of remedial power.<sup>137</sup> Tanzania's parliament had amended the constitution to prohibit nonparty independent candidates from running for electoral office, but the African Court ruled that this violated individual rights to freedom of association and political participation, as well as other provisions of the African Charter. The idea is that freedom of association includes freedom not to associate. It then ordered the country to take constitutional steps to remedy the situation.<sup>138</sup> Tanzania's review is pending.

In other cases, the Court also found that the Cote d'Ivoire's electoral rules, which allowed the ruling party and president to appoint the majority of members of the electoral commission, were incompatible with the ACDEG as well as the African Charter, and the Economic Community of West African States Protocol on Democracy and Good Governance.<sup>139</sup> The African Court is empowered to interpret not just the Charter but also "any other relevant instrument" that the state party has ratified.<sup>140</sup> The Court used these sources to implicitly hold that an

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134. Adem K. Abebe, *Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court* (forthcoming) (on file with author).

135. Christina Murray et al., *Presidential Term Limits and the International Community*, 9 n.3 (U. Antwerp Inst. Dev. Pol'y Working Paper 2018), <https://www.uantwerpen.be/images/uantwerpen/container2673/files/Publications/WP/2018/wp-201809.pdf>.

136. Christopher R. Mtikila v. United Republic of Tanzania, No. 009/2011 and No. 011/2011, Judgment, Afr. Ct. Hum. & Peoples' Rts. (June 14, 2013).

137. *Id.* at ¶ 124.

138. *Id.* at ¶ 126.

139. *Actions Pour la Protection des Droits de l'Homme (APDH) v. The Republic of Cote d'Ivoire*, No. 001/2014, Judgment, Afr. Ct. Hum. & Peoples' Rts. (Nov. 18, 2016).

140. *Welcome to the African Court*, AFRICAN COURT, <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (last visited Nov. 26, 2018).

independent electoral commission was a human right of sorts.<sup>141</sup> And in other cases, the Court has found that criminal defamation is incompatible.<sup>142</sup> In these cases, the Court has been expansive, using its broad power of appropriate orders to require structural changes in the relevant laws.

One instance in which the African Court was called on directly to maintain the integrity of democratic institutions came when President Kagame of Rwanda proposed a referendum on allowing him another term in office.<sup>143</sup> Opponents appealed to the African Court, alleging a violation of the ACDEG, and asking for interim measures blocking the referendum.<sup>144</sup> The referendum was held before the case could be heard, illustrating that sometimes individual adjudication is too little too late.

In addition to the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has also issued decisions that are relevant to the core of democracy, as we have defined it. As a separate body created by the African Charter, the Commission is responsible for the general promotion and protection of human rights, and it hears cases as well.<sup>145</sup> In one case, it found that Cameroon's judicial council, which had the president as chair, and the minister of justice as vice chair, violated judicial independence, implying some limit on the executive's role in judicial appointments.<sup>146</sup> This case goes directly to the threat to the rule of law posed by political interference with the judiciary, and thus falls within our minimal definition of democracy laid out above.

Why has the African regional system, including the Commission and Court, arguably been more protective of democratic processes and engaged more thoroughly on these issues than similar bodies in Europe or Latin America?<sup>147</sup> Part of the answer is legal. The Charter includes among its principles the separation of powers, which requires an independent election management body and autonomous institutions to support democracy.<sup>148</sup> The Charter requires that

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141. See *APDH v. The Republic of Cote d'Ivoire* (interpreting a number of instruments in its decisions).

142. Abebe, *supra* note 134, at 14.

143. Murray et al., *supra* note 135, at 12–13.

144. *Id.*

145. African Charter on Human and Peoples' Rights art. 62, June 27, 1981, 21 I.L.M. 58 (“[e]ach party shall undertake to submit . . . a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter”).

146. Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03, Afr. Commission on Hum. & Peoples' Rts. [Afr. Comm'n H.P.R.] (May 2009). The Commission arrived at similar conclusions in a recent case against the DRC where it found that the African Charter guarantees the separation of powers. *Jose Alidor Kabambi and Others v. DRC*, Communication 408/11, Afr. Comm'n H.P.R., ¶¶ 81–90 (Nov. 15, 2016).

147. To be sure, it has not been unlimited. As Abebe notes, the Court has not been very good at policing incumbent takeovers or “soft” coups, such as occurred in Zimbabwe in 2017 and Egypt in 2012. See Abebe, *supra* note 134, at 17.

148. African Charter on Democracy, Elections and Governance arts. 3(5), 17(1), 15.

constitutional amendments be based on “national consensus” and specifically mentions a referendum, which turn out to be pursued frequently in the continent.<sup>149</sup> Thus the African Court has power to review constitutional amendments, which even many national constitutional courts do not have.

But there surely is a political story as well. National traditions of judicial independence and democratic functioning are weaker on the African continent than in other parts of the world. The European and Latin American experiences with fascism and military rule provoked a consensus, still strong today, on the need to preserve democratic governance. But paradoxically, this has led the regional bodies in Europe and Latin America to rely on national processes, allowing more room for experimentation, and potentially opening up their regions to democratic backsliding by creative political leaders.

Perhaps there are “advantages of backwardness” in democracy protection, just as there are for development.<sup>150</sup> In development theory, the advantages of backwardness imply the search for new markets and technologies, allowing the leapfrogging of earlier stages.<sup>151</sup> Consider, for example, the turn of Iberia outward to the New World, once trade routes cut off to the East with the rise of the Ottoman Empire. European city-states closer to the core of economic activity had no need to go searching for new trade routes to Asia. But the peripheral states did, and in doing so, discovered the New World.

In Africa, the nascent regional organizations have been much more aggressive in producing substantive requirements for democratic governance. Much of the new regionalism accelerated in reaction to high-profile efforts by the International Criminal Court, which was particularly aggressive when it came to African leaders such as Omar al-Bashir and Uhuru Kenyatta.<sup>152</sup> Oddly in an effort to insulate the continent from outside interventions, the history of colonialism led to several democracy enhancing efforts.

#### CONCLUSION

In reviewing the performance of various international courts and institutions in defending core features of democratic governance, I have in some sense put liberal theory on trial. Liberalism holds that international institutions constitute a kind of hands-tying mechanism for democratic governments, allowing them to pursue particular goals that might otherwise be impossible and to make more effective commitments to their citizens.<sup>153</sup> This story certainly made sense in an

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149. *Id.* at art. 10(2).

150. The term comes from Thorstein Veblen, a scholar in the early twentieth century. See Lars Sandberg, *Ignorance, Poverty and Economic Backwardness in the Early States of European Industrialization*, 11 J. EUR. ECON. HIST. 675, 675 (1982).

151. *Id.* at 676.

152. Mark Doyle, *African Union Urges ICC to Defer Uhuru Kenyatta Case*, BBC (Oct. 12, 2013), <https://www.bbc.com/news/world-africa-24506006>.

153. See Moravcsik, *supra* note 18, at 543.

era of democratic expansion. But the commitments are only really credible if costs are imposed on the back end.

It is in the nature of courts, whether national or international, that they tend to hear one case at a time, and to have trouble dealing with large structural issues, absent a strong political consensus. This limits the power of courts to staunch democratic backsliding when it reaches systemic proportions. Further, the case-by-case nature of the process means that agents of democratic erosion can act strategically to exploit holes in the jurisprudence to accomplish their ends. It is no accident that two of the leading backsliders, Hungary's Viktor Orbán and Poland's Jarosław Kaczyński, are themselves lawyers.<sup>154</sup> They have carefully pursued their reforms to capture the political system in a careful, legalistic, and methodical way.

The European institutions seem designed with the idea that backsliding risk would be limited to a single country. When, as it currently seems, democratic backsliding is spreading across several countries in the region, the political mechanisms of Article 7 of the Treaty on the European Union seem woefully inadequate. Instead, the best hope so far has been a set of actions brought to the ECJ. The major decision by the European Court to enjoin the application of the Polish law on the judiciary will be the biggest test of whether the system can actually work.

The ECJ's recent decision with regard to Poland illustrates another theme of this review. International courts seem particularly exercised by national violations of judicial independence. The alliance among judges, defending their profession across borders, is real and necessary, given the judiciary's lack of the proverbial purse or sword. An independent judiciary and the rule of law are necessary to make democracy work and so this cross-border, multilevel alliance is a welcome one. But will it be effective? The Inter-American Court of Human Rights has itself been most active on the issue of judicial independence, though it was not particularly effective in staunching the degradation and capture of the judiciary in Venezuela. Perhaps the lesson is that a sustained campaign of erosion is hard to resist, but that international courts can in some sense provide some space for domestic actors to mobilize and organize to contest backsliding. In this sense, the international situation is not that different from national constitutional orders, in which nondemocratic actors sometimes need to step in to slow down antidemocratic actors.<sup>155</sup>

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154. *Viktor Orbán*, BRITANNICA, <https://www.britannica.com/biography/Viktor-Orban> (last visited Nov. 26, 2018); *see also Jarosław Kaczyński*, BRITANNICA, <https://www.britannica.com/biography/Jaroslaw-Kaczynski> (last visited Nov. 26, 2018).

155. Tom Ginsburg & Aziz Huq, *Democracy's Near Misses*, 29 J. DEMOCRACY 16, 29 (2018).

# Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron's Study of the UN Security Council

David Kaye\*

In his 1993 study in the *American Journal of International Law*, *The Legitimacy of the Collective Authority of the Security Council*, David Caron proposed that:

a basic challenge for international governance is to seek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of allegations of illegitimacy. What are the characteristics of a process of decision with integrity, that may be trusted? How does one ensure that an institution is faithful to the promise of the organization, that is, that it acts with integrity?<sup>1</sup>

Consistent with his approach to scholarship across the range of his concerns, Caron addressed two things (at least) at once. In the most immediate sense, he was concerned with the emergent role of “a functioning UN Security Council”—which was then (1991–93) seen as an institution bridging the end of the Cold War and the beginning of what George H.W. Bush called the New World Order<sup>2</sup>—a Council acting with “vitality” to counter a variety of threats to international peace and security.<sup>3</sup> Put more directly, Caron was seeking to understand whether the blowback to a Council that “acted in utterly

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\* UC Irvine School of Law; United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. I want to express my deepest thanks to the editors of the *Berkeley Journal of International Law* for shepherding this essay through to publication and to Professor Laurel Fletcher for her leadership as a human rights scholar and clinician and her work to preserve the extraordinary legacy of our dear friend and mentor, David Caron.

1. David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 561 (1993) [hereinafter *Legitimacy*].

2. See George H.W. Bush, Address Before a Joint Session of Congress, September 11, 1990, <http://millercenter.org/the-presidency/presidential-speeches/september-11-1990-address-joint-session-congress>.

3. *Legitimacy*, *supra* note 1, at 553.

unprecedented ways”<sup>4</sup> would have concrete implications for its functioning. As he described the moment, he saw “no small measure of irony that, as the international community finally achieved” the capability to pursue its role under Chapter VII of the UN Charter, many “began to have second thoughts about the legitimacy of that body’s use of its collective authority.”<sup>5</sup> Bringing to the discussion a clear-eyed understanding of the political threats facing the Council and world order, he introduced the study by noting that his analysis would eventually turn to policy prescriptions to address the possibility of a legitimacy gap in the Council’s exercise of authority. In a narrow sense, the article was a policy-relevant exploration that he would punctuate with proposals to strengthen the central security institution of international law.

But the article speaks beyond its time; it goes much further and deeper than the policy issues of its moment. I read Caron’s conclusions as reflective of his humility and his embrace of scholarly inquiry, a recognition that discussions of legitimacy must take into account the variation in attitudes toward the concept, its subjectivity, and its politicized sheen. Caron asked, what does it mean to speak of an institution’s use of authority as illegitimate?<sup>6</sup> And in the context of the Security Council, does it matter? He analyzed and then concluded that legitimacy does matter and that, in order to bolster its legitimacy, the Security Council must change.<sup>7</sup> But even in his call for change, Caron was measured and cognizant of the realities of international politics. He showed elements of idealism and realism.

I was Caron’s student when he published *Legitimacy*, and his article (like the man himself) strongly influenced the way I think about international law and institutions, not to mention the professional roles of international lawyers. I want to use Caron’s framework to suggest some tentative answers to evaluate another question, just as present today in our global conversation as *Legitimacy* was at the moment of its publication twenty-five years ago: Why are State-driven models of global internet governance so widely appraised as illegitimate? And, by contrast, why have the existing models of internet governance been so attractive not only to civil society and companies but also to the vast majority of States? What can Caron’s assessment of “legitimacy” impart to our own understanding of this major issue of global governance?

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4. *Id.*

5. *Id.*

6. *Id.* at 555.

7. See, for instance, Caron’s call for elimination of the “reverse veto,” in which members of the Council “block[] it from terminating or otherwise altering an action it has already authorized or ordered.” *Id.* at 577–88.

## I. THE LEGITIMACY FRAMEWORK

*Legitimacy* showcases a familiar feature of Caron’s scholarship, namely that his focus on specific problems (here, the legitimacy claims and counterclaims swirling around the Security Council in the early 1990s) would benefit from an evaluation of a broader theoretical or normative problem.<sup>8</sup> In this case, the Council’s then-newfound success and critique provided him with a vehicle to evaluate the concept of legitimacy in international law and institutions. “[T]his rather nebulous term [legitimacy] is loosely employed,” he noted, but its power over the Council deserved study.<sup>9</sup> He disclaimed any purpose to “set forth a general account of the notion of legitimacy in international governance.”<sup>10</sup> What he wanted to understand was whether *perceptions* of illegitimacy had any practical significance. “Although I think it clear that perceptions of illegitimacy can matter,” he specified, “precisely when and how they matter is hard to say because the determinants of their significance in practice remain unclear.”<sup>11</sup> He explored directly a question that many legal scholars would shy away from, a difficult-to-define concept of *legitimacy* that brought together questions of law and politics, perception and reality, and consequence and principle.

There is much in *Legitimacy* that may elude our attention today because what at the time was cutting edge has become the norm. Writing in the *American Journal of International Law*, he situated his work within a corpus of legal scholarship, especially the then-recent work on legitimacy by Thomas Franck of New York University.<sup>12</sup> But he went beyond that, as Caron was at the forefront of early efforts at interdisciplinarity.<sup>13</sup> He sought to understand, develop, and articulate the concept of legitimacy not just as a matter of law under the UN Charter but also by drawing upon the scholarship especially of two pathbreaking scholars then at Berkeley—the late International Relations theorist Ernst Haas and the social psychologist Tom Tyler—and the work of German sociologist Jurgen Habermas.<sup>14</sup> Today, interdisciplinary work has become a recognizable, if not predominant, feature of international legal scholarship. Caron was not only early onto the value of other disciplines in assessing legal and institutional questions, but his approach had definite influence over succeeding scholars.

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8. See, e.g., *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, PROC. ASIL ANN. MEETING (2018); *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401 (2006); *The ILC Article on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT’L L. 857 (2002); and *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4 (2000).

9. *Legitimacy*, *supra* note 1, at 556.

10. *Id.* at 557.

11. *Id.*

12. *Id.* at 556 n.19, citing Thomas M. Franck, *The Power of Legitimacy Among Nations*, 24 N.Y.U. J. INT’L L. & POL. 199 (1991).

13. See, e.g., Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993).

14. See *Legitimacy*, *supra* note 1, at 557 nn.19, 23.

Caron began the article with basic observations, approaching legitimacy in “social and political terms.”<sup>15</sup> He observed that while illegitimacy claims “reflect subjective conclusions, perhaps based on unarticulated notions about what is fair and just,” they may also reflect genuine “dissatisfaction with an organization.”<sup>16</sup> And in turn, he evaluated whether those perceptions and conclusions have an impact on the actual functioning of the institution. He asked, “Is an organization perceived as legitimate more likely to be used and thus more likely to operate within the full scope of its agenda?”<sup>17</sup> He added: “[A]lthough international organizations are not world government and a realist’s recognition of power is built into their constitutive documents, these organizations hold the promise of something more than politics as usual.”<sup>18</sup> Perceptions of illegitimacy, he wrote, “resonate in the case of international organizations [a]s exemplified by the space between the promise of the preamble to the charter of the organization and the realities of the compromises in the text that follows, a space in which there is discretion regarding the use of authority.”<sup>19</sup> He went on, “one must seek an institution that simultaneously can employ its authority effectively and employs it in a manner that is regarded generally as legitimate.”<sup>20</sup> The challenge: “[S]eek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of illegitimacy.”<sup>21</sup>

While he acknowledged that the underlying substantive norms of the institution may drive core attitudes toward global governance, he nonetheless posited that a process that generates perceptions of legitimacy goes some distance in promoting substantive outcomes that engender trust and acceptance. “What are the characteristics of a process of decision with integrity, that may be trusted?” he asked. “How does one ensure that an institution is faithful to the promise of the organization, that is, that it acts with integrity?”<sup>22</sup> Four factors, in his view, promote those kinds of perceptions:

- 1) the operation of the organization is entrusted to “persons who can claim to be independent of those governed and to have no interest in a particular outcome”;
- 2) “states entrusted with the operation of the organization may be held accountable for the consequences of their actions”;

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15. *Id.* at 557.

16. *Id.* This reflection is quintessential Caron. He asks us to look for good faith behind a claim that may be difficult to sustain as an objective matter. Why are people making a claim? That is important to him, regardless of whether the claim ultimately holds up. The claim itself may reflect something problematic in our politics and law even if a legal claim itself would fail.

17. *Id.* at 557–58.

18. *Id.* at 560.

19. *Id.*

20. *Id.* at 561.

21. *Id.*

22. *Id.*

- 3) “an institution may also be accountable in that a court, an entity whose integrity is assured via independence, reviews the institution’s decisions”; and
- 4) “integrity may be promoted by providing the opportunity for representative participation and fostering an ongoing dialogue as to the legitimacy of any action.”<sup>23</sup>

In short, Caron identified four principles that could enable an institutional process to avoid claims of illegitimacy. He disclaimed any suggestion that if an institution met these four criteria, legitimacy would follow. To the contrary, he was alive to the reality that it would be “simplistic to focus on the relation of process to perceptions of illegitimacy without considering the substance of what is being discussed in relation to those perceptions.”<sup>24</sup> But these four principles could enable observers to identify underlying causes for claims of illegitimacy and help organizations identify the concerns that they need to address. Caron argued that independence, accountability, oversight, and representativeness can be significant tools to address the “resonance” of claims of illegitimacy.<sup>25</sup>

Much of Caron’s article is given over to a rigorous evaluation of these principles in the context of the Security Council.<sup>26</sup> As this is not an essay about the Security Council *per se*, I only note that Caron’s assessment of the institution’s commitment to these four factors leads him not to pessimism but to prescription. His analysis suggests that the Council cannot be said to be independent given that its members are also those governed. Neither are member States—particularly the Permanent Five members of the Council but also their close allies—held accountable for their decisions.<sup>27</sup> Oversight exists in the form of the International Court of Justice, but that is a limited form of judicial review.<sup>28</sup> Administrative and political reviews, such as what could be imagined in the form of Secretariat or General Assembly evaluations, are nonexistent. And representativeness is a definite challenge, given especially the makeup of the P-5, the exclusion of major powers in the Global South, and the persistence of a veto that vests extraordinary authority not merely in five governments but simply one, acting alone. The election of nonpermanent States to Council membership could counter issues of representativeness, but given the power disparity on the Council, it does little to address the resonance of the underlying claims.

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23. *Id.*

24. *Id.* at 562.

25. *Id.* at 561.

26. See especially *id.* at 562–66, followed by extensive presentation of proposals in response to his assessment.

27. *Id.* at 561.

28. *Id.*

II. INTERNET GOVERNANCE AND THE *LEGITIMACY* FRAMEWORK

Caron's evaluation of perceptions of the Security Council provides a framework for thinking about legitimacy at the international level and its impact on governance, beyond the UN's central body for international peace and security. Caron's questions may be asked not only of existing institutions with authority to regulate international relations (i.e., peace and security) but also of potential changes in global regulatory regimes. I want to deploy his framework to help understand why the typical global forums for governance have limited if any impact in the context of the global internet.

At this moment, global internet governance faces a set of very serious challenges across a range of areas. The internet has acquired the features of a digital battlefield, a place where State and non-State actors threaten public institutions and processes, conduct national security operations, deploy tools to interfere with human rights across borders, and conduct all sorts of other threats to private actors, including hacking to gain trade secrets or interfere with the work of journalists.<sup>29</sup> Even a brief recitation calls to mind how the internet has become a place of State and non-State competition and insecurity. The examples are proliferating and include such well-known incidents as the transnational hacking of Sony, evidently by North Korea; evidence of internet probing by Russia and China into U.S. critical infrastructure; the United States' use of the Stuxnet virus to interfere with the Iranian nuclear program; the use of internet tools for transnational digital surveillance conducted by intelligence agencies around the world; and cross-border digital attacks on activists, journalists, and academics.<sup>30</sup> At the same time, the promise of a globally accessible internet, advancing the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers,"<sup>31</sup> is threatened by increasing domestic regulation and censorship—which risks, over the long-term, a breakdown in the way people communicate across borders.

The range of threats on the internet—whether to public institutions, corporate security, or individual rights—might present an argument for global regulatory action driven by the typical tools of State initiative. After all, the kinds of threats identified above suggest colorable cases of international instability, perhaps even the kinds of threats that would be subject to the Security Council's attention under Chapter VII of the UN Charter. These threats may be moving the

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29. See, e.g., RICHARD CLARKE, *CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT* (2012); KIM ZETTER, *COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD'S FIRST DIGITAL WEAPON* (2015); PETER SINGER AND EMERSON BROOKING, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018).

30. *Id.*

31. International Covenant on Civil and Political Rights, art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 14688.

needle toward State-driven approaches to governance.<sup>32</sup> So far, however, the organizing principle for internet governance has involved multiple actors—not just governments but private, nongovernmental, academic, and others with power over and equities in the internet. Since at least 2005, it is possible to identify a strong preference that the internet be governed not merely by States but by all those who have a stake in its operation.<sup>33</sup> Why is that? And how do we evaluate the legitimacy of competing approaches?

I do not intend to use this space to evaluate in detail the modes of governance of the internet today, much as it is a vast and wide-ranging space that touches upon all manner of global issues from infrastructure development and the emerging 5G network to cyberattacks and cybersecurity, from global surveillance and the private surveillance industry to regulation of terrorist content, hate speech, and disinformation. But I do want to give a sketch of internet governance, a brief introduction, in order to reflect on the value of David Caron’s framework for evaluating legitimacy.

Early in the internet’s emergence as a global force, it was easy to identify a cultural resistance in democratic societies to centralized, government-driven global internet governance. In 1996, the Grateful Dead lyricist and internet theorist and activist John Perry Barlow’s *Declaration of the Independence of Cyberspace* imagined that the internet would usher in “a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.”<sup>34</sup> To governments, Barlow implored, “On behalf of the future, I ask you of the past to leave us alone. You have no sovereignty where we gather.”<sup>35</sup> This idea of a kind of ungoverned internet, a space free of government interference, held a certain attraction to societies in North America and Europe, and it continues to exercise a cultural hold on ideas about online space—even if a platonically ungoverned internet was never the reality and is certainly not true today.<sup>36</sup> The values underlying Barlow’s *Declaration* persist in serving as a foundation for how many of those actors with a role in internet governance perceive the digital age.

Even if Barlow’s internet nirvana no longer captures the public imagination about the internet, its core insight—that government interference could portend

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32. See, e.g., FRANCE DIPLOMATIE, *CyberSecurity: Paris Call of 12 November 2018 for Trust and Security in Cyberspace*, <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

33. See generally JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM (2008).

34. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (February 8, 1996), <https://www.eff.org/cyberspace-independence>. The Declaration served as a vision document for the Electronic Frontier Foundation, which Barlow co-founded.

35. *Id.*

36. See generally JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006).

new forms of tyranny—has been borne out by the use and abuse of online space by public authorities.<sup>37</sup> Government abuse, in other words, has reinforced for many the idea that government stewardship and regulation would have negative implications for the functioning of the internet.<sup>38</sup> Many governments even share this view.<sup>39</sup> The central UN process on internet governance has expressed this view as well, and one can see in the development of the 2005 UN World Summit on the Information Society (WSIS) the emergence of a governing principle that, while moving away from Barlow’s internet nirvana, nonetheless offers a vision for decision-making that would take into account not just government but civil society and private sector equities.<sup>40</sup>

WSIS does not reflect all aspects of internet governance, but it is a UN-driven process that has provided a framework for thinking about internet governance. As such, it reflects an agreed-upon view of what that governance should entail. Even while rejecting the notion of the internet as ungoverned space, the UN process retained an idea about governance that recognized Barlow’s insight that the internet offered more than merely a space for commerce. That is, it would offer a space for community across borders. It would offer the development of an information society: a new way of thinking about development, rooted in knowledge and information-sharing. The UN General Assembly launched the WSIS process late in 2001 in order

to marshal the global consensus and commitment required to promote the urgently needed access of all countries to information, knowledge and communication technologies for development so as to reap the full benefits of the information and communication technologies revolution, and to address the whole range of relevant issues related to the information society, through the development of a common vision and understanding of the information society and the adoption of a declaration and plan of action for implementation by Governments, international institutions and all sectors of civil society[.]<sup>41</sup>

One year later, General Assembly Resolution 57/238 welcomed the WSIS preparations and “encourage[d] non-governmental organizations, civil society

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37. See generally FREEDOM HOUSE, FREEDOM ON THE NET 2018 (Oct. 2018), [https://freedomhouse.org/sites/default/files/FOTN\\_2018\\_Final%20Booklet\\_11\\_1\\_2018.pdf](https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf). The report opens darkly, “The internet is growing less free around the world, and democracy itself is withering under its influence.”

38. Consider, for instance, the debate over encryption and whether governments should impose restrictions on its commercial and personal use. In the context of my 2015 report to the UN Human Rights Council on encryption and anonymity (UN Doc. A/HRC/29/32) civil society organizations repeatedly expressed concern about government regulation’s impact on the functioning of the internet. See <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>.

39. *Id.*

40. For a detailed study of multi-stakeholder governance in the WSIS and Internet Governance Forum of the UN, see generally JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM (2008).

41. G.A. Res. 56/183, at 1 (Dec. 21, 2001).

and the private sector to contribute further to, and actively participate in, the intergovernmental preparatory process for the Summit and in the Summit itself, according to the modalities of participation established by the Preparatory Committee.”<sup>42</sup> The phrasing here suggests that the General Assembly saw the process as State-driven—that nongovernmental actors could participate in a State process according to the rules States establish. But it is nonetheless a step toward an idea of sharing responsibility to govern the internet.

By 2005, internet governance had become “an odd patchwork of United States government fiat, decentralized [sic] private action and *ad hoc* national and international regulation.”<sup>43</sup> But by the end of that year, the UN consolidated a vision of shared governance that acknowledged meaningful roles for multiple stakeholders. The so-called Tunis Agenda, adopted by the UN as part of the WSIS process, would create the basis for the Internet Governance Forum (IGF), a rolling national, regional, and international “forum for multi-stakeholder dialogue”<sup>44</sup> about internet policy and regulatory issues. The IGF itself would be “multilateral, multi-stakeholder, democratic and transparent.”<sup>45</sup> The multi-stakeholder formula did not mean that the IGF would take decisions on matters of internet governance, but that all manner of stakeholders—governments, private companies, non-governmental organizations, inter-governmental organizations, regional institutions, activists, academics, and independent technologists—could participate in the debates that would lead to recommendations, evaluations, and the creation of emerging norms. It was understood that no party could dictate outcomes to any other. To be sure, governments retained significant power over the political process, adopting the Tunis Agenda itself, but it was a process that recognized the value of integrating nongovernmental voices and interests in the governance itself.

In 2015, on the tenth anniversary of the adoption of the multi-stakeholder format in Tunis, the UN adopted a resolution to mark what it called “WSIS+10.” The resolution reaffirmed

the value and principles of multi-stakeholder cooperation and engagement that have characterized the World Summit on the Information Society process since its inception, recognizing that effective participation, partnership and cooperation of Governments, the private sector, civil society, international organizations, the technical and academic communities and all other relevant stakeholders, within their respective roles and responsibilities, especially with balanced representation from developing countries, has been and continues to be vital in developing the information society.<sup>46</sup>

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42. G.A. Res. 57/238, at 2 (Dec. 20, 2002).

43. MALCOLM, *supra* note 40, at xxvii.

44. International Telecommunication Union, *Tunis Agenda for the Information Society*, WSIS-05/TUNIS/DOC/6(Rev.1), ¶ 72 (Nov. 18, 2005).

45. *Id.* ¶ 73.

46. G.A. Res. 70/125, ¶ 3 (Dec.16, 2015).

The signaling here is important: the resolution—adopted only by States—affirms these values as central to decision-making about the internet. The substantive provisions of the resolution reinforce the idea that the internet should be governed with multiple stakeholders in mind. Its first operative paragraph expresses a substantive vision rooted in human rights and sustainable development.<sup>47</sup> The resolution takes note of “abusive uses” of digital technologies but it is within the context of an overall celebration of the internet.<sup>48</sup>

This approach has been borne out in specific areas of governance. Kal Raustiala summarized the essentials of global internet governance crisply in discussing domain name registration and the evolution of the Internet Corporation for Assigned Names and Numbers (ICANN). The United States established ICANN which, after significant domestic American debate, is now a nonprofit organization responsible for assigning domain names and ensuring the workability of the network. ICANN has significant regulatory power over the organization of the internet, and its description of its process captures the ethic of multi-stakeholderism:

ICANN’s inclusive approach treats the public sector, the private sector, and technical experts as peers. In the ICANN community, you’ll find registries, registrars, Internet Service Providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from more than 100 governments, and a global array of individual Internet users. All points of view receive consideration on their own merits. ICANN’s fundamental belief is that *all users of the Internet deserve a say in how it is run*.<sup>49</sup>

The U.S. Government (and others that are like-minded, such as the more than two dozen governments that are members of the so-called Freedom Online Coalition<sup>50</sup>) as well as users and most of industry value, in Raustiala’s words, the internet’s “high degree of openness, its diversity, its completeness, and its fundamental resilience.”<sup>51</sup> These are the underlying values that led—rather organically at first—to “the elaborate multi-stakeholder governance structure that exists today.”<sup>52</sup> Developed and democratic governments have strongly supported an approach to internet governance that involves all those actors with an interest in outcomes, not just governments but also private sector companies and civil society.

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47. *Id.* ¶ 1.

48. *Id.* ¶ 11.

49. ICANN, *Welcome to ICANN (Internet Corporation for Assigned Names and Numbers)* (last visited Apr. 18, 2019), <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (emphasis added).

50. See FREEDOM ONLINE COALITION, <https://freedomonlinecoalition.com/> (last visited Apr. 18, 2019).

51. Kal Raustiala, *Governing the Internet*, 110 AM. J. INT’L L 491, 492 (2016).

52. *Id.*

One may see the multi-stakeholder principle expressed in the institutional framework that dominates global internet policy discussions beyond the specific subject of domain names. Standard-setting organizations involving companies, academics, and various technologists establish rules for a common infrastructure, protocols, and languages necessary for the internet to work, for networks to communicate with one another. These standards are developed by the Internet Engineering Task Force (IETF), the World Wide Web Consortium, the ITU's Telecommunications Standardization Sector, the European Telecommunications Standards Institute, the Institute of Electrical and Electronics Engineers, and the 3rd Generation Project.<sup>53</sup> Most of these organizations have a concrete impact on the internet as we know it, making decisions (typically by consensus) that influence everything from accessibility and security to speed and integration. These organizations have significant power over the operation of the internet's ability to meet the values Raustiala identified above.

Not all States have celebrated the multi-stakeholder approach. In the face of WSIS+10, some States, led by China and Russia, have countered with a different agenda fed by a different set of values. In a letter sent to the UN Secretary General in 2015, China, Russia, and four Central Asian governments shared a draft "code of conduct for information security," updating a code they had initially prepared and presented to the UN in 2009.<sup>54</sup> The draft code does not include the words or the values of multi-stakeholderism. Instead, the code begins with the foundation that governance is necessary to combat "criminal misuse" of the internet or other uses that interfere with international security.<sup>55</sup> It proposes that States "cooperate fully with other interested parties in encouraging a deeper understanding by all elements in society, including the private sector and civil-society institutions, of *their responsibility* to ensure information security[.]"<sup>56</sup> This is a model of State-driven, State-maintained internet governance—a model of multilateralism, not multi-stakeholderism, and it presents the other stakeholders as second-tier actors, if not potential miscreants.

The Chinese-Russian code has not found widespread support, but it does highlight that there is some growing skepticism and opposition—at least among a certain set of governments—towards the current model of multi-stakeholderism. And it is plausible that, over the next several years, attitudes toward internet governance could change, especially given the threats identified above and the rise of authoritarian models of governance worldwide. Even

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53. See Rept. of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Addendum: Supplementary Materials Accompanying Annual Report, at 3–11, U.N. Doc. A/HRC/35/22 (May 22, 2017).

54. Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, U.N. Doc. A/69/723 (Jan. 13, 2015) ("Code of Conduct").

55. *Id.* 3–4.

56. *Id.* 5 (emphasis added).

democratic States could decide that online threats are so great that they need to “multilateralize” internet governance and adopt State-centric approaches.

Despite objections, multi-stakeholderism remains the overriding organizing principle for internet governance, one embraced by nearly all participants, including especially activists from civil society.<sup>57</sup> As one activist put it, “Many, probably most, people in the ‘Internet community’ cherish multistakeholder processes as a fundamental principle.”<sup>58</sup> The embrace is not surprising; private and nonprofit actors make the decisions that keep the internet working and its multiple parts capable of communicating with one another. Excluding them from governance would be difficult, if not impossible, and States may also lack the technical capacity to direct private and other actors to take certain kinds of action.

Multi-stakeholderism promotes elements of independence, accountability, oversight, and participation, the four that Caron’s framework identifies as legitimacy-promoters in the context of international governance. They are not, however, guarantors of legitimacy. As Caron put it, “the problem of legitimacy will be an ongoing one for any effort at international governance.”<sup>59</sup> But they are factors that help to generate legitimacy, which in turn allows the global system to work. In the internet governance context, all four appear to be present. The multi-stakeholder approach ensures that, with its multiple actors, no single actor can dominate—either in the making of decisions or in the veto of outcomes. The predominance of consensus as the defining decision-making approach promotes an environment in which no actor can guarantee a self-dealing outcome. The activities of most multi-stakeholder processes are transparent, with all outcomes subject to public disclosure, encouraging oversight and public debate. Participation is open to all and, over time, has increased in representativeness.

These are some of the features that have contributed to the sense that multi-stakeholderism advances the interests of most of those with a stake in the internet’s governance. It is not one that always works to the benefit of States that, like China and Russia, would prefer to have greater unaccountable control over decision-making. It is also one that does not always advance the interests or the rights of users, depending on the forum at issue. Private sector interests may have outsized voices in some forums. All in all, however, the only serious attack on the legitimacy of multi-stakeholderism has come from States that would prefer to have a system that looks more like the Security Council approach that drew—and continues to draw—so much criticism for its legitimacy deficits.

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57. See, e.g., Peter Micek, *Let it go: It’s time for global, multi-stakeholder oversight of the Internet* (Sep. 13, 2016), <https://www.accessnow.org/let-go-time-global-multistakeholder-oversight-internet/>.

58. David Souter, *Inside the Information Society: The what and why of multistakeholder participation*, ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (Jan. 23, 2017), <https://www.apc.org/en/blog/inside-information-society-what-and-why-multistakeholder-participation>.

59. *Legitimacy*, *supra* note 1, at 588.

CONCLUSION

Caron ended *Legitimacy* with a step back from the Security Council. He writes that “[t]he renewed sense of global community means, at least for now, that it is possible in more areas to judge whether the conduct of a State is acceptable.” He then wrote:

Challenges to power framed in terms of the illegitimacy of that power cannot be dealt with merely on the level of general principles. Rather, the means of confronting the challenges to legitimacy must be institutionalized. This conclusion places a heavy emphasis on process, not because I believe justice is merely procedural, but because I believe our diverse global community is more likely to find its vision of substantive justice through a process involving debate.<sup>60</sup>

These last words have been with me since I read them and talked to Professor Caron about them in 1993. It seemed to me bold to conclude in the first person. *I believe*, he wrote. He suggested, even if implicitly, that the omniscient impersonal voice of scholarship could give way to the personality and the person behind it. And in its substance, the concluding point is about what legal scholars and practitioners can and should value. It contains an undeniable truth about world politics: we are diverse, we have interests that may be difficult to reconcile, but we must find processes that build confidence in decisions about their reconciliation and solution, and ultimately about the exercise of power.

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60. *Id.*

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# Institutional Arrangements for the Ocean: From Zero to Indefinite?

Marie Jacobsson\*

## INTRODUCTION

When Professor Harry Scheiber asked me to address the subject of “institutional arrangements for the ocean,” it struck me that this matter keeps coming back. This does not mean that it is irrelevant or meaningless to continue to address it. Quite the contrary. Firstly, defending the role of international institutions has become more important as we see political ambitions to dismantle them or to undermine their work.<sup>1</sup> Secondly, the more time that passes since the adoption and subsequent entry into force of the United Nations Convention on the Law of the Sea, the more relevant the role and interaction of institutional arrangements for the ocean becomes. This is due to the multitude of arrangements established to address ocean-related matters. This development is not likely to languish.

I recall an international conference held twenty years ago at the Fridtjof Nansen Institute in Norway.<sup>2</sup> The 1998 conference, “Order for the Oceans at the Turn of a Century,” was held to mark the 40th anniversary of the Nansen Institute, but also to mark the United Nations-proclaimed International Year of the Ocean.<sup>3</sup> Since the Institute has an early history of cooperation with Berkeley Law’s Law of the Sea Institute, it is of particular interest to recall the Nansen

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1. The International Criminal Court is particularly targeted, but there are also other examples. See *African Union Backs Mass Withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <https://www.bbc.com/news/world-africa-38826073>; James Goldston, *Why John Bolton’s Diatribe against the International Criminal Court Is Misleading, Misguided, and Wrong*, OPEN SOC’Y FOUND. (Sept. 14, 2018), <https://www.opensocietyfoundations.org/voices/why-john-bolton-s-diatribe-against-international-criminal-court-misleading-misguided-and>; Andrew E. Kramer, *Russia Pulls Out of I.N.F. Treaty in ‘Symmetrical’ Response to U.S. Move*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/world/europe/russia-inf-treaty.html>.

2. See *About the Fridtjof Nansen Institute*, FRIDTJOF NANSEN INST., <https://www.fni.no/about-fni/category291.html> (last visited June 1, 2019).

3. ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY xiii (Vidas & Østreng eds., 1999).

Conference.<sup>4</sup> One of the main subjects addressed at that conference was “implementation through international institutions.”<sup>5</sup> Among those who spoke on this particular aspect were renowned lawyers, like the former Secretary-General of the International Seabed Authority (ISA), Satya Nandan,<sup>6</sup> as well as Judges Koroma,<sup>7</sup> Mensah,<sup>8</sup> and Vukas,<sup>9</sup> and Vladimir Golitsyn who, at that time worked for the United Nations.<sup>10</sup> Professor Bernard Oxman addressed the 1994 implementation agreement to the Law of the Sea Convention.<sup>11</sup>

Twenty years later, we can note that the number of institutions created under the Law of the Sea Convention remains the same; namely, the ISA,<sup>12</sup> the International Tribunal for the Law of the Sea,<sup>13</sup> and the Commission on the Limits of the Continental Shelf.<sup>14</sup>

Does this mean that nothing has changed? Certainly not.

Although there is no new comprehensive *institutional* regime for the ocean, other institutional and semi-institutional management structures and arrangements for the purpose of ocean governance have mushroomed. Scheiber and Paik recall that the “possibilities of new international institutions and the viability of regional approaches as an alternative to (or complimentary to) the universalist approach were subjects of intense discussion” but that “the new

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4. I take this opportunity to convey the warmest regards from Professor Davor Vidas, who knew David very well. We all share beautiful memories from an ILA Committee meeting in Lopud, Croatia, last year, when we met to discuss the issue of sea-level rise. We were glad to have Susan (Spencer) with us, too. I have a beautiful picture of Susan and David from that meeting—a meeting where law, art, and the natural environment were blended. For information on the Committee on International Law and Sea-Level Rise, see *Committees*, INT’L L. ASS’N, <http://www.ila-hq.org/index.php/committees> (last visited June 1, 2019).

5. ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 57–142.

6. Satya N. Nandan, *Legislative and Executive Powers of the International Seabed Authority for the Implementation of the Law of the Sea Convention*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 73.

7. Abdul G. Koroma, *Implementation of the Law of the Sea Convention through Its Institutions: An Overview*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 57.

8. Thomas A. Mensah, *The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 81.

9. Budislav Vukas, *Possible Role of the International Tribunal for the Law of the Sea in Interpretation and Progressive Development of the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 95.

10. Vladimir Golitsyn, *Interrelation of the Institutions under the Law of the Sea Convention with Other International Institutions*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 133.

11. See Bernard H. Oxman, *The 1994 Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY, *supra* note 3, at 15 (addressing the agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982).

12. See *About the International Seabed Authority*, INT’L SEABED AUTH., <https://www.isa.org.jm/authority> (last visited June 1, 2019).

13. See *The Tribunal*, INT’L TRIBUNAL FOR L. SEA, <https://www.itlos.org/the-tribunal/> (last visited June 1, 2019).

14. See *Commission on the Limits of the Continental Shelf*, UNITED NATIONS, [http://www.un.org/Depts/los/clcs\\_new/clcs\\_home.htm](http://www.un.org/Depts/los/clcs_new/clcs_home.htm) (last visited Feb. 22, 2019).

forms in ocean regionalism and institutions that prevail at present were not fully anticipated three decades ago.”<sup>15</sup>

This is probably best reflected in the development of the annual United Nations General Assembly resolutions on *Oceans and the Law of the Sea*.<sup>16</sup> These resolutions date back to the early 1990s. The first resolution in 1993 noted the forthcoming entry into force of the Law of the Sea Convention.<sup>17</sup> It encouraged States to ratify, and, interestingly, requested the competent international organizations, the United Nations Development Programme, the World Bank, and other multilateral funding agencies, to intensify assistance to developing countries in their efforts to realize the benefits of the comprehensive legal regime established by the Convention.<sup>18</sup> The resolution also expressed some general concern about the status of the marine environment. All in all, it contained twenty-five paragraphs.

The Law of the Sea resolution adopted in 1998—the year of the Nansen Conference—was not much longer; it contained twenty-eight paragraphs.<sup>19</sup> But its contents signaled a new direction: it was now clearly recognized that different aspects of ocean space (management) are closely interrelated and need to be considered as a whole.<sup>20</sup> References are made to two current topics: namely, piracy and armed robbery at sea, as well as the initiative in UNESCO to commence the work on protection of underwater cultural heritage. What then followed is nothing short of an explosive expansion of the resolution. The most recent resolution from 2018 on Oceans and Law of the Sea is fifty-six pages long and contains 374 paragraphs.<sup>21</sup>

So, what has happened? And what does this have to do with institutional arrangements?

In short, much has happened and most of it has to do with the law, international cooperation, and institutional engagement.

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15. *Introduction to REGIONS, INSTITUTIONS, AND LAW OF THE SEA: STUDIES IN OCEAN GOVERNANCE 2* (Harry N. Scheiber & Jin-Hyun Paik eds., 2013).

16. *See generally Oceans and the Law of the Sea in the General Assembly of the United Nations*, UNITED NATIONS, [http://www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm) (last updated May 23, 2019).

17. G.A. Res. 48/28, ¶ 1 (Dec. 9, 1993).

18. *Id.* at ¶ 16 (“Requests the competent international organizations, the United Nations Development Programme, the World Bank and other multilateral funding agencies, in accordance with their respective policies, to intensify financial, technological, organizational and managerial assistance to the developing countries in their efforts to realize the benefits of the comprehensive legal regime established by the Convention and to strengthen cooperation among themselves and with donor States in the provision of such assistance[.]”).

19. G.A. Res. 53/32, ¶¶ 20, 22–23 (Nov. 24, 1998).

20. *Id.* at preambular ¶ 4.

21. G.A. Res. 73/124 (Dec. 11, 2018).

## I. BACKGROUND EXAMPLES OF COOPERATION ON MARITIME MATTERS

Maritime matters and maritime cooperation have been regulated since pre-Grotian times. Let us recall some of the classical maritime codes, such as the Sea Law of the Rhodians, the Rules of Oléron, the Consolato del Mare, the Wisby Rules, and the Hanseatic Rules.<sup>22</sup> Most of these codes pertained to trade and several contained dispute settlement clauses. Thus, both before and after the jurists de Vitoria (1509), Vázquez de Menchaca (1564), and Grotius (1609) published their treaties, States and entities active on the high seas always accepted that the common area needs some “rules of the road.” Political and technical realities have been the decisive force behind various early agreements, e.g., the multilateral 1884 Convention for the Protection of Submarine Telegraph Cables, adopted in Paris.<sup>23</sup> An important development was the early treaties that regulated naval warfare, for instance the 1856 Paris Declaration Respecting Maritime Law that aimed at protecting neutral flags and goods and clearly spelled out that privateering was and remained abolished.<sup>24</sup> The Paris Declaration was followed by other agreements and treaties on the law of naval warfare.<sup>25</sup> There were also a number of bilateral treaties that Great Britain concluded with other States in suppression of slave trade.<sup>26</sup> Often non-State actors, like private organizations, paved the way by identifying and suggesting regulations in maritime matters.<sup>27</sup>

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22. See A. PEARCE HIGGINS & C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 23–27 (1943).

23. Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884. See J. C. BANCROFT DAVIS & JOHN H. HASWELL, *TREATIES AND CONVENTIONS CONCLUDED BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS* 1176–85 (1889).

24. Declaration Respecting Maritime Law, Apr. 16, 1856, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=473FCB0F41DCC63BC12563CD0051492D>.

25. See Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Aug. 22, 1864, T.S. 396; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, T.S. 543. See also HIGGINS & COLOMBOS, *supra* note 22, at 18.

26. For a recent description, see Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, in 78 *BRITISH YEAR BOOK OF INTERNATIONAL LAW* 342, 357 (2007).

27. The International Law Association has repeatedly addressed maritime matters. One early example is the Draft Convention on Maritime Jurisdiction in Time of Peace, 1926. For that, and other examples, see *List of ILA Conferences 1873–2016*, INT’L L. ASS’N, [http://www.ila-hq.org/images/ILA/docs/ILA\\_Conferences\\_1873-2016.pdf](http://www.ila-hq.org/images/ILA/docs/ILA_Conferences_1873-2016.pdf) (last visited June 2, 2019). Likewise, the Institute of International Law, has addressed maritime matters since the start of its existence. See *Overview Resolutions English Version*, INST. INT’L L., <http://www.idi-iil.org/app/uploads/2018/07/Overview-Resolutions-Website-Final-EN.xlsx> (last visited June 2, 2019). Martin Davies has noted that “[t]he phenomenon of globalisation places increasing stress on legal institutions grounded in territorial sovereignty because of the transnational or non-territorial nature of so many of the legal issues of the Twenty-first century. Maritime law is a mature body of law that has long been accustomed to dealing with this tension, by shaping national laws to fit into informal transnational norms and by a process of informal co-operation between admiralty courts in jurisdictional terms.” Martin Davies, *Maritime Law, the Epitome of Transnational Legal Authority*, in *BEYOND TERRITORIALITY: TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION* 327, 339 (Gunther Handl et al. eds., 2011).

Admittedly, the establishment of the ISA, the International Tribunal for the Law of the Sea, and the Commission on the Limits of the Continental Shelf were remarkable in the sense that they were the first institutional regimes established with the object and purpose of regulating, solving, and advising on maritime matters. However, they were not the first *institutions* aimed at regulating maritime matters or the management of ocean resources.

Let us recall two salient, but different, examples; namely, the International Whaling Commission, established in 1946,<sup>28</sup> and the International Maritime Organization (IMO), established in 1948.<sup>29</sup> The International Whaling Commission was set up under the International Convention for the Regulation of Whaling which was signed in Washington D.C. on December 2, 1946.<sup>30</sup> The preamble to the Convention recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks” and states that its purpose is “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”<sup>31</sup> The purposes of the IMO are “to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade[.]” It is empowered to deal with administrative and legal matters related to these purposes.<sup>32</sup> The IMO is often held up as the brightest star of all specialized agencies of the United Nations. Since it began its work in 1958, the IMO has slowly but surely interpreted its mandate in a manner so as to respond to the current needs of the international community. It now addresses safety and security at sea, and environmental protection, and it is an important partner in support of the United Nation’s Sustainable Development Goals.<sup>33</sup> Even climate matters have found their way into the IMO curriculum.

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28. Presently eighty-nine countries are members. See *History and Purpose*, INT’L WHALING COMMISSION, <https://iwc.int/history-and-purpose> (last visited June 2, 2019); *Overview*, INT’L WHALING COMMISSION, <https://iwc.int/iwcmain> (last visited June 2, 2019).

29. The International Maritime Organization “is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships. IMO’s work supports the UN SDGs.” See *Introduction to IMO*, INT’L MAR. ORG., <http://www.imo.org/en/About/Pages/Default.aspx> (last visited June 2, 2019). The IMO Convention entered into force in 1958. See *Introduction*, INT’L MAR. ORG., <http://www.imo.org/en/About/Conventions/Pages/Home.aspx> (last visited June 2, 2019); Convention on the International Maritime Organization, Mar. 6, 1948, 289 U.N.T.S. 3.

30. See *History and Purpose*, INT’L WHALING COMMISSION, <https://iwc.int/history-and-purpose> (last visited June 2, 2019).

31. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

32. Convention on the International Maritime Organization, art. 1(a), Mar. 6, 1948, 289 U.N.T.S. 3.

33. It helps strengthen education, research, and capacity building through its university, the World Maritime University in Malmö, Sweden. See *About*, WORLD MARITIME UNIVERSITY, <https://www.wmu.se/who-we-are> (last visited June 2, 2019). The International Maritime Law Institute Malta offers advanced training, study, and research in international maritime law. See *About Us*, INT’L

Also, other organizations addressing maritime matters were established and acting at the time of the entry into force of the Law of the Sea Convention. The Commission for the Conservation of Antarctic Marine Living Resources stands out as the first organization that worked on the basis of an ecosystem approach.<sup>34</sup> A few Regional Fisheries Management Organizations had already been established, such as the Northwest Atlantic Fisheries Organization and the General Fisheries Commission for the Mediterranean. In fact, the cooperative management of fisheries had long since taken place at local and regional levels, both as a functional or geographical tool. The Common Fisheries Policy of the European Union is an example of a functional approach.<sup>35</sup>

Additionally, other agreements have had repercussions for ocean management, sometimes by preserving the classical high seas rights, and freedom of navigation in particular. The 1959 Antarctic Treaty serves as one such example.<sup>36</sup> The States that negotiated the Antarctic Treaty were well aware that they did not have the legal power to regulate the use of the high seas for nontreaty parties and therefore included a nonprejudicial clause to ensure “the rights, or the exercise of the rights, of any State under international law with regard to the high seas in the [Antarctic Treaty] area.”<sup>37</sup> The preamble of the International Seabed Treaty contains a similar clause.<sup>38</sup> Since then, nonprejudicial clauses can be found in the variety of agreements on Nuclear (Weapons) Free Zones that pertain to the maritime sphere, such as the Rarotonga Treaty.<sup>39</sup> The area of application of the Bangkok Treaty includes *inter alia* the exclusive economic zones of the parties to the treaty and the airspace over the

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MAR. L. INST., <https://www.imli.org/about-us/imo-international-maritime-law-institute> (last visited June 2, 2019).

34. See *About CCAMLR*, CCAMLR, <https://www.ccamlr.org/en/organisation> (last visited June 25, 2019).

35. The Common Fisheries Policy is a set of rules for managing European fishing fleets and for conserving fish stocks. See *The Common Fisheries Policy*, EUR. COMMISSION, [https://ec.europa.eu/fisheries/cfp\\_en](https://ec.europa.eu/fisheries/cfp_en) (last visited June 2, 2019). It is also worth recalling that the European Union has the exclusive competence to regulate the member States’ fisheries. For a description of the European Union’s actions with respect to marine governance, see Robin Churchill, *The European Union and the Challenges of Marine Governance: From Sectoral Response to Integrated Policy?*, in *THE WORLD OCEAN IN GLOBALISATION: CLIMATE CHANGE, SUSTAINABLE FISHERIES, BIODIVERSITY, SHIPPING, REGIONAL ISSUES* 395, 395–436 (Davor Vidas & Peter Johan Schei eds., 2011).

36. The Antarctic Treaty art. VI, Dec. 1, 1959, 402 U.N.T.S. 71. Parties to the Convention on the Conservation of Antarctic Marine Living Resources are bound by the same provision through Article IV of CCAMLR. Convention on the Conservation Treaties art. IV, May 20, 1980, 80 Stat. 271, T.I.A.S. No. 10240. For more information relating to the Antarctic Treaty System, see *Key Documents of the Antarctic Treaty System*, SECRETARIAT ANTARCTIC TREATY, [https://www.ats.aq/e/ats\\_keydocs.htm](https://www.ats.aq/e/ats_keydocs.htm) (last visited June 2, 2019).

37. The Antarctic Treaty art. VI, Dec. 1, 1959, 402 U.N.T.S. 71.

38. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, May 18, 1972, 955 U.N.T.S. 115.

39. South Pacific Nuclear Free Zone Treaty (the Rarotonga Treaty) art. 2, Aug. 6, 1985, 1445 U.N.T.S. 177.

continental shelf.<sup>40</sup> At the same time, the Bangkok Treaty provides that nothing in the treaty shall prejudice the rights or the exercise of these rights by any other States under the provisions of the convention.<sup>41</sup> Freedom of the high seas and rights of passage are explicitly mentioned in the Bangkok Treaty. The Pelindaba Treaty also contains a “non-prejudice” clause with respect to the rights or exercise of rights under the principle of the freedom of the seas.<sup>42</sup> Both treaties also have compliance mechanisms and impose obligations on the parties to cooperate with the International Atomic Energy Agency, another international organization.

In addition, the United Nations General Assembly has, on several occasions, adopted resolutions establishing zones of peace or nuclear-weapon-free zones in sea areas, for instance in the Indian Ocean and the Southern Hemisphere (the South Atlantic) and adjacent areas. With one exception—the Zone of Peace and Cooperation of the South Atlantic—none of these zones are mentioned in the annual Law of the Sea Convention resolutions. The matter is simply too sensitive.<sup>43</sup>

As mentioned earlier, in 1993, the United Nations General Assembly requested that the Secretary-General report back on the developments pertaining to the Law of the Sea Convention. The first report was presented in 1994<sup>44</sup> and has since been followed by annual reports. Through the reports, it became obvious that numerous institutions and organizations were involved in matters related to ocean affairs. The reports covered more and more ground: maritime safety and security, piracy, drug trafficking, migrants, protection of archaeological objects at sea, environmental protection, development, sharing of information, and hydrographical surveys. Even human rights,<sup>45</sup> rule of law, and climate change found their way into the reports. In effect, the annual resolutions

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40. Treaty on the Southeast Asian Nuclear Weapon-Free Zone (the Bangkok Treaty) art. 1(a), (b), Dec. 15, 1995, 1981 U.N.T.S. 129.

41. *Id.* at art. 2.

42. African Nuclear Weapon-Free-Zone Treaty (Treaty of Pelindaba) art. 2, ¶ 2 (Apr. 11, 1996).

43. The annual reports by the Secretary-General on the Law of the Sea do not have any references to nuclear-weapon-free zones. Very cautious reference to their existence is made in the 2018 Secretary-General’s report on disarmament. *See* U.N. SECRETARY-GENERAL, SECURING OUR COMMON FUTURE: AN AGENDA FOR DISARMAMENT 22 (2018).

44. U.N. Secretary General, *Law of the Sea: Report of the Secretary-General*, U.N. Doc. A/49/631 (Nov. 16, 1994).

45. The first time “human rights” were mentioned in such a report was in 1995. *See* U.N. Secretary General, *Law of the Sea: Report of the Secretary-General*, ¶ 76, U.N. Doc. A/50/713 (Nov. 1, 1995). The concept is not mentioned in the 1996 report and does not occur again until the 1998 report. The human rights perspective then crops up in a discussion about the link between human trafficking and the transporting of migrants by sea. *See* U.N. Secretary General, *Oceans and the Law of the Sea: Report of the Secretary-General*, ¶ 137, U.N. Doc. A/53/456 (Oct. 5, 1998). After that, the human rights aspect gradually begins to be incorporated into the reports. The 2008 report mentions “human rights” twelve times, the words “human” or “humanitarian” fifty-three times and “individuals” occurs ten times. *See* U.N. Secretary General, *Oceans and the Law of the Sea: Report of the Secretary-General*, U.N. Doc. A/63/63 (Mar. 10, 2008).

on oceans and the Law of the Sea contained a parallel inventory of all those institutions that are working with the issues, such as the Intergovernmental Oceanographic Commission of UNESCO, the World Meteorological Organization, the United Nations Office on Drugs and Crime, the United Nations High Commissioner for Refugees, the United Nations Environment Programme,<sup>46</sup> the International Labour Organization, and the FAO,<sup>47</sup> to mention but a few. The references to regional organizations and initiatives are plentiful. In recent years, we also find references to private institutions, businesses, and the civil society. The report mirrors the engagement of these nongovernmental associations. This engagement is further evidenced by the voluntary commitments registered at and since the comprehensive Ocean Conference in 2017.<sup>48</sup>

Throughout the resolution, we find emphasis, encouragement, and recognition of regional and functional cooperation, but also clear references to international law, including the Law of the Sea Convention. This is as far from the narrow perspective as possible. It is recognition of the fact that numerous institutions address maritime matters.<sup>49</sup> At the same time, the resolution identifies the General Assembly as *the* global institution having the competence to undertake such a review of the developments relating to oceans affairs and the Law of the Sea.<sup>50</sup> However, there is one implicit understanding: the resolutions do not address matters concerning disarmament or protective security rights

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46. The Regional Seas Program was launched in 1974. See *Why Does Working with Regional Seas Matter?*, UNITED NATIONS ENV'T PROGRAMME, <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas> (last visited June 3, 2019). Van Dyke claims that “the relative success of the Mediterranean and OSPAR programmes and to a somewhat lesser extent the Western Caribbean Program, are attributable in large to the involvement of nongovernmental/civil society organizations which bring ideas and information to these programmes and help set their agendas and thereby put pressure on the members to provide proper funding for needed activities.” Jon M. Van Dyke, *Whither the UNEP Regional Seas Programmes?*, in *REGIONS, INSTITUTIONS, AND LAW OF THE SEA*, *supra* note 15, at 89, 108–09.

47. On FAO, see Jean-François Pulvenis, *FAO, Ocean Governance, and the Law of the Sea*, in *REGIONS, INSTITUTIONS, AND LAW OF THE SEA*, *supra* note 15, at 111–28.

48. See *Registry of Voluntary Commitments*, UNITED NATIONS, <https://oceanconference.un.org/commitments/> (last visited June 3, 2019). Not all States welcomed the holding of an Ocean Conference in parallel with the ordinary General Assembly Law of the Sea meetings. Extensive discussions took place before resolution A/RES/70/226, United Nations Conference to Support the Implementation of Sustainable Development Goal 14, could be adopted, as well as before resolution A/70/303 setting the modalities for the Conference. See G.A. Res. 70/226 (Feb. 12, 2016); G.A. Res. 70/303 (Sept. 23, 2016). The Conference turned out to be successful and most States seem now to embrace it.

49. Lowe and Talmon have put together documents of the International Maritime Organization, of regional fisheries organizations, security-related documents, treaties concerning resource exploitation, environmental protection measures and much more, into the framework created by the Law of the Sea Convention. See *THE LEGAL ORDER OF THE OCEANS: BASIC DOCUMENTS ON LAW OF THE SEA* (Vaughan Lowe & Stefan Talmon eds., 1988). The compilation serves as evidence of the growing relevance for managing ocean matters. Still, and for very good reasons, it does only focus on purely maritime matters.

50. G.A. Res. 73/124, *supra* note 21, at ¶ 371.

since States are not prepared to relinquish their national security interest to the General Assembly. Disarmament regulations, confidence building measures, and the right to take enforcement measures at sea are matters kept close to the heart of each individual State.<sup>51</sup>

International law is one legal system, and the challenge facing the international community is to move ocean governance gradually into a more integrated and cross-sectorial system. This process is still evolving and steadily growing in importance for the international community.

## II. FUTURE PERSPECTIVES

Oceans management is partly universal, but also increasingly regionalized and “functionalized.” It makes sense; neither the General Assembly as a political organ nor the regional institutions have the capacity or mandate to address and regulate all issues relevant to the management of the oceans. It is far from likely that this development will be stopped or debarred. Occasionally, vague suggestions are made or voices are heard arguing in favor of a renegotiation of the United Nations Convention on the Law of the Sea. However, few, if any, have ever addressed institutional arrangements.

One of the main issues in the context of the ongoing negotiations on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ) is that States will have to address whether or not there is a need for a new institutional *structure* to address matters relating to BBNJ and area-based management.<sup>52</sup> There are, in essence, three possibilities: (1) a new treaty regulating the management of BBNJ; (2) a middle-ground way through a treaty that establishes some sort of regulatory mechanism to assess, but not necessarily decide, what decisions are taken at a regional level; or (3) maintaining the current regulation, but enhancing cooperation.

It is essential to build from what we have. This is because the convention rests on two important pillars: cooperation and compulsory dispute settlement mechanisms. We must rethink what we refer to when we discuss institutional arrangements for the ocean. It is not likely that “one” institution can effectively deal with every aspect of ocean matters. They are simply too many and too complex to be dealt with by one institution. The fifty-six pages and 374

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51. For operational perspectives, see JAMES KRASKA & RAUL PEDROZO, *INTERNATIONAL MARITIME SECURITY LAW* (2013) and *ROUTLEDGE HANDBOOK OF MARITIME REGULATION AND ENFORCEMENT* (Robin Warner & Stuart Kaye eds., 2016).

52. See *Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction*, UNITED NATIONS, <https://www.un.org/bbnj/> (last visited June 3, 2019). For a summary and analysis of the discussions, see generally Cymie R. Payne, *New Laws for the High Seas*, 46 *ECOLOGY L.Q.* 191, 37 *BERKELEY J. INT’L L.* 345 (2019).

paragraphs of the Oceans and the Law of the Sea resolution evidences this.<sup>53</sup> Management of ocean matters in the United Nations family alone is now so complex that a new interagency mechanism has been established, UN Ocean, that seeks to enhance the coordination, coherence, and effectiveness of competent organizations of the United Nations system and the ISA. It is clearly set out that this is to be done in conformity with the Law of the Sea Convention.<sup>54</sup>

This demonstrates that ocean matters cannot be regulated by maritime conventions only. In addition, it is worth repeating that threats to the ocean do not primarily stem from activities in the ocean, but are often land-based or derive from activities in the air.<sup>55</sup> An obvious example is sea-level rise, which is not due to activities at sea. But, the footprints in the ocean are difficult to erase, whether or not they come from land- or sea-based activities or remain from war, such as nuclear testing or the dumping of chemical and explosive substances.

While institutions other than those explicitly identified in the Law of the Sea Convention are paying more attention to ocean and maritime matters, it is likewise important to ensure that the balance achieved in the package deal that the convention aims at establishing is maintained. At the same time, this package deal needs to respond to the pressing need for clarifications and adaptations. The Part XI Implementation Agreement and the Fish Stocks Agreement do exactly that. Hopefully the future BBNJ instrument will do so as well.

Does this mean that there is a risk of legal fragmentation? This does not have to be the case, provided that the institutions and structures that we have established continue to be honored. The most important of these institutions and structures in this context are the compulsory dispute settlement procedures under the Law of the Sea Convention and the independent role of the ISA. But these institutions do not work in an ivory tower, isolated from the surrounding legal, political, environmental, scientific, and economic development realities. In a statement at the BBNJ meeting in New York, 2018, the Secretary-General of ISA stated that ISA, when setting up a regional scale environmental management plan, took into account relevant “scientific and technical guidance from CBD

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53. G.A. Res. 73/124, *supra* note 21. The resolution continues to grow year by year. In 2017 it contained 370 paragraphs on fifty-five pages. See G.A. Res. 72/73 (Jan. 4, 2018). The most recent Fish Stocks resolution is only 243 paragraphs and on forty pages. See G.A. Res. 73/125 (Jan. 15, 2019).

54. See *Home*, UN-OCEANS, <http://www.unoceans.org/home/en/> (last updated June 7, 2018). Some 24 UN agencies are part of the platform. *Id.*

55. Van Dyke, *supra* note 46, at 90 (“Only the Black Sea, the Mediterranean Sea, the Persian/Arab Gulf ROPME Sea Area, and the Southeast Pacific regions have protocols on land based pollution,” although not yet in force). See also 1974 Paris Conventions that also addresses land-based pollution of the marine environment—but this convention is superseded by the OPSPAR Convention. *Id.* n.11. The original idea is to manage marine pollution now and use a multisectoral integrated ecosystem approach. The challenge is to move it to the next level, namely, sustainable development. See also Doris König, *Global and Regional Approaches to Ship Air Emissions Regulation: The International Maritime Organization and the European Union*, in *REGIONS, INSTITUTIONS, AND LAW OF THE SEA*, *supra* note 15, at 317.

[Convention on Biological Diversity] processes.”<sup>56</sup> An even more prominent example is the decision by the ISA to seek guidance through a request for an advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (“the Chamber”).<sup>57</sup> The advisory opinion that the ISA sought related to matters regarding responsibility and liability and required qualified interpretation of treaties. The Chamber heard oral statements from a number of States, and also from intergovernmental<sup>58</sup> and nongovernmental organizations.<sup>59</sup> In its advisory opinion, the Chamber relied not only on treaty law and international court cases, but also on the work of the United Nations International Law Commission. This, I believe, bears evidence of attempts for harmonious interpretation, but also of the very simple fact that neither the ISA nor the Chamber work in isolation. The law is and must be a functional tool that works in pace with the demands of the international community.

The establishment of a compulsory dispute settlement structure is a crucial institutional element in the Law of the Sea Convention. All 168 States that are parties to the Convention have voluntarily committed themselves to this compulsory dispute settlement mechanism.<sup>60</sup> This is reflected in the rise of cases in the International Tribunal for the Law of the Sea, the International Court of Justice, and various arbitration agreements. We also see cases relevant to the Law of the Sea in other fora, such as the European Court of Human Rights and in separate agreements to resort to arbitration. Also, national courts are frequently forced to address maritime matters from a wide range of perspectives. This development is likely to continue and increase. Hence, it becomes more and more important that all courts and tribunals are familiar with the Law of the Sea Convention framework and its checks and balances.<sup>61</sup>

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56. Michael W. Lodge, Secretary-General of the ISA, Statement at IGC1 BBNJ (Sept. 7, 2018), <https://ran-s3.s3.amazonaws.com/isa.org-jm/s3fs-public/documents/EN/SG-Stats/abmt-bbnj.pdf>.

57. Int’l Seabed Authority, *Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea*, ISBA/16/C/13 (May 6, 2010).

58. Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO). *See About Us*, INTERGOVERNMENTAL OCEANOGRAPHIC COMMISSION, <http://www.unesco.org/new/en/natural-sciences/ioc-oceans/about-us/> (last visited June 4, 2019).

59. International Union for Conservation of Nature. *See About*, INT’L UNION FOR CONSERVATION NATURE, <https://www.iucn.org/about> (last visited June 4, 2019).

60. Implementation Agreement is ratified by 150 States and the Fish Stocks Agreement by eighty-nine. The EU has ratified all three. *See Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the Implementation of Part XI of the Convention and of the Agreement for the Implementation of the Provisions of the Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks as at 31 March 2018*, UNITED NATIONS (Mar. 31, 2018), [https://www.un.org/depts/los/reference\\_files/status2018.pdf](https://www.un.org/depts/los/reference_files/status2018.pdf).

61. The ILC work on the topic of identification of customary law aims at mitigating this challenge. *See Draft Conclusions on Identification of Customary International Law*, United Nations (2018), [http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft\\_articles/1\\_13\\_2018.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_13_2018.pdf&lang=EF).

This also means that there is reason to be concerned when the agreed dispute settlement procedure is not respected, in other words, when States do not appear in the courts or before tribunals.<sup>62</sup> This sets a bad precedent and risks dismantling the system. At a minimum, States should appear or present their views in writing. It is for the courts and tribunals to decide whether or not they have jurisdiction, and it is the courts and tribunals that address the merits of a case before the court or the tribunal.

The most important challenge to the ocean and to our own survival is climate change. It affects and will continue to affect the oceans. As David Caron has said, both policy and law need to begin to anticipate the challenges ahead.<sup>63</sup> From an institutional perspective, this means that we must rely on structures adopted outside the context of the Law of the Sea, such as the Paris Agreement and the United Nations Framework Convention on Climate Change. The institutions must be buttressed, not dismantled. This should be born in mind as we move into the United Nations Decade of Ocean Science for Sustainable Development, starting in 2021. Addressing the ocean-climate nexus is unavoidable, as the discussions at the 2017 Oceans Conference,<sup>64</sup> the COP24 in Katowice, Poland in 2018, and at the Ocean Action Day in December 2018 have demonstrated.<sup>65</sup> The connection between climate change and the health of the oceans is slowly but surely reaching the high-level political agenda.<sup>66</sup> Scientists have known this since long before now.

#### CONCLUSION

The negotiators of the 1982 Law of the Sea Convention foresaw not only that “the problems of ocean space are closely interrelated and need to be

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62. The Arctic Sunrise Arbitration and the South China Sea Arbitration may serve as examples of this. See *In re Arctic Sunrise Arbitration* (Neth. v. Russ.), Case No. 2014-02, Award on Jurisdiction, ¶ 72 (Perm. Ct. Arb. 2014), <http://www.pcacases.com/web/sendAttach/1325> (“Russia’s Declaration cannot create an exclusion that is wider in scope than what is permitted by article 29 8(1)(b).”); *In re South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pcacases.com/web/sendAttach/2086>.

63. David Caron, *Climate Change and the Oceans*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 15, at 537. Caron refers to geoengineering and notes that the law is less clear in terms of possible geoengineering than in efforts to mitigate emissions from shipping and offshore oil activities. See also Tavis Potts & Clive Schofield, *Climate Change and Evolving Regional Ocean Governance in the Arctic*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA, *supra* note 15, at 437–66.

64. *Climate Action is Needed to Protect World’s Oceans*, UNITED NATIONS, <https://unfccc.int/news/climate-action-is-needed-to-protect-world-s-oceans> (last visited June 4, 2019).

65. See *Oceans Action Day at UNFCCC-COP24*, OCEAN POL’Y RES. INST. (Dec. 22, 2018), [https://www.spf.org/en/\\_opri/news/20181222.html](https://www.spf.org/en/_opri/news/20181222.html); *Oceans Action Day at COP 24*, IISD REPORTING SERV. (Dec. 8, 2018), <http://enb.iisd.org/climate/cop24/oceans-action-day/>.

66. For example, Belgium organized the High Level Conference on Climate Change and Oceans Preservation in Brussels in February 2019. See *Introduction*, CLIMATE CHANGE & OCEANS PRESERVATION, <https://climateoceans.eu> (last visited June 4, 2019).

considered as a whole,”<sup>67</sup> but also affirmed “that matters not regulated by this Convention continue to be governed by the rules and principles of general international law[.]”<sup>68</sup>

That takes us back to Hugo Grotius’s idea: no sovereignty over ocean spaces, but use them in common interest and cooperation. I believe that Grotius would have been pleased with the development of institutional cooperation that has replaced the grab-and-go practice of no responsibility or liability for the usurpation or damage made to the rights of other users. This would hopefully repress the “tragedy of the commons.”<sup>69</sup> Admittedly, there has been a territorialization of the sea since Grotius’s time.<sup>70</sup> In addition, economies, sciences, and technologies continue to advance and make various uses of the ocean even more possible. This is a kind of functionalization that States try to manage by maintaining the flag state regime or strengthening port state control.<sup>71</sup> But, to achieve a balanced and fair use of the ocean, the international community needs to establish just and fair collective management of the ocean. This is in essence a part of the Grotian idea of a sustainable global common.<sup>72</sup>

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67. United Nations Convention on the Law of the Sea preambular para., Dec. 10, 1982, 1833 U.N.T.S. 397.

68. *Id.*

69. For a brief description of the concept, see ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2–3 (1990). For an interesting analysis, see Harry N. Scheiber, *The “Commons” Discourse on Marine Fisheries Resources: Another Antecedent to Hardin’s “Tragedy”*, 19 THEORETICAL INQUIRES L. 489, 489–90 (2018).

70. Generally, on territorialization, see CHRISTOPHER R. ROSSI, SOVEREIGNTY AND TERRITORIAL TEMPTATION: THE GROTIAN TENDENCY (2017) and Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 830 (2006).

71. See Cedric Ryngaert & Henrik Ringbom, *Introduction: Port State Jurisdiction: Challenges and Potential*, 31 INT’L J. MARINE & COASTAL L. 379, 380–81 (2016).

72. See ROSSI, *supra* note 70 (for a refreshing account of the Grotian tradition).

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# Navigating the Oceans: Old and New Challenges for the Law of the Sea for Straits Used for International Navigation

*Nilufer Oral\**

## INTRODUCTION

David Caron in his elegant exposé on the *Great Straits Debate* explains that: Straits simultaneously involve interests both near and far. And it is that fact that makes passage through straits a difficult object of negotiations. Although all nations have an interest in efficient shipping, it is particular nations—often far from the straits—that have interests in the unimpeded movement of naval vessels or that directly or through their nationals have interests in the unimpeded movement of commercial vessels. Simultaneously, it is the states with coasts on these straits that most directly face the risks and other costs of such vessel passage. Negotiating solutions to this ‘near-far’ clash of interests is inherently difficult.<sup>1</sup>

Straits are by definition narrow waterways linking seas and the ocean which often provide significant time-saving and cost-cutting navigational routes to commercial shipping. In turn, this navigationally advantageous position can give coastal States the power to exert control over passage of international shipping by imposing regulatory conditions or even by completely closing passage to foreign ships. The topic of straits has taken its place in the great discourses of international law stretching over a period of more than three centuries, dating back to Hugo Grotius in the seventeenth century and well into the twentieth

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1. David D. Caron, *The Great Straits Debate: The Conflict, Debate, and Compromise that Shaped the Straits Articles of the 1982 United Nations Convention on the Law of the Sea*, NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW 11, 11–32 (David D. Caron & Nilufer Oral eds., 2014).

century.<sup>2</sup> The question of the legal rights of passage for foreign ships through straits has held a prominent place in international law and the law of the sea, especially during the negotiations of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>3</sup>

This Article will examine the key challenges that have shaped the evolution of the regime of straits used for international law dating back to the early jurists of the nineteenth century. The common thread has been what David Caron refers to as the *near-far clash of interests* between States bordering straits and the distant shipping States using them. This Article will first examine the dynamics that shaped the development of the regime of straits under international law over the centuries leading to the adoption of Part III of UNCLOS on the regime of straits. The Article will then examine current challenges that were not expressly addressed under UNCLOS. These issues include the status of mandatory pilotage in straits that are ecologically vulnerable and present navigational risks to shipping. It will also assess questions that arise due to the melting of sea ice in the Arctic as a result of climate change and its impact on the status of navigation and protection of the environment in the Northwest Passage. Lastly, the Article will examine the Malacca and Singapore Straits, the Strait of Bab al Mandab, and the Strait of Hormuz as key choke points for the transport of oil that are facing security threats from piracy, robbery, and terrorism.

#### I. HISTORICAL EVOLUTION OF THE REGIME OF STRAITS

Hugo Grotius and other early scholars of international law, such as de Vattel, saw straits as part of the common interests of the international community.<sup>4</sup> However, this view was not necessarily shared by coastal States that bordered such straits. From the earliest times, the problem of straits concerned the power of the coastal State to control the passage of foreign ships. One well-known example in history is the ancient rule of the Ottoman Empire which gave the Ottoman Sultan unilateral power to close the Turkish Straits to the passage of foreign ships.<sup>5</sup> Another example is found in the Danish/Baltic Straits, where for four centuries Denmark imposed tolls on ships until the signing of the Copenhagen Convention on the Sound and the Belts.<sup>6</sup>

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2. Hugo Caminos, *The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea*, 205 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 20 (1987).

3. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

4. See EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* 256 (Béla Kapossy & Richard Whitmore eds., 2008); Caminos, *supra* note 2, at 20.

5. Caminos, *supra* note 2, at 24. See also NILUFER ORAL, *REGIONAL CO-OPERATION AND PROTECTION OF THE MARINE ENVIRONMENT UNDER INTERNATIONAL LAW: THE BLACK SEA* 24 (2013).

6. GUNNAR ALEXANDERSSON, *THE BALTIC STRAITS* 70–73 (1982); Treaty for the Redemption of the Sound Dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns,

It is no surprise that the development of international law on straits has centered on finding a balance between two competing interests: that of the coastal States with an inherent interest in regulating shipping activities in these narrow passageways, and that of the shipping States in ensuring freedom of navigation through these critical routes.<sup>7</sup> Hugo Caminos, formerly judge of the International Tribunal for the Law of the Sea, notes in his 1987 Hague lecture, “[t]his scenario of competing interests in formulating a special legal régime for straits is similar to that existing 350 years ago as Grotius and Selden contested the pros and cons of wide coastal State jurisdiction.”<sup>8</sup> In short, there has long been a struggle about how straits should be governed between the interests of the coastal State and the interests of the international community.

The question of the navigational regime for straits has inspired many learned jurists over the centuries to spill significant quantities of ink on the topic. Emer de Vattel, the renowned eighteenth century international law jurist, recognized in *The Law of Nations* (1798), his hallmark treatise on international law, that the separate status of straits from other parts of the ocean, “serve for a communication between two seas, the navigation of which is common to all or several nations, the nation which possesses the strait, cannot refuse the others passage through it, provided that passage be innocent . . . .”<sup>9</sup> On the other hand, similar to Grotius, de Vattel did concede that the coastal State has some limited rights to impose a moderate tax in return for services, such as for protecting ships from pirates and to defray other costs, such as maintaining lighthouses and other things necessary for shipping safety.<sup>10</sup> The first in-depth scholarly examination of international law in relation to straits belongs to the Norwegian jurist Erik Brüel. His now classic work *International Straits* has since been supplemented with a multitude of scholarship on straits.<sup>11</sup>

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Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway and Denmark, Mar. 14, 1857, 116 CONSOLIDATED TREATY SERIES Consol. T.S. 357; Convention for the Discontinuance of the Sound Dues between Denmark and the United States, of Apr. 11, 1857, 116 CONSOLIDATED TREATY SERIES Consol. T.S. 465.

7. See Caron, *The Great Straits Debate*, *supra* note 1, at 11.

8. Caminos, *supra* note 2, at 20.

9. De Vattel, *supra* note 4, at 256.

10. *Id.*

11. The list of publications on straits is numerous. For example, under the general editorship of Gerard Mangone, followed by Nilufer Oral after his passing, since 1978, seventeen volumes on straits used in international navigation have been published as part of the Brill/Nijhoff series entitled STRAITS OF THE WORLD (Nilufer Oral ed.). See generally, e.g., LEWIS M. ALEXANDER, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES (1986); Caminos, *supra* note 2. See generally, J. A. DE YTURRIAGA, STRAITS USED FOR INTERNATIONAL NAVIGATION: A SPANISH PERSPECTIVE (1991); BING BING JIA, THE REGIME OF STRAITS IN INTERNATIONAL LAW (1998); ANA G. LÓPEZ MARTÍN, INTERNATIONAL STRAITS: CONCEPT, CLASSIFICATION AND RULES OF PASSAGE (2010); HUGO CAMINOS & VINCENT P. COGLIATI-BANTZ, THE LEGAL REGIME OF STRAITS: CONTEMPORARY CHALLENGES AND SOLUTIONS (2014).

The importance of straits under international law is further reflected by the attention given to the subject by international law bodies and codification conferences. The Institut de Droit International undertook an examination of straits between the years of 1894 and 1912 and the possibility of a separate regime from that of the territorial sea.<sup>12</sup> The topic was also a subject of study by the International Law Association (ILA) between 1894 and 1910.<sup>13</sup> The question of the legal regime of straits was again a subject of the 1907 Hague Peace Conference, related to the laying of mines, another topic examined by the ILA.<sup>14</sup> Between 1923 and 1936 a series of lectures on straits were given at the Hague Academy, the last one in 1936 by Erik Brüel.<sup>15</sup> In 1924 under the League of Nations, a committee of experts was established to examine questions of international law considered ripe for codification.<sup>16</sup> Different subcommittees were formed and one was tasked with examining the relationship of the rules of the territorial sea to straits.<sup>17</sup> The final report of the experts committee led to the 1930 Hague Codification Conference where three specific topics were to be discussed, which included the question of the regime of straits as part of the topic on the territorial sea.<sup>18</sup>

Lastly, the rights of passage through straits used for international navigation was also the subject matter of the *Corfu Channel*, the very first case brought before the newly established International Court of Justice in 1947.<sup>19</sup> The United Kingdom brought the case against Albania claiming reparation for the loss of two navy destroyers and forty-four personnel from mines in the Corfu Channel, which Albania failed to report as required under international law.<sup>20</sup> One of the important questions that the court addressed concerned the innocent passage rights of the British warships through the territorial waters of Albania in the Corfu Channel, and whether Albania could require prior authorization for passage.<sup>21</sup> On the latter issue, Albania claimed that the Corfu Channel was not in that category of straits in which a right of passage existed as it was only of

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12. LÓPEZ MARTÍN, *supra* note 11, at 4–5; *see also* Caminos, *supra* note 2, at 28.

13. LÓPEZ MARTÍN, *supra* note 11, at 5–6.

14. Caminos, *supra* note 2, at 28–29.

15. *Id.* at 35–39.

16. U.N., 1 THE WORK OF THE INTERNATIONAL LAW COMMISSION 3, 7 (8th ed. 2017).

17. Caminos, *supra* note 2, at 30.

18. *See id.* The other two topics were: (1) nationality and (2) the responsibility of states for damage done on their territory to the person or property of foreigners. *See id.*

19. *See generally* The Corfu Channel Case (United Kingdom v. Albania), Judgment, 1949 I.C.J. Rep 4 (Apr. 9).

20. Specifically, the United Kingdom claimed that “Albanian Government either caused to be laid, or had knowledge of the laying of, mines in its territorial waters in the Strait of Corfu without notifying the existence of these mines as required by Articles 3 and 4 of Hague Convention No. VII 1 of 1907, by the general principles of international law and by the ordinary dictates of humanity.” Application Instituting Proceedings and Documents of the Written Proceedings, Corfu Channel (U.K. v. Alb.) 1494 I.C.J. Pleadings 9–10 (May 22, 1947).

21. The *Corfu Channel Case* (Merits) Judgment of April 9, 1949, p. 27.

secondary importance and not a “necessary route between two parts of the high seas.”<sup>22</sup> The United Kingdom, in turn, claiming the application of innocent passage, challenged the Albanian requirement of prior authorization as a condition of the passage of foreign warships in the Corfu Channel.<sup>23</sup> This landmark case brought some clarity to certain unresolved questions concerning the legal regime of straits: in particular, warships enjoyed a customary right to innocent passage through straits used in international navigation in times of peace.<sup>24</sup> Secondly, while the court did not define the elements of an international strait, it made clear that innocent passage rights applied in straits *connecting two parts of the high sea*.<sup>25</sup> The court also rejected the Albanian position that because the Corfu Channel was not a necessary route and only a secondary one, it did not belong to that class of international highways through which the rights of innocent passage exists.<sup>26</sup> The court found that the strait need not be a *necessary* route for a right of innocent passage to exist.<sup>27</sup> The definition of a strait used for international navigation was an issue that would crop up in future disputes between states.

As briefly outlined above, the conflict between international shipping interests and that of the coastal State in straits used in international navigation has influenced the development and codification of international law for centuries.

## II. THE CHALLENGES FOR THE LAW OF THE SEA THAT SHAPED THE REGIME OF STRAITS USED IN INTERNATIONAL NAVIGATION

The problem of the legal regime of straits in the twentieth century became intertwined with the thorny problem of the breadth of the territorial sea. David Caron describes the key changes that eventually led coastal States to seek greater regulatory control over foreign shipping:

The law of the sea present in custom in the 1800s began to collapse at the outset of the 20th century. This collapse in part began because of improvements in technology that opened the oceans to more and more exploitation. First, the advent of steam engines and of refrigeration meant that more efficient and more distant fisheries emerged. Second, the discovery of oil offshore and the development of the capacity to exploit that

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22. *See id.* at 28. Regardless of innocent passage rights, Albania had further claimed that the passage of the British warships was not innocent. *Id.* at 30. Albania pointed to subjective elements of the political intent of Britain to intimidate Albania through combat formation and gun positioning. *Id.*

23. *Id.* at 27. *See also* Memorial Submitted by the Government of the United Kingdom of Great Britain and of Northern Ireland, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Pleadings 19, 42, 45 (Sept. 30).

24. *Corfu Channel*, *supra* note 21, at 28. For a detailed discussion on straits and the law of war see HUGO CAMINOS & VINCENT P. COGLIATI-BANTZ, *THE LEGAL REGIME OF STRAITS: CONTEMPORARY CHALLENGES AND SOLUTIONS*, 11–39 (2014).

25. *Corfu Channel*, *supra* note 21, at 28.

26. *Id.* at 28–29.

27. *Id.*

resource lead [sic] to more and more offshore oil development. These two factors led coastal states to look to claim greater and greater bands of coastal waters. That tendency, the tendency to enclose the oceans, led to the possibility that many straits of the world—previously open to free navigation—would slip in whole or in part under national jurisdiction.<sup>28</sup>

Because the world transitioned to a petroleum-based economy, the importance of offshore oil deposits continued to increase and made its mark on the question of the breadth of the territorial sea and the regime of straits. The launching of the first tanker in the Caspian Sea in 1878 to transport oil<sup>29</sup> marked the beginning of a new era. As the world economy transformed from coal and steam to petroleum oil, the number of oil tankers at play in global waters increased. And these tankers created both operational and accidental pollution of the seas. International concern over oil pollution dates back to 1926 when the United States convened a governmental conference to draft a treaty regulating intentional oil discharges.<sup>30</sup> The first international treaty addressing oil pollution was the 1954 International Convention for the Prevention of Pollution at Sea by Oil.<sup>31</sup> The advent of super tankers carrying millions of tons of oil and the transport of nuclear waste by sea created an equally unacceptable threat of costly environmental pollution and health risks to coastal States.<sup>32</sup> The 1967 *Torrey Canyon* tanker accident, which occurred off the coast of Northern England, was the first major incident that highlighted the dangers of pollution to coastal States.<sup>33</sup> The risk of oil spills from tankers was one of the issues that shaped the debates at the third United Nations Conference on the Law of the Sea, that took place between 1973 and 1982 (UNCLOS III). The concerns of pollution from tankers was best expressed by Malaysia, which was of the view that the mere passage of such tankers in straits constituted non-innocent passage.<sup>34</sup> Coastal State environmental concerns played an important role in the negotiation of the straits regime during the Third Conference on the Law of the Sea.<sup>35</sup> Whereas, in

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28. Caron, *The Great Straits Debate*, *supra* note 1, at 11–12.

29. DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER* 42–54 (1991).

30. Z. OYA OZCAYIR, *LIABILITY FOR OIL POLLUTION AND COLLISIONS* 171 (1998).

31. International Convention (with annexes) for the Prevention of Pollution of the Sea by Oil, 1954, May 12, 1954, 327 U.N.T.S. 3.

32. Jon M. Van Dyke, *Transit Passage Through International Straits* 188, in *THE FUTURE OF OCEAN REGIME-BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON* 178 (Aldo Chircop, Ted L. McDorman, Susan J. Rolston eds., 2009).

33. See *Brief history of the IMO*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx> (last visited Feb. 21, 2019); see also Ved P. Nanda, *The “Torrey Canyon” Disaster: Some Legal Aspects*, 44 *DENV. L.J.* 400, 400–01 (1967).

34. Van Dyke, *supra* note 32, at 188.

35. Caron, *The Great Straits Debate*, *supra* note 1, at 26–28 (citing Munadjat Panusaputro, *Elements of an Environmental Policy and Navigational Scheme for Southeast Asia, with Special Reference to the Straits of Malacca*, in *REGIONALIZATION OF THE LAW OF THE SEA, PROCEEDINGS OF THE 11TH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE* 178–81 (Douglas M. Johnston ed., 1977)).

the past the regime of the passage of straits was not considered separately but included as part of the regime of the territorial sea.<sup>36</sup>

Following the 1930 Hague Codification, it was not until the 1950s that the governments reconvened to codify a new treaty on the law of the sea. The work of the International Law Commission on the law of the sea and the regime of the high seas laid the foundation for the first conference on the law of the sea (UNCLOS I) held in 1958.<sup>37</sup> Resolution of the maximum breadth of the territorial sea escaped resolution under the 1958 Geneva set of Conventions<sup>38</sup> and narrowly in 1960 during UNCLOS II.<sup>39</sup> The unresolved issue of the breadth of territorial seas was among the critical issues addressed by the delegates to UNCLOS III. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone<sup>40</sup> remained silent on this issue but codified the right of foreign flagged ships to have innocent passage through the territorial sea, including the requirement that submarines navigate on the surface and show their flag.<sup>41</sup> The only reference to straits concerned the prohibition of the suspension of innocent passage of foreign ships in paragraph 4 of article 16.<sup>42</sup>

The expansion of the breadth of the territorial sea from what was considered to be the customary international rule of three to twelve nautical miles (nm) meant that significant areas that were subject to the high seas regime of freedom would fall under the control and regulation of coastal States as provided under the innocent passage regime. It is not surprising that maritime interests and in particular naval powers were not favorable to the loss of their freedom of movement in the high seas. On the other hand, coastal States wary of foreign shipping activities near their coast, especially in light of technological

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36. LÓPEZ MARTÍN, *supra* note 11, at 14.

37. Caminos, *supra* note 2, at 44–45. Mr. J.P.A. François was appointed as Special Rapporteur and during that time period prepared a total of eight reports for the Commission. *See Analytical Guide to the Work of the International Law Commission*, INTERNATIONAL LAW COMMISSION, [http://legal.un.org/ilc/guide/8\\_1.shtml](http://legal.un.org/ilc/guide/8_1.shtml) (last accessed Feb. 21, 2019).

38. The Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285.

39. *See generally* Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205; Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 11; Convention on the Continental Shelf, Apr. 29, 1958, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285. The United States and Canada had submitted a common proposal which allowed for the coastal State to extend the breadth of its territorial sea up to six nautical miles and to establish a fishery zone in the high seas contiguous to the territorial sea of up to twelve nautical miles. However, the proposal failed by one vote to obtain the necessary two-thirds majority. *See* YTURRIAGA, *supra* note 11, at 40.

40. *See generally* Convention on the Territorial Sea and the Contiguous Zone, *supra* note 39, at arts. 14–17.

41. *Id.* at art.14(6)

42. *Id.* at art.16(4).

developments, including the threat from the transport of oil, sought greater regulatory control afforded by an expansion of the territorial sea.<sup>43</sup>

Consequently, during UNCLOS III the lines were drawn between those States seeking a wide territorial sea up to twelve nm and the maritime States who sought to preserve their right to unimpeded passage, in particular the United States and later the Union of Soviet Socialist Republics,<sup>44</sup> especially in straits where extension of the breadth of the territorial sea to twelve nm would swallow up high seas areas. For naval powers, the right of free and unimpeded passage for warships, and in particular for submarines, was critical and non-negotiable.<sup>45</sup> The United States had consistently defended a narrow territorial sea and later conditioned its acceptance of a twelve nm territorial sea on preserving high seas freedoms of passage in international straits.<sup>46</sup> States bordering straits were equally vocal and persistent. These States wanted to maintain innocent passage in straits while also ensuring their ability to regulate navigation and protect the marine environment.<sup>47</sup> An eventual compromise solution was achieved with an entirely new regime of “transit passage,” introduced by the United Kingdom.<sup>48</sup>

Under the 1958 Geneva Convention only one subparagraph is devoted to straits.<sup>49</sup> By contrast, Part III of UNCLOS is exclusively devoted to the regime of straits used in international navigation with a total of twelve articles, excluding article 233 in Part XII.<sup>50</sup> Without question, straits used for international navigation acquired new prominence under UNCLOS, underscoring the importance of these waterways under international law.

### III. THE REGIME OF STRAITS USED FOR INTERNATIONAL NAVIGATION UNDER UNCLOS

Part III of UNCLOS established multiple categories of straits and applicable regimes. Broadly speaking one can begin with separating those straits that fall

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43. See, e.g., YTURRIAGA, *supra* note 11, at 68–76.

44. *Id.* at 42–48. See also Caron, *The Great Straits Debate*, *supra* note 1, at 13–14.

45. James Kraska, *The Strategic Foundation of the Law of the Sea*, in OCEAN LAW DEBATES: THE 50-YEAR LEGACY AND EMERGING ISSUES FOR THE YEARS AHEAD 208–13 (Harry N. Scheiber, Nilufer Oral, Moon-Sang Kwon eds., 2018).

46. See William L. Jr. Schachte and J. Peter A. Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT’L L. 527, 530–31 (1993).

47. The “Strait States” included Spain, Malaysia, Indonesia, Philippines, Cyprus, Egypt, Morocco, and Yemen. See YTURRIAGA, *supra* note 11, at 73.

48. Third Conference on the Law of the Sea, *United Kingdom: Draft Articles on the Territorial Sea and Straits* U.N. Doc. A/CONF.62/C.2/L.3, Ch. 3, art. 1 (July 3, 1974).

49. *Geneva Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205.

50. Article 233 allows a State bordering strait to take appropriate enforcement measures against a foreign ship that has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b) of the Convention and that causes or threatens major damage to the marine environment of the strait. See U.N. Convention on the Law of the Sea, *supra* note 3, at art. 233. There is an exception for ships that have sovereign immunity under article 236. *Id.* at art. 236.

under Part III and those that are excluded, such as straits that form part of the internal waters of a State,<sup>51</sup> straits that are regulated in whole or in part by long-standing international conventions,<sup>52</sup> and straits that are not used for international navigation.<sup>53</sup> The different categories of straits are important for determining the rules of passage that apply. There are straits that are subject to the transit passage regime and those where the traditional customary passage of nonsuspendable innocent passage regime applies.

Innocent passage is defined as passage that is “not prejudicial to the peace, good order, or security of the coastal State.”<sup>54</sup> Article 19 of UNCLOS includes a non-exhaustive list of acts that would be considered to be non-innocent and thereby allow the coastal State to interfere with the passage of the ships.<sup>55</sup> These are: (a) any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defense or security of the coastal State; (d) any act of propaganda aimed at affecting the defense or security of the coastal State; (e) the launching, landing, or taking on board of any aircraft; (f) the launching, landing, or taking on board of any military device.<sup>56</sup> In straits subject to the innocent passage regime, the coastal State cannot suspend innocent passage.<sup>57</sup> Whereas, in the territorial sea regime the coastal State with due notification may, without discrimination in form or in fact, temporarily suspend, in specified areas of its territorial sea, the innocent passage of foreign ships.<sup>58</sup>

The regime of nonsuspendable innocent passage applies in straits used for international navigation between a part of the high seas or an exclusive economic zone and the *territorial sea* of a foreign State, commonly referred to as “dead end” straits.<sup>59</sup> In addition, the regime of nonsuspendable innocent passage applies in straits used for international navigation which include a route through the high seas or an exclusive economic zone, if this route is of similar

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51. Article 35(a) excludes “any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such.” *Id.* at art. 35(a). Original cites to 35(c).

52. *Id.*

53. See Table 1, *infra* Part III.

54. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 19(1).

55. *Id.* at art. 19(2).

56. *Id.*

57. *Id.* at art. 45(2).

58. *Id.* at art. 25(3).

59. *Id.* at art. 45(2); see BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 313 (2005).

convenience with respect to navigational and hydrographical characteristics.<sup>60</sup> This is also known as “the Messina Clause.”<sup>61</sup>

The transit passage regime is defined under article 37 of UNCLOS. It applies to straits that are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.<sup>62</sup> The duties of ships and aircraft engaged in transit passage were further clarified to require the following:

- proceed without delay through or over the strait;
- refrain from any threat or use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress; and
- comply with other relevant provisions of this Part.<sup>63</sup>

Lastly, under the regime of innocent passage, submarines are required to engage in surface passage and show their flag whereas transit passage makes no express mention of submarine passage. The reference to normal *modes of continuous and expeditious transit* presumably means submerged passage for submarines.<sup>64</sup>

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60. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 36.

61. Tullio Scovazzi, *The Strait of Messina and the Present Regime of International Straits*, in *NAVIGATING STRAITS: CHALLENGES FOR INTERNATIONAL LAW*, *supra* note 1, at 143–45.

62. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 37.

63. *Id.* at art. 39(1)(a)–(d).

64. U. N. CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 342 (Myron Nordquist, Satya N. Nandan, & Shabtai Rosenne eds., 1993).

Table 1  
Categories of Straits under UNCLOS

| Transit Passage Straits  | Nonsuspendable Innocent Passage Straits   | Excluded from Part III of UNCLOS   |
|--|---|--|
| Straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. | Straits used for international navigation with a route through the high seas or an exclusive economic zone of similar convenience (“Messina Strait” exception) (article 36).    | Straits that form part of the internal waters of a State. (article 35(a)).                                   |
| --   | Straits used for international navigation between a part of the high seas or an exclusive economic zone and the <i>territorial sea</i> of a foreign State (“dead end” straits). | Straits that are regulated in whole or in part by long-standing international conventions. (article 35 (c)). |
| --   | --  | Straits that are not used in international navigation.   |

#### A. *Transit Passage vs. Nonsuspendable Innocent Passage*

The adoption of the entirely new transit passage regime was one of the most important outcomes of UNCLOS III on the question of straits. It was a regime borne of political compromise with no historical legal precedent.<sup>65</sup> One of the important compromises was that in return for the right of expedited passage for ships engaged in transit passage, States bordering straits were allowed to take certain measures for increased safety of navigation as well as pollution prevention. For example, under Part III of UNCLOS, ships engaged in transit passage are obliged to comply with generally accepted international regulations, procedures, and practices for safety at sea, including the International

65. See Said Mahmoudi, *Transit Passage*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008), <https://cil.nus.edu.sg/wp-content/uploads/2017/11/Said-Mahmoudi-Transit-Passage-2008-EPIL.pdf>.

Regulations for Preventing Collisions at Sea.<sup>66</sup> They are also required to comply with “generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.” This refers implicitly to the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78).<sup>67</sup> Nonetheless, the transit passage regime, in contrast to “nonsuspendable innocent passage,” gives the State bordering a strait much more limited regulatory competence to regulate foreign shipping for protection of the environment and safety of navigation. For example, any passage that willfully causes serious pollution in violation of the 1982 UNCLOS renders that passage non-innocent.<sup>68</sup> Once a passage is classifiable as non-innocent, a coastal State may take enforcement measures. There is no parallel provision for transit passage. However, article 233 (Part XII) allows the State bordering a strait to take enforcement action if a foreign ship violates the coastal State’s navigation safety and maritime traffic laws.<sup>69</sup> Moreover, a coastal State may take action against violations of its pollution laws. Perhaps one could argue that in the case of actual or likely threat of “major” damage to the marine environment of the straits, ships are deemed to have lost their transit passage rights. For example, the States bordering the Malacca Straits have interpreted article 233 as permitting them to take enforcement measures against ships that fail to meet the 3.5 meter under-keel clearance requirement that they have established.<sup>70</sup>

More importantly, under the innocent passage regime, the coastal State has broad prescriptive competence to adopt laws and regulations for *inter alia* safety of navigation and maritime traffic, preservation of the environment of the coastal State, and the prevention, reduction, and control of pollution. It also has competence to adopt laws and regulations for the conservation of the living resources of the sea.<sup>71</sup> In addition, States bordering straits where transit passage applies, may establish sea lanes and traffic separation schemes.<sup>72</sup> However, they must conform to generally accepted international regulations that are adopted by the competent international organization.<sup>73</sup> The competent international organization is understood to be the International Maritime Organization

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66. Mary George, *Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention*, 33 OCEAN DEV. & INT’L L. 189, 195 (2002).

67. Nov. 2, 1973, 1340 U.N.T.S. 61.

68. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 19(2)(h).

69. *Id.* at art. 233.

70. Mary George, *The Regulation of Maritime Traffic in Straits Used for International Navigation*, in OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 33–36 (Alex G. Oude-Elferink & Donald R. Rothwell eds., 1982).

71. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 21.

72. *Id.* at art. 22.

73. *Id.* at art. 41(3).

(IMO).<sup>74</sup> Furthermore, the State bordering a strait must obtain the approval of any other States bordering the strait in question.<sup>75</sup> Article 42(1)(a) allows States bordering straits to adopt laws and regulations for the safety of navigation and the regulation of maritime traffic only as provided under article 41.<sup>76</sup> This means that the State can only establish sea lanes and traffic separation schemes adopted by the competent international organization (i.e. IMO).<sup>77</sup> In addition, article 42(1)(b) allows States bordering straits to adopt laws and regulations relating to transit passage that give effect to applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances in the strait.<sup>78</sup> However, while the coastal State under the innocent passage regime can require tankers, nuclear-powered ships, and ships carrying inherently dangerous or noxious substances to confine their passage to sea lanes,<sup>79</sup> and also to carry certain documents, and observe special precautionary measures,<sup>80</sup> the transit passage does not have any similar provisions.<sup>81</sup> Article 22(2) allows the coastal State to impose requirements, such as carrying documents or adopting precautionary measures, without obtaining the approval of the IMO.<sup>82</sup> Whereas, those States bordering straits subject to the transit passage would have to submit such measures to the IMO for approval. The IMO approval process can be time-consuming and result in a rejection or an amended approval based on the differing views and interests represented by the IMO member governments.

A small concession given to States bordering straits used for transit passage is the additional enforcement competence found in article 233, which allows such States to take enforcement measures against foreign-flagged vessels in the case of actual or threatened major damage to the environment.<sup>83</sup> Arguably, at least in the case of actual or likely threat of “major” damage, ships are deemed to have lost their transit passage rights. For example, the States bordering the Malacca Straits have interpreted article 233 as permitting them to take enforcement measures against ships that fail to meet the 3.5 meter under-keel clearance requirement that they have established.<sup>84</sup>

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74. See generally A. Blanco-Bazán, *IMO Interface with the Law of the Sea Convention*, in *CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION* 269–87 (Myron H. Nordquist & John N. Moore eds., 1999).

75. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 41(4).

76. Article 42(1)(a) provides that “Subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:(a) the safety of navigation and the regulation of maritime traffic, as provided in article 41.” *Id.* at art 42(1)(a).

77. See *id.*

78. *Id.*

79. *Id.* at art. 22(2).

80. *Id.* at art. 23.

81. See *id.* at arts. 17–32.

82. *Id.*

83. Van Dyke, *supra* note 32, at 184–86.

84. George, *Transit Passage and Pollution Control*, *supra* note 66, at 195.

The key issues that dominated the negotiations during UNCLOS III and the regime of straits focused on resolving the demands for unimpeded passage by the maritime power States and that of the States bordering straits to protect their coastal areas from the navigational and environmental risks associated with shipping. This is what David Caron described as the “‘near-far’ clash of interests.”<sup>85</sup> The transit passage regime sought to mediate these different demands. Some thirty-six years have passed since the adoption of the UNCLOS in 1982, and the resolution of the straits issues that dominated international law. However, in the twenty-first century, straits used for international navigation continue to raise issues and problems that do not have clear or ready answers in UNCLOS. The following issues will be examined as examples of some of the current challenges in straits used in international navigation: mandatory pilotage in the Torres Strait and Strait of Bonifacio, the status of the legal regime of the Northwest Passage, and security issues in recognized chokepoints such as the Straits of Malacca and Singapore and the Strait of Bab-el Mandab.

#### IV. CHALLENGES IN THE TWENTY-FIRST CENTURY

A number of issues related to straits used for international navigation remain unanswered under UNCLOS. For example, one question is whether mandatory pilotage can be imposed in areas that are at high risk for accidents and/or are ecologically sensitive, such as the Torres Strait. Another issue concerns the impacts of climate change. As the temperature warms and sea ice melts, the Arctic is opening up the possibility of full year circumpolar navigation in areas such as the Northwest Passage, an area considered by Canada to be part of its internal waters. Other issues that remain a challenge for chokepoint straits such as the Malacca and Singapore Straits, the Bab al Mandab Strait, and the Strait of Hormuz involve security matters. With the exception of piracy in the high seas, security is not expressly addressed under UNCLOS.

##### A. *The Torres Strait, Strait of Bonifacio, and Mandatory Pilotage*

The Torres Strait is considered to be one of the most hazardous and navigationally difficult stretches of water in the world due to its shallowness and numerous islands, shoals, reefs, and small islets.<sup>86</sup> It is routinely used by international shipping, where they pass through the 800-meter wide Prince Charles Channel.<sup>87</sup> The northern half of the strait is only navigable by vessels with a very shallow draft, and deep draft vessels are restricted to using narrow

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85. See Caron, *The Great Straits Debate*, *supra* note 1, at 11.

86. See Donald K. Anton, *Making or Breaking the International Law of Transit Passage? Meeting Environmental and Safety Challenges in The Torres Strait with Compulsory Pilotage*, NAVIGATING STRAITS, *supra* note 1, at 51–52, 56.

87. *Id.* at 52.

channels between the various islands off Cape York, principally the Prince of Wales Channel immediately North of Hammond Island.<sup>88</sup> The strait is also located in the Great Barrier Reef, a World Heritage Site protected under the World Heritage Convention as one of the most biologically diverse and fragile marine areas.<sup>89</sup> In 1990 the Great Barrier Reef, at the request of Australia, was also the first particularly sensitive sea area (PSSA) designated by the IMO.<sup>90</sup>

The associated protective measures for the PSSA included mandatory pilotage for the northern part of the Great Barrier Reef Inner route—an internal water of Australia and thus not subject to UNCLOS. Also, the measures recommended pilotage for the Torres Strait Great Barrier Reef Inner Route<sup>91</sup> for “all loaded oil, chemical tankers, and liquefied gas carriers.”<sup>92</sup>

In 2003 following the grounding of the bulk carrier *Aegean Falcon*, Australia and Papua New Guinea jointly proposed to the IMO the extension of the PSSA of the Great Barrier Reef that had been established in 1990 by the IMO.<sup>93</sup> The joint proposal included two associated protection measures: (1) the establishment of a two-way route through the Torres Strait for the first time, and (2) the much more controversial extension of the existing Great Barrier Reef region compulsory pilotage area to include the Torres Strait.<sup>94</sup>

The request for mandatory pilotage was first discussed in the Marine Environment Protection Committee (MEPC) of the IMO. In an extensive analysis of the question of compulsory pilotage in the Torres Strait, Don Anton explains that initially, with very little debate, the MEPC gave its preliminary

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88. *See id.* at 51–52.

89. U.N. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151; *see Great Barrier Reef*, UNESCO WORLD HERITAGE LIST, <https://whc.unesco.org/en/list/154/documents/> (last visited May 23, 2019).

90. A PSSA is defined as “an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.” International Maritime Organization, *Res A.720(17) Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas* 58 (1991); International Maritime Organization, *IMO Res A.885(21) on ‘Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective Measures’ as amended by IMO Res A.720(17) ‘Amendments to the Guidelines’ as amended by IMO Res A.982(24) on Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas* (2005), revoking Annex II of Res A.720(17). *See Anton*, Making or Breaking the International Law of Transit Passage?, *supra* note 86, at 58.

91. Resolution MEPC.45(30).

92. IMO, *Use of Pilotage Services in the Torres Strait and the Great North East Channel*, Resolution A.710(17) (Nov. 6, 1991). *See Australia, PNG push for mandatory Torres pilotage*, LLOYD’S LIST AUSTRALIA DCN (July 1, 2004). This extended a 1987 IMO resolution recommending that certain classes of vessel use a pilot when passing through the Strait and Great Barrier Reef area. *Use of Pilotage Services in the Torres Strait and Great Barrier Reef Area*, IMO Resolution A.619(15) (adopted, 16 November 1987). *See Anton*, *supra* note 86, at 58.

93. *Anton*, *supra* note 86, at 59–60.

94. *Id.* at 60.

approval to the extension of the PSSA.<sup>95</sup> The issue of compulsory pilotage was referred to the fiftieth session of the IMO Subcommittee on the Safety of Navigation (NAV) where concerns about the legality of mandatory pilotage were expressed.<sup>96</sup> These concerns included questions on the legality of compulsory pilotage under international law in a strait used for international navigation.<sup>97</sup> At the end of these debates, NAV agreed that the measure for compulsory pilotage was “operationally feasible and largely proportionate to provide protection to the marine environment.”<sup>98</sup> Therefore, NAV invited the MEPC “to consider whether there might be a need to develop guidelines and criteria for compulsory pilotage in straits used for international navigation notwithstanding the diverse view of delegations regarding a legal basis for such a regime.”<sup>99</sup> The question was then sent to the IMO Legal Committee in October 2004 where it was the subject of intense debates.<sup>100</sup>

The matter divided the IMO.<sup>101</sup> In the end, the IMO found a compromise by extending the PSSA and leaving silent as to whether pilotage was mandatory.<sup>102</sup> Part of the compromise also included an agreement to include in the MEPC final report a statement made by the United States and supported by several other States recognizing that the “[r]esolution is recommendatory and provides no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation. The U.S. could not support the resolution if this committee took a contrary view.”<sup>103</sup>

Notwithstanding the opposition by the United States and some other States in 2006, Australia adopted national legislation making pilotage mandatory in the Torres Straits for all vessels of seventy meters or more in overall length and for all loaded oil and chemical tankers or liquefied gas carriers of any length.<sup>104</sup> However, certain States such as the United States and Singapore continue to express concern over compulsory pilotage in the Torres Strait.<sup>105</sup>

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95. IMO, REPORT OF THE MARINE ENVIRONMENT COMMITTEE ON ITS FORTY-NINTH SESSION, IMO Doc. MEPC 49/22, ¶¶ 8.25–8.27 (Aug. 8, 2003). Prior to action by MEP, an Informal Technical Group required very little time to agree that all the environmental criteria were satisfied and unanimously agreed, in principle, that the Torres Strait be designated as a PSSA and that the compulsory pilotage APM be approved. *Report of the Informal Technical Group*, IMO Doc. MEPC 49/WP.10 (July 16, 2003) (On file with author).

96. Anton, *supra* note 86, at 60.

97. *Id.* at 60–64.

98. *Id.* at 61 (quotations omitted).

99. *Id.* at 61–62 (quotations omitted).

100. *Id.* at 62; *see also* IMO, REPORT OF THE LEGAL COMMITTEE ON THE WORK OF ITS EIGHTY-NINTH SESSION, IMO DOC. LEG 89/16, Section O (Nov. 4, 2004).

101. Anton, *supra* note 86, at 62–64.

102. IMO, Marine Env't Prot. Comm. Res. 133(53) (July 22, 2005).

103. Anton, *supra* note 86, at 63–64 (quotations omitted).

104. *Id.* at 64.

105. *Id.* at 83.

*B. Strait of Bonifacio*

The Strait of Bonifacio is located between Sardinia and Corsica and measures eleven kilometers at its narrowest point.<sup>106</sup> It is a strait used for international navigation and subject to the transit passage regime. However, it is also an area known for its biological diversity and ecological vulnerability to shipping activities.<sup>107</sup> The ecological importance of the strait has been recognized at the global level. In 1993 the IMO adopted a resolution that recommended that governments prohibit or at least strongly discourage the transit in the Strait of Bonifacio of laden oil tankers and ships carrying dangerous chemicals or substances in bulk.<sup>108</sup> In 1993 by national decrees both Italy and France banned the passage of all Italian and French tankers carrying petroleum, petroleum products, or other dangerous or toxic substances through the Bonifacio Strait.<sup>109</sup> The Strait of Bonifacio also falls within the Pelagos Sanctuary that was created in 1999 as a specially protected marine area of Mediterranean importance.<sup>110</sup> Moreover, it is the first protected area inscribed to the Protocol for Specially Protected Areas of Mediterranean Importance<sup>111</sup> under the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean.<sup>112</sup> Additionally, parts of the Strait have been listed as Natura 2000 sites of European Importance.<sup>113</sup>

The Australian-Papua New Guinea proposal for mandatory pilotage in the Torres Straits may have influenced the decision of the Italian and French governments to make a similar joint proposal for the Bonifacio Strait. In 2010, France and Italy had jointly submitted an application to the IMO for designation

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106. See *Strait of Bonifacio*, NOSTRA NETWORK OF STRAITS, <http://www.nostraproject.eu/Partnership/Strait-of-Bonifacio> (last visited May 23, 2019).

107. *Id.* B. Sorgente, R. Sorgente, A. Olita, L. Fazioli, A. Cucco, A. Perilli, M. Sinerchia & A. Ribotti et al., *Effects of protection rules and measures in an important international strait area: the Bonifacio Strait*, 5 J. OF OPERATIONAL OCEANOGRAPHY, 5:1, 35–44 (2012).

108. IMO Res. A.766(18), *Navigation in the Strait of Bonifacio* (Nov. 17, 1993).

109. See, REPORT OF THE LEGAL COMMITTEE ON THE WORK OF ITS EIGHTY-NINTH SESSION, *supra* note 100, Section O.

110. See International Agreement for the Creation of a Mediterranean Sanctuary for Marine Mammals, Nov. 25, 1999 (Fr.– It.–Monaco).

111. See Protocol Concerning Mediterranean Specially Protected Areas, Apr. 3, 1982, *amended and renamed* Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, June 10, 1995, 2102 U.N.T.S. 203.

112. Convention for the Protection of the Mediterranean Sea against Pollution, Feb. 16, 1976, *amended and renamed* Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, June 10, 1995. See G. Notarbartolo di Sciarra, T. Agardy, D. Hyrenbach, T. Scovazzi and P. Van Klaveren, *The Pelagos Sanctuary for Mediterranean Marine Mammals*, 18 AQUATIC CONSERVATION: MARINE AND FRESHWATER ECOSYSTEM 367 (2008); Giuseppe Notarbartolo di Sciarra, David Hyrenbach, and Tundi Agardy, *The Pelagos Sanctuary for Mediterranean Marine Mammals*, 2 LESSONS IN CONSERVATION (2008) 91–109.

113. See Tulio Scovazzi & Ilaria Tani, *Problems Posed by Marine Protected Areas Having a Transboundary Character*, in 29 MARINE TRANSBOUNDARY CONSERVATION AND PROTECTED AREAS 17–34 (Peter Mackelworth ed., 2016).

of a PSSA in the Strait of Bonifacio.<sup>114</sup> The application originally included *inter alia* a request for mandatory pilotage.<sup>115</sup> However, later this request was withdrawn by Italy and France.<sup>116</sup> The decision to withdraw the request for mandatory pilotage was greeted favorably by States such as Singapore, which expressed “its firm position that the imposition of a mandatory pilotage system in straits used for international navigation has no international legal basis, and would contravene Article 42(2) of the United Nations Convention on the Law of the Sea.”<sup>117</sup>

Pilotage is not expressly provided for in any UNCLOS provisions. The only navigational measures expressly mentioned in the Convention are sea lanes, traffic separation schemes in article 41, and the general reference to international regulations and standards for safety of navigation—which would include collision prevention measures under the International Regulations for Preventing Collisions at Sea 1972,<sup>118</sup> safety of navigation measures under the International Convention for the Safety of Life at Sea,<sup>119</sup> and the IMO General Provisions on Ships’ Routing. Moreover, as the competent international organization implicitly recognized in UNCLOS, the IMO has the competence to adopt measures necessary for the protection of safety of navigation and protection of the marine environment.<sup>120</sup> Pilotage is clearly such a measure. In 1968 the IMO adopted a resolution on pilotage that governments:

should organize pilotage services in those areas where such services would contribute to the safety of navigation in a more effective way than other possible measures and should, where applicable, define the ships or classes of ships for which employment of a pilot would be mandatory.<sup>121</sup>

Since then, the IMO has adopted several resolutions recommending pilotage in certain areas, where deemed clearly necessary for safety of navigation and pollution prevention.<sup>122</sup> The outstanding question of the joint Australia-Papua

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114. See generally IMO, Rep. of the Mar. Envtl. Prot. Comm., MEPC 61/9, *Designation of the Strait of Bonifacio a Particularly Sensitive Sea Area* (June 25, 2010).

115. *Id.* at 2.

116. IMO, Rep. of the Mar. Envtl. Prot. Comm. on its Sixty-First Session, MEPC 61/24 ¶ 9.3 (Oct. 6, 2010).

117. *Id.* at ¶ 9.5.

118. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 U.N.T.S. 16.

119. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 2.

120. A Blanco-Bazán, *supra* note 74, at 272–82.

121. IMO, Assembly Res. A.159(ES.IV), *Recommendation on Pilotage* (1968).

122. IMO Resolution A.480(IX) (adopted in 1975) recommends the use of qualified deep-sea pilots in the Baltic and Resolution A.620(15) (adopted in 1987) recommends that ships with a draught of thirteen meters or more should use the pilotage services established by Coastal States in the entrances to the Baltic Sea; A.486(XII) (adopted in 1981) recommends the use of deep-sea pilots in the North Sea, English Channel, and Skagerrak; A.579(14) (adopted in 1985) recommends that certain oil tankers, all chemical carriers, gas carriers, and ships carrying radioactive material using the Sound (which separates Sweden and Denmark) use pilotage services; A.668(16) (adopted in 1989) recommends the use of pilotage services in the Euro-Channel and IJ-Channel (in the Netherlands); A.710(17) (adopted in 1991) recommends ships

New Guinea request for mandatory pilotage in the Torres Strait was whether such a measure was in violation of transit passage under international law. The question remains unresolved as States are split on the matter.<sup>123</sup> Nonetheless, there is no doubt that the IMO as the competent international organization for shipping under UNCLOS could further work on this important legal issue. As it stands, it remains an open question whether pilotage can be made mandatory under international law for straits used in international navigation that are found in ecologically sensitive waters and pose a risk to safety of navigation.

### C. Climate Change and the Northwest Passage

Climate change is rapidly melting ice in the Arctic Ocean, opening up once frozen seas to international shipping. In 2007 for the first time in recorded history the fabled Northwest passage was temporarily opened to shipping,<sup>124</sup> and in 2016 the first luxury cruise liner the *Crystal Serenity* made history as the first voyage through the Northwest Passage.<sup>125</sup> In August of 2018, Maersk shipping, the largest shipping company in the world, announced it would send for the first time a container ship through the Russian Northeast Passage.<sup>126</sup>

The regime of passage for the Northwest Passage has long been a source of dispute between the United States and Canada, the latter claiming sovereignty and that the Northwest Passage is part of its internal waters. The United States has consistently refuted these claims.<sup>127</sup> The Canadian position became crystallized in reaction to the voyage of the United States oil tanker, the *SS Manhattan* in 1969, which sought passage through the Northwest Passage, using ice breakers without obtaining Canada's permission.<sup>128</sup> In reaction Canada

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of over seventy meters in length and all loaded oil tankers, chemical tankers, and liquefied gas carriers, irrespective of size, in the area of the Torres Strait and Great North East Channel, off Australia, use pilotage services; A.827(19) (adopted in 1995) on Ships' Routing includes in Annex 2 Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Canakkale, and the Marmara Sea recommends that "Masters of vessels passing through the Straits are strongly recommended to avail themselves of the services of a qualified pilot in order to comply with the requirements of safe navigation." IMO, *Pilotage*, available at <http://www.imo.org/en/ourwork/safety/navigation/pages/pilotage.aspx>.

123. The views of some States can be found in IMO records. See, e.g., IMO, Sub-Comm. on Safety of Navigation, Doc. NAV 50/19, *Report to the Maritime Environment Protection Committee* (July 28, 2004). See also MARKUS J. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE AREAS, 203, 202–04 (2008).

124. Gwladys Fouché, *North-West Passage is now plain sailing*, THE GUARDIAN, (Aug. 28, 2007).

125. The *Crystal Serenity* cruised thirty-two days through the Northwest Passage with one thousand passengers. It returned the next year, but later the company announced that the ship would not be returning to the Northwest Passage. See *No More Crystal Serenity in the Northwest Passage*, HIGH NORTH NEWS, Dec. 13, 2017, <http://www.highnorthnews.com/no-more-crystal-serenity-in-the-northwest-passage/>.

126. Michael Selby-Green, *The world's largest shipping company is launching an Arctic route—and it's a worrying sign for the future of the planet*, BUSINESS INSIDER NORDIC, Aug. 23, 2018.

127. James Kraska, *The Law of the Sea Convention and the Northwest Passage*, 22 INT'L J. MARINE & COAST L. 257, 265 (2007).

128. Michael Byers & Suzanne Lalonde, *Who controls the Northwest?*, 52 VAND. J. TRANSNAT'L 1133, 1148 (2009).

extended its territorial sea from three to twelve nm and created a one hundred nm pollution prevention zone in its Arctic Waters under the *Arctic Waters Pollution Act*.<sup>129</sup>

However, nearly five decades after the voyage of the *SS Manhattan*, the prospect of an ice-free Arctic is plausible. According to the Intergovernmental Panel on Climate Change (IPCC), the “[l]oss of summer sea ice will bring an increasingly navigable Northwest Passage.”<sup>130</sup> However, what impact will the melting Arctic ice have upon the legal status of the Northwest Passage? When the Northwest Passage becomes accessible to ice-free shipping, a key question is whether the United States’ position—that it is a strait used for international navigation—will prevail.<sup>131</sup> In other words, will it transform into a strait that connects one part of the high seas or exclusive economic zone to another part of the high seas or exclusive economic zone and thereby subject to the transit regime? If so, what implications would this have for the protection of these ecologically sensitive waters from inevitable risks such as operational and accidental pollution created by international shipping? If the transit passage regime were to apply, the only available framework would be the limited measures in article 41 for the designation of sea lanes or establishment of traffic separation schemes with the permission of the IMO.<sup>132</sup> Furthermore, Canada would be limited to adopting laws and regulations that give effect to applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances in the strait (i.e. MARPOL Annex I), which is a far cry from the stringent provisions of the *Arctic Waters Pollution Act*.

Some resolution may have been found with the adoption by the IMO of the International Code for Ships Operating in Polar Waters (Polar Code), which went into effect on January 1, 2017.<sup>133</sup> The Polar Code establishes mandatory standards for ships.<sup>134</sup> For example, the Polar Code imposes specific ship construction, design, and equipment conditions that require ships intending to operate in certain areas of the Antarctic and Arctic to apply for a Polar Ship Certificate.<sup>135</sup> It also prohibits all discharge of oil or oily mixtures and noxious

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129. *Id.* at 1148–52; Douglas M. Johnston, *The Northwest Passage Revisited*, 33 OCEAN DEV. & INT’L L. 145, 149 (2002).

130. O.A. Anisimov et al., 2007: *Polar Regions (Arctic And Antarctic)*, in CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 676 (M.L. Parry et al. eds., 2007 ). *See also* THE ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 25, available at [https://www.pmel.noaa.gov/arctic-zone/detect/documents/AMSA\\_2009\\_Report\\_2nd\\_print.pdf](https://www.pmel.noaa.gov/arctic-zone/detect/documents/AMSA_2009_Report_2nd_print.pdf).

131. *See generally* Kraska, *The Law of the Sea Convention and the Northwest Passage*, *supra* note 127; Suzanne Lalonde and Frédéric Lasserre, *The Position of the United States on the Northwest Passage: Is the Fear of Creating a Precedent Warranted?* 44 OCEAN DEV. & INT’L L. 28, 29–30 (2013).

132. *See* U.N. Convention on the Law of the Sea, *supra* note 3, at art. 41.

133. IMO, International Code for Ships Operating in Polar Waters (Polar Code), Doc. MEPC 68/21/Add.1 (2014).

134. *See id.* at Part I-A.

135. *Id.* at Part I-A, Section 1.3.

liquid substances into the sea and limits disposal of garbage classified as nonharmful to “when the ship is as far as practicable from areas of ice concentration exceeding one tenth of a nautical mile, but in any case not less than twelve nautical miles from the nearest land, nearest ice-shelf, or nearest fast ice.”<sup>136</sup>

The Polar Code applies to both national waters and international waters of the Arctic, which avoids the problem of determining whether the Northwest Passage constitutes the internal waters of Canada or are straits subject to the transit passage regime. The Polar Code is an important step in ensuring that all shipping in the Arctic will be subject to high standards. However, the legal question remains unresolved for now concerning whether Canada will be able to maintain its position that the Northwest Passage is an internal waterway of Canada. If so, it can continue to apply its strict national laws for protection of the marine environment. However, if the melting sea-ice transforms the Northwest Passage into a strait that meets the definition of article 37 for transit passage, Canada will have difficulty in maintaining this position.

#### D. Chokepoints and Security

Several straits lie in regions that are prone to security threats, such as piracy, armed robbery, and terrorism, all of which create both physical and economical risks to safe shipping. In addition, political tensions and regional conflicts also pose serious threats to global shipping and in particular to oil supply. The Malacca and Singapore Straits are two of the most critical straits for global shipping and in particular for oil transport. Some 40 percent of world trade and 50 percent of crude oil is transported through them.<sup>137</sup> Japan is one of the largest users of the straits with 60 percent of its oil transported through them.<sup>138</sup>

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136. *Id.* at Part II-A, Section 5.2.1.1. See also David L. Vanderzwaag, *Governance of the Arctic Ocean beyond National Jurisdiction: Cooperative Currents, Restless Sea*, in OCEAN LAW DEBATES: THE 50-YEAR LEGACY AND EMERGING ISSUES FOR THE YEARS AHEAD 406 (Harry N. Scheiber et al. eds., 2018).

137. U.S. ENERGY INFORMATION ADMINISTRATION, WORLD OIL TRANSIT CHOKEPOINTS 6–7, July 25, 2017, [https://www.eia.gov/beta/international/analysis\\_includes/special\\_topics/World\\_Oil\\_Transit\\_Chokepoints/wotc.pdf](https://www.eia.gov/beta/international/analysis_includes/special_topics/World_Oil_Transit_Chokepoints/wotc.pdf); see also Hoshua H. Ho, *Enhancing Safety, Security, and Environmental Protection of the Straits of Malacca and Singapore: The Cooperative Mechanism?*, 40 OCEAN DEV. & INT’L L. 233, 233 (2009).

138. See John Mauldin, *2 Choke Points That Threaten Oil Trade Between the Persian Gulf And East Asia*, FORBES (Apr. 17, 2017), <https://www.forbes.com/sites/johnmauldin/2017/04/17/2-choke-points-that-threaten-oil-trade-between-persian-gulf-and-east-asia/#6c2450024b96>.

Since the 1990s, piracy<sup>139</sup> and armed robbery<sup>140</sup> have posed major security threats in the Malacca and Singapore Straits. Following the September 11, 2001 attack in the United States, concerns arose over possible terror attacks against shipping in the straits by Islamic extremist groups in the Southeast Asian region, which took place in Jakarta and Bali between 2002 and 2005.<sup>141</sup> While terrorism attacks against shipping in the Malacca and Singapore Straits have not occurred, piracy continues to be a major problem.

Piracy has been recognized in international law since the earliest times as an exception to the traditional freedom of navigation in the high seas, which has been codified in the 1958 Geneva Convention on the High Seas<sup>142</sup> and UNCLOS.<sup>143</sup> UNCLOS requires that States cooperate in the repression of piracy in the high seas or other areas beyond national jurisdiction.<sup>144</sup> There is no similar requirement of cooperation for straits used for international navigation for repression of terrorism or armed robbery. Indeed, the issue of cooperation in straits used for international navigation came up in relation to the overall costs the State bordering a strait bears in maintaining navigational safety and protection of the environment.<sup>145</sup> Article 43 of UNCLOS was adopted to address the concerns of States bordering straits by providing for a cooperative mechanism.<sup>146</sup> Article 43 provides that the “user” States of straits used in international navigation under Part III should cooperate in establishing and maintaining navigational and safety aids and in the prevention, reduction, and control of pollution.<sup>147</sup> Article 43 grew out of initial proposals by States

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139. See generally ROBERT BECKMAN & ASHLEY ROACH (EDS.), *PIRACY AND INTERNATIONAL MARITIME CRIMES IN ASEAN: PROSPECTS FOR COOPERATION* 119–33 (2012); JAMES KRASKA, *CONTEMPORARY MARITIME PIRACY, INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA* 41–45 (2011); Mary George, *Security, Piracy and Terrorism in the Straits of Malacca and Singapore*, in *NAVIGATING STRAITS*, *supra* note 1, at 299–324.

140. Armed robbery is defined by IMO Assembly Resolution A. 1025 (26) on the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships as:

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea; 2. any act of inciting or of intentionally facilitating an act described above.

141. Hoshua, *supra* note 137, at 234.

142. Arts. 15–22, 450 U.N.T.S. 11, (Apr. 29, 1958).

143. U.N. Convention on the Law of the Sea, *supra* note 3, at arts. 17–33, 100–05.

144. *Id.* at art. 100.

145. S. N. Nandan & D. H. Anderson, *Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982*, 60 BRITISH Y.B. OF INT’L L. 159, 193–94 (1990); David H. Anderson, *Funding and Managing International Partnerships for the Malacca and Singapore Straits, Consonant with Article 43 of the UN Convention on the Law of the Sea*, 3 SING. J. INT’L & COMP. L. 444, 444–47 (1999).

146. SATYA NANDAN & SHABTAI ROSENNE, *UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY*, VOL. II 380–83 (1993).

147. Article 43 provides that User States and States bordering a strait should by agreement cooperate: (a) in the establishment and maintenance in a strait of necessary navigational and safety aids

bordering straits during UNCLOS III that they be able to be compensated for works undertaken to facilitate passage.<sup>148</sup> However, no mention was made to security issues, but only to safety of navigation and protection of the environment.

Cooperation in the Malacca and Singapore Straits among the three coastal States (Singapore, Malaysia, and Indonesia) for safety of navigation dates back to the 1970s.<sup>149</sup> However, in 2007 an agreement for a cooperative mechanism for the Malacca and Singapore Straits between the littoral States (State bordering a strait) and user States was officially launched.<sup>150</sup> It is the only mechanism to date implementing article 43 of UNCLOS.<sup>151</sup> Consequently, the measures taken under the cooperative mechanism are only for safety of navigation and protection of the marine environment.<sup>152</sup>

Instead, security measures for the Malacca and Singapore Straits have been adopted outside the context of UNCLOS and at the regional levels. The Association of Southeast Asian Nations (ASEAN) has provided the main forum and framework for adopting cooperative measures.<sup>153</sup> ASEAN is a regional intergovernmental organization comprised of ten Southeast Asian States. It seeks to promote economic, social, cultural, and security cooperation.<sup>154</sup> ASEAN has played an important role for addressing security issues in the Malacca and Singapore Straits.<sup>155</sup> Measures taken include, for example, the adoption of the 2002 Agreement on Information Exchange and Establishment of Communication Procedures applying to *inter alia* crimes such as terrorism and

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or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships. U.N. Convention on the Law of the Sea, *supra* note 3, at art. 43.

148. The Law of the Sea Straits Used for International Navigation, Legislative History of Part III of the United Nations Convention on the Law of the Sea, vol. 1, 78, Draft art. 11(3) (1992). See Nilufer Oral, *Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention*, 20 OCEAN Y.B. 561, 567–68 (2006). See generally, Bernard Oxman, *Observations on the Interpretation and Application of Article 43 of UNCLOS with Particular Reference to the Straits of Malacca and Singapore*, 2 SING. J. INT'L & COMP. L. 408 (1998) (discussion of the process).

149. Robert Beckman & Sun Zhen, *The Cooperative Mechanism for the Straits of Malacca and Singapore*, in GOVERNANCE OF ARCTIC SHIPPING: BALANCING RIGHTS AND INTERESTS OF ARCTIC STATES AND USER STATES 380, 381–412 (Robert C. Beckman et al. eds., 2017).

150. Takashi Ichioka, *Cooperation in the Straits of Malacca and Singapore*, in NAVIGATING STRAITS, *supra* note 1, at 345–49.

151. Hoshua, *supra* note 137, at 240–43.

152. See U.N. Convention on the Law of the Sea, *supra* note 3, at art. 43.

153. Mary George, *Security, Piracy and Terrorism in the Straits of Malacca and Singapore*, in NAVIGATING STRAITS, *supra* note 1, at 300.

154. See ASEAN, *About ASEAN*, <https://asean.org/asean/about-asean/>.

155. BECKMAN & ROACH, *supra* note 139, at 139–40.

piracy at sea,<sup>156</sup> and the Malacca Strait Patrols and “Eyes-in-the-Sky” air patrol arrangement among Indonesia, Malaysia, Singapore, and Thailand.<sup>157</sup>

The Bab al-Mandab Strait is another strait where security is of great importance and where questions as to the applicability of UNCLOS come up due to the current conflict in Yemen. The effects of the conflict spills over into this strait with risks to the security of shipping.<sup>158</sup> The strait is bordered in the northeast by Yemen and to the southwest by Eritrea and Djibouti. It is a crucial link in the maritime trade route linking the Mediterranean to the Indian Ocean by way of the Suez Canal and Red Sea and is a recognized chokepoint for oil transport.<sup>159</sup> The Bab al Mandab Strait has a history of piracy, and the current conflict in Yemen is impacting shipping. For example, as a result of the Houthi rebel attacks against two of its tankers on July 25, 2018, Saudi Arabia temporarily halted all oil shipments.<sup>160</sup> These were eventually resumed after protective measures were taken.<sup>161</sup>

Piracy is expressly addressed under UNCLOS. However, attacks by other nonstate actors, such as terrorists, are not addressed under UNCLOS. It is a gap which became more evident after the terror attack in 1985 in the high seas of the Mediterranean Sea against the *Achille Lauro* cruise ship.<sup>162</sup> To remedy this gap, in 1988 the IMO adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.<sup>163</sup> And following the September 11, 2001 Al Qaeda attacks against the United States, the IMO adopted the International Ship and Port Facility Security Code.<sup>164</sup> This Code specifically seeks to enhance security measures in ports and on ships.<sup>165</sup> These measures showed the important role of the IMO in addressing security threats to shipping that are not addressed expressly under UNCLOS.

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156. ASEAN, *Agreement of Information Exchange and Establishment of Communication Procedures*, Art. III, <http://www.asean.org/archive/17346.pdf>.

157. See Ralph Emmers, *The Role of the Five Power Defence Arrangements in the Southeast Asian Security Architecture* 17 (Rajaratnam School Of International Studies, Working Paper No. 195, 2010), <http://www.rsis.edu.sg/publications/WorkingPapers/WP195.pdf>.

158. Clive Schofield, *Securing the World's Most Dangerous Strait? The Bab-Al Mandeb And Gulf of Aden*, in *NAVIGATING STRAITS*, *supra* note 1, at 273–74.

159. *Id.* at 270–71.

160. *Saudi Arabia suspends oil exports through Bab al-Mandeb*, AL JAZEERA (July 25, 2018), <https://www.aljazeera.com/news/2018/07/saudi-arabia-suspends-oil-exports-bab-el-mandeb-180725215417388.html>.

161. *Id.*

162. M. Halberstam, *Terrorism on the high seas: the Achille Lauro, Piracy and the IMO convention on maritime safety*, AM. J. INT'L L. 269, 269–70 (1988).

163. NATALIE KLEIN, *MARITIME SECURITY AND THE LAW OF THE SEA* 151–54 (2011); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 3, 1988, 1678 U.N.T.S. 201.

164. Amendment to the Safety of Life at Sea (SOLAS) Convention (1974/1988) Ch. XI-2.

165. See Nilufer Oral, *Terror at Sea: Detection and Prevention – The New International Ship and Port Facility Security Code and the Amended SOLAS Chapter XI-2*, in *RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA* 335 (Kuen Fu et al. eds., 2006).

Another example where security threats pose threats to shipping in straits used for international navigation is the Hormuz Strait, which is bordered by Iran and Oman. The Strait of Hormuz is listed by the U.S. Energy Information Administration as one of the most important oil chokepoints in the world with some 18.5 million b/d passing in 2016.<sup>166</sup> During the Iran-Iraq war, Iran had closed the strait to international shipping, which was received with protests by the international community.<sup>167</sup> In 2012 Iran had threatened to prevent the passage of foreign shipping through the Hormuz Strait in response to the imposition of economic sanctions.<sup>168</sup> And again in 2018 in the aftermath of the United States withdrawing from the Iran-United States Nuclear Agreement and threatening to halt Iran imports of oil, Iran once again threatened closure of the Strait of Hormuz.<sup>169</sup> The threat by Iran in 2018 to close the Strait of Hormuz raised the possibility of the UN Security Council adopting a decision to take military action and intervene against Iran.<sup>170</sup> On April 23, 2019, Iran once again threatened to close the Strait of Hormuz if it is prevented from transporting its oil, following the U.S. announcement lifting exemptions to certain countries that buy oil from Iran.<sup>171</sup>

#### CONCLUSION

Straits used for international navigation are vital links in the great global maritime highway providing “short cuts” for global shipping that save valuable time and money. Centuries ago jurists recognized the importance of free access through straits. It is not surprising that a schism should arise between the interest of the States bordering straits and those of shipping States, the former wishing to control passage and the latter wishing for unimpeded passage. This schism grew over the centuries especially as the “*near-far clash of interests*” emerged in the twentieth century and presented an important challenge for international law to address.

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166. See U.S. ENERGY INFORMATION ADMINISTRATION, WORLD OIL TRANSIT CHOKEPOINTS, OVERVIEW (2017), <https://www.eia.gov/beta/international/regions-topics.php?RegionTopicID=WOTC>.

167. Wolff Heintschel von Heinegg, *Law of Naval Warfare and International Straits*, 71 INT’L L. STUD. 263, 265–66 (1998).

168. See Nilufer Oral, *Transit Passage Rights in the Strait of Hormuz and Iran’s Threats to Block the Passage of Oil Tankers*, 16 AM. SOCIETY OF INT’L L. INSIGHTS (May 3, 2012), <https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage>.

169. Saeed Kamali Dehghan, *Iran threatens to block Strait of Hormuz over US oil sanctions*. THE GUARDIAN (Jul. 5, 2018), <https://www.theguardian.com/world/2018/jul/05/iran-retaliate-us-oil-threats-eu-visit-hassan-rouhani-trump>.

170. *UNSC Might Authorize Military Action If Iran Closes Strait of Hormuz*, SPUTNIK (Aug. 28, 2018), <https://sputniknews.com/middleeast/201808281067526760-iran-strait-hormuz/>.

171. Ahmad Ghaddar, *FACTBOX-Strait of Hormuz: the world’s most important oil artery*, REUTERS (Apr. 23, 2019), <https://www.reuters.com/article/usa-iran-oil-strait/factbox-strait-of-hormuz-the-worlds-most-important-oil-artery-idUSL5N2254EM>.

This challenge was taken up in the historic UNCLOS III negotiation process. The UNCLOS is a remarkable Convention negotiated over a period of almost a decade. One of its crowning achievements was Part III, which established a detailed regime for straits used for international law, including a new regime for transit passage within the meaning provided under article 37.<sup>172</sup> It also preserved the regime of nonsuspendable innocent passage for other straits.<sup>173</sup> The key issues that dominated the negotiations of the straits regime in UNCLOS were the competing interests of the States bordering straits for protection of their marine environment and that of the maritime States, in particular the naval powers intent to preserve unimpeded passage for warships and especially submarines.<sup>174</sup> Part III sought to balance these interests as States bordering straits were given some regulatory powers to designate sea lanes and establish traffic separation schemes with the approval of the IMO as well as to adopt laws and regulations to prevent the discharge of oily substances and other noxious substances from ships.<sup>175</sup> In return, foreign shipping was entitled to unimpeded passage through straits subject to the transit passage.<sup>176</sup> While UNCLOS introduced new concepts and measures for straits used for international navigation, it was an instrument shaped by the concerns of its time. Adopted in 1982, the years to follow revealed new challenges and dormant difficulties awakened. For example, the question whether mandatory pilotage violates transit passage emerged as an issue at the IMO with the joint request made by Australia and Papua New Guinea for protections for the Great Barrier Reef.

Other challenges of concern to straits are threats to the security of shipping from piracy, armed robbery, and terrorism. The UNCLOS only addresses piracy and is silent on other security threats. However, in relation to straits, threat to shipping in the Straits of Malacca and Singapore emerged in the 1990s. And while UNCLOS mandates cooperation of States to combat piracy in the high seas, it is silent in regard to straits used for international navigation and in particular where transit passage applies. Article 43 of UNCLOS provides a framework for a cooperative mechanism between littoral States and user States of straits to help the former bear the costs of maintenance of the straits. However, it does not apply to security matters. Whereas, the measures undertaken by the States bordering straits for security purposes come with high costs. This remains somewhat of a gap.

The existing regime of straits is the result of nearly a century of negotiations. And as briefly outlined in this Article, the subject matter of straits

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172. U.N. Convention on the Law of the Sea, *supra* note 3.

173. *Id.* at art. 45(2).

174. See Kraska, *supra* note 45, at 208–13.

175. U.N. Convention on the Law of the Sea, *supra* note 3, at arts. 21–22.

176. See Caron, *The Great Straits Debate*, *supra* note 1, at 19–20.

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used in international navigation continues to be a dynamic area of international law. There are still many issues that need to be addressed. What remains unclear is to what extent these can be addressed under UNCLOS.

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# New Law for the High Seas

Cymie R. Payne

*Much of the intellectual attraction and intrinsic elegance which characterizes international law of the sea comes from the fact that it ranges from the historical heritage of the past to the potential achievements of the future.*

– Tullio Scovazzi<sup>1</sup>

## INTRODUCTION

In international law as in other fields, elegance is the result of careful design, appropriateness for context, and functional performance. David Caron's interest in thinking systematically about environmental treaty design led him to ponder the policy tools and institutions that can be created by States when they negotiate treaties.<sup>2</sup> This essay examines aspects of design for a once-in-a-lifetime opportunity to fashion a new treaty for the high seas, the ocean space that lies more than two hundred nautical miles offshore,<sup>3</sup> and which provides more than half of the oxygen we breathe. This paper also suggests some of the issues that

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1. Tullio Scovazzi, *The Evolution of International Law of the Sea: New Issues, New Challenges*, in 286 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 39, 53 (Hague Acad. of Int'l Law ed., 2000). Though Albert Einstein said, about his own exegesis of the theory of relativity, "I adhered scrupulously to the precept of that brilliant theoretical physicist L. Boltzmann, according to whom matters of elegance ought to be left to the tailor and to the cobbler." ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND GENERAL THEORY 5 (Robert W. Lawson trans., 1916).

2. David D. Caron, *Analyzing and Understanding Treaties in the Area of International Environmental Law*, in TEACHING INTERNATIONAL ENVIRONMENTAL LAW: IDEAS AND EXPERIENCES FROM THE SEMINAR ROOM AND THE LECTURE HALL 8 (Eric S. Howard ed., 1994). In addition to the subjects covered in this essay, Caron's treaty analysis includes an assessment of treaty norms, incentives and sanctions, compliance monitoring, enforcement, and dispute settlement. *See generally id.*

3. More precisely, the high seas are ocean waters beyond two hundred nautical miles (nm) from any State's coastal baseline (or twelve nm for States that have not claimed an Exclusive Economic Zone) and the seabed beyond two hundred nm (or extended continental shelf boundaries where they have been claimed). Tullio Treves, *High Seas*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., <http://www.mpepil.com> (last updated Jan. 2009). *See also* Joanna Mossop, *Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles*, 38 OCEAN DEV. & INT'L L., 283–304 (2007).

negotiators will confront in their attempts to govern other areas beyond sovereign State control, including outer space and cyberspace.

States began to work in earnest on the new agreement on September 4, 2018, the opening of an Intergovernmental Conference (IGC). The United Nations General Assembly (UNGA), in resolution 72/249, set the following mandate:

. . . to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea [UNCLOS] . . . [on] the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction [BBNJ], in particular, together and as a whole, marine genetic resources [MGR], including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology[.]<sup>4</sup>

The geographic scope alone is huge: the high seas constitute about half of Earth's surface, and 95 percent of the volume of the world ocean. UNCLOS's high seas provisions "apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State,"<sup>5</sup> subject to the rights of any coastal State regarding certain natural resources of its continental shelf.<sup>6</sup>

Governance thus requires a multilateral solution, as the high seas border over 150 States, and even land-locked States have interests in its resources and planetary functions such as climate regulation. The temporal scope should be as ambitious: the principles and institutions created by this agreement are intended to conserve ocean biodiversity for future generations. Multilateral treaties are difficult to negotiate and rarely amended, so what is decided now will be with us for the foreseeable future.

Caron reminded us that understanding the problem that a treaty is intended to solve is the first step both for analyzing and for drafting a treaty. Fitting the scope and function of the treaty to the problem will determine the legal rules, policy instruments, and essential parties needed for its success.<sup>7</sup> The problems the BBNJ treaty is intended to solve are multifaceted and based on a "delicately crafted" political agreement,<sup>8</sup> with an overall focus on high seas biodiversity. Current conservation concerns—aside from the ocean warming, acidification, and deoxygenation caused by climate change—are chiefly habitat and species collapse from fishing, noise, and other pollution, physical damage from

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4. G.A. Res. 72/249, U.N. Doc A/RES/72/249, ¶¶ 1–2 (Dec. 24, 2017).

5. United Nations Convention on the Law of the Sea art. 86, Dec. 10 1982, 1833 U.N.T.S. 397, [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS].

6. *Id.* at arts. 76–77.

7. Caron, *supra* note 2, at 8.

8. Eden Charles, *Foreword* to GLEN WRIGHT ET AL., *THE LONG AND WINDING ROAD: NEGOTIATING A TREATY FOR THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIODIVERSITY IN AREAS BEYOND NATIONAL JURISDICTION* 5 (2018), <https://www.actu-environnement.com/media/pdf/news-31928-iddri-haute-mer.pdf>.

commercial shipping, and harmful impacts from land-based activities such as plastic and other pollution from solid waste disposal.<sup>9</sup> Pollution and physical removal of habitat by deep seabed mining are among the most significant future impacts that are expected to damage high seas biodiversity. There are also potentially valuable resources—including genetic information, fish, and minerals—that those who have the technical capability can take or that could be considered the shared property of the international community.

These varied problems require a variety of approaches. Like the climate change agreements, the BBNJ agreement will need to be regulatory, to manage human activities in the high seas.<sup>10</sup> Like the deep seabed mining agreement, it should define and allocate property rights,<sup>11</sup> in this case for marine genetic resources. Like the migratory and endangered species agreements,<sup>12</sup> it should create policy tools to ensure management for long-term viability of marine creatures' populations. Unlike any international agreement to date, it should manage marine ecosystems to preserve ocean biodiversity for future generations.

While the BBNJ is unique in its attempt to address the problem of managing high seas biodiversity, it will benefit from the development of multilateral environmental agreements (MEAs) since the 1970s. Some of the earliest MEAs dealt with pollution—accidental<sup>13</sup> or chronic<sup>14</sup>—and with management of living resources such as whales and fish.<sup>15</sup> Because these issues required regular inputs of new scientific information, the agreements usually created a treaty body responsible for integrating science into policy making, and provided rules to facilitate amendment of the treaty or of its annexes according to new scientific information. The Montreal Protocol, for example, is regularly updated with new research about ozone-damaging substances, not only through amendments, but also through a simplified adjustment procedure that allows for a quicker

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9. Patricio Bernal et al., *Overall Assessment of Human Impact on the Oceans*, in I THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT 935, 935–37 (United Nations ed., 2017) [hereinafter World Ocean Assessment].

10. See U.N. Framework Convention on Climate Change art. 4, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

11. UNCLOS, Agreement on the Implementation of Part XI of the Convention, *supra* note 5.

12. See Convention on the Conservation of Migratory Species of Wild Animals 96–113, June 26, 1979, 1651 U.N.T.S. 333, 19 ILM 15 (1980); ATS 1991/32; BTS 87 (1990), Cm. 1332; Convention on International Trade in Endangered Species of Wild Fauna and Flora art. IX, Mar. 3, 1973, 993 U.N.T.S. 243 [hereinafter CITES].

13. Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency art. 1, Sept. 26, 1986, 1457 U.N.T.S. 24643.

14. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293, S. TREATY Doc. 9, 99th Cong., 1st Sess. (1985), reprinted in 26 ILM 1529; Montreal Protocol on Substances that Deplete the Ozone Layer art. 2, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY Doc. 10, 100th Cong., 2d Sess., reprinted in 26 ILM 1550.

15. International Convention for the Regulation of Whaling (ICRW) art. III, Dec. 2 1946, 161 U.N.T.S. 72.

response.<sup>16</sup> In addition, UNCLOS, the ozone, climate change, and biodiversity agreements introduced treaty elements intended to address the disparate situation of States that had been colonized and that therefore lagged in economic development.<sup>17</sup> These included recognition of some resources as the common heritage of humankind,<sup>18</sup> finance for capacity building and technology transfer,<sup>19</sup> and facilitative compliance mechanisms.<sup>20</sup> The BBNJ agreement will likely follow suit.

The status of the high seas as an area beyond national jurisdiction (ABNJ) influences every aspect of the new agreement. Caron referred to the complications that arise due to the presence of a border.<sup>21</sup> Here, the border between sovereign space and common space is a further complication. Bilateral solutions are not possible, nor can private law provide much help; and the area to be governed is, by definition, not subject to the national law of any State. Furthermore, international law has not fully defined the rights of the international community or individual States as against a high seas polluter or plunderer State.

Yet a new treaty for the open ocean offers the possibility for States to agree to a set of rules, institutions, and procedures that are better suited to the needs of the twenty-first century than either customary international law or the last century's agreements can provide. For example, although environmental impact assessment (EIA) is now recognized as an international obligation,<sup>22</sup> UNCLOS article 206 only alludes to the process in passing. The specifics of how and when assessment should take place can be settled in the BBNJ agreement. The treaty could also create institutional clearinghouses to better coordinate and share the burgeoning scientific research that informs both conservation and sustainable use of the ocean. Biodiversity threats that cannot be easily eliminated (like the effects of climate change) can be partially mitigated, and human activities that conflict

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16. Montreal Protocol, *supra* note 14, at art. 2. The adjustment process also illustrates a common procedural measure: the parties are to make every effort to reach agreement on adjustment by consensus, but if that proves impossible, then a two-thirds majority vote will make the decision binding on all parties. *Id.* This is in contrast to CITES or the ICRW, which allow parties to take a reservation to a new listing of a species or restriction on hunting.

17. Lee A. Kimball, *Developing a Policy Structure to Respond to Global Change*, in *ECOLOGICAL AND SOCIAL DIMENSIONS OF GLOBAL CHANGE* 321 (David D. Caron et al. eds., 1994).

18. UNCLOS, *supra* note 5, at art. 125; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 Jan. 1967, 610 U.N.T.S. 8843.

19. United Nations Framework Convention on Climate Change art. 9, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; United Nations Convention on Biological Diversity art. 6, June 5, 1992, 31 ILM 818, 1760 U.N.T.S. 69 [hereinafter Convention on Biological Diversity].

20. Montreal Protocol, *supra* note 14, at art. 10; UNFCCC, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, annex to decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3, ¶ 4 (2005).

21. Caron, *supra* note 2, at 9.

22. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14 ¶ 204 (Apr. 20); Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 2011 ITLOS Rep. 10, ¶¶ 145, 147–148 (Feb. 1).

with each other could be peacefully coordinated through BBNJ agreement mechanisms implementing Area-Based Management Tools (ABMT).<sup>23</sup> This would contribute to implementation of two UNCLOS obligations: to preserve the marine environment and to use the high seas only for peaceful purposes.

Moreover, this agreement can strengthen existing ocean governance.<sup>24</sup> Because the BBNJ agreement is an implementing agreement, and thus intended to develop UNCLOS principles and rules, it will be subject to principles that the parties to UNCLOS previously accepted, such as the obligation to protect the marine environment and the rights of freedom of the seas for some high seas activities. One of the central achievements of UNCLOS was to define the extent of State jurisdiction, rights, and duties over different maritime zones, including the high seas.<sup>25</sup> In fact, these divisions effectively created today's legal definition of the high seas. The BBNJ agreement can further develop the rights and duties of States (and nonstate actors) regarding high seas areas and in relation to adjacent coastal States. Where UNCLOS principles are wanting—for example, they do not account adequately for human activities impacting the ocean, especially industrial fishing, mining, and climate change—the BBNJ agreement can supply governance tools that address current ocean conditions, remaining consistent with these principles. UNCLOS also created institutions that can and should be used by the new agreement. The International Tribunal for the Law of the Sea (ITLOS) provides a forum for dispute settlement and a source of

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23. Sustainable Development Goal 14 (“Conserve and sustainably use the oceans, seas and marine resources for sustainable development”) is implemented through targets including Target 14.5, which states “[b]y 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information.” G.A. Res. 70/1, Transforming our World: The 2030 Agenda for Sustainable Development ¶¶ 14, 14.5 (Sept. 25, 2015). The International Union for Conservation of Nature (IUCN) defines a protected area as “[a] clearly defined geographical space, recognised, dedicated and managed through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values” and a conserved area as “a geographically defined space, not recognised as a Protected Area, which is governed and managed over the long-term in ways that deliver the effective and enduring in situ conservation of biodiversity, with associated ecosystem services and cultural and spiritual values.” IUCN, IUCN GREEN LIST OF PROTECTED AND CONSERVED AREAS: USER MANUAL, VERSION 1.1, 8 (2018), <https://iucn.my.salesforce.com/sfc/p/#24000000e5iR/a/1o000005FBq/Od6wezU5G3bMvrKX10MyUYrN.LykKS7SicquUy241e4>. See also Lisa A. Levin & Nadine Le Bris, *The Deep Ocean under Climate Change*, 350 SCI. 766, 768 (2015) (“Spatial planning to restrict direct human disturbance—for example, by creating networks of deep-water marine protected areas—may help to establish refugia for endangered species and habitats and can reduce cumulative stresses. Protections to reduce physical and chemical disturbances from bottom trawling, mine tailings disposal, oil and gas extraction, or even seabed mining in areas subject to the greatest stress of warming, acidification, or deoxygenation will lessen chances of habitat loss and extinction of species and the ecological functions they support.”).

24. As Koivurova and Caddell argue, the BBNJ Agreement can provide “a firm platform to build on current cooperative arrangements for these vulnerable and rapidly changing marine ecosystems” in the Arctic. Timo Koivurova & Richard Caddell, *Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic*, 112 AJIL UNBOUND 134, 134 (2018).

25. See, e.g., Scovazzi, *supra* note 1, at 94.

authoritative treaty interpretation through its advisory opinions.<sup>26</sup> Some of UNCLOS's principles and provisions will be implemented for the first time by this agreement, and having recourse to ITLOS for authoritative interpretation and dispute settlement will be valuable.

This Article engages in a design exercise, beginning in Part I with a review of how the BBNJ negotiation developed from the UNCLOS review process. Part II examines the problem the BBNJ agreement is intended to address, the selection of policy tools available, and the elements of the BBNJ "package" in light of concerns about pollution, environmental management, and resource allocation. In Part III, the Article turns to the question of necessary parties for success, and concludes with consideration of an essential party that is often not in the actual, physical room: the ocean environment. Elegant-looking structures, designs that work smoothly and precisely, are usually the result of careful attention to the devilish details. Let us turn to them.

#### I. DEVELOPMENT OF THE BBNJ NEGOTIATION

The BBNJ negotiation was the result of years of work within the United Nations that also led to two other UNCLOS implementing agreements. In 1994, both UNCLOS and an agreement on deep seabed mining in ABNJ,<sup>27</sup> the first implementing agreement to UNCLOS, came into force. In 1995, a second UNCLOS implementing agreement was adopted to address the conservation and management of straddling and highly migratory fish stocks (Fish Stocks Agreement); these include popular fish like pollock, mackerel, tuna, and swordfish.<sup>28</sup> A host of regional and sectoral agreements and nonbinding agreements developed independently both before and after UNCLOS.<sup>29</sup>

Entry into force of UNCLOS nonetheless left gaps and inconsistencies in management of the world ocean. UNCLOS stated "that the problems of ocean space are closely interrelated and need to be considered as a whole," a sentiment repeated in each annual UNGA resolution on the Law of the Sea, beginning with

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26. See generally Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, *supra* note 22 (outlining institution of proceedings to obtain advisory opinion); Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion), Advisory Opinion, 2015 ITLOS 4 (Apr. 2).

27. G.A. Res. 48/263, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Aug. 17, 1994). Ranganathan pointed out that, for a framework treaty, UNCLOS itself included an unusual amount of detail by creating the International Seabed Authority and other treaty bodies that oversee deep seabed mining in ABNJ. Surabhi Ranganathan, *The Law of the Sea and Natural Resources*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 121, 125 (Eyal Benvenisti & Georg Nolte eds., 2018).

28. See Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks art. 5, Aug. 4, 1995, 2167 U.N.T.S. 3.

29. See *infra* notes 45–52 and accompanying text.

resolution 48/28 (1993).<sup>30</sup> And yet, the deep seabed mining agreement and the Fish Stocks Agreement, to a significant degree, treated resource extraction as isolated from each other and from overall management of the ocean.

Three efforts were deployed to address the need for integration. In 1999, UNGA created the Open-ended Informal Consultative Process on Oceans and Law of the Sea to strengthen the UNGA debate on the subject and to improve coordination and cooperation between States.<sup>31</sup> In 2015, the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects released the First World Ocean Assessment to provide a scientific basis for policy making.<sup>32</sup> The Ad Hoc Open-ended Informal Working Group (BBNJ Working Group) was created in 2004 to study conservation and sustainable use of BBNJ.<sup>33</sup>

In 2015, the BBNJ Working Group recommended development of an international legally binding instrument for the conservation and sustainable use of marine biodiversity in ABNJ under UNCLOS, and UNGA Resolution 69/292 officially launched a two-year preparatory committee process (the PrepCom) to make substantive recommendations to the UNGA on the elements of a draft text.

The issues and points of difference between States became clearer over the course of two years of formal sessions, working groups, and intersessional meetings, and many workshops, trainings, side events, conferences, briefing papers, books, and articles, resulting in a final report from the PrepCom to the UNGA.<sup>34</sup> According to the final report, most delegations agreed that BBNJ guiding principles could include, *inter alia*, respect for the sovereignty and territorial integrity of all States, and use of marine biological diversity of ABNJ for peaceful purposes only, reference to the legal principles of precaution and polluter-pays, operational principles including the ecosystem approach, science-based approach, and using the best available scientific information and knowledge, including traditional knowledge, and public participation and

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30. G.A. Res. 49/28 (Dec. 16, 1994). The annual UNGA resolution on oceans and the law of the sea provides a useful means of tracking issues and activities, such as capacity building, human trafficking, land-based pollution of the ocean, and implementation of sustainable development initiatives like the Johannesburg Plan of Implementation.

31. Results of the review by the Commission on Sustainable Development of the sectoral theme of “Oceans and seas”: international coordination and cooperation, G.A. Res. 54/33 (Nov. 24, 1999).

32. Bernal et al., *supra* note 9, at 936–40.

33. Oceans and Law of the Sea ¶ 73, Nov. 17, 2004, G.A. Res. 59/24.

34. Report of the Preparatory Committee established by UNGA resolution 69/292: Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (31 July 2017), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/AC.287/2017/PC.4/2](http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.287/2017/PC.4/2). Documentation of the process, including the important role of civil society, can be found in the reports of Earth Negotiations Bulletin – IISD Reporting System, <http://enb.iisd.org/vol25/>. The texts of interventions submitted to the United Nations PaperSmart are also available, <http://papersmart.unmeetings.org/en/>.

transparency.<sup>35</sup> Certain positions seemed to remain rigid: for example, the United States' position regarding intellectual property rights to marine genetic resources developed by U.S. companies remained unchanged;<sup>36</sup> the Russian Federation's reluctance to move any issues forward continued.

## II. SCOPE AND FUNCTION OF THE TREATY

The motivation for the BBNJ initiative was expressed in the BBNJ Working Group co-chairs' 2014 report:

Concerns were expressed over the unprecedented rate of loss of marine biodiversity . . . with increased human activity in areas beyond national jurisdiction, both in terms of extent and scope, there was an increased chance of putting at risk and damaging biodiversity, ecosystems processes and function and, in some instances, permanently altering the marine environment . . . threatening the survival of mankind given that the healthy functioning of those diverse systems sustained life on Earth.

Some delegations highlighted the accumulation of a number of threats to ecosystems beyond areas of national jurisdiction, including unsustainable resource utilization, destruction of habitats, pollution, ocean acidification and climate change. A view was expressed that unsustainable fishing, in particular overfishing, illegal, unreported and unregulated [IUU] fishing and certain destructive fishing practices, was the greatest threat to marine biodiversity in those areas.<sup>37</sup>

In addition to the important biodiversity impacts of IUU and poorly managed high seas fishing mentioned here by the BBNJ Working Group, shipping is a major cause of concern.<sup>38</sup> While the UNGA recognized that a significant amount of the damage to the ocean is from land-based pollution,

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35. Report of the Preparatory Committee, *supra* note 34, at 9. The ecosystem approach appears as early as the 1982 Convention for the Conservation of Antarctic Marine Living Resources. *See also* Cymie R. Payne, *The Ecosystem Approach: New Departures for Land and Water*, 24 *ECOLOGY L.Q.* 619, 619 (1997).

36. The United States is isolated in this regard: it signed but never became a party to the Convention on Biological Diversity (CBD), unlike every other UN member State (and three States that are not members of the United Nations). Work in the CBD institutions necessarily is reflected in the approach to biodiversity taken by every BBNJ delegation, particularly the Aichi Targets, a framework for biodiversity conservation for the entire United Nations, *available at* <https://www.cbd.int/sp/targets/>, and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, *available at* <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

37. Letter Dated 5 May 2014 from the Co-Chairs of the Open-ended Informal Working Group to the President of the General Assembly, ¶¶ 9–10, U.N. Doc. A/69/82 (2014).

38. *Summary of the First Global Integrated Marine Assessment*, in I THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT 16, 29 (United Nations ed., 2017) (“[S]hipping brings with it increased risks of marine pollution both from acute disasters and chronic pollution and the potential introduction of invasive non-native species. . . . Pollution from ships takes the form of both catastrophic events (shipwrecks, collisions, and groundings) and chronic pollution from regular operational discharges.”).

including plastics and climate change-related pollution,<sup>39</sup> those concerns were not explicitly included in the BBNJ negotiating “package” that the UNGA approved.<sup>40</sup> This seems to suggest that only maritime activities will be covered by the agreement, but there is not a bright line identifying activities within its scope. For example, States have taken different positions on whether the obligation to undertake an assessment for activities that will have a significant negative impact on high seas biodiversity applies to activities that take place within national waters, or whether that obligation only applies to activities that occur in ABNJ.<sup>41</sup>

While numerous agreements are currently in place to deal with high seas resources, the BBNJ negotiation reflects the decision that there are too many gaps and too much fragmentation for these to effectively govern the vast and rich high seas.<sup>42</sup> Hundreds of international agreements relate to fisheries alone.<sup>43</sup> The Food and Agriculture Organization (FAO) lists six global and transoceanic fishery agreements, and thirty-four additional regional organizations.<sup>44</sup> Some of these are regional fisheries management organizations that have been established for particular target species<sup>45</sup> and for regions,<sup>46</sup> with authority to manage—or in some cases only to advise on managing—fisheries, through controls on fishing gear, fishing effort, trade, and other measures. Four Regional Seas programs address ABNJ.<sup>47</sup> Besides these, there are instruments like the 2009 FAO

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39. Oceans and the Law of the Sea, G.A. Res. 66/231, ¶ 148 (Dec. 24, 2011); see Lisa A. Levin & Nadine Le Bris, *The Deep Ocean under Climate Change*, 350 SCIENCE 766, 766–68 (2015).

40. *Id.* at ¶ 167, Annex; Kristina M. Gjerde, *Perspectives on a Developing Regime for Marine Biodiversity Conservation and Sustainable Use beyond National Jurisdiction*, in OCEAN LAW DEBATES 354, 354–380 (Harry N. Scheiber et al., eds. 2018).

41. Informal working group on environmental impact assessments, Transcript of Oral report of the Facilitator to the plenary, Friday, 14 September 2018 (on file with author).

42. For a discussion of BBNJ institutional design, see Cymie R. Payne, *Introduction to the Symposium on Governing High Seas Biodiversity*, 112 AJIL UNBOUND 118–20 (2018).

43. See generally United Nations Treaty Collection, <https://treaties.un.org> (last visited Feb. 19, 2019). For a more detailed discussion, see ILA Committee on The Role of Sustainable Natural Resources Management in International Law, Conference Report, Johannesburg § 3.2 (2016), available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1551&StorageFileGuid=f9337875-261b-4937-b0ab-f18c04e1aa79>.

44. Food and Agriculture Organization of the United Nations, <http://www.fao.org/fishery/rfb/search/en> (last visited Feb. 19, 2019).

45. Tuna, for example, is monitored and managed by the Commission for the Conservation of Southern Bluefin Tuna, Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas (ICCAT), Indian Ocean Tuna Commission, and the Western and Central Pacific Fisheries Commission. See ROBIN ALLEN, INTERNATIONAL MANAGEMENT OF TUNA FISHERIES 8–28 (2010), <http://www.fao.org/3/i1453e/i1453e00.pdf>.

46. See, e.g., Sub-Regional Fisheries Commission, an organization of West African coastal States and its 2012 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission.

47. See Convention for the Protection of the Mediterranean Sea against Pollution art. 10, Feb. 16, 1976, 1102 U.N.T.S. 27, 15 ILM 290, as supplemented by the Protocol for the Protection of the Mediterranean Sea against Pollution resulting from Exploration and Exploitation of the Continental Shelf

Agreement on Port State Measures that create obligations for both flag States and port States including: inspections to identify IUU fishing activities, authority to deny port facilities for activities like transshipment, recognition of the port State's right to deny entry to vessels, the obligation to deny entry to IUU fishing vessels other than for enforcement or emergency, and capacity building to assist developing States.<sup>48</sup> The Convention on Biological Diversity (CBD), the scope of which is primarily limited to areas within national jurisdiction, also applies to "processes and activities, regardless of where their effects occur, carried out under [a State party's] jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction,"<sup>49</sup> and calls on its 196 parties "as far as possible and as appropriate, [to] cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biodiversity."<sup>50</sup> Yet, inconsistencies, gaps in geographic and subject matter coverage (including the lack of the "competent international organizations" for biodiversity in ABNJ referred to in CBD, Article 5), and poor implementation of conservation obligations in many existing regimes have led to the decline in ocean biodiversity and the poor prognosis offered by the World Ocean Assessment.

With this understanding of the threats to high seas biodiversity and property rights issues identified by the BBNJ Working Group, and the need to consider the dense but fragmented body of already applicable instruments and frameworks, it is possible to turn to consideration of governance strategies.

#### A. *The Problem of Pollution: Prevention and Liability*

To manage pollution risks to biodiversity in ABNJ, negotiators can adapt past experience with different types of pollution to the new context of high seas pollution from mining, shipping, and other sources. Some approaches to

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and the Seabed and Its Subsoil (Madrid Protocol) Oct. 14, 1994, 1-48454 U.N.T.S. I Biodiversity Protocol—Specially Protected Areas for Mediterranean Importance (SPAMI) and inter-sectoral cooperation; Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, 2354 U.N.T.S. 67, 32 ILM 1069 ("OSPAR Convention"); Convention for the Protection of the Natural Resources and Environment of the South Pacific Region art. 4, Nov. 25, 1986, 26 I.L.M. 38; Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476; Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455.

48. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing arts. 3, 9, Nov. 22, 2009, FAO Resolution No. 12/2009.

49. Convention on Biological Diversity, *supra* note 19, at art. 4; *see also id.* art. 3.

50. Convention on Biological Diversity, *supra* note 19, at art. 5; *see also* Lyle Glowka, et al., A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY 27–28 (IUCN, Gland/Cambridge, 1994), available at <https://portals.iucn.org/library/sites/library/files/documents/EPLP-no.030.pdf>; Scovazzi, *supra* note 1, at 215 (analyzing whether marine genetic material in ABNJ is regulated under international treaty provisions for fishing, scientific research, or something else, concluding that the CBD and UNCLOS both apply but that the regime leaves a vacuum).

pollution management seek to prevent damage, while others impose legal liability in order to incentivize caution and internalize the costs of harm to the polluting activity. Prevention should be a priority for chronic sources of pollution and for situations where the risk and cost of accidents are high or not recoverable, as is likely in the high seas;<sup>51</sup> liability is an important supplemental strategy for the high seas that will be most useful to the extent that it discourages and excludes incompetent operators from high seas activities. Liability generally requires reparation of the harm, but as marine scientific research increasingly demonstrates, reparation in the water column and seabed of the high seas is virtually impossible.<sup>52</sup> Reparation should, of course, be provided to the extent that it can offset harm.

Before considering preventive and liability-based governance tools, it will be useful to appreciate that pollution can be the result of either chronic or accidental harm. Chronic harms are those that occur as part of a regular activity, such as the noise of ships' propellers, discharges of waste, introduction of alien species through ballast water, and plumes of sediment from processing anticipated at mining sites.<sup>53</sup> Accidents, on the other hand, are unintended events, such as oil spills.

Caron suggested that the strategies that a treaty uses will depend on whether the harm is chronic or accidental.<sup>54</sup> In economic terms, an activity that normally produces environmental damage can be said to externalize that cost of its operation; a regulation that prevents the harm can be described as internalizing the cost to the operator. However, preventive regulations that internalize the cost of an activity's harms will cause dislocation costs (which may also fall on individuals or communities other than the operator). That, in turn, may create political pressure opposing preventive regulation. As a result, Caron proposed that adaptation is the usual treaty response to a chronic problem; and compensation for chronic harm is unlikely.<sup>55</sup>

On the other hand, Caron thought that costly accidents would engender a host of preventive efforts to reduce the risk of harm; response strategies to mitigate the damage; and compensation to wipe out the remaining risk.<sup>56</sup> More than twenty additional years of assessment of international incidents confirm that accidents trigger interest in regulation<sup>57</sup> and chronic harm does appear less likely

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51. HJ Niner et al., *Deep-Sea Mining With No Net Loss of Biodiversity—An Impossible Aim*, 5 FRONTIERS IN MARINE SCIENCE 1, 5 (2018).

52. *Id.* at 2.

53. D. Freestone et al., *Chapter 50: Sargasso Sea*, in I THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT 3 (United Nations ed., 2017).

54. Caron, *supra* note 2, at 12, tbl. 1.

55. *Id.*

56. *Id.*

57. Rick S. Kurtz, *Coastal Oil Pollution: Spills, Crisis, and Policy Change*, 21 REV. POL'Y RES. 139, 201 (2004) (finding that the Exxon Valdez oil spill was a catalyst for the 1990 Oil Pollution Act in

to lead to regulatory reform than a dramatic accident. Thus, it can be seen that major oil spills have engendered new treaty-based preventive measures such as better oil tanker design, ship inspection, and spill response training.<sup>58</sup> Recognizing that prevention sometimes fails and accidents occur, legal liability regimes have also been put in place to provide compensation.<sup>59</sup> In contrast, day-in, day-out pollution from cruise ships and cargo ships has not attracted the same focused attention and political pressure, so regulation has moved more slowly, if at all.

However, the major strategies used to govern chronic and accidental environmental damage are similar. Before-the-fact preventive efforts and after-the-fact “polluter pays” approaches to restore the situation *ex ante* are used in both situations. Preventive tools to manage pollution include reporting, such as the UN Framework Convention on Climate Change requirement that Annex I countries report annually on their sinks and sources of greenhouse gases,<sup>60</sup> and command and control regulation, such as the ship design measures and operational requirements used to reduce and mitigate accidents by the oil tankering industry that the International Maritime Organization (IMO) manages.<sup>61</sup>

The BBNJ Working Group identified two preventive policy tools and included both as elements of the “package”: prior assessment of activities with EIA and establishing high seas locations where the highest risk activities would be limited or prohibited using ABMT. EIA, a form of reporting, serves to identify potentially harmful activities. ABMT can be used either to direct harmful activities to regions where they do not threaten vulnerable biodiversity or to prohibit them entirely. Measures like ship design will remain the responsibility of the IMO, though how and where ships operate could be influenced by ABMT developed under the BBNJ agreement. Some species-level protections will continue to be provided by other treaty regimes that prohibit killing or harming individual members of certain species; notably the International Convention for the Regulation of Whaling’s moratorium on hunting the great whales, and the Convention on International Trade in Endangered Species (CITES) prohibition

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the context of additional status quo-disruptive factors); IMO, Background (ship design regulation followed Erika and Prestige oil spills) *available at* <http://www.imo.org/en/ourwork/environment/pollutionprevention/oilpollution/pages/background.aspx>.

58. International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) Annex I, Regulations 13F and 13G; European Commission, Maritime safety: IMO introduces new double-hull requirements at worldwide level to close the gap with new EU safety rules, IP/03/1667 (2003). [http://europa.eu/rapid/press-release\\_IP-03-1667\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-03-1667_en.htm?locale=en) [hereinafter International Convention for the Prevention of Pollution from Ships].

59. International Convention on Civil Liability for Oil Pollution Damage art. 3, Nov. 27, 1992, 1956 U.N.T.S. 255; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage art. 4, Nov. 22, 1992, 1953 U.N.T.S. 330.

60. UNFCCC, *supra* note 10, at art. 4.

61. International Convention for the Prevention of Pollution from Ships, *supra* note 58, at art.1.

on “introduction from the sea” into trade of some shark species, manta rays, and others.<sup>62</sup>

As Caron observed, chronic externalities of well-established high seas activities like shipping and fishing are difficult to manage through preventive measures because of the costs of environmentally safe gear, operational rules, and geographic restrictions, and because of the perception that there is an unfettered right to engage in navigation and fishing on the high seas. This view persists, although States agreed in UNCLOS that the freedoms of the high seas are tempered by obligations of due regard for other high seas activities and obligations to protect and preserve the marine environment and to conserve its living resources.<sup>63</sup>

Even promoters of future activities that are relatively novel—for example, deep seabed mining—tend to espouse a sense of entitlement that makes robust regulation on behalf of other values difficult. This is reflected in the arguments put forward by the fishery and submarine cable sectors that their industries should be excluded from the BBNJ agreement<sup>64</sup> and insistence by the International Seabed Authority (ISA) that it has sole jurisdiction over the seabed in ABNJ,<sup>65</sup> even though its mandate is limited to mining of minerals.

Additional measures, which can mitigate, if not prevent, damage, include advance coordination to supply materiel and personnel to respond after an incident has occurred. The BBNJ negotiation has not considered whether to include provisions for emergency measures to contain damage from accidents, to protect vulnerable and valuable environments, or to restore damaged environments, but it should. Response measures could be handled through regional or sectoral bodies, or developed through protocols to the BBNJ agreement as the need arises and as the capability for emergency response develops. Although response measures for accidents in ABNJ are very limited

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62. CITES, *supra* note 12, at art. I(e) (“transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State”); *see also* CITES, Resolution Conf. 14.6 (Rev. CoP16).

63. UNCLOS, *supra* note 5, at arts. 87 (Freedom of the High Seas), 116–120 (Freedom to Fish, Cooperation and Conservation), 192–237 (Protection and Preservation of the Marine Environment).

64. The International Cable Protection Committee, Submarine Cables and BBNJ, 25 (2016) (“The submarine cable service respectfully urges the diplomats involved in the BBNJ process not to change or condition the existing provisions in UNCLOS that deal with submarine cables and not to impose any new and additional EIA and MPA requirements for cables in a new implementing agreement.”), *available at* <https://perma.cc/NV8W-Q83W>. *See also* Tara Davenport, *The High Seas Freedom to Lay Submarine Cables and the Protection of the Marine Environment: Challenges in High Seas Governance*, 112 AJIL UNBOUND 141, 141–43 (2018).

65. ISA, *Statement by the International Seabed Authority* (Sept. 5, 2018), <http://statements.unmeetings.org/media2/19408113/international-seabed-authority.pdf>.

now, it should be a goal to develop effective containment and control procedures for every activity undertaken in the high seas.<sup>66</sup>

Liability and reparations for avoidable damage also should be addressed in the agreement. Customary international law is understood to require reparations when a State breaches its international obligations and causes damage to another State or States,<sup>67</sup> and MEAs often include language regarding responsibility, liability, and compensation. Under UNCLOS, article 235, which as a principle of the framework convention would apply to the implementing BBNJ agreement, “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.” The Fish Stocks Agreement, also an UNCLOS implementing agreement, elaborates on this with its article 35: “States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement.” Similarly, responsibility, liability, and compensation can be included in the final articles of the BBNJ agreement. This would strengthen the norms of harm prevention, create a disincentive for noncompliance, impose accountability, and provide resources for restoration.

#### *B. The Problem of Environmental Management: Assessment and Coordination*

Another challenge for the BBNJ agreement to address is that the “oceans, seas[,] and coastal areas form an integrated and essential component of the Earth’s ecosystem and are critical to sustaining it,”<sup>68</sup> yet the health of marine biodiversity is injured by alien invasive species, resource extraction, abandoned fishing gear, and direct damage by ships, trawls, and other activities.<sup>69</sup>

MEAs for biodiversity protection and habitat management rely on some of the same tools that have traditionally been used to manage pollution and some additional ones. Monitoring and reporting information remains important. The strategy of listing valuable and vulnerable areas is a frequently used management strategy. The Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat requires all three strategies: listing sites, monitoring their health, and reporting obligations.<sup>70</sup>

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66. A good example is the Polar Code for the Arctic. *See generally* International Code for Ships Operating in Polar Waters (Polar Code) and related amendments, IMO resolution MEPC.264(68), MEPC 68/21/Add.1.

67. Draft Articles on State Responsibility for Internationally Wrongful Acts, in Rep. of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

68. Future We Want, G.A. Res. 66/288, ¶ 158 (July 27, 2012).

69. *Id.* at ¶¶ 163–177.

70. Convention on Wetlands of International Importance especially as Waterfowl Habitat art. 2, Feb. 2, 1971, 996 U.N.T.S. 245, TIAS 11084, 11 I.L.M. 963 (1971) (Ramsar Convention).

Another tactic, coordination, can contribute to monitoring for biodiversity protection: for example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) requires countries to provide import and export permits for any listed species that is traded between two member States; compliance is monitored by matching the import permits with export permits.<sup>71</sup> Coordination can also entail establishing international standards that allow interoperability between countries and creating baseline norms for all participants in certain industries, as the Statute of the International Atomic Energy Agency (1956) does.<sup>72</sup>

Planning, yet another approach, plays an important role for habitat conservation, as in regional seas programs, such as the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR Convention”), that identify activities and designate where they can be conducted to avoid conflicts and harmful impacts.<sup>73</sup>

Command and control regulation is a governance approach that is already used in the high seas for resource extraction by regional fisheries management organizations and the ISA. The International Commission for the Conservation of Atlantic Tunas does this with area closures, catch limits, and gear restrictions.<sup>74</sup> UNCLOS and the 1994 Implementing Agreement prohibit deep seabed exploration, prospecting, and mining except subject to contracts and approvals that the International Seabed Authority issues under UNCLOS, the 1994 Agreement, and its own rules.<sup>75</sup>

The BBNJ agreement as currently sketched out will rely on monitoring, reporting, listing, and coordination for habitat and biodiversity management. EIA, in particular, is intended to provide information about new activities in the high seas. It does not, however, deliver any kind of overall status report of the condition of the ocean with respect to species or ecosystems that accounts for current activities. Strategic Environmental Assessment, which evaluates plans and projects, could offer a broader review of a region or a resource, but it would still not provide an overall ocean assessment and management plan.<sup>76</sup> Such a

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71. Convention on International Trade in Endangered Species of Wild Fauna and Flora art. VI, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; Cymie R. Payne, *Introductory Note to Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Compliance Procedures*, 46 INTERNATIONAL LEGAL MATERIALS 1174, 1174 (2007).

72. Statute of the International Atomic Energy Agency art. XII, Oct. 26, 1956, 276 U.N.T.S. 3.

73. Convention for the Protection of the Marine Environment of the North-East Atlantic art. II, Sept. 22, 1992, 2354 U.N.T.S. 67, 32 ILM 1069.

74. International Commission for the Conservation of Atlantic Tunas, established by the International Convention for the Conservation of Atlantic Tunas art. IV–VIII, May 4, 1966.

75. UNCLOS, *supra* note 5, at Part XI; 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 33 I.L.M. 1309; *see also* UNCLOS, *supra* note 5, at Annex III, art. 3.

76. Rep. of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond

planning process is almost unimaginable in scope, but with so many human activities significantly impacting the ocean, it is unimaginable that humanity would not attempt it.

The BBNJ agreement will have to work in coordination with other agreements. ABMT provides for geographic coordination of activities. While it might route some activities, like fishing or shipping, to certain areas of the ocean space, and other activities, like marine animal reproduction, to other areas, it does not tell fishers how many fish they can catch nor shippers how many trips they can make. On the other hand, command and control regulatory approaches can be implemented through national law governing flagship activities and sectoral legal regimes. Better alignment of conservation goals and methods between the regimes that govern the high seas are needed to achieve the sustainable use and conservation outcomes that the UNGA has called for.<sup>77</sup>

### C. The Problem of Allocation

The BBNJ negotiation differs from others such as the Paris Agreement for the climate change regime in a notable respect: it includes the prospect of rich rewards as well as the burden of regulation. The vast majority of ocean species have not been described;<sup>78</sup> and ocean life is both highly diverse and often adapted to unusual conditions including extreme heat, cold, and pressure, adaptations that are inscribed in marine genetic codes. This adds up to high potential for discoveries through systematically searching for biochemical and genetic information in nature—bioprospecting—that can lead to new products with commercial value.

The potential commercial value of marine bioprospecting in ABNJ is illustrated by a rather charming story:

. . . the ocean pout, *Zoarces americanus*, lives along the Atlantic coast of North America from Labrador to Delaware, down to a depth of more than 300 metres and in waters colder than 10 degrees C (and sometimes much

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national jurisdiction, U.N. Doc. A/AC.287/2017/PC.4/2, 5.7, 18 (2017) (“The text could address strategic environmental assessments.”); Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, art. 4, May 21, 2003, 2865 U.N.T.S. 140. See also Richard Barnes, *The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law*, 31 INT’L J. MARINE & COASTAL L. 1, 1–37 (2016). For a proposal of how to implement strategic environmental assessments in BBNJ, see DEEP-OCEAN STEWARDSHIP INITIATIVE, POLICY BRIEF: STRATEGIC ENVIRONMENTAL ASSESSMENT (SEA). See also ENVISIONING ITS APPLICATION TO MARINE AREAS BEYOND NATIONAL JURISDICTION (ABNJ) (Sept. 2018), available at <http://dosi-project.org/wp-content/uploads/2018/05/DOSI-SEA-Brief-1.pdf>.

77. See Margaret A. Young & Andrew Friedman, *Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction*, 112 AJIL UNBOUND 123, 125 (2018).

78. Camilo Mora, et al., *How Many Species Are There on Earth and in the Ocean?*, 9 PLOS BIOLOGY 1, 2–6 (2011); *About the Census*, CENSUS OF MARINE LIFE, <http://www.coml.org/about-census> (last visited Feb. 20, 2019) (ten-year scientific assessment of marine life, which also created Ocean Biogeographic Information System (OBIS) database, “the world’s largest open access, online repository of spatially referenced marine life data”).

colder). . . . As an adaptation to chilly waters, the ocean pout produces antifreeze proteins, which attach to any ice crystals in the fish's blood and curb their growth, preventing them from damaging cells.

Scientists at Unilever were able to recreate the eelpout's "ice structuring" protein in a form that could be used to solve an important social need: preventing ice cream from losing its smooth texture should it thaw and refreeze during handling.<sup>79</sup>

The hope of receiving benefits from eventual products like this, and even life-saving pharmaceuticals, provides an incentive for some States—especially the developing States—to participate in the negotiation. States with an interest in encouraging investment and wary of the high risk and long time frames of research and development for turning marine genetic resources into commercial products argue that the benefits should accrue to the investors.

There is a history of conflicting views on the property rights to genetic resources between developed and developing States.<sup>80</sup> For years, developed country industries sought and found biological materials in biodiverse developing countries, which the companies developed into profitable pharmaceuticals and other products. The host countries complained that they were not capturing the value of genetic resources found within their territories, and, in 1992, their concerns were addressed by the CBD. The CBD, in articles 1, 3, and 15, recognized that the genetic information of life forms was subject to host countries' "sovereign right to exploit their own resources" and that access to genetic resources required "fair and equitable sharing of the benefits arising out of the utilization of genetic resources" as determined by the host country. So, although the CBD has limited effect beyond national borders, its parties have explored the issues extensively.<sup>81</sup>

UNCLOS does not address rights to exploit marine genetic resources in ABNJ. It was negotiated before marine genetic resources were recognized as valuable, so the parties did not confront the allocation of property rights. UNCLOS parties did, however, designate the mineral resources of the seabed and its subsoil in ABNJ (the Area) as the common heritage of mankind and implemented a benefit-sharing regime.<sup>82</sup> They did not address whether the associated living resources (or any other high seas resources) shared that status. Some argue that the failure to include means that the intent was to exclude; others

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79. Jon Copley, *What Do Sir Roger Moore and a Deep-Sea Fish Have in Common?* (June 2017), [http://www.joncopley.com/blog\\_jun17.html](http://www.joncopley.com/blog_jun17.html).

80. For a fascinating, critical analysis, see Ikechi Mgbeoji, *Beyond Rhetoric: State Sovereignty, Common Concern, and the Inapplicability of the Common Heritage Concept to Plant Genetic Resources*, 16 LEIDEN J. INT'L L., 821, 822–23 (2003).

81. Its Nagoya Protocol deals in more detail with benefit sharing, but does not address ABNJ. See Nagoya Protocol, *supra* note 36, at art. 5.

82. UNCLOS, *supra* note 5, at pmb., art. 136; Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, G.A. 25/2749 (Dec. 12, 1970).

take the position that the possibility of such benefits was simply not contemplated and that philosophically all such valuable resources should be equitably shared by humankind. Moreover, the fact that some of the living beings whose genetic material is of commercial and scientific interest inhabit the Area, that is the seabed in ABNJ, creates a legal ambiguity. Scovazzi points to often-overlooked UNCLOS article 149, which bestows common heritage status on archeological and historical objects found in the Area; he calls this the “legal attraction [of the space] on the object itself.”<sup>83</sup> He shows that the legal attraction appears to exist in article 143 as well, which subjects marine scientific research, without specifying mineral resources, in the Area to a special set of obligations to share the results and to train others, especially from developing States. Certainly Arvid Pardo, the UNCLOS negotiator from Malta who is most identified with the common heritage, considered the high seas to partake of that status in its entirety.<sup>84</sup>

The CBD addressed the ownership of genetic resources, but in the very different context of sovereign territory. Its principle, stated in article 3, is that “States have, in accordance with the Charter of the United Nations and the principles of international law, the *sovereign right to exploit their own resources* pursuant to their own environmental policies . . .” (emphasis added).

Article 15 further says that “[r]ecognizing the sovereign rights of states over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.” Intellectual property rights, financial transfers, and transfer of technology are then to be negotiated between the State that owns the genetic resources and those that develop them into commercially valuable products. Without the rule of sovereign ownership, the allocation of property rights to genetic resources is perplexing.

And this is the single most divisive issue for the BBNJ negotiation. The position of developing States has been that the high seas are a global commons and that the resources found there should be shared equitably among all States.<sup>85</sup> The fact that some States have the technical capability of collecting samples of life forms and exploiting the genetic information found therein for commercial advantage should not, in their view, create a property entitlement. Instead, the value should be shared in some way among all States as the common heritage of humankind.

States with advanced technology see ocean resources as subject to the principle of the “freedom of the seas.” In their view, the agreement to designate deep seabed mineral resources as common heritage was a negotiated exception

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83. Scovazzi, *supra* note 1, at 218.

84. Arvid Pardo, *Thirteenth Statement to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor March 23, 1971*, in *THE COMMON HERITAGE: SELECTED PAPERS ON OCEANS AND WORLD ORDER 1967–1974*, 221 (1975).

85. WRIGHT ET AL., *supra* note 8, at 34.

to an open access rule that they believe exists in both customary international law and in UNCLOS.<sup>86</sup> Moreover, they argue, the World Intellectual Property Organization (WIPO) is the proper forum for this issue. Yet WIPO has not made progress in addressing genetic resources in ABNJ.<sup>87</sup> Despite the lack of international agreement, some private actors have forged ahead, with patents already taken out on more than 1600 genetic sequences from ninety-one species associated with deep sea and hydrothermal vent systems.<sup>88</sup>

John Norton Moore, a self-declared political conservative, argued that the U.S. industry benefited from UNCLOS's arrangement for deep seabed minerals because it provided a stable property regime.<sup>89</sup> Under the principle of "freedom of the seas," a company that made the substantial investment in prospecting and mining an ABNJ site might be able to claim any minerals it could seize, but it would not be able to exclude other operators. That would render the entire lengthy and capital-intensive enterprise infeasible. The negotiating concession that a different property regime would prevail and that some benefits would go to the international community was, to Moore's mind, a reasonable compromise in light of the security of title that it would give to industry.<sup>90</sup> The same considerations could be held to apply with regard to marine genetic resources, except that as a practical matter collecting genetic material from ABNJ does not entail the same long-term investment that mining does; a bioprospector is not as dependent as a miner on her ability to physically exclude competitors. Thus, the same equitable arguments supporting the CBD and UNCLOS approaches apply to marine genetic resources in ABNJ, but the different factual context removes one pragmatic incentive to declare marine genetic resources the common heritage of humankind (there may be others).

Resolution of these opposing positions promises to be difficult. Scovazzi suggested that the CBD was, in fact, the instrument that should govern marine

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86. See, e.g., United States Statement, Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction Agenda Item 6: General Exchange of Views, Sept. 5, 2018, available at <http://statements.unmeetings.org/media2/19408107/microsoft-word-united-states-opening-statement-bbnj-igc-session-1.docx.pdf>.

87. WIPO, THE CONSOLIDATED DOCUMENT RELATING TO INTELLECTUAL PROPERTY AND GENETIC RESOURCES REV. 2, 3 (2018) (addressing patent disclosure obligations for genetic resources from areas beyond national jurisdictions and associated traditional knowledge), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=340736](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=340736); Claudio Chiarolla, *The Work of the World Intellectual Property Organization (WIPO) and Its Possible Relevance for Global Ocean Governance*, in COMPREHENSIVE STUDY ON EFFECTIVE AND SUSTAINABLE GLOBAL OCEAN GOVERNANCE, IMO (INTERNATIONAL MARITIME ORGANIZATION)/IMLI (INTERNATIONAL MARITIME LAW INSTITUTE) RESEARCH REPORT TO THE NIPPON FOUNDATION 3 (2016), available at <https://ssrn.com/abstract=3002489>.

88. R. Blasiak et al., *Corporate Control and Global Governance of Marine Genetic Resources*, 4 SCI. ADVANCES 1, 1 (2018).

89. John Norton Moore, *UNCLOS Key to Increasing Navigational Freedom*, 12 TEX. REV. L. & POL'Y 459, 462-63 (2008).

90. *Id.* at 466-67.

genetic resources, while UNCLOS would control fishing and scientific research.<sup>91</sup> Problems would still remain. For instance, it is clear that product development from a fish's genetic code is quite different from supplying the protein needs of a growing population with its flesh, and that basic research into cellular structures is different again.<sup>92</sup> Yet when a fish is caught, and even when it is taken to a laboratory for study, the distinctions may not seem so clear and the legal labels governing permissible uses may tend to slip off. (Note that fish are used as an example here, but interesting species for genetic exploration are more likely to be extremophiles and the myriad other ocean creatures adapted to different living conditions.)

### III. MULTILATERALISM AND NECESSARY PARTIES

The ability to eventually arrive at an agreement with enough parties to make it functional will depend on whether States see cooperation on these issues as sufficiently beneficial to their national interests. A treaty architect has to consider which States must participate for the treaty to stand up. The most direct strategy is to stay focused on the motivations that brought the parties to the negotiating table in the first place. Another way to do this is by providing positive and negative incentives in the substance of the treaty. A third tactic is to set the entry into force clause so that the treaty will only enter into force when the critical parties have joined.

Although a perverse twist of domestic politics—the ability of a small number of senators to block ratification—kept the United States from becoming a party to UNCLOS, the fact that this maritime power achieved its major goals in the treaty negotiation has resulted in the executive branch (presidents and executive agencies, including the U.S. Navy) largely complying with UNCLOS,<sup>93</sup> with the exception of the provisions on deep seabed minerals.<sup>94</sup> The United States, as an important flag State, naval power, and coastal State, remained committed to the UNCLOS negotiation for years because it promised greater stability for rules regarding navigation, including innocent passage of

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91. Scovazzi, *supra* note 1, at 213–20.

92. In the BBNJ negotiations these three states are referred to as *in vivo* (normally used to refer to experiments with live beings), *in vitro* (usually referring to experiments on components of living beings, like cells), and *in silico* (referring to computer simulations). The use of terms in the BBNJ context is not precisely what is meant by scientific researchers.

93. Clive Schofield & Ian Townsend-Gault, *Time for the United States to Join the Party: Prospects for US Ratification of the United Nations Convention on the Law of the Sea*, 8 INT'L ZEITSCHRIFT 1, 2–4 (2012). Most provisions of UNCLOS are considered customary international law and are therefore binding on UNCLOS nonparties in any case. J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 4–6 (1996). And, as former ITLOS President Treves says, nonparty States live in a world where most other States are parties, so they must take account of UNCLOS rules. Tullio Treves, *15 UNCLOS and Non-Party States before the International Court of Justice*, in OCEAN LAW AND POLICY 367 (Carlos Eposito et al. eds. 2017).

94. Stephan Dinan, *Skeptical Senate Eyes Sea Treaty*, WASH. TIMES (Mar. 6, 2005), <https://www.washingtontimes.com/news/2005/mar/6/20050306-102143-1173r/>.

warships, freedom of the seas for shipping, and greater control over coastal resources by coastal States.<sup>95</sup> The United States, though not an UNCLOS party, today consistently takes the position that UNCLOS's rules on those points are legally binding as customary international law.

Nonparties are only able to participate as observers in the UNCLOS institutions—the International Tribunal for the Law of the Sea (ITLOS), the International Seabed Authority, and the Commission on the Limits of the Continental Shelf (CLCS)—so they wield less influence in developing and applying the law of the sea and they are unable to engage in important activities including sponsoring deep seabed mining in ABNJ and submitting extended continental shelf claims to the CLCS. One reason that U.S. senators stated for blocking ratification of UNCLOS was to protect U.S. seabed mining interests from the international regulatory system created by the Convention. The high seas mining regime was created in response to the position of developing countries. However, instead of going ahead and mining in defiance of the treaty's rules, no U.S. company has been willing to undertake deep seabed mining outside the legal regime created by UNCLOS, with one company instead incorporating in the United Kingdom, which is a party.<sup>96</sup>

While the anticipated benefit of avoiding regulation has not accrued to the United States, the cost has: not only the lost business opportunity, but the United States cannot shape the rules that govern deep seabed mining because it is not represented in the governing body, the International Seabed Authority. The net result suggests that UNCLOS included appropriate terms and that U.S. interests were properly addressed in the treaty; and although this important seafaring nation did not become an UNCLOS party through its domestic political miscalculation, the treaty regime itself was not harmed (though concerns regarding the dispute settlement regime are discussed below).<sup>97</sup>

Finding an appropriate balance of interests for the BBNJ agreement is more challenging. There is a common interest in exploring and using marine genetic resources. Nonetheless, it is clear that the United States, and other States including Russia, are moving away from multilateralism and toward bilateralism or even isolationism. This is a trend that the Berkeley study, *Between Empire and Community*, traced back to the Bush administration, while suggesting that it

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95. John Norton Moore, *supra* note 89, at 462–63 (2008). James Kraska warns that maritime powers will strive to ensure that a BBNJ agreement does not destabilize this system. James Kraska, *National Security Considerations for a Binding Instrument on Managing Biodiversity Beyond National Jurisdiction*, 112 AJIL UNBOUND 150, 150–51 (2018).

96. Press Release, Lockheed Martin, UK Government Sponsors Lockheed Martin UK Subsidiary for License to Harvest Polymetallic Nodules (Mar. 14, 2013), *available at* <http://www.lockheedmartin.co.uk>.

97. Although the United States has not signed or ratified UNCLOS, it has become a party to one of the two UNCLOS implementing agreements, the Fish Stocks Agreement. Thus, UNCLOS nonparty status is not necessarily a barrier for a State to join UNCLOS implementing agreements, including an eventual BBNJ agreement.

had even earlier roots.<sup>98</sup> Once again, some States, including the United States, are reluctant to relinquish the advantage of their advanced technologies and financial resources to prospect and develop marine resources in shared ocean space. For developing States, this is another repetition of colonial-era natural resource grabs, and a more equitable arrangement has to be found. It appears that the interests of all parties cannot easily be met.<sup>99</sup> As already discussed, customary international law and existing treaty arrangements do not adequately address the important concerns about conservation of biological diversity that brought the majority of United Nations members to the table.<sup>100</sup>

Giving dimension to these concepts involves a closer look at the activities that take place at sea. At the outset, I noted that the scope of the treaty is geographically global and that all States have interests in the ocean. The realization that a relatively small number of States dominate fishing, shipping, mining, cable laying, and military activities in the ocean leads directly to the recognition that there are certain States that must be party to the agreement for it to succeed. At any rate, those States must adhere to its terms, even if they remain outside as nonparties.<sup>101</sup> The question then is, how can those States be induced to join the BBNJ agreement, and if they remain outside it, what is their legal relationship to treaty obligations like EIA and respect for MPAs? A further question, for land-locked States like Switzerland and Nepal: do they have a right to be part of the treaty and thus to have a say in the governance of a planetary system that not only provides access to genetic resources and minerals but that sustains global systems including the climate and the level of oxygen in the atmosphere? And do they have obligations if, for example, natural or legal persons with the nationality of a land-locked country invest in high seas activities? This notion, that there is a common interest of humankind “in a certain minimum of reliable modes of conduct[,]” has gained traction.<sup>102</sup> Given the existential value of these planetary systems, some terms of the agreement must be binding on all States, as a matter of *jus cogens*, and all States must be considered beneficiaries of the rights it creates.

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98. David D. Caron, *Between Empire and Community—The United States and Multilateralism 2001-2003: A Mid-Term Assessment*, 21 BERKELEY J. INT’L. L. 395, 395 (2003).

99. For the history of this issue, see WRIGHT ET AL., *supra* note 8, at 41.

100. David Freestone, *The Limits of Sectoral and Regional Efforts to Designate High Seas Marine Protected Areas*, 112 AJIL UNBOUND 129, 133 (2018).

101. Victor Galaz et al., *The Problem of Fit among Biophysical Systems, Environmental and Resource Regimes, and Broader Governance Systems: Insights and Emerging Challenges*, in INSTITUTIONS AND ENVIRONMENTAL CHANGE 147–86 (Oran R. Young et al., eds. 2008).

102. Jutta Brunnée, “Common Interest”—*Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law*, 49 HJIL 791, 792 (1989) (note that Brunnée proposes that those common interests that “can crystallize into a rule of international law triggering specific duties” should be considered “common concerns”); Qin Tianbao, *China’s Peaceful Development and Global Climate Change: A Legal Perspective*, 3 L., ENV’T & DEV. J. 54, 65 (2007) (discussing a “new theory of state sovereignty balancing national interests and common interests of humankind”).

As a practical matter, the entry into force provision will need to consider which States must be parties for the agreement to function successfully and whether having a quantification of some sort would be a useful tool to build those States' confidence and willingness to participate. An example of how this was done is the Kyoto Protocol, which to come into force required ratification by at least fifty-five of the parties to the United Nations Framework Convention on Climate Change, and also sufficient Annex I parties to account for at least 55 percent of the total 1990 Annex I carbon dioxide emissions.<sup>103</sup> This ensured that major emitters that ratify the agreement are not put at an economic disadvantage by being the only market participants that are burdened by the treaty's obligations: it is only once their competitors join that their obligations become effective.

This dynamic is more important for MEAs than for many other types of treaties. On the one hand, environmental obligations are often linked to near-term economic performance so nonparticipants will have an economic advantage; on the other hand, a critical mass of actors in a shared physical space have to agree to limit their impacts for the project to be successful. David Caron observed that environmental problems like this—and ozone depletion—require concerted action, and at least the major contributors to the problem, present and future, need to be parties to the regime.<sup>104</sup>

For the BBNJ negotiation, there is wide participation in the discussions, including the major maritime States: The United States, China, South Korea, the European Union, and Japan. Not all major fishing nations however are at the table, although fishing is one of the most damaging ocean activities. For example, Taiwan's fleet is second only to mainland China with 12 percent of the world's high seas fishing catch, yet it does not have a seat at the United Nations and therefore could not participate in the negotiation if it wished to.<sup>105</sup> States that have not negotiated their interests in an international agreement may not feel committed to comply with it, and as nonparties they are not legally bound to do so.

#### CONCLUSION: THE ENVIRONMENT AS A PARTY

When the negotiation is done, one fact will remain: “the environment” is a physical presence, a force that cannot be subjected to law. “Effectiveness” of ocean governance will not be judged by the number of EIAs conducted or the

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103. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 25, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22.

104. David D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Lawmaking*, 14 HASTINGS INT'L & COMP. L. REV. 755, 773 (1990).

105. For a discussion of the complications that ensue from international relations with the Republic of China (Taiwan) and the People's Republic of China, which both purport to represent the same nation, see Yann-Huei Song, *One China, but Two Sets of Maritime Legislation: Developments, Implications, and Challenges for the United States*, in THE LAW OF THE SEA 209–47 (Harry N. Scheiber ed., 2000).

excellence of the BBNJ instrument's guiding principles. It will only be measurable by empirical data showing that ocean life is in good shape and that ocean systems are contributing to Earth's planetary health. In 1991, writing about regulating chemicals that cause the ozone hole in the atmosphere, David Caron said:

In negotiations concerning environmental matters . . . there is the added and quite different task of the parties seeking to discover precisely what the environment requires. In this sense, the environment is an unobtrusive, but central presence in the negotiations. It is a party that does not volunteer information, but may answer questions if asked correctly. It is also a party that refuses to negotiate.<sup>106</sup>

How do we satisfy that final party at the table—the environment, that refuses to negotiate, yet whose demands must be met?

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106. Caron, *supra* note 104, at 773.

# Maritime Interdiction of North Korean Ships under UN Sanctions

*James Kraska\**

## INTRODUCTION

To be effective in shaping state conduct, the liberalism and idealism that informs public international law must contend with geopolitical realities and the role of power in the international system. David D. Caron was unafraid to address this dichotomy.<sup>1</sup> His work bridged epistemic communities and offered concrete approaches to some of the most vexing international problems. Caron's work on radioactive waste and nuclear weapons at sea, for example, manifests a profound understanding of the threats posed by the proliferation of nuclear weapons and illicit nuclear materials in the oceans, and how international law reduces these ghastly perils. By providing boundaries for state behavior and fashioning a stability of expectations, international law deepens military and environmental security, and thereby reduces geopolitical risks. Inspired by the contributions of Caron and Harry Scheiber in exploring international law as a tool for addressing the threat of nuclear weapons and material at sea,<sup>2</sup> this Article demonstrates how the legal process is the best tool available, albeit an imperfect one, to counter North Korea's maritime proliferation of nuclear weapons and technology.

The nuclear weapons program of the People's Democratic Republic of Korea (DPRK) emerged within a complex regional political reality. Protected by U.S. extended deterrence, the Republic of Korea (ROK) has prospered for nearly seventy years despite lying directly under the guns of North Korea, which is

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1. This Article is in fond memory of and deep respect for the life and work of David D. Caron, a towering figure in international law and a public intellectual for the rule of law with global standing as one of the world's most influential champions of the law at sea.

2. See generally THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS (David D. Caron & Harry N. Scheiber eds., 2nd ed. 2014) (considering how the nuclear age has affected the oceans and the legal regime of the oceans).

enabled by China and Russia to serve as a cudgel to oppose American presence in the region. The DPRK detonated its first nuclear device in 1993, challenging the U.S. nuclear security umbrella and opening the specter of nuclear proliferation. If the United States and ROK actively punish North Korea with military force, North Korea likely would lash out in all directions. If they relent and accept the DPRK into the nuclear club, the consequences could prove equally deadly. International law lies within this dilemma as the only credible option for containing the rogue state's nuclear ambitions. The Charter of the United Nations (UN) and the United Nations Convention on the Law of the Sea (UNCLOS) operate in tandem for this purpose. The Charter may be considered a constitution for the world; UNCLOS has been called the constitution for the oceans.<sup>3</sup> These seminal treaties work together in a powerful way to restrain North Korea's nuclear program. Specifically, the UN Security Council has invoked its authority in Chapter VII of the Charter to address threats to the peace by harnessing the legal competence of flag state, port state, and coastal state authority reflected in UNCLOS to strangle North Korea's access to oceanic trade, crippling its economy and undermining its ability to spread nuclear material and weapons.

The struggle to develop and enforce international rules to stop North Korea's nuclear program is a story still unfolding. But decades of progress in international law and state practice have combined with tighter sanctions by the Security Council to dramatically cripple North Korea's ability to develop and share nuclear weapons and supporting material and technology. The consequences of failure are genuinely terrifying, as even a single nuclear detonation anywhere in the world would prove catastrophic to global economic and political stability.<sup>4</sup>

#### I. CONTROLLING NUCLEAR PROLIFERATION AND THE LAW OF THE SEA

The UN negotiations for the law of the sea began after World War II. Law of the sea conferences in 1958 and 1960 arose within the dynamic context of the bipolar Cold War strategic nuclear confrontation. Some states held out the prospect that a new treaty on the law of the sea could curb the greatest dangers posed by the most dangerous weapons. Newly independent states feared the U.S.-Soviet naval rivalry generated externalities of increased military risk, and even nuclear war, in the global commons, and they hoped that a new law of the sea could unwind some of the tension. In 1958 for example, the Second Committee of the UN Geneva Conference on the Law of the Sea considered

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3. Tommy T.B. Koh, President of the Third United Nations Conference on the Sea, Remarks, A Constitution for the Oceans, *reprinted in* THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 11–16 (Myron H. Nordquist ed., 1985).

4. Matthew Bunn & Nickolas Roth, *The Effects of a Single Terrorist Nuclear Bomb*, BULLETIN OF THE ATOMIC SCIENTISTS (Sept. 28, 2017), <https://thebulletin.org/2017/09/the-effects-of-a-single-terrorist-nuclear-bomb/>.

prohibiting the testing of nuclear weapons on the high seas.<sup>5</sup> In 1963 the two superpowers banned nuclear tests in the atmosphere, outer space, and under water, including the territorial seas and high seas.<sup>6</sup> Ambassador Arvid Pardo advanced a proposal for preserving the oceans for peaceful purposes during his historic speech on seabed mining in the UN General Assembly in November, 1967.<sup>7</sup> The following month, the UN General Assembly established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>8</sup> After three sessions, the committee presented its conclusion to the UN General Assembly in 1968.<sup>9</sup> This study convinced the General Assembly of the need for broader review, which was initiated through establishment of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction.<sup>10</sup> Comprised of forty-two member states, the committee explored the norms and rules for global oceans governance. On December 15, 1969, the committee report requested that the Secretary-General gauge support for convening a multilateral conference of states to codify oceans governance.<sup>11</sup> Nearly a year later, the UN General Assembly adopted a resolution reserving the high seas and seabed and ocean floor for peaceful purposes.<sup>12</sup> The resolution also decided to convene a general comprehensive conference in 1973 on the law of the sea.<sup>13</sup> The conference would be named the Third UN Conference on the Law of the Sea.

The conference set in motion by Ambassador Pardo did not regulate nuclear weapons at sea, but it did adopt a comprehensive multilateral regime for oceans governance—United Nations Convention on the Law of the Sea (UNCLOS).<sup>14</sup> In keeping with the mandate of the General Assembly, however, UNCLOS aspires to promote the “peaceful uses” of the seas and oceans. The term “peaceful purposes” or “peaceful uses” is referred to eight times in UNCLOS, including the preamble.<sup>15</sup> Article 301 of the treaty, “[p]eaceful uses of the seas,” declares that states parties shall refrain from the “threat or use of force against the

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5. U.N. Conference on the Law of the Sea, *Official Records*, at 43–48, U.N. Doc. A/CONF.13/40 (Vol. IV) (Apr. 27, 1958).

6. The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Oct. 15, 1963, 480 U.N.T.S. 43.

7. U.N. GAOR, 22nd Sess., 1515th mtg. at 1–15, U.N. Doc. A/C.1/952 (Nov. 1, 1967).

8. G.A. Res. 2340 (XXII), ¶ 1 (Dec. 18, 1967).

9. Rep. of the Ad Hoc Comm. to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, UN Doc. A/7230, (Dec. 31, 1968).

10. G.A. Res. 2467 (XXIII), at 15 (Dec. 21, 1968).

11. G.A. Res. 2574 (XXIV), at 10 (Dec. 15, 1969).

12. G.A. Res. 2750 (XXV), at 25–27 (Dec. 17, 1970).

13. *Id.*

14. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

15. See *id.* at pmb., art. 301 (reserving the seas for peaceful purposes); art. 141, 143, 147 (reserving the international seabed Area for peaceful purposes); art. 88 (reserving the high seas for peaceful purposes); art. 240, 242, 246 (noting that marine scientific research may be conducted only for peaceful purposes).

territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”<sup>16</sup> This text is replicated from article 2(4) of the Charter of the United Nations and reflects a bedrock norm of international law.<sup>17</sup> These two treaties now work in tandem to contain the North Korean nuclear threat, and the principles they embody are echoed in numerous subsequent treaties concerning nonaggression in international affairs and reducing the threat of weapons of mass destruction.

Arising from the zeitgeist of the time, the Non-Proliferation Treaty (NPT) was adopted in 1968<sup>18</sup> and the Seabed Nuclear Arms Treaty was adopted in 1971.<sup>19</sup> Meanwhile, regional efforts focused on establishment of nuclear-free oceans and zones of peace in the South Pacific,<sup>20</sup> the Indian Ocean,<sup>21</sup> and the Caribbean and Latin America in 1967.<sup>22</sup> These were supplemented by the Outer Space Treaty<sup>23</sup> and the Antarctic Treaty,<sup>24</sup> both of which restricted nuclear weapons in areas of the global commons. The nuclear armament negotiations of détente produced the Strategic Arms Limitations Treaty, which placed a cap on submarine-launched ballistic missiles.<sup>25</sup>

In the intervening years, four additional treaties built international will and capability to counter the threat of nuclear proliferation. The Convention on the Physical Protection of Nuclear Material (CPPNM) requires states to take measures to prevent, detect, and punish offenses relating to nuclear material.<sup>26</sup> Second, the Nuclear Terrorism Convention covers a range of inchoate and

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16. *Id.* at art. 301.

17. U.N. Charter art. 2, ¶ 4.

18. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 729 U.N.T.S. 161.

19. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof, May 18, 1972, 955 U.N.T.S. 115.

20. South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga) art. 3, Aug. 6, 1985, 1445 U.N.T.S. 177.

21. *See* Comm. on Disarmament, Report on the Work of its Thirty-Fifth Session, U.N. Doc. A/35/27 at 22 (1971); G.A. Res. 2832 (XXVI), at 36 (Dec. 16, 1971).

22. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) art. 1, Apr. 22, 1968, 634 U.N.T.S. 281.

23. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies art. 3, Oct. 10, 1967, 610 U.N.T.S. 205. *See also* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies art. 3, Dec. 5, 1979, 1363 U.N.T.S. 21.

24. The Antarctic Treaty art. 1, Dec. 1, 1959, 402 U.N.T.S. 71.

25. Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (with Protocol), U.S.-U.S.S.R., May 23, 1972, 944 U.N.T.S. 13445. A follow-on agreement, Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (with Protocol), June 18, 1979, was largely observed but never entered into force.

26. Convention on the Physical Protection of Nuclear Material (with annexes), Mar. 3, 1980, 1456 U.N.T.S. 101.

completed crimes related to nuclear terrorist attacks.<sup>27</sup> The Terrorist Bombing Convention focuses on the unlawful use of explosives with the intention to kill, to injure, or to cause extensive destruction to compel a government to act (or not act).<sup>28</sup>

Finally, the most recent instrument was negotiated after the attacks of 9/11 and applies specifically to the oceans. The 2005 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) completely transformed an earlier version of the treaty that had focused on extradition and prosecution of crimes aboard ships.<sup>29</sup> The 1988 version of SUA largely has fallen into desuetude. The new agreement holds greater promise, although it entered into force in 2010 and is underutilized. The 2005 SUA contains a comprehensive set of protocols for disrupting the movement of weapons of mass destruction (WMD)<sup>30</sup> at sea and includes a regime for boarding foreign-flagged vessels.<sup>31</sup> The new treaty is also the first multilateral treaty to criminalize dual use material<sup>32</sup> that could be misused in WMD to threaten a ship or pose a danger at sea or as a means of intimidating a population, a government, or an international organization.<sup>33</sup>

The new SUA Convention is the first comprehensive legal regime for maritime security. While it holds great promise for expanding and strengthening security in the maritime domain, it has weaknesses that prevent it from being an optimal instrument to restrain DPRK nuclear proliferation. First, with just forty-five contracting states, the Convention is not universally adopted.<sup>34</sup> Second, enforcement jurisdiction under the treaty is based entirely on flag state consent. At sea that means any action against a suspicious vessel is subject to the

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27. G.A. Res. 59/290 (Apr. 13, 2005).

28. International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 37 I.L.M. 249, 2149 U.N.T.S. 284. See Samuel M. Witten, Note, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774, 774 (1998).

29. Int'l Conference on the Revision of the SUA Treaties, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, IMO Doc. LEG/CONF. 15/21, Nov. 1, 2005.

30. *Id.* at art. 1(d) (defining biological, chemical, and nuclear weapons); art. 3bis(1)(b) (forbidding transport on a ship of explosive or radioactive material, knowing it is intended to be used to cause death or injury, and special fissionable material or related equipment, knowing it is intended to be used in violation of the safeguards under the International Atomic Energy Agency (IAEA)).

31. *Id.* at art. 8bis.

32. 2005 SUA, *supra* note 29, at art. 3bis(1)(b)(iv) (stipulating that a seafarer transporting a dual use item that is used in WMD must have the general intent that the device can be used as a WMD and the specific intent that in fact it will be used in such manner). The earlier treaty is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221.

33. 2005 SUA, *supra* note 29, at arts. 3(2), 3bis(a).

34. International Maritime Organization, Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions, Sept. 21, 2018, 442–43, available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf>. Benin is the most recent State Party—it joined on July 26, 2018. *Id.*

exclusive jurisdiction of the flag state.<sup>35</sup> Seeking flag state consent for any particular enforcement action is often time consuming, and even fruitless, as ship registries and governments grapple with whether to permit foreign armed forces to conduct an opposed boarding of a ship that flies its flag. Ensuring that the government has appointed a designated authority to make such decisions is crucial for the effective implementation of the SUA Convention. Yet only five states parties have designated a flag state law enforcement authority to respond to requests for assistance, such as to confirm nationality or flag registry, or to authorize boarding of a ship. These states are: France, Latvia, San Marino, Sweden, and the United States.<sup>36</sup> The lack of a designated authority in most member states means that it takes more time to discover and utilize channels of communication to coordinate among flag, port, and coastal states during any enforcement action.

Such communications seams are exploited by traffickers. For decades North Korea relied on the prerogative of exclusive flag state jurisdiction to shield its ships from international scrutiny, since flag state administrations are so slow or reluctant to act. Article 92 of UNCLOS captures the longstanding rule that flag states maintain exclusive jurisdiction over vessels that fly their flag. While this rule has facilitated international trade and contributes to a liberal international order, it has also protected shadowy networks and made collective security more challenging.<sup>37</sup>

Effective flag state enforcement is essential because coastal state enforcement jurisdiction is so weak. While it may be possible under some circumstances for a coastal state to assert prescriptive jurisdiction over a foreign-flagged ship in the territorial sea for violation of national laws that implement these agreements, the extension of criminal enforcement jurisdiction in such cases is rather tenuous. Coastal states may assert jurisdiction over violations of their laws committed on board ships in the territorial sea if the crimes inure to the good order or security of the coastal state.<sup>38</sup> Coastal states also may act against ships in the contiguous zone—out to twenty-four nautical miles from the shoreline—in cases involving suspected immigration or customs violations

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35. See UNCLOS, *supra* note 14, at art. 92.

36. IMO Comprehensive Information, *supra* note 34, at 444–46.

37. For example, in 2002, U.S. and Spanish naval forces intercepted a shipment of fifteen Scud ballistic missiles on the high seas on board the *So San* but were unable to seize the cargo because it was on board a North Korean ship and protected by North Korean flag state jurisdiction. See Thom Shanker, *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, N.Y. TIMES (Dec. 11, 2002), <https://www.nytimes.com/2002/12/11/world/threats-and-responses-arms-smuggling-scurd-missiles-found-on-ship-of-north-korea.html>; Thomas E. Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles*, WASH. POST (Dec. 11, 2002), <https://www.washingtonpost.com/archive/politics/2002/12/11/spain-and-us-seize-n-korean-missiles/f9741e30-0cf3-4eb6-bec6-862dc46ccb5c/>.

38. UNCLOS, *supra* note 14, at art. 27.

occurring in the territorial sea.<sup>39</sup> Port states may have some limited jurisdiction over foreign-flagged vessels that arrive in port, but assertion of port state control measures generally is effective only if all ports available to a ship act in unison to enforce the same laws. Otherwise, the criminal vessel simply seeks out substandard ports that will give it a pass. In some ports, for example, proper records are not maintained, or port officials may be bribed to overlook infractions. In sum, coastal state and port state law enforcement authorities must have the capability or proficiency to act and the capacity or bandwidth to act, and their leaders must have the political will to do so.

These challenges lead to the third major weakness of the 2005 SUA Convention. While its proscriptive rules are advanced and procedural mechanisms are durable on paper, it is not as yet tightly connected to the enforcement architecture led by the states with the greatest naval capability, maritime presence and capacity, and political will to act, including through the UN Security Council. The attacks of 9/11, however, galvanized states to graft the new SUA counterproliferation regime onto the framework of UNCLOS to offer even greater prospects for success than the original SUA treaty. While the United States pursued negotiation of the SUA Convention through the International Maritime Organization (IMO) in 2002 (and they were completed in 2005), it launched the Proliferation Security Initiative (PSI) as a more flexible, legally nonbinding tool in 2003. PSI provided impetus for a stronger, global multilateral regime to combat the proliferation of WMD.<sup>40</sup>

## II. THE GREAT POWER COUNTER-PROLIFERATION REGIME

The attacks on September 11, 2001 motivated the international community to take more serious steps to guard against asymmetric WMD.<sup>41</sup> Just months after the attacks, in December 2002, President George W. Bush unveiled a new strategy to combat WMD proliferation that went beyond the traditional methods of diplomacy, arms control, threat reduction assistance, and export controls by placing greater emphasis on actual interdiction of WMD. The resulting *National Strategy to Combat Weapons of Mass Destruction* specifically focused on implementing effective interdiction as a key element of a comprehensive U.S. approach.<sup>42</sup>

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39. *Id.* at art. 33. Coastal states also may enforce fiscal and sanitary (quarantine) laws in the contiguous zone.

40. Michael Byers, Note, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 528 (2004).

41. See N.R. Kleinfeld, *U.S. Attacked; Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror*, N.Y. TIMES (Sept. 12, 2001), <https://www.nytimes.com/2001/09/12/us/us-attacked-hijacked-jets-destroy-twin-towers-and-hit-pentagon-in-day-of-terror.html>.

42. DEP'T OF HOMELAND SEC., *National Strategy to Combat Weapons of Mass Destruction* (Dec. 2002), available at <https://www.hsdl.org/?abstract&did=860>; Statement on the National Strategy to Combat Weapons of Mass Destruction, 38 WEEKLY COMP. PRES. DOC. 2150 (Dec. 11, 2002).

In early 2003 the United States and ten cooperating nations established PSI.<sup>43</sup> The PSI network set forth a *Statement of Interdiction Principles* that relies on voluntary actions by states that are consistent with their national legal authorities and relevant international law to prevent the proliferation of WMD and related materials.<sup>44</sup> The program is based entirely on multilateral coordination. Support has expanded from the original eleven sponsors to more than one hundred states, all of which have pledged to implement the *Interdiction Principles*.<sup>45</sup> These states are examining and updating existing national laws and utilizing international legal authorities and frameworks during periodic exercises.<sup>46</sup>

States participate in PSI by adhering to the *Interdiction Principles*, which pledge to disrupt the illegal transfer of WMD and their delivery systems.<sup>47</sup> By agreeing to the *Interdiction Principles*, states commit to implement effective measures, either alone or in concert with other states, to disrupt the transfer or transport of WMD, their delivery systems, and related materials.<sup>48</sup> States are also obligated to adopt streamlined procedures for the rapid exchange of information about suspected proliferation activity.<sup>49</sup> Through collaboration and operational expert meetings, states agree to review and strengthen their national protocols and legal authorities, as well as promote the progressive development of international law to support these commitments.<sup>50</sup>

States also express a willingness to take specific action consistent with their national laws to interdict WMD and related systems and materials.<sup>51</sup> These actions are dependent on the existing legal architecture embedded in UNCLOS that recognizes the competence of flag states, coastal states, and port states to exercise jurisdiction over ships at sea. States agree not to transport or assist in

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43. Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. See *Principles for the Proliferation Security Initiative*, U.S. DEP'T OF STATE (Sept. 4, 2003), <https://2001-2009.state.gov/t/isn/rls/prsrl/23809.htm>.

44. Proliferation Security Initiative: Statement of Interdiction Principles, U.S. DEP'T OF STATE (Sept. 4, 2003), <https://2001-2009.state.gov/t/isn/rls/fs/23764.htm>. See also Mary Beth Nikitin, Proliferation Security Initiative (PSI) CRS Report for Congress (Congressional Research Service, Aug. 9, 2018).

45. Nikitin, Proliferation Report, *supra* note 44, at 12. On November 1, 2018, the Republic of Palau become the 106th state to PSI and the Statement of Interdiction Principles. See Office of the Minister of State, Republic of Palau, Diplomatic Note 107/MSUS/2018, 1 Nov. 2018.

46. Steven R. Weisman, *U.S. to Send Signal to North Koreans in Naval Exercise*, N.Y. TIMES (Aug. 18, 2003), <https://www.nytimes.com/2003/08/18/world/us-to-send-signal-to-north-koreans-in-naval-exercise.html>.

47. Statement of Interdiction Principles, *supra* note 44. Excerpts may be found at JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW 786–87 (2013). See also AARON DUNNE, THE PROLIFERATION SECURITY INITIATIVE: LEGAL CONSIDERATIONS AND OPERATIONAL REALITIES, STOCKHOLM INT'L PEACE RES. INST. POLICY PAPER 36, 13–17 (2013).

48. DUNNE, *supra* note 47, at 13.

49. *Id.*

50. *Id.*

51. *Id.* at 13–14.

the transport of WMD-related cargoes, and board and search their ships on the high seas suspected of transporting such illicit cargoes. States are also required to interdict foreign ships in their internal waters or territorial sea that are illegally trafficking in WMD and associated materials and technology. There is a presumption that states that have signed the *Interdiction Principles* will provide consent for their ships to be boarded and searched by foreign warships.<sup>52</sup> Port states should not permit suspicious foreign-flagged vessels to get underway from their ports without a thorough inspection. Furthermore, ships in the territorial sea of a coastal state that are in violation of international nonproliferation regimes may be considered prejudicial to the good order or security of the coastal state and therefore forfeit their right of innocent passage and may be boarded by the law enforcement forces of the coastal state.<sup>53</sup>

States especially agree to take effective measures to keep WMD and related materials out of the hands of rogue states and nonstate actors.<sup>54</sup> States should adopt streamlined procedures to facilitate the rapid exchange of time-sensitive intelligence to facilitate interdiction operations. States party to SUA, for example, have a legal responsibility to identify designated contacts to share information and authorize actions affecting their ships, coasts, and ports. PSI states also agree to take action, which may be interdiction at sea, boarding and inspection of ships in port, or simply passing along time-sensitive information for use by a partner state to disrupt the delivery of WMD and related cargo.<sup>55</sup>

Participating states may implement bilateral or multilateral boarding agreements that authorize foreign law enforcement or armed forces to interdict their ships that are suspected of trafficking in WMD. For example, the United States has signed bilateral ship boarding agreements with the largest flag state registries in the world, which include (in order of total deadweight tonnage): (1) Panama; (2) Liberia;<sup>56</sup> (3) Marshall Islands; (6) Malta; and (7) The Bahamas.<sup>57</sup> The United States also has PSI agreements with Belize, Croatia, Cyprus, Mongolia, and Saint Vincent and the Grenadines.<sup>58</sup> Combined, the United States

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52. *Id.*

53. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 83 (3d ed. 1999); DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 11–12 (James Crawford & John S. Bell eds., 2009).

54. DUNNE, *supra* note 47, at 13–14.

55. *Id.*

56. See Sean D. Murphy, Commentary, “*Proliferation Security Initiative*” for Searching Potential WMD Vessels, 98 AM. J. INT’L L. 355, 355 (2004) (noting the Feb. 11, 2004 agreement with Liberia).

57. *Top 10 Flag States 2017*, LLOYD’S LIST (Dec. 8, 2017), <https://lloydlist.maritimeintelligence.informa.com/LL1120177/Top-10-flag-states-2017>. The United States does not have agreements with (4) Hong Kong; (5) Singapore; (8) China; (9) Greece; and (10) Japan.

58. See John R. Crook, Commentary, *United States Concludes Additional Proliferation Security Initiative Ship Boarding Agreements*, 99 AM. J. INT’L L. 919, 919 (2005) (recounting agreements signed with Belize and Cyprus); *The United States and Mongolia Proliferation Security Initiative Shipboarding Agreement*, U.S. DEP’T OF STATE (Oct. 23, 2007), <https://2001->

has signed agreements with flag states that account for some 54 percent of global shipping.<sup>59</sup> The agreements provide that ships may be boarded under different circumstances.<sup>60</sup> In the agreements with The Bahamas and Croatia, for example, flag state consent is required in all situations. Other agreements, however, permit flag state consent to be presumed if the flag state does not respond to a request to board a ship within a certain time frame, such as four hours.

The year after PSI began, the United States, the United Kingdom, and France successfully led the UN Security Council to adopt Resolution 1540, which decided that all states shall “refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport,

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2009.state.gov/t/pa/prs/ps/2007/oct/93957.htm; *St. Vincent Holds Bilateral Proliferation Security Initiative Workshop and Tabletop Exercise with the United States*, U.S. EMBASSY IN BARBADOS, THE EASTERN CARIBBEAN, AND THE OECS (Aug. 19, 2015), <https://bb.usembassy.gov/st-vincent-hosts-bilateral-proliferation-security-initiative-workshop-tabletop-exercise-united-states/>.

59. Percentages of world shipping tonnage for states with PSI shipboarding agreements with the United States are: Panama, 18.44%; Liberia, 11.78%; Marshall Islands, 11.63%; Malta, 5.33%; The Bahamas, 4.29%. The United States also has PSI agreements with Belize, Croatia, Cyprus (1.81%), Mongolia, and Saint Vincent and the Grenadines. *See* U.N. Conference on Trade and Development, *Review of Maritime Transport*, p. 32, UN Doc. UNCTAD/RMT/2017 (2017).

60. In alphabetical order, the agreements are: Agreement Between the Government of the Commonwealth of the Bahamas and the Government of the United States of America Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Aug. 11, 2008, <https://2009-2017.state.gov/t/isn/trty/108223.htm>; Agreement Between the Government of the United States of America and the Government of Belize Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Aug. 4, 2005, <https://2001-2009.state.gov/t/isn/trty/50809.htm>; Agreement between the Government of the United States of America and the Government of the Republic of Croatia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials, June 1, 2005, <https://2009-2017.state.gov/t/isn/trty/47086.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Cyprus Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, July 25, 2005, <https://2009-2017.state.gov/t/isn/trty/50274.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, Feb. 11, 2004; <https://2009-2017.state.gov/t/isn/trty/32403.htm>; Agreement Between The Government Of The United States Of America And The Government Of Malta Concerning Cooperation To Suppress The Proliferation Of Weapons Of Mass Destruction, Their Delivery Systems, And Related Materials By Sea, Mar. 15, 2007, <https://2009-2017.state.gov/t/isn/trty/81883.htm>; Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Aug. 13, 2004, <https://2009-2017.state.gov/t/isn/trty/35237.htm>; Agreement Between the Government of the United States of America and the Government of Mongolia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Oct. 23, 2007, <https://2009-2017.state.gov/t/isn/trty/106218.htm>; and Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, May 12, 2004, <https://2009-2017.state.gov/t/isn/trty/32858.htm>.

transfer or use nuclear, chemical or biological weapons and their means of delivery.”<sup>61</sup> The resolution was adopted under Chapter VII of the Charter, which authorizes the Security Council to take measures, when it determines there exists a threat to the peace, a breach of the peace, or an act of aggression, to restore international peace and stability.<sup>62</sup> The resolution declares that the spread of weapons of mass destruction, including nuclear, chemical, and biological weapons, as well as their means of delivery, constitute a threat to international peace and security, thereby meeting the first of the three criteria that may trigger Security Council action.<sup>63</sup>

The Security Council adopted Resolution 1540 under article 41, which authorizes states to use nonforceful measures to compel compliance, such as cutting diplomatic ties and ceasing international trade and communication. The use of force, which is authorized by article 42 and is typically signaled in resolutions through text authorizing “all necessary means,” was not invoked. Still, the Security Council’s authority looms large and states are directed to adopt and enforce effective national measures to stop illegal efforts to acquire or use WMD, especially for the purpose of terrorist attacks.<sup>64</sup> Duties to implement Resolution 1540 extend to the prevention of financing WMD and an affirmative obligation to establish accountability and controls over materials related to WMD. States are also required to maintain stringent border controls and to employ law enforcement forces to detect, deter, prevent, and counter illicit trafficking and brokering in WMD and associated materials.<sup>65</sup> The Resolution complements obligations under the NPT, the Chemical Weapons Convention,<sup>66</sup> the Biological Weapons Convention,<sup>67</sup> and state responsibilities under the International Atomic Energy Agency (IAEA). In 2016 the Security Council unanimously reaffirmed the obligations in Resolution 1540 and called on states to strengthen and intensify their efforts to fully implement it.<sup>68</sup>

Resolution 1540 is a useful authority to restrain the proliferation of nuclear, chemical, and biological weapons. But the threats from such WMD are diffuse and enforcing the provisions against violators presents a problem in collective

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61. S.C. Res. 1540, ¶ 1 (Apr. 28, 2004). The Resolution has been progressively extended. The current mandate expires on April 28, 2021. *See* S.C. Res. 1673 (Apr. 27, 2006); S.C. Res. 1810 (Apr. 25, 2008); S.C. Res. 1977 (Apr. 20, 2011).

62. U.N. Charter art. 39.

63. Res. 1540, *supra* note 61, at ¶ 9.

64. *Id.* at ¶ 2.

65. *Id.* at ¶ 3(c).

66. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45.

67. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Oct. 4, 1972, 1015 U.N.T.S. 163.

68. S.C. Res. 2325, ¶ 1 (Dec. 15, 2016).

action.<sup>69</sup> Effective enforcement of nonproliferation regimes requires states to act in concert, but lack of consensus on the threat posed, diverging interests, and free riders weaken the effectiveness of collective action in this case.<sup>70</sup> While the DPRK presents the most acute threat of nuclear proliferation, China holds the cards in stopping stronger enforcement mechanisms.<sup>71</sup> Resolution 1540 is a generic resolution and a necessary part of the progressive development of nonproliferation authority, but what is needed in the case of DPRK is Security Council action tailor-made to isolate the country and cut it off from the global economy. Such a resolution, however, is unlikely because it would be blocked by China and Russia.

Additionally, the U.S. Department of Treasury has an arsenal of financial levers to enforce sanctions against foreign companies and individuals that supplement UN Security Council authority. The American President can unilaterally impose U.S. sanctions on businesses and individuals involved in propping up the North Korean economy.<sup>72</sup> Because the U.S. economy is so important to the global economy and Washington controls access to much of the global banking system, even unilateral U.S. sanctions can deter legitimate foreign firms from engaging in illegal activity.<sup>73</sup> For example, even though European states have not gone along with a reimposition of sanctions on Iran, U.S. sanctions are still a powerful tool against the regime in Tehran. A chief executive at A.P. Møller-Maersk A/S, the world's largest shipping company, stated in May 2018, "I don't think any shipping line that operates globally will be able to do business in Iran if the [U.S.] sanctions arrive in full force[.]"<sup>74</sup> As the Trump administration threatened to impose sanctions on Iran during the fall of 2018, the container and tanker shipping industry began to wind down their business with the Iranian regime.<sup>75</sup>

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69. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 8 (2nd ed. 1971) ("Just as those who belong to an organization or group can be presumed to have a common interest, so they obviously also have purely individual interests. . . .").

70. Jeffrey W. Knopf, *After Diffusion: Challenges to Enforcing Nonproliferation and Disarmament Norms*, 39 *CONTEMP. SEC. POLICY* 367, 375–76 (2018).

71. Jane Perlez, *On U.S.-North Korea Talks, China May Hold the Cards*, *N.Y. TIMES* (May 11, 2018), <https://www.nytimes.com/2018/05/11/world/asia/north-korea-china-nuclear-trump-sanctions.html>.

72. See, e.g., North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, §§ 201–210, 130 Stat. 93 (2016); Memorandum on Delegation of Certain Functions and Authorities under the North Korea Sanctions and Policy Enhancement Act of 2016, 2016 *DAILY COMP. PRES. DOC.* (May 18, 2016); Imposing Additional Sanctions with Respect to North Korea, 82 Fed. Reg. 44705, 44705 (Sept. 21, 2017); North Korea Sanctions Regulations, 83 Fed. Reg. 9182, 9182–83 (Mar. 5, 2018), 31 C.F.R. pt. 510.

73. Costas Paris & Joanne Chiu, *U.S. Sanctions Start to Pinch Shipping in Iran*, *WALL ST. J.* (May 29, 2018), <https://www.wsj.com/articles/u-s-sanctions-start-to-pinch-shipping-in-iran-1527586200>.

74. *Id.*

75. *Id.*

### III. NORTH KOREAN NUCLEAR SANCTIONS

Nowhere is the threat of the proliferation of WMD, and in particular, nuclear weapons, more evident today than the case of the DPRK. On February 19, 1992, South Korea and North Korea issued a joint declaration renouncing the testing, manufacturing, production, receipt, possession, storing, deploying, or use of nuclear weapons. Both parties agreed to use nuclear energy solely for peaceful purposes and not even possess nuclear enrichment facilities.<sup>76</sup> A year later, in March 1993, North Korea sent a letter to the President of the Security Council stating its intent to withdraw from the NPT.<sup>77</sup> The Security Council responded with the adoption of Resolution 825 on May 11, 1993, in which it called on the DPRK to reconsider its decision, reaffirm its commitment to the NPT, and honor its safeguards agreement with the IAEA.<sup>78</sup> In response, Pyongyang suspended its withdrawal from the NPT on June 9, 1993.<sup>79</sup> Thus began the saga of broken promises, noncompliance with numerous UN security council and IAEA resolutions, and other unsuccessful international efforts to convince the DPRK to abandon its nuclear ambitions. Slowly, North Korea became more belligerent, with its ballistic missiles overflying Japan for the first time on August 31, 1998.<sup>80</sup>

In January 2003, North Korea finally made good on its threat from 1993 and withdrew from the NPT, coming out from under a legally binding IAEA Safeguards Accord.<sup>81</sup> Even so, the DPRK stated that it did not intend to produce nuclear weapons.<sup>82</sup> Following the fourth round of the Six-Party Talks in Beijing in September 2005, the regime reaffirmed this pledge and committed to abandoning all nuclear weapons and rejoin the NPT and implement IAEA safeguards.<sup>83</sup> International expectations for a more stable Korean Peninsula were shattered, however, on July 5, 2006 when North Korea launched a series of

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76. Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula, Feb. 19, 1992, available at [http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/aptkoreanuc.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/aptkoreanuc.pdf).

77. Robert A. Manning, *Testing a Post-Cold War World: A Nuclear Standoff in North Korea*, L.A. TIMES (May 9, 1993), at M2; Robert A. Manning, *A Nuclear Standoff in North Korea: Pyongyang is Threatening to Withdraw from the Nuclear Non-Proliferation Treaty unless Concerns are Addressed*, L.A. TIMES, May 12, 1993, at WA2.

78. S.C. Res. 825, ¶ 2 (May 11, 1993).

79. *Joint Declaration of South and North Korea on the Denuclearization of the Korean Peninsula*, NUCLEAR THREAT INITIATIVE (Oct. 26, 2011), <https://www.nti.org/learn/treaties-and-regimes/joint-declaration-south-and-north-korea-denuclearization-korean-peninsula/>.

80. Sheryl WuDunn, *North Korea Fires Missile Over Japanese Territory*, N.Y. TIMES (Sept. 1, 1998), <https://www.nytimes.com/1998/09/01/world/north-korea-fires-missile-over-japanese-territory.html>.

81. *Text of North Korea's Statement on NPT Withdrawal*, ATOMIC ARCHIVE (Jan. 10, 2003), <http://www.atomicarchive.com/Docs/Deterrence/DPRKNPTstatement.shtml>.

82. *Id.*

83. *Joint Statement of the Fourth Round of the Six-Party Talks*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 19, 2005), <http://www.acronym.org.uk/docs/0509/doc04.htm>.

ballistic missiles into the Sea of Japan in violation of a self-proclaimed moratorium.<sup>84</sup>

The Security Council reacted ten days later by condemning the multiple missile launches and demanding that the DPRK suspend all activities related to its ballistic missile program.<sup>85</sup> Resolution 1695 reaffirmed Resolutions 825 and 1540, and it concluded that North Korea's proliferation of nuclear, chemical, and biological weapons and delivery systems constituted a threat to international peace and security. Once this condition predicate for action under Chapter VII of the UN Charter was invoked, the Security Council authorized all states to halt the transfer of ballistic missiles and technology to North Korea. Pyongyang responded with its first clear-cut nuclear weapons test three months later, on October 9, 2006. One week later the Security Council adopted Resolution 1718, which condemned the nuclear test and demanded that the DPRK halt further tests or ballistic missile launches.<sup>86</sup> This resolution formed the regime to contain North Korea that persists to the present.

Acting under Chapter VII (Article 41) of the Charter, Resolution 1718 further directed the DPRK to abandon all nuclear weapons, WMD, and ballistic missile programs in a complete, verifiable, and irreversible manner.<sup>87</sup> The resolution imposed sanctions on North Korea, and obligated all member states of the United Nations to prevent the supply, sale, or transfer of three classes of cargo: (1) a range of heavy conventional weapons, including warships, military aircraft, and armored vehicles and artillery; (2) technology related to chemical, biological, or nuclear weapons and ballistic missiles; and (3) luxury goods, which are enjoyed by the ruling clique even as the impoverished population struggled to survive.<sup>88</sup> Resolution 1718 also stopped the export of North Korean materials used for WMD and imposed travel restrictions on persons engaged in WMD programs.

True to form, North Korea conducted a second nuclear test on May 25, 2009.<sup>89</sup> The Security Council tightened sanctions even further. Resolution 1874 expanded the arms embargo and established an inspection regime.<sup>90</sup> The resolution called on states to search ships on the high seas if they were believed to carry illicit cargo from the DPRK. States also were required to inspect cargo bound for and from the DPRK, including goods flowing through their seaports and airports, if there was a reasonable belief that the cargo violated UN

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84. Norimitsu Onishi & David E. Sanger, *Missiles Fired by North Korea; Tests Protested*, N.Y. TIMES (July 5, 2006), <https://www.nytimes.com/2006/07/05/world/asia/05missile.html>.

85. S.C. Res. 1695, ¶ 2 (July 15, 2006).

86. S.C. Res. 1718, ¶¶ 1, 2 (Oct. 14, 2006).

87. *Id.*

88. *Id.*

89. Choe Sang-Hun, *North Korea Claims to Conduct 2nd Nuclear Test*, N.Y. TIMES (May 24, 2009), <https://www.nytimes.com/2009/05/25/world/asia/25nuke.html>.

90. S.C. Res. 1874, ¶¶ 9–15 (June 12, 2009).

sanctions.<sup>91</sup> The resolution directed states to inspect vessels in such circumstances, with the consent of the flag state.<sup>92</sup> Leveraging port state control measures and a regime of ship inspection incumbent on exclusive flag state jurisdiction did not introduce any new enforcement authority for states per se, however.

The entire framework for maritime sanctions against the DPRK is integrated with flag state rights and duties under UNCLOS.<sup>93</sup> Flag states always have the authority to inspect or search ships that fly their flag. Port states have inherent authority to inspect ships arriving in their ports as a condition of port entry. But the resolution imposed due diligence on flag and port states to implement these two principles in a coherent manner against North Korean ships. In doing so, the resolution provides a justification and the political cover of the Security Council mandate for port states and flag states to implement such stringent measures, which could affect exports and undermine national industries.<sup>94</sup> Furthermore, if a flag state did not consent to the inspection on the high seas of its ship under suspicion, it now had a duty to direct the ship to proceed to port for inspection by local authorities. If an inspection discovers prohibited items, member states are authorized to seize and dispose of them. These provisions shield ports from liability for seizures, making seizure more likely. Yet while responsible flag states will, in all probability, observe this requirement and divert their vessels to a convenient port for inspection, it is highly unlikely that rogue states such as Syria, Iran, Myanmar, and the DPRK will do so. Failing to do so, however, raises the diplomatic costs of defiance faced by noncompliant states, and it raises the prospect that they may have sanctions imposed on them. Violations by Syrian, Russian, and Chinese ships make apparent that some states either flagrantly ignore sanctions for their ships as a matter of government policy in order to erode the U.S.-led security architecture on the Korean Peninsula, or simply lack proper oversight of their shipping industry.<sup>95</sup>

Resolution 1874 also includes a novel provision to bar bunkering or other services for North Korean ships.<sup>96</sup> Operative paragraph 17 prohibits member states from providing bunkering services, such as fuel or other supplies or vessel services to ships, if there are reasonable grounds to believe they are in violation of Security Council sanctions. This provision was instrumental in preventing at least two suspected weapons shipments to Myanmar—one in July 2009 and one

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91. *Id.* at ¶ 11.

92. *Id.* at ¶ 12.

93. *Id.* at ¶¶ 12–13, 16.

94. Keith Johnson & Dan De Luce, *Busting North Korea's Sanctions-Evading Fleet*, FOREIGN POL'Y (Feb. 28, 2018), <https://foreignpolicy.com/2018/02/28/busting-north-koreas-sanctions-evading-fleet-ofac-treasury-shipping/#>.

95. Ian Talley et al., *World News: Pyongyang Skirts Curbs, U.N. Says—Report Alleges China, Russia Maintain Trade Ties Despite Sanctions; a Blow to U.S. Goals*, WALL ST. J., Sept. 17, 2018, at A6.

96. Res. 1874, *supra* note 90, at ¶ 17.

in May 2011. These instances provide case studies for effective interdiction against North Korea's efforts to violate UN sanctions.

In June 2009, satellite intelligence detected the tramp steamer *Kang Nam I* being loaded with a cache of weapons in North Korea bound for Myanmar.<sup>97</sup> The steamer got underway, shadowed by the USS *John S. McCain* (DDG 56) over the course of several days. When it became apparent to the North Korean ship's master that he would not be able to refuel in Singapore as originally planned, the ship reversed course and returned to North Korea.<sup>98</sup> (Once the ship was detected by the U.S. Navy and lost anonymity, the Singaporeans would have been alerted and would have imposed port state control measures on the ship under Resolution 1874 if it entered into port). Thus, delivery of the cargo was thwarted merely by the likelihood that the ship could not take on fuel and would be followed every step of the way by U.S. naval forces.

In May 2011 a suspected transshipment of military hardware on board the Motor Vessel (M/V) *Light* was disrupted in a similar operation.<sup>99</sup> The ship was Chinese owned and operated but was registered in Belize and manned by a North Korean crew. Pursuant to the bilateral U.S.-Belize PSI boarding agreement, Belize granted permission for U.S. naval forces to board and inspect the ship on the high seas.<sup>100</sup> On May 26, the USS *McCampbell* (DDG 85) intercepted the cargo vessel south of Shanghai and requested permission to board. At the same time, Washington received assurances from Singapore and Malaysia that the vessel would not be allowed to enter any of their ports consistent with Resolution 1874. The North Korean master declined the request to board and claimed the vessel was carrying industrial chemicals to Bangladesh. Despite having received permission to board from the flag state, U.S. authorities declined to conduct an opposed boarding of the vessel in an effort to minimize risk to the crew and de-escalate the situation.<sup>101</sup> The USS *McCampbell* and American military aircraft kept the ship under surveillance, however. Fearing that he would not be able to secure fuel for the ship in Singapore or Malaysia, the master reversed course on May 29, and returned to port in North Korea.<sup>102</sup> Assuming regional coastal nations such as China, Indonesia, Malaysia, and Singapore continue to comply with UN sanctions, it will be extremely difficult, if not impossible, for North Korean vessels to make long voyages because they will be unable to stop for fuel en route.

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97. Choe Sang-Hun, *South Korea Says Freighter from North Turns Back*, N.Y. TIMES (July 6, 2009), <https://www.nytimes.com/2009/07/07/world/asia/07korea.html>.

98. *Id.*

99. David E. Sanger, *U.S. Said to Turn Back North Korea Missile Shipment*, N.Y. TIMES (June 12, 2011), <https://www.nytimes.com/2011/06/13/world/asia/13missile.html>.

100. *Id.*

101. *Id.*

102. *Id.*

Resolutions 1718 and 1874 invoke the earlier authorities to counter nuclear proliferation, including the NPT, the Biological Weapons Convention, the Chemical Weapons Convention, and Resolution 1540. While neither the resolutions nor the treaties authorize the use of force to compel compliance, all states have the inherent right of self-defense, which is reflected in article 51 of the Charter.<sup>103</sup> And follow-on resolutions continue to tighten the noose. Resolution 1718 established a “1718 Committee” to oversee sanctions measures imposed on North Korea.<sup>104</sup> Following a trail of noncompliance by the DPRK, the 1718 Committee has been granted progressively greater power to authorize states to take action to enforce UN sanctions.

On December 11, 2012 North Korea conducted another ballistic missile test.<sup>105</sup> The following month the Security Council adopted Resolution 2087 to condemn this violation of Resolutions 1718 and 1874.<sup>106</sup> The new resolution expanded the list of entities and individuals placed under sanction for assisting the regime’s efforts to evade Security Council action.<sup>107</sup> Resolution 2087 also directed the 1718 Committee to issue an Implementation Assistance Notice in cases where a vessel has declined to permit an inspection after such inspection had been approved by the vessel’s flag state, or in the case of any DPRK-flagged vessel refusing inspection.<sup>108</sup> Later that same year the Security Council passed Resolution 2094, which expanded the sanctions even further, to include two new entities and three individuals under sanction for contributing to North Korea’s prohibited programs.<sup>109</sup> The resolution also imposed targeted financial sanctions related to North Korea’s prohibited activities.<sup>110</sup>

Resolution 2270 sustained the requirement for states to inspect cargo within or transiting through their territory, including airports, seaports, and free trade zones, that originated in North Korea or are bound for North Korea, on North Korean-registered ships or aircraft, or are brokered or facilitated by North Korean agents or companies.<sup>111</sup> Nationals of all UN member states are also prohibited from leasing or chartering vessels or aircraft or providing crew services to North Korea.<sup>112</sup> States are called upon to deregister any vessel owned, operated, or crewed by North Korea, and to not register any such vessel that is

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103. UN Charter, *supra* note 62, at art. 51.

104. Res. 1718, *supra* note 86, at ¶ 12.

105. Choe Sang-Hun & David E. Sanger, *North Koreans Launch Rocket in Defiant Act*, N.Y. TIMES (Dec. 11, 2012), <https://www.nytimes.com/2012/12/12/world/asia/north-korea-launches-rocket-defying-likely-sanctions.html>.

106. S.C. Res. 2087, ¶ 1 (Jan. 22, 2013).

107. *Id.* at ¶ 12.

108. *Id.* at ¶ 7.

109. S.C. Res. 2094, ¶ 27 (Mar. 7, 2013).

110. *Id.* at ¶¶ 11–13.

111. S.C. Res. 2270, ¶ 20 (Mar. 2, 2016).

112. *Id.* at ¶ 18.

deregistered by another state.<sup>113</sup> The only exception is for vessels that demonstrate they are used exclusively for livelihood purposes of North Korean citizens and that are not generating revenue for the DPRK, such as coastal fishing vessels. All states now are required to prohibit their nationals, persons, and corporations subject to their jurisdiction from registering vessels in North Korea. These stricter search measures extend to all cargo bound for North Korea, not just suspected vessels. The resolution also banned construction of new vessels by the regime and broadened the range of banned armaments.<sup>114</sup>

Not only is the DPRK not permitted to register foreign-owned ships, North Korean ships are barred from ports worldwide if there are reasonable grounds to believe they are involved in sanctions violations.<sup>115</sup> This rule may be waived in case of emergency or humanitarian purposes. Resolution 2270 proscribes the sale or transfer of coal, iron, and iron ore from North Korea, except for special limitations. For example, raw materials that originated outside North Korea and transhipped through the country solely for export from the Port of Rajin (Rason) are permitted, provided that the state notifies the 1718 Committee in advance and such transactions are unrelated to generating revenue for the nation's nuclear or ballistic missile programs.<sup>116</sup> Furthermore, economic sanctions prohibit states from importing a list of minerals from North Korea: coal, iron and iron ore, gold titanium ore, vanadium ore, and rare earth metals—materials that typically travel in bulk carriers. DPRK sanctions work on both sides of the trade. North Korea is likewise barred from selling gold, titanium ore, vanadium ore, and rare earth minerals, or using its ships and aircraft to transport these materials to any state.

Resolution 2321 also was adopted under article 41 and it requires flag states to designate and then de-flag vessels supporting the DPRK ballistic missile and nuclear programs.<sup>117</sup> These ships are then banned from ports worldwide. For humanitarian reasons, the resolution permitted some coal exports from North Korea so long as they did not exceed a specified value and were disconnected from the nuclear and ballistic programs.<sup>118</sup> Similarly, iron and iron ore imports could resume if they also were not associated with illegal activity.<sup>119</sup> The resolution also imposed stricter measures on ships used in the DPRK's nuclear weapons activities.

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113. *Id.* at ¶¶ 19–20.

114. *Id.* at ¶ 29.

115. *Id.* at ¶ 22.

116. *Id.* at ¶ 29(a).

117. S.C. Res. 2321, ¶ 12 (Nov. 30, 2016).

118. *Id.*

119. *Id.* at ¶ 26.

North Korea conducted additional launches of ballistic missiles on July 4 and 28, 2017 in violation of Security Council resolutions.<sup>120</sup> In response, the Security Council adopted Resolution 2371, which authorized the 1718 Committee to designate additional goods to be banned from individuals and entities associated with the DPRK nuclear program.<sup>121</sup> The resolution also implemented a complete ban on coal, iron, and iron ore imports into any state from the DPRK.<sup>122</sup>

The third resolution of 2017, Resolution 2375, reduced the oil imports allowed to North Korea by about 30 percent and cut off over half of the refined petroleum products bound for the DPRK.<sup>123</sup> The Security Council imposed an annual cap of two million barrels per year on all refined petroleum products into the DPRK. The resolution also banned all joint ventures with the DPRK, depriving the regime of foreign investment and infusions of foreign technology transfers.<sup>124</sup>

Resolution 2375 broadens the maritime interdiction regime to counter Pyongyang's smuggling at sea, progressively authorizing greater jurisdiction over North Korean ships involved in proscribed activities.<sup>125</sup> Substantively, ship-to-ship transfers of any goods are prohibited with North Korean vessels or ships operating on behalf of North Korea.<sup>126</sup> All states are authorized to conduct inspection of any ships on the high seas if there is suspicion that they are somehow tied to the regime's nuclear infrastructure. The inspections require the consent of the flag state and do not apply to sovereign immune vessels, such as warships. Resolution 2375 also applies to the ships of any flag state, although it was adopted under article 41, which means that only nonforceful measures may be used implement it.<sup>127</sup> If a flag state refuses such a search of one of its ships, however, it is required to direct the ship to a port so that it may be inspected by local authorities. If a flag state fails to authorize inspection or divert the ship to port for inspection, then the 1718 Committee may designate the vessel in violation of UN sanctions.<sup>128</sup> These "designated vessels" must be immediately deregistered by the flag state, taking them out of the stream of maritime commerce.<sup>129</sup> On a regular basis, the 1718 Committee shall release the names of

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120. David E. Sanger et al., *North Korea Tests a Ballistic Missile That Experts Say Could Hit California*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/world/asia/north-korea-ballistic-missile.html>.

121. S.C. Res. 2371, ¶ 3 (Aug. 5, 2017).

122. *Id.* at ¶ 8.

123. S.C. Res. 2375, ¶ 14 (Sept. 11, 2017).

124. *Id.* at ¶ 18.

125. *Id.*; Res. 2371, *supra* note 121, at ¶ 6.

126. Res. 2375, *supra* note 123, at ¶ 11.

127. *Id.* at ¶ 7.

128. *Id.* at ¶ 8.

129. While Resolution 2321 required that the flag state shall deflag the vessel, Resolution 2375 requires that the flag state shall *immediately* deregister it. *Id.* at ¶ 8.

ships and flag states that are uncooperative.<sup>130</sup> The inspections regime may be carried out only by warships and other ships on government service, such as maritime law enforcement vessels.<sup>131</sup>

North Korea conducted a ballistic missile test once again on November 28, 2017, causing the Security Council to further increase pressure. Resolution 2397 cut refined petroleum to North Korea to just 500,000 barrels for twelve months, starting on January 1, 2018.<sup>132</sup> Sixteen regime officials, mostly in the banking industry, were added to the sanctions list as well.<sup>133</sup> The package of sanctions contained in resolutions 2375 and 2397 have widespread support and were endorsed by a group of seventeen influential PSI maritime states in January 2018.<sup>134</sup> On April 10, 2019, the Security Council extended North Korean sanctions through April 24, 2020, continuing the saga of ratcheting up the costs of noncompliance.<sup>135</sup>

#### CONCLUSION: ARE THE MARITIME SANCTIONS EFFECTIVE?

Will UN maritime sanctions be successful against the DPRK? We can assess the effectiveness of the sanctions regime by looking to two significant examples of maritime sanctions—the first to control a rebellious colony, Rhodesia (today Zimbabwe), and the second to halt development of WMD in Saddam Hussein’s Iraq. In Southern Rhodesia, the white minority population unilaterally declared its independence from the United Kingdom on November 11, 1965. The United Kingdom rejected the pronouncement and ushered through UN Security Council Resolution 217 (1965).<sup>136</sup> The resolution condemned the declaration of independence and authorized the U.K. armed forces to use force to prevent the importation of oil into Rhodesia, especially through the port of Beira, in present-day Mozambique and then under Portuguese colonial rule. These terms included an arms embargo and economic sanctions, which were enforced by the Royal Navy from March 1, 1966 to June 25, 1975, when Mozambique became an independent state and assured the United Kingdom that

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130. *Id.* at ¶ 9.

131. *Id.* at ¶ 10.

132. S.C. Res. 2397, ¶ 5 (Dec. 22, 2017). *See also* Mark Landler et al., *North Korea Fires a Ballistic Missile in a Further Challenge to Trump*, N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/world/asia/north-korea-missile-test.html>.

133. Res. 2397, *supra* note 132, at Annex I.

134. Joint Statement from Proliferation Security Initiative (PSI) Partners in Support of United Nations Security Council Resolutions 2375 and 2397 Enforcement, Jan. 12, 2018, <https://www.state.gov/t/pa/prs/ps/2018/01/277419.htm>. The states are: Australia; Argentina; Canada; Denmark; France; Germany; Greece; Italy; Japan; Republic of Korea; Netherlands; New Zealand; Norway; Poland; Singapore; United Kingdom; and the United States.

135. S.C. Res. 2464, ¶ 1 (Apr. 10, 2019).

136. S.C. Res. 217, (Nov. 20, 1965).

it would not allow the transshipment of oil into Rhodesia.<sup>137</sup> During the Beira Patrol, the Royal Navy maintained a blockade in the Mozambique Channel with a flotilla that initially included an aircraft carrier.<sup>138</sup> This economic stranglehold contributed to the fall of white Rhodesia in 1979.<sup>139</sup> The sanctions, while imperfectly enforced, were effective at imbuing a sense of isolation among the minority white regime and destabilizing its hold on power.<sup>140</sup> Yet the Beira Patrol lasted nearly a decade and was only a supporting element in bringing about majority rule in Zimbabwe.

The example of Iraq provides a similarly circumspect lesson: maritime sanctions enforcement is a useful tool for controlling rogue behavior, but by itself is not dispositive. After Iraq invaded Kuwait in August 1990, the UN Security Council adopted Resolution 661 to prevent the importation of commodities to or from Iraq or Kuwait.<sup>141</sup> Four months later the Security Council authorized “all necessary means” to enforce UN mandates against Iraq.<sup>142</sup> The multinational Maritime Interception Force kept pressure on Iraq until the coalition invasion of 2003 toppled the regime, thirteen years later.<sup>143</sup> Like the Beira Patrol, the hardships imposed by the Iraq sanctions often fell on the people and not the regime.<sup>144</sup> Although the sanctions did not force the regime of Saddam Hussein out of power, they were effective at helping to contain the spread of WMD.<sup>145</sup> This success, however, was only possible because of the work of the UN Monitoring, Verification, and Inspection Commission (UNMOVIC), which imposed a comprehensive in-country inspection regime.<sup>146</sup> Sadly, the success of the sanctions was unclear until after the invasion. As former chief UN weapons inspector Hans Blix observed, “the UN and the world had succeeded in disarming Iraq without knowing it.”<sup>147</sup>

While the numerous sanctions and Security Council resolutions have decimated the DPRK’s international shipping industry and hobbled its economy, they have not been watertight. The greatest obstacle has been to entice states that

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137. *Britain Ends a Blockade on Oil Bound for Rhodesia*, N.Y. TIMES, July 3, 1975, at 63; John F. Burns, *Rhodesia Restored to Colonial Status*, N.Y. TIMES, Dec. 13, 1979, at A1.

138. The aircraft carriers Royal Navy HMS *Eagle* and Royal Navy HMS *Ark Royal* both participated in the Beira Patrol. See Richard Mobley, *The Beira Patrol*, 55 NAVAL WAR C. REV. 63, 68–70 (2002).

139. William Minter & Elizabeth Schmidt, *When Sanctions Worked: The Case of Rhodesia Reexamined*, 87 AFR. AFF. 207, 231–232 (1988); Johan Galtung, *On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia*, 19 WORLD POL. 378, 414–15 (1967).

140. Minter & Schmidt, *supra* note 139, at 231–34.

141. S.C. Res. 661, ¶ 3 (Aug. 6, 1990).

142. S.C. Res. 678, ¶ 2 (Nov. 29, 1990).

143. Alix M. Freedman & Bhushan Bahree, *Iraq is Shipping Large Cargoes of Crude, Violating U.N. Rules*, WALL ST. J., Feb. 21, 2003, at A1.

144. Barbara Crossette, *Iraq Sanctions Kill Children*, U.N. REPORTS, N.Y. TIMES, Dec. 1, 1995, at A9.

145. George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, 83 FOREIGN AFF. 90, 91 (2004).

146. S.C. Res. 1284, ¶ 1 (Dec. 17, 1999).

147. Lopez & Cortright, *supra* note 145, at 92.

trade with North Korea to stick with the sanctions regime, especially China. In 2000, China, Japan, and South Korea each accounted for about 20 percent of trade with North Korea.<sup>148</sup> Over time, however, Japan and South Korea have eliminated their commercial ties so that today China accounts for some 90 percent of trade with the DPRK.<sup>149</sup> China had permitted microcommerce with North Korea, but in 2016 agreed to the major sanctions against trade in raw materials. The following year, China consented to a ban on other commerce, including textiles and marine products.<sup>150</sup>

But China continues to struggle to comply with DPRK sanctions. Japan has detected Chinese vessels involved in ship-to-ship transfers of oil to North Korean ships, in violation of UN sanctions.<sup>151</sup> Chinese business networks in Taiwan, Hong Kong, and Mainland China, coupled with offshore corporations, appear to be complicit in ship-to-ship oil transfers in violation of UN sanctions. China also slowed efforts by the 1718 Committee to ban ships engaged in sanctions busting. In early 2018, China stalled a U.S. proposal to ban thirty-three ships from ports worldwide and blacklist twenty-seven shipping firms involved in circumventing Security Council resolutions.<sup>152</sup>

Russian ships are also involved in violating sanctions. In early 2018, the Russian-flagged tanker, *Patriot*, made two ship-to-ship transfers of oil—the first to the North Korea-flagged M/V *Chong Rim 2* and the second to the North Korea-flagged vessel M/V *Chon Ma San*. Both ships were under sanction by the Security Council, as was the purchaser of the oil, Taesong Bank, a North Korean company. On April 10, the *Patriot* conducted another ship-to-ship transfer with the North Korean tanker *Wan Heng 11*, which then entered port at Nampo, North Korea.<sup>153</sup> Ships operating out of Vladivostok, Russia for Primorye Maritime Logistics Company and Gudzon Shipping Company have also engaged in ship-to-ship transfers of oil to North Korean ships to circumvent UN sanctions. In

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148. Stephen M. Haggard, *Those North Korea Sanctions Might be Working. Here's Why*, WASH. POST (Apr. 6, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/06/those-north-korea-sanctions-might-be-working-heres-why/?utm\\_term=.2ff5717c6d39](https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/06/those-north-korea-sanctions-might-be-working-heres-why/?utm_term=.2ff5717c6d39).

149. *Id.*

150. Sue-Lin Wong & Richa Naidu, *U.N. Ban on North Korean Textiles will Disrupt Industry and Ordinary Lives, Experts Say*, REUTERS (Sept. 12, 2017), <https://www.reuters.com/article/us-northkorea-missiles-sanctions-textile/u-n-ban-on-north-korean-textiles-will-disrupt-industry-and-ordinary-lives-experts-say-idUSKCN1BN1SI>.

151. Alastair Gale, *North Korea Skirts Sanctions with Ship Transfers Over Wider Area*, WALL ST. J. (May 29, 2018), <https://www.wsj.com/articles/north-korea-skirts-sanctions-with-ship-transfers-over-wider-area-1527606731>.

152. *China Holds Up US bid for UN Ban of Ships Circumventing North Korea Sanctions*, S. CHINA MORNING POST (Mar. 6, 2018), <https://www.scmp.com/news/china/article/2135847/china-holds-us-bid-un-ban-ships-circumventing-north-korea-sanctions>.

153. S.C. Press Release, *Security Council 1718 Sanctions Committee Updates One Designated Vessel*, U.N. Press Release SC/13505, (Sept. 14, 2018). The ship was added to the sanctions list.

response, the United States imposed unilateral sanctions on those Russian businesses.<sup>154</sup>

One Security Council diplomat said on condition of anonymity, “Russia and China have never been fully committed to North Korean sanctions . . . they are trying to do whatever it takes to get away with it rather than a full implementation.”<sup>155</sup> While Russia and China have been problematic, they are not alone in either intentionally or unwittingly helping the DPRK avoid sanctions. Vessels flagged in states stretching from Dominica, Panama, and Sierra Leone are also involved in violating sanctions.<sup>156</sup> Some of these states operate open registries or “flags of convenience” that often lack the administrative capacities to exercise effective oversight over all of the ships that fly their flag, making sanctions violations more likely. Problematic vessels also appear to be affiliated with business networks in the Marshall Islands and the British Virgin Islands.<sup>157</sup>

The violations involving ship-to-ship transfers of oil products have permitted the DPRK to exceed the annual cap of 500,000 barrels of imported fuel, which caused the United States in July 2018 to call for a ban on any new oil flowing into the country.<sup>158</sup> The United States believes North Korean tankers accepted ship-to-ship transfers at least eighty-nine times in the first five months of 2018, and that the annual cap would have been busted even if the ships unloaded only one-third of their capacity.<sup>159</sup>

There is no doubt that maritime interception operations can serve as an effective means of at least weakening recalcitrant regimes and slowing the development of WMD programs. The maritime interception operations against Iraq were effective in arresting Saddam Hussein’s WMD programs, but only when coupled with a verifiable inspection regime inside the country. In the case of North Korea, intrusive inspections could also be effective in at least hampering

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154. Gardiner Harris, *New U.S. Sanctions Target Russia for Defying Rules on North Korea*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/us/politics/new-us-sanctions-target-russia-for-defying-rules-on-north-korea.html>.

155. Chris Horton et al., *Trump Rebuked China for North Korea’s Oil Smuggling. It’s More Complicated*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/world/asia/north-korea-oil-smuggling.html>.

156. *Id.*; Niharika Mandhana, *Fake Signals and Illegal Flags: How North Korea Uses Clandestine Shipping to Fund Regime*, WALL ST. J. (Nov. 28, 2018), <https://www.wsj.com/articles/fake-signals-and-illegal-flags-how-north-korea-uses-clandestine-shipping-to-fund-regime-1543402289>; Alastair Gale & Costas Paris, *North Korean Tanker Seen Flouting Sanctions, Japan Says*, WALL ST. J. (Jan. 24, 2018), <https://www.wsj.com/articles/japan-flags-possible-violation-of-north-korean-sanctions-1516797380?mod=searchresults&page=3&pos=6>.

157. Horton et al., *supra* note 155.

158. Carol Morello, *U.S. Urges U.N. to Halt All Oil Transfers to North Korea*, WASH. POST (July 12, 2018), [https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306\\_story.html?utm\\_term=.8c46039b99e9](https://www.washingtonpost.com/world/national-security/us-urges-un-to-halt-all-oil-transfers-to-north-korea/2018/07/12/db70a144-85e5-11e8-8f6c-46cb43e3f306_story.html?utm_term=.8c46039b99e9).

159. *Id.*

WMD development and proliferation. If the DPRK acquiesces to such inspections, it would be a game-changer on the peninsula.<sup>160</sup>

Even without any additional movement toward denuclearization of North Korea, however, the maritime regime in place has made it impossible for the DPRK to use the oceans freely. The regime in Pyongyang may not transport weapons or WMD and their associated materials and components by sea, either for export or import. North Korean ships are barred from carrying all but the most carefully prescribed humanitarian cargo and limited fuel oil. DPRK ships cannot lawfully obtain certificates of compliance with IMO conventions, which means they are driven “out of class” as certificates expire, making them ineligible for entry into foreign ports. Its vessels may not fly the flag of any other national registry, or obtain cargo and hull insurance, so the entire maritime industry of the DPRK is slowly dying. The DPRK is also forbidden from chartering foreign vessels. While small numbers of ships, notably registered in Russia and China, appear to be noncompliant by conducting ship-to-ship transfers of oil, the cost of these operations is high. Russia and China face considerable scrutiny and criticism for such actions, and it is unclear whether the operations of these noncompliant ships are a matter of state policy.<sup>161</sup> In either event, however, transaction costs for North Korea now pose an enormous obstacle to developing and trafficking in WMD, and perhaps even an existential challenge to the regime itself.

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160. Choe Sang-Hun & David E. Sanger, *North Korea Agrees to Allow Inspectors into Nuclear Testing Site, Pompeo Says*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/07/world/asia/pompeo-north-korea-visit.html>.

161. Ian Talley, *U.S. Calls Out China, Russia on North Korea Energy Caps, Urges U.N. Action*, WALL ST. J. (July 13, 2018), <https://www.wsj.com/articles/u-s-urges-u-n-to-reprimand-china-and-russia-for-selling-oil-products-to-north-korea-1531411312>.

# Ocean Policy and the Law of the Sea: The Contributions of David D. Caron (1952–2018)

*Harry N. Scheiber\**

With the sudden death of Professor David Caron in February 2018, the field of ocean law and policy studies lost one of its most gifted and celebrated leaders. His many contributions to scholarship on oceans issues were only one segment of a large corpus of writings in which he contributed to varied aspects of international and environmental law. All of his major early-career writings, and more than a third of his full corpus of scholarly publications, were in the oceans field. In addition to being a prolific and influential writer, David was a prominent actor in the policy arena, achieved eminence as a lawyer and arbitrator (and most recently, as a judge), and was notable for his accomplishments as an academic institution builder and administrator. One may guess, however, that he would most wish that we should recall that he was a gifted and incredibly dedicated university teacher.

His academic positions included service as a member of the faculty in the University of California, Berkeley, School of Law (Berkeley Law), from 1987 to 2013; midway through this period, he was named Maxeiner Distinguished Professor of Law. At Berkeley Law, he shared with Professor Richard Buxbaum a role as leading light and indispensable mentor to the international law faculty. He took every responsibility, from his first day on our faculty, with a sense of high purpose and intense institutional dedication. Berkeley Law—and later the Dickson Poon School of Law, Kings College, London, of which he became Dean on taking emeritus status at Berkeley in 2013—benefited in myriad respects from

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the ways in which he deployed his rare gifts both in the classroom and in the creative organization and administration of academic activities.

To the great advantage of scholars, jurists, and policy officials in ocean law and policy, one of the causes to which David gave unstinting efforts was the Law of the Sea Institute (LOSI), which he and I co-directed at Berkeley Law from 2002 until 2013.<sup>1</sup> For five years after departing Berkeley, he continued to be actively involved in LOSI conferences and publications, including his role in the conception and organization of the conference from which the LOSI book *Stress Testing the Law of the Sea* drew its papers.<sup>2</sup> One of the last entries in the lengthy bibliography of David's distinguished writing is an important paper on the law of marine protected areas (MPAs) that he coauthored for presentation at LOSI's 50th Anniversary conference, held at Berkeley, and that was published in 2018 in the LOSI volume *Ocean Law Debates*.<sup>3</sup>

Within days after his untimely death, tributes to David began to appear on the web and in print publications; and so his remarkable accomplishments in the larger field of international law are being memorialized as the brilliance of his career requires.<sup>4</sup> It is, however, especially appropriate that in the present paper we should focus on the scope and importance of his contributions to ocean law and policy discourses, including his role in LOSI at Berkeley Law.

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David's connection to the ocean was formed during his undergraduate years as a cadet in the U.S. Coast Guard Academy, to which he won appointment after a childhood and secondary education in New England. Evidence of his bent for leadership and the recognition of his character and intellectual brilliance surfaced quickly in his Academy years: he was named brigade commander of the corps of cadets, and he graduated in 1974 with special honors in physics and political science. In the following four years in the Coast Guard service, reaching the rank of Lieutenant, he drew challenging assignments of significant responsibility, including a position as navigator on the icebreaker-style research vessel *USCG Polar Star* during its storied transit of the Northwest Passage. Both in the Arctic area and in a later assignment as the Coast Guard's assistant chief for marine protection and port security in California, David was also a salvage diver, one of the last cohort of dive officers who wore the old metal-helmeted diving suits

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1. For the history of the Law of the Sea Institute at Berkeley Law, and its prior record from 1965 on as a consortium of ocean law experts, see Harry N. Scheiber, *The Law of the Sea Institute: A New Forum for Debate of Ocean Law in the 1960s: Decade of Uncertainty*, in *OCEAN LAW DEBATES: THE 50-YEAR LEGACY AND EMERGING ISSUES FOR THE YEARS AHEAD* 11, 84–92 (H.N. Scheiber, N. Oral & M. Kwon eds., 2018).

2. See generally *STRESS TESTING THE LAW OF THE SEA: DISPUTE RESOLUTION, DISASTERS AND EMERGING CHALLENGES* (Stephen Minas & H. Jordan Diamond eds., 2018).

3. David D. Caron & Stephen Minas, *Conservation or Claim? The Motivations for Recent Marine Protected Areas*, in *OCEAN LAW DEBATES*, 529–52.

4. See the website [https://works.bepress.com/david\\_caron/](https://works.bepress.com/david_caron/) for biographical data and a detailed listing of David Caron's writings.

supported by an air line from the tending surface vessel—a link to naval history and the heritage of undersea exploration that fascinated our students and that David cherished recalling when pressed by his seminar students to recount this or other “war stories.”

Similarly, albeit this time in a major international arena, at the Fridtjof Nansen Institute International Conference on Globalization and the World Ocean, held in Oslo in August 2008, David and an International Tribunal for the Law of the Sea judge (later the Tribunal’s president), Vladimir Golitsyn, were together on the platform to present brief talks at the closing session. David spoke on varied historic “images of the Arctic,” a subject on which he had presented in numerous other fora as well. In his talk he mentioned the pioneering *Polar Star* transit—prompting Judge Golitsyn to interject that in addition to irritating the Canadians, the ship also was guilty of incursions, en route, into Russian waters. David replied that he happened to have been the navigator on the *Polar Star*, and he could assure everyone that any drifting into Russian waters was “entirely inadvertent”! Judge Golitsyn, as I recall, joined in the laughter that shook the conference hall at that point!

Whatever the satisfactions that he earned in his illustrious career in law, uniquely memorable times for David, I think, were the days during which he could steal time for a private scuba diving expedition, or to enjoy the surf off an island beach, or (on a recent vacation adventure) to delight in even inland waters, as at the helm of a lumbering chartered vessel on European canals in company of the family to which he was so devoted—his wife, Susan, and grown children, Marina and Peter.

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After resigning his Coast Guard commission, David was awarded a Fulbright study grant, on which he completed a MSc. degree in 1979 at the University of Wales Center for Marine Law and Policy. During that interval, he studied the problem of the global ocean seabed and its management as was contemplated under the drafts of the United Nations Convention on the Law of the Sea (UNCLOS) then circulating, and offered a searching analysis of how the national legislation for seabed mining ventures enacted by the United States and Germany (neither State then a party to the Convention) should be viewed in the event that active seabed mining under the proposed United Nations agency, “The Authority,” should be undertaken.<sup>5</sup>

Having decided to pursue legal studies in a professional program, David was admitted in 1980 to the JD program at Berkeley Law. Here again, his record was one of great distinction: He would graduate in 1983 with Order of the Coif honors, and in his final student year he was editor-in-chief of *Ecology Law*

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5. See David D. Caron, *Deep Seabed Mining: A Comparative Study of Municipal Legislation by the United States of America and the Federal Republic of Germany*, 5 *MARINE POL’Y* 4, 5–16 (1981).

*Quarterly*, one of the first law journals in any country to specialize in the emerging fields of environmental law and policy.

Most significantly, however, he earned as a law student at Berkeley the attention of Professor Stefan A. Riesenfeld, who engaged him as his research assistant and who would become a mentor to him in the years to follow. Inspired and guided by Professors Riesenfeld and Buxbaum, and by several senior scholars outside Berkeley (most notably the distinguished lawyer and diplomat Bernard Oxman, who was a visiting professor during David's final student year), David published articles on the problems of the prospective seabed mining regime under UNCLOS and on transnational marine pollution from offshore oil activities.<sup>6</sup> On rereading today those papers from his student years, one is astonished by the extent to which David was even then exhibiting a leading characteristic of his later writings, *viz.*, a remarkable prescience regarding the potential range of legal implications that could arise from newly applied technologies and from emerging environmental challenges.

An historic event in international discourse on the status and future of UNCLOS was a major international conference of the Law of the Sea Institute, held in San Francisco in October 1984. More than seventy presenters, including many of the most eminent scholars in international law and several of the most prominent participants in the lengthy negotiations of UNCLOS, discussed virtually the entire range of ocean law issues addressed by UNCLOS, including fisheries management and conservation principles, criteria and processes for marine environmental protection, navigation by military and civilian vessels, and, withal, the overarching question of how UNCLOS would affect the traditional process of the formation of international law.<sup>7</sup> Professor Riesenfeld was co-organizer of the conference, in the run-up to which David Caron was his research assistant and in that capacity deeply involved in the identification of topics and speakers. David's involvement in the subsequent global discourse, down to our own day, as to the rights and obligations of States as set down in UNCLOS and implementing instruments thus began "at the creation," as it were. With Professor Oxman, whose visiting professorship at Berkeley coincided with the San Francisco conference preparations, and the international lawyer Charles Buderl, David coedited a small book of essays evaluating the UNCLOS issues, the first of his publications in book form, again a product of his student years.<sup>8</sup> Over the years that followed, David composed learned commentaries on the

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6. David D. Caron, *Liability for Transnational Pollution Arising from Offshore Oil Development*, 10 *ECOLOGY L.Q.* 641, 642 (1983).

7. THE DEVELOPING ORDER OF THE OCEANS: PROCEEDINGS: LAW OF THE SEA INSTITUTE, EIGHTEENTH ANNUAL CONFERENCE, OCTOBER 24-27, 1984, SAN FRANCISCO ix-xiii, 743-49 (Robert B. Krueger & Stefan A. Riesenfeld eds., 1985). On Riesenfeld's role in organizing the conference, see John Briscoe, *A Remembrance of Stefan A. Riesenfeld*, in *SCIENCE, TECHNOLOGY, AND NEW CHALLENGES TO OCEAN LAW* 464-65 (Harry N. Scheiber, James Kraska, & Moon-Sang Kwon eds., 2015).

8. Bernard H. Oxman, David D. Caron & Charles Buderl, *LAW OF THE SEA: U.S. POLICY DILEMMA* (1983).

Convention, expressing his frustration regarding the negative US posture toward ratification, as Congress, paralyzed by the decision-making process in committees, continually declined to act favorably despite a continuous rise in support for ratification by the 1990s from industry, the military, and scholars.<sup>9</sup>

After receiving his law degree at Berkeley, David served the Iran-US Claims Tribunal in The Hague from 1983 to 1986 as legal assistant to the American judges Charles Brower and Richard Mosk. His immersion, during his Tribunal clerkship, in the processes of international dispute settlement was of great influence on his subsequent career both as scholar and as lawyer. During these years in The Hague, he also advanced his formal credentialing as a scholar in international law, receiving the Diploma of The Hague Academy and initiating a research project that would culminate in his earning the Doctorate of Law from the University of Leiden in 1990. He lay the academic groundwork in this period for the recognition he would in time achieve as a leading expert on procedure in international arbitration; it would serve him for his later-career role, too, in a range of major international arbitrations on boundary disputes, environmental issues, commercial treaty obligations, and human rights challenges.

After completing his service with the Tribunal judges in 1986, David returned to California, taking up a position as law associate in the prestigious San Francisco law firm Pillsbury Madison & Sutro, with offices across the Bay from our law school in Berkeley. After a year in the firm, the wheel of his career took a major turn: his alma mater brought him home, it may be said, as a tenure-track assistant professor in 1987. Settling in at Berkeley Law, and provided with an elegant office looking out on a section of the busy campus but also the quiet of the magnificent Berkeley hills, David now was established in a coveted institutional base for what became a truly great career in academia. In a relatively short time, he won tenure and then was named to a chair as Maxeiner Distinguished Professor. While on the Berkeley Law faculty, he enjoyed the collegueship and continued mentoring of his former teachers; and he won the enduring respect and admiration of his own cohort of younger colleagues—not only those in the Law School but also professors in many other disciplines on the Berkeley campus faculty, in relationships impelled by David's exceptional literacy in the physical sciences and his deep interest in political science, history, and the new interdisciplinary "law and society" field.

I was privileged to have an office next door to David's, and from his earliest days on the faculty we spoke to one another almost daily, our more substantive exchanges being reflected in the acknowledgements in nearly all our respective ocean-law-related publications. He always had interesting insights, humorous angles, or compellingly lucid comments on matters of law and policy, classroom teaching, and campus issues. Family news was always in the mix—notably in

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9. See, e.g., David D. Caron & Harry N. Scheiber, *The United States and the 1982 Law of the Sea Treaty*, 12(4) ASIL INSIGHT (2007).

the form of boastful (though of course wholly accurate) reports on the accomplishments of our children!

Only a few months after David's appointment to the Berkeley Law faculty, I was engaged in organizing an international symposium on the subject of ocean resources, and in that context, David mentioned that he was deeply concerned about the implications for international law of the US policy of imposing sanctions on distant-water-fishing nations that were engaged in damaging environmental practices. I urged him to present a paper on the subject to the symposium, which was scheduled to be held in only about six weeks' time.

In the weeks that followed, colleagues were astounded by the way in which he was exploiting the already rich "on-line" research resources of the worldwide web, a medium regarding use of which most of our older generation colleagues (including myself) were then almost completely ignorant. The brilliant paper that David produced in such short order was presented to acclaim at the conference, and it was then published in 1989, along with the other conference papers, in a symposium issue of *Ecology Law Quarterly*.<sup>10</sup>

At that time, the UNCLOS, signed in 1982, had not yet gone into force, as the United States and the other most advanced industrial nations were withholding ratification because of the notorious controversy over the seabed mining regime. However, the Convention's vitally important provision authorizing the creation by coastal nations of Exclusive Economic Zones (EEZs) had already produced an historic change in the old regime of freedom of the seas, with more than a hundred nations having already acted to proclaim extended offshore jurisdictions beyond their territorial sea limits. Yet there was no settled view as to whether the Convention's language warranted a coastal nation's entire denial of access by foreign states' flagged fishing vessels in an EEZ. The United States Congress had passed legislation under which the Executive potentially would be required to ban fishing in the American EEZ by the fleets of nations that violated the restrictions on commercial whaling imposed by the International Whaling Commission—a declaration, in effect, of authority in EEZ waters that ostensibly went beyond the specific terms of UNCLOS regarding coastal state authority. David's article provided a close textual analysis of the relevant international instruments and the existing literature, analyzed the U.S. legislation and executive process, and commented on a decision in 1986 of the United States Supreme Court. In addition, he presented empirical data that illustrated the limits of potential practical impact of the fishing sanctions policy. Beyond that, he also broadened his inquiry to examine what he termed "the growing instrumental importance of sanctions," especially in regard to the conditions under which such actions, whether with regard to fishing access, trade terms, or other relations among states, might be justified as legitimate exercises of state power. Reflecting

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10. David D. Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 *ECOLOGY L.Q.* 311 (1989).

on the specific U.S. policy in effect, he concluded that it was not prohibited by the explicit language of UNCLOS—yet, he asserted, this exercise of the power posed a high “strategic risk” to the achievement of overarching American policy objectives in international law and diplomacy. Whatever the short-term payoff for the policy, he wrote, it was a precedent that other nations could rely upon in the same or other ways that would confuse and disrupt the process by which a consensus could be achieved as to the terms of authority in the EEZ under UNCLOS.

In what would become a hallmark of David’s later writings, he thus moved to the front and center of his analysis the issue of institutional stability in international relations. In conclusion, he deplored the fishing sanctions because they “increase[d] the complexity of the legal order,” in particular as to the terms of authority in the EEZ—but more broadly, he contended, sanctions were undesirable as lending legitimacy to a “possessory view” of ocean resources and spaces that could undermine the underlying “cooperation and friendly relations” among states, essential to achievement of consensus on EEZ powers. The importance of such consensus, he averred, transcended any short-term advantage. One discerns, then, in this first major research effort by David, the laying of a foundation stone for the intellectual framework that would provide the basic thematic thrust of argument—a prioritizing of institutional stability and efficacy—in so much of his work in the years to follow.

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His article on sanctions established David immediately as an important voice in ongoing debates over U.S. ocean-law policy; and it had a durable influence in the extended debates and diplomacy, persisting well into the 1990s, regarding the interpretations of the more comprehensive UNCLOS regime. Only a year after his sanctions article appeared, he published in *ELQ* a path-breaking study: “When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level.”<sup>11</sup> This piece was one of the very first scholarly analyses to appear in the literature of international law to address the rising-sea-level question—an issue now recognized, of course, as one of the most urgent challenges posed for islands and coastal areas by climate change. It is today recognized as a classic, and its analysis is as relevant now as it was when it first appeared. Together with his later contributions to the discourse on rising challenges from climate change, his 1990 study reminds us of David’s impressive capacity for anticipating new challenges to established ocean regimes and their implications for inherited legal norms. Equally, it illustrated his insightfulness in suggesting the innovations in ocean law required to meet those challenges.

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11. David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 *ECOLOGY L.Q.* 621, 622 (1990).

The passage of time, and a personal research agenda that seemed ever-broadening in scope—with arbitration, in both the commercial law and public law areas, becoming increasingly central to his work as scholar and as practitioner—did not push the climate change issue out and away from the core of David’s engagement with major research issues. In fact, in two papers published in LOSI books, he extended and modified his conception of how the law should adapt to sea level rise, advancing the proposal that the boundaries of offshore zones should be fixed, so that the allocations of rights and responsibilities for each zone (as defined in the 1982 United Nations Convention on the Law of the Sea) would remain in force even when future change in geological realities impacted the physical boundaries of islands and other coastal areas. With the subtitle, “A Proposal to Avoid Conflict,” the first of these papers appeared in a 2009 LOSI book on maritime boundaries disputes and settlements.<sup>12</sup> Four years later, David wrapped the same proposal into an insightful analysis of how the legal order would need to cope with intersecting effects of climate change and the potential problems that must be anticipated from varied human efforts at mitigation.<sup>13</sup>

The 2018 LOSI volume *Stress Testing the Law of the Sea*, which includes excellent papers addressing climate change impacts in their manifold dimensions, bespeaks the durability of David’s commitment to the subject. More particularly, that book is also a testament to the active role that he played in designing the conceptual structure of the conference in London at which the papers were originally presented. It is evidence, too, of the continuing connection that David maintained with the Law of the Sea Institute after he left Berkeley, in terms of not only inspiring the direction and content of the larger LOSI discourse but also in arranging for the kind of material support that sustains the Institute’s vitality as a forum for new research. This continuity of his personal commitment was an invaluable asset to the present LOSI co-directors, Holly Doremus and H. Jordan Diamond, in the same way as it was to me when I continued as solo director for several years, until my retirement.

Other major academic and professional legal activities, meaning commitment to a busy schedule that often required much international travel, occupied David from almost the beginning of his time on the Berkeley faculty. More specifically, when the LOSI headquarters was moved to Berkeley, reorganized (as will be mentioned below) as a Berkeley Law unit, David had already achieved for himself a prominent place in the international legal arena:

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12. David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARIES DISPUTES: SETTLEMENT PROCESSES AND THE LAW OF THE SEA 1–18 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

13. *Climate Change and the Oceans*, in REGIONS, INSTITUTIONS, AND LAW OF THE SEA: STUDIES IN OCEAN GOVERNANCE 515 (Harry N. Scheiber & Jin-Hyun Paik eds., 2013). See also David D. Caron, *Time and the Public Trust Doctrine: Law’s Knowledge of Climate Change*, 35 U. HAW. L. REV. 441, 449–52 (2013).

He served from 1994 to 1996 as counsel in proceedings before the Marshall Islands Nuclear Claims Tribunal, and then from 1996 to 2003 on the Precedent Panel of the UN Compensation Commission in Geneva, charged with addressing the myriad claims arising from damages incurred during the 1990 Gulf War. He had also begun in 1993 a long period of important service to the government as a member of the U.S. Secretary of State's Advisory Committee on Public International Law—an appointment of special personal significance to David since his revered mentor Professor Riesenfeld had served on that committee with great distinction for many years.

Similarly, an award of great sentimental importance to David, apart from the professional recognition it conveyed, was his winning of the Stefan A. Riesenfeld Award of the University of California “for outstanding achievement and contributions to the field of international law.” David's involvements meanwhile multiplied, while also increasing steadily in their visibility, in the professional organizations of both American and international arbitrators, in the American Society of International Law (of which he would be elected as president from 2010 to 2012), in the American Law Institute, and in the programs of The Hague Academy of International Law. A culminating event of his career, an especially meaningful “bookend” chapter as it were, would come in 2015 when the United States government appointed him as a judge on the Iran-US Claims Tribunal, the institution in which his professional career as lawyer had begun three decades earlier. He also was assigned then to the eminent position of ad hoc judge of the International Court of Justice.

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Despite the pressures of these proliferating commitments, David was maintaining his full program of teaching and administrative obligations at Berkeley at the time he and I took up codirection of the Law of the Sea Institute. We began our work in 2002, in consultation with the eminent scholars and International Tribunal for the Law of the Sea members, Judges Tullio Treves and Choon-ho Park, and with Professors Richard Buxbaum of Berkeley, William T. Burke of the University of Washington, and Bernard Oxman of the University of Miami—and especially with the late Jon Van Dyke of the University of Hawaii with regard to the specifics of LOSI program designs and conference organization. With Judge Park as intermediary and sponsor, aided in liaison by Seokwoo Lee, then a young professor at Inha University, several of our early conference and publication efforts enjoyed the coordinated support of Inha University. More recently, LOSI has collaborated in conference organization with the Korea Institute of Ocean Science and Technology. At Berkeley Law, we benefited from the office facility and operating support provided by the dean's office, and also from other sources in the University of California, especially the California Sea Grant program. Collaborations were negotiated from 2003 to 2010 with other institutions, among them the University of Washington; the Harte Institute of Texas A&M University (a research unit headed by a Berkeley

JSD graduate, Richard McLaughlin); and the Environmental Law Institute (whose ocean and coastal program was founded and then headed by another of our graduates, Dr. Kathryn Mengerink, and in which H. Jordan Diamond began her legal career); the Coast Guard Academy (where a Berkeley Law LL.M. graduate, Capt. Glenn Sulmasy, a prolific scholar, was a department head); and the Nansen Institute in Norway (where Dr. Willy Østreng and, later, Dr. Davor Vidas maintained close ties with our Institute).

The efforts involved in forging these and other organizational relationships, the familiar never-slackening pace of fundraising that the realities of academic life impose, and the burdens that academic editing require were responsibilities that David and I shared. Our agreed design for the Institute, departing from the previous policy when LOSI was headquartered at the University of Hawaii, was to sponsor mainly small conferences on an invitational basis, and to publish the papers in book form after full vetting and editing. The 2010 LOSI conference, however, was held at the facility in Hamburg of the International Tribunal for the Law of the Sea, with further cosponsorship of Academia Sinica of Taiwan, the Ocean Policy Research Foundation of Japan, and the Bucerius Law School in Hamburg; the proceedings were in this instance open to subscribers from the public, with some two hundred in attendance.<sup>14</sup>

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The foregoing discussion of the content and organizational history of LOSI at Berkeley provides, I hope, a general picture of the milieu and the challenges in which the work went forward during the period when David was codirector. One special element in David's part of that record justifies, however, being considered his most outstanding personal accomplishment while codirector—again, evidence of his exceptional gift of insightful prescience: It was his recognition that the course of human events was altered fundamentally with the advent of the nuclear age in 1945, but that its implications for the oceans, as of seventy years later, had been studied only in highly fragmented ways, with many gaps. David believed it was a matter of signal urgency that the ramifications of the nuclear age should be analyzed as an interrelated set of technological and environmental phenomena that were already having—and in the future would have—far-reaching impacts on the oceans and their role in the global climate.

And so, in 2004 we convened in Berkeley a small LOSI invitational workshop of ocean-law experts from several countries, to obtain advice on David's preliminary agenda. Incorporating their critiques, and after further

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14. We were fortunate that the Brill/Nijhoff house committed to us for publication vetted and edited volumes as they became ready. Several of the books in the LOSI series were coedited by colleagues in other institutions: Judge Paik of ITLOS and Professors Moon-San Kwon of KIOST, Nilufer Oral of Bilgi Istanbul University, Clive Schofield of Wollongong University (Australia), James Kraska of the U.S. Naval War College, Seokwoo Lee of Inha University, and Jon Van Dyke and Sherry Broder of the University of Hawaii. For a full listing of LOSI books, *see* Publications, Oceans at Berkeley Law, available at <https://www.law.berkeley.edu/research/clee/research/law-of-the-sea-institute/publications/>.

consultation with a few scientists and engineers, the agenda was refined to include the respective impacts of nuclear testing, the dumping of wastes into the ocean and burial of waste in the seabed floor, the transport of nuclear materials at sea, the deployment of military vessels as mobile bases for nuclear weapons, and seaborne carriage or uses of nuclear weapons at sea by terrorists or by rogue nations. Special conditions in the polar regions and in the Marshall Islands were also to be addressed by expert commentators. This agenda became the program of our major international LOSI invitational conference held at Berkeley Law in February 2006. Not least important of the conference panels was one devoted to the topic of environmental dangers associated with nuclear power stations and waste facilities located in coastal zone areas, the tragic relevance of which would become evident five years later, when the Fukushima disaster struck in 2011. Publication of the conference papers, after editing and commissioning of two additional papers, was achieved with the appearance of the book *Oceans in the Nuclear Age: Legacies and Risks* (Brill/Nijhoff, 2010), coedited by David and myself. Brill brought out an expanded edition in paperback format in 2014, and the book remains one of the brightest ornaments of the LOSI program's record.<sup>15</sup>

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After having reviewed here the record of David's extraordinary career, there remains the need to take notice, however briefly, of the graciousness with which he left his mark on institutions and in relationships with colleagues in so many profoundly personal ways. In the words of former Berkeley Law Dean Christopher Edley, who relied on David's sage counsel in the administrative realm, David was not only a "superstar" in the profession but also a man always "forthright, insightful, and painstakingly fair." Kathryn Mengerink, Berkeley Law alumna and currently executive director of the Waitt Institute, has written of David as a great "oceans rock star, . . . but more importantly, as one of the most beautiful souls out there." The encomium posted on the US-Iran Claims Tribunal website at the time of David's death stated that he will be remembered for "his exceptional professional skills and impressive experience as a scholar . . . , but above all [for] his persuasive human qualities giving evidence of his deeply-rooted moral qualities." These appraisals encapsulate the expressions of admiration and sorrowful remembrance that have come forth from many of David's hundreds of former students and from his colleagues in the large constellation of institutions that he served.

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15. A second major LOSI undertaking in the same time frame was a research project, funded by the California Sea Grant program, that was centered on Pacific fisheries issues and conducted by a team made up of Kathryn Mengerink (a Scripps Institution doctoral graduate in biology and then a Berkeley Law JD student), Yann-huei Song (a Berkeley Law JSD graduate, senior scholar in Academia Sinica of Taiwan), and the present writer, who was Principal Investigator for the project. For some of its major findings, see Harry N. Scheiber, Kathryn Mengerink & Yann-huei Song, *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 99-165 (2007).

A close friendship with David, along with our joint projects and shared responsibilities on the Berkeley Law faculty and in LOSI, formed a treasured part of my own career as a research scholar and teacher in ocean law and policy. On one occasion, in the course of delivering an elegant banquet address, David referred generously to our having “mentored one another,” despite the difference in seniority and despite our having come to the history and the law of ocean uses from different but intersecting paths. For me, this mentoring exchange produced enduring intellectual benefit, but it also brings to mind today the memory of David’s capacity for loyalty and of his love of lively, though always respectful, intellectual engagement. For many others, in the many legal, juridical, and academic organizations in which he served—and in which he so often took a leadership role—one can be certain that there are similar memories of how he enriched the lives of individuals and exemplified the worthiest values of those institutions.

One can also say with a certainty that David would have taken great pleasure in the publication of the present BJIL-ELQ joint edition, representing, as it does, a merger of his deep interests in science, environmental values, rule of law ideals, dispute resolution, and, more comprehensively, the human condition as affected by legal ordering of the oceans. He will be sorely missed by the many colleagues with whom he was associated in the several worlds of public service and of law, both academic and practical, in which he made his indelible mark. But missed by none, outside his beautiful family, more so than by the community of scholars, jurists, and policy officials who shared his devotion to the study and advancement of ocean law and policy—always, as David advocated, in the context of the quest for a global regime of rule of law.