

## **Panel 18: Alternative Orders: [R]evolution or Reconstitution?**

### CLE Reading Material:

- The Click-and-Commit World Order; MJ Durkee, Chicago Journal of International Law Vol 26 (2025)
- The International Order, International Law, and the Definition of Security; Harlan Grant Cohen, Michigan Journal of International Law Vol. 47 (2026)
- Multilateralism's Life Cycle; Harlan Cohen; AJIL;  
<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/multilateralisms-life-cycle/49343526DF8DD1B9C3834F0577C03B98>

## The Click-and-Commit World Order

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### Abstract

*This essay explores the rise of a new model of global governance: the “click-and-commit world order,” characterized by digitally mediated pledging platforms through which a wide array of actors—states, corporations, cities, NGOs, and individuals—publicly commit to addressing global problems through non-binding promises. In contrast to traditional treaty-making, these pledging platforms offer a decentralized, voluntary framework for international cooperation that relies on public declarations rather than negotiated obligations.*

*Within the U.N. system, this mode of governance developed within the United Nations Global Compact and the Paris Climate Agreement, where bottom-up pledges were institutionalized within formal and informal international structures. The internet now amplifies and democratizes this model, enabling coordination and norm diffusion without requiring state action or legal enforcement. Examples such as the Net Zero Space Initiative and a range of climate-related platforms illustrate how the pledging order bypasses formal treaty regimes in favor of reputational incentives, public transparency, and symbolic participation.*

*The essay evaluates the values, risks, and institutional dynamics of this emergent order, including its emphasis on pluralism, voluntarism, and functional over status-based participation. Ultimately, the pledging order reflects a shift from constitutional, rule-restraining global law toward a voluntarist, productivity-oriented attempt to address 21st-century transnational challenges—particularly where formal multilateralism has stalled.*

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I. INTRODUCTION

One corner of the internet houses the “Net Zero Space” initiative. There is a URL, where anyone on Earth with an unrestricted internet connection may access the project.<sup>1</sup> The initiative describes itself as “a multi-stakeholder platform calling to achieve sustainable use of outer space by 2030 by taking concrete actions to mitigate the generation of new orbital debris and remediate existing ones.”<sup>2</sup> Orbital debris threaten the utility of orbital bands that satellites inhabit and that rockets and astronauts must cross to reach outer space. Like several other significant global problems, international law has not (yet) managed to offer a rules-based solution.

What exactly is the Net Zero Space initiative? Curiously, it uses frameworks familiar to international lawyers. Navigate to the Frequently Asked Questions (FAQs) page to learn that there is a “Declaration.”<sup>3</sup> This “is a soft law instrument and, as such, supporting it bears no implication under national or international law: it’s merely a political signal in favor of the larger political goal.”<sup>4</sup> The initiative is not “legally binding,” a question that is only relevant if one is thinking in terms of law.<sup>5</sup> Dig deeper to learn that the host of the initiative is an organization called the Paris Peace Forum, which is “a platform open to all,” though it adopts the language and trappings of late twentieth-century inter-state organizations.<sup>6</sup> The Forum “work[s] to improve global governance through multistakeholder cooperation” and serves as the “secretariat” to the Net Zero Space initiative.<sup>7</sup>

The initiative functions by soliciting and publicizing “concrete actions,” which it elsewhere characterized as pledges.<sup>8</sup> Participants in the initiative must provide a “concrete announcement,” that is, a pledge to do something relevant to the initiative’s agenda.<sup>9</sup> Amazon’s Project Kuiper, for example, pledges to “[d]eploy their satellites at altitudes that support reliable deorbiting at the end of mission life, using active propulsion to enable deorbit in less than one year[.]”<sup>10</sup> The FAQs continue: “Is there a monitoring mechanism to assess compliance with

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<sup>1</sup> *Sustainable Use of Outer Space by 2030*, NET ZERO SPACE, <https://perma.cc/VAW9-5R66> (last accessed Mar. 30, 2025).

<sup>2</sup> *Frequently Asked Questions*, NET ZERO SPACE, <https://perma.cc/FYT6-BMPS> (last accessed Mar. 30, 2025).

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

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

<sup>5</sup> *Id.*

<sup>6</sup> *About Us*, [PARIS PEACE FORUM](https://perma.cc/35NF-ENNM), <https://perma.cc/35NF-ENNM> (last accessed Apr. 29, 2025).

<sup>7</sup> *Frequently Asked Questions*, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Amazon: Project Kuiper*, NET ZERO SPACE, <https://perma.cc/Y49P-VKRG> (last accessed Mar. 30, 2025).

the pledges?”<sup>11</sup> This question once again recalls late 20th century international law, which relied heavily on such mechanisms to facilitate the effectiveness of its rules. Net Zero Space disavows these techniques. No monitoring. And joining is simple! “Support can be formalized by a simple confirmation via e-mail of your willingness to join. You can reach us at [netzerospace@parispeaceforum.org](mailto:netzerospace@parispeaceforum.org).”<sup>12</sup>

Welcome to the Click-and-Commit World Order. In an era of geopolitical challenges, a retreat from robust multilateralism, and a growing list of issues demanding international coordination, public and private actors of many kinds have begun to innovate around the modalities of cooperation. Technology, specifically the easy communication of the internet, facilitates this.

Key to the click-and-commit order is the idea of “pledging.” Elsewhere I have defined pledging as individual promises actors make in a way that is not formally reciprocal, or part of a bargained-for exchange.<sup>13</sup> These are often made within a pledging platform, which is the framework of cooperation in which the pledge is made. The Net Zero Space initiative, with its facilitative website and email address, exemplifies this. The pledging platform calls for pledges (provide your “concrete announcement”) and defines the goal (“mitigate the creation of new orbital debris and remediate those existing”).<sup>14</sup> The pledging platform sometimes offers standards the pledges should meet. The platform usually offers some apparatus to collect the pledges and maintain records of them (a “simple confirmation via e-mail”).<sup>15</sup> It sometimes publishes these pledges (“examples of what current supporters have committed to may be found on the ‘Supporters’ tab on this website”) to celebrate progress, attract more subscribers, or facilitate accountability.<sup>16</sup>

Of course, pledging is now also familiar within formal international law as a treaty design choice. Consider the Paris Climate Agreement: states are asked to make individual pledges (nationally determined contributions) within the overall framework of the treaty (the pledging platform).<sup>17</sup> What internationally-minded individuals and groups have realized, however, is that pledging as a mechanism of cooperation does not depend on the special status of states as sovereigns. After all, each actor pledges only for him or herself and the only consequences for failure to deliver on the pledge are reputational. States can pledge, but so can cities, corporations, individuals, universities, NGOs, think tanks, religious groups, and

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<sup>11</sup> *Frequently Asked Questions*, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> Melissa J. Durkee, *The Pledging World Order*, 48 YALE J. INT’L L. 1 (2023).

<sup>14</sup> *Sustainable Use of Outer Space by 2030*, *supra* note 1.

<sup>15</sup> *Frequently Asked Questions*, *supra* note 2.

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

<sup>17</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

others. Moreover, the internet can take the place of the major international treaty conference or international organization: gathering participants, coordinating, creating focal point moments, and generating hype. And so, pledging has escaped the bounds of formal international law and leapt into the pluralistic cybersphere. It has permeated the climate change issue area and spread far beyond it to forest protection, fair trade practices, the circular economy, packaging waste, orbital debris, and on and on.

What do we make of these facts? What is the relationship between the rules-based international order and the click-and-commit pledging order? And what does this relationship augur for the future? This essay begins to evaluate these implications.

Concerned? The future is in our hands. Click here to “commit to declaring concrete, tangible example(s) of actions . . . [you] took, or are planning to undertake”<sup>18</sup> to address it.

## II. BACKGROUND

One way to contextualize the relationship between technologically mediated pledging activity and international lawmaking is to cast the former as an indicium of the gradual retreat of the state from the center of international problem solving, as rules-based international legal ordering shrinks within a rapidly pluralizing broader landscape of global governance.

The traditional international legal origin story begins at the Peace of Westphalia in 1648 and its centering of the state as sovereign, with rights of domestic non-intervention and sole authority for international lawmaking. That Westphalian understanding began to shift in the 20th century, especially after the Second World War, with constitutional treaties, multilateral organizations, and human rights obligations that pierced the veil of sovereign prerogative to bring international legal rights to the individual. The end of the Cold War precipitated and coincided with increasing globalization, progressively eroding the central role of states in developing and disseminating international legal norms. International organizations made rules and defined norms; non-state actors used the capacities of the internet to network across state borders and coordinate and participate in the work of global governance; multilateral treaty regimes multiplied with their accompanying secretariats and committees; state officials networked and coordinated with peers, disaggregating the state.

The 21st century and the launch of social media only accelerated the capacity of diverse groups to connect and organize around the globe. At the same time, it revealed the international system’s inability to respond to major global problems

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<sup>18</sup> *The Net Zero Space Declaration*, NET ZERO SPACE, <https://perma.cc/MTP6-FTTU> (last accessed Apr. 27, 2025).

like climate change and distributional injustices. These failures accelerated a populist backlash to the post-Cold War era globalist ambitions of U.N. officials and other elites. As the first quarter of the century comes to a close, these problems are coming to a head, with states flaunting international rules, decoupling through national security exceptionalism, and failing to curb the oncoming climate cataclysm.

The story of the rise of international norm generation through click-commit “pledging” is embedded in this larger context. It begins in the post-Cold War period, as a slew of new actors entered the international lawmaking ecosystem. These include civil society actors, “NGOs, social movements, business forums, research institutes, and other civil society associations,”<sup>19</sup> and the commercial private sector. While the U.N. system had formally relegated non-state actors to minor and subsidiary roles at its founding,<sup>20</sup> the U.N. came to embrace these actors in the late 20th century. Thousands of organizations gained consultative status through the U.N.’s Economic and Social Council, and groups began to regularly attend annual meetings of the International Monetary Fund, the World Bank, the Ministerial Conference of the World Trade Organization, the Conference of the Parties for the Climate Treaties, and many other fora. U.N. leaders like former U.N. Secretary General Kofi Annan hailed this influx as a participatory “revolution” and a “global people power.”<sup>21</sup> His successor Boutros Boutros-Ghali celebrated the democratizing effect of civil society participation, calling it “a basic form of popular representation in the present-day world.”<sup>22</sup>

Business groups were among the swell of engaged participants and the U.N. ultimately embraced them too. The “acceleration of business-led global integration during the 1990s” led to the business sector’s increasing interest in engaging with international organizations.<sup>23</sup> Business groups engaged in the same ways as the rest of civil society—through non-profit trade and industry associations accredited as “consultants” to ECOSOC and other bodies,<sup>24</sup> through

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<sup>19</sup> Jan Aart Scholte, *Relations with Civil Society*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 715 (Jacob Katz Cogan et al. eds., 2016).

<sup>20</sup> See Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742, 1754–58 (2018).

<sup>21</sup> Press Release, U.N. Secretary-General, Partnership with Civil Society Necessity in Addressing Global Agenda, Says Secretary-General in Wellington, New Zealand Remarks, U.N. Press Release SG/SM/7318 (Feb. 29, 2000), <https://perma.cc/9QFP-FLT7>.

<sup>22</sup> 47th Annual DPI/NGO Conference, United Nations, Keynote Address by Secretary-General Boutros Boutros-Ghali, 3 (Sept. 8, 1994).

<sup>23</sup> Georg Kell, *Relations with the Private Sector*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 730 (Jacob Katz Cogan ed., 2017).

<sup>24</sup> See generally Durkee, *supra* note 20 (discussing business engagement through the ECOSOC consultancy system).

membership on national delegations, and through other formal and informal consultative and partnership roles.<sup>25</sup>

The U.N.'s turn toward private actors launched its embrace of pledging as an ordering mechanism and problem-solving tool. First came the Millennium Declaration of 2000, anticipating "greater opportunities to the private sector, non-governmental organizations and civil society, in general, to contribute to the realization of" the U.N.'s goals.<sup>26</sup> The vehicle for the private sector contributions came in the form of the U.N. Global Compact. The Compact was a "call to companies around the world to align their strategies and operations" in support of U.N. goals in areas like human rights, labor, anticorruption, and environment.<sup>27</sup> According to Georg Kell, founder and former Executive Director of the U.N. Global Compact, the Global Compact has led to a "silent reform," in U.N. working practices, and an era of strategic partnerships and public-private projects of all kinds.<sup>28</sup>

In sum, as the possibilities for robust multilateral legal ordering declined in the early 21st century, even as global problems mounted, international organizations welcomed a slew of diverse non-state actors into global governance using innovative new methods of engaging cooperation. By leaning into the participatory dynamics and the digital technology that facilitates them, the U.N. adopted a pledging blueprint that deemphasizes hard law and the state. Many other actors followed suit.

### III. PLEDGING

What is this pledging blueprint? I have previously defined this as constituted by pledging within pledging platforms.<sup>29</sup> A pledge is a non-reciprocal, individually determined commitment (a pledge) made within a larger framework of cooperation (a pledging platform). Actors pledge when they independently determine what it is that they promise to do, rather than negotiating about those commitments as a group and committing to a common promise. Pledges are bottom-up, customized commitments made in response to a call.

That call, and the larger framework of cooperation, are what I call the "pledging platform." The platform defines the goal, seeks and gathers pledges, sometimes offers criteria or standards for the pledges, and usually publishes them

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<sup>25</sup> See generally Kell, *supra* note 23 (outlining a variety of forms of engagement).

<sup>26</sup> G.A. Res. 55/2, Millennium Declaration, U.N. Doc A/RES/55/2 (Sept. 18, 2000) ¶ 30.

<sup>27</sup> Press Release, U.N. Global Compact, Results from the Global Compact Survey says that a deeper understanding of sustainability issues is gaining momentum around the world but much remains to be done to truly operationalize corporate sustainability and translate commitments into tangible action, UNTV (Jun. 4, 2012), <https://perma.cc/EEU4-THY3> (last accessed Apr. 27, 2025).

<sup>28</sup> Kell, *supra* note 23.

<sup>29</sup> This portion builds on terms and analysis first offered in Durkee, *supra* note 13.

to celebrate progress, attract more subscribers, or facilitate accountability. The pledging platform sometimes requires other activities in connection with the pledge, like progress reports, an accounting, or subsequent pledges expressing greater ambition. The pledging platform is the organizing infrastructure for the pledges, often hosted on a webpage. Indeed, this entire method of problem solving is only realistically realizable within the digital environment of the globalized twenty-first century. Consider two highly salient examples: the Global Compact, and climate pledges.

### A. The Global Compact

After attempting, but failing, to develop international legal regulations to ensure corporate accountability during the cold war years, the U.N. tried a more voluntary tack at the end of the century under Kofi Annan.<sup>30</sup> It launched the Global Compact, “a call to companies to align strategies and operations with universal principles.”<sup>31</sup> I characterize the Global Compact as a major, influential, internet-facilitated pledging platform.

The Global Compact solicits pledges. Specifically, it asks businesses to “demonstrate their leadership role as world citizens” by pledging to “endor[s] and champion[] the nine principles . . . and mak[e] sure they are carried out in corporate practice.”<sup>32</sup> Originally, Compact members were simply asked to endorse the principles and make progress reports.<sup>33</sup> Later, the Compact solicited forward-looking pledges in each of the Global Compact’s principal areas of focus—human rights, labor, environment, and anti-corruption<sup>34</sup>—and set out a framework for periodic review and renewal of the pledges. The Compact anticipated that companies would “ratchet up” their commitments with successive pledges.<sup>35</sup>

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<sup>30</sup> Compare Comm. on Transnat’l Corporations, *Draft United Nations Code of Conduct on Transnational Corporations*, in Rep. on the Spec. Sess., U.N. Doc. E/1983/17/Rev.1, ¶¶ 12–27 (1983) with Office of High Comm’r, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework, U.N. Doc. HR/PUB/11/04 (2011), <https://perma.cc/4G6M-Q99Y>. The two regimes demonstrate a pivot away from binding regulation, with the latter regime dispensing with the regulatory frame and emphasizing only the corporate duty to *respect* human rights.

<sup>31</sup> *Who We Are*, U.N. GLOBAL COMPACT, <https://perma.cc/BB2W-6B5N> (last accessed Mar. 30, 2025).

<sup>32</sup> Kathryn Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison* 5 (OECD, Working Papers on International Investment No. 2001/05, 2001); see also *Who We Are*, *supra* note 31.

<sup>33</sup> Gordon, *supra* note 32, at 6 (noting that these reports were meant to include “specific examples of progress [entities] have made or lessons they have learned in putting the principles into practice”).

<sup>34</sup> *The Communication on Progress*, U.N. GLOBAL COMPACT, <https://perma.cc/5QUX-BSUE> (last accessed Apr. 5, 2025).

<sup>35</sup> Gordon, *supra* note 32, at 6.

Pledges are published on a searchable webpage.<sup>36</sup> In fact, website viewers can navigate around a map of the world to peruse Compact partners and corresponding pledges.<sup>37</sup>



*U.N. Global Compact, "Explore Our Participants" Page*

Joining the Compact just takes a few clicks on a simple application page, and the Compact has been wildly successful in terms of the sheer numbers of its participants. As of this writing, the Compact claims as members “over 20,000+ companies based in over 160 countries, both developed and developing, representing nearly every sector and size.”<sup>38</sup> Its participant database has nearly 25,000 entries.<sup>39</sup> Participants include business, nongovernmental organizations, foundations, academic institutions, and other groups.<sup>40</sup> Notably, the pledges serve as the Compact’s cornerstone means of enlisting participation and action, and the U.N.’s major effort in the area of corporate accountability. The U.N. dropped its former efforts to develop binding regulation on corporations concerning issue areas within the Compact.

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<sup>36</sup> See *Who’s Involved*, U.N. GLOBAL COMPACT, <https://perma.cc/UL5K-RMA9> (last accessed Mar. 30, 2025).

<sup>37</sup> *Explore Our Participants*, U.N. GLOBAL COMPACT, <https://perma.cc/9EJQ-37PU> (last accessed Mar. 30, 2025).

<sup>38</sup> *Who We Are*, *supra* note 31.

<sup>39</sup> See *Who’s Involved*, *supra* note 36.

<sup>40</sup> Georg Kell, *Twelve Years Later: Reflections on the Growth of the U.N. Global Compact*, 52 BUS. & SOC’Y 31, 31–52 (2021) (reviewing these diverse participant groups).

## B. The Paris Climate Treaty

In the climate arena, pledging has become a major ordering mechanism inside and outside of formal international law. The 2015 Paris Climate Agreement, concluded fifteen years after the launch of the Global Compact, is itself an example of pledging within a pledging platform.<sup>41</sup> The core of the agreement is the call for pledges: “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”<sup>42</sup> In other words, parties decide what climate mitigation measures they will take and thus choose their own treaty commitment. These are bottom up, individually determined, non-reciprocal commitments—customized pledges to suit the needs of the pledgor.

Negotiating parties also agreed on the terms of the pledging platform: Pledges must be made every five years;<sup>43</sup> they must be communicated and publicly recorded;<sup>44</sup> successive pledges are meant to “represent a progression” beyond previous pledges;<sup>45</sup> pledges must “reflect [a party’s] highest possible ambition”;<sup>46</sup> and parties must “account” for whether or not they have achieved their pledge.<sup>47</sup> These commitments make up what I call the pledging platform—the infrastructure within which the pledges are made.

## C. The Climate Action Portal

Pledging is not just a matter of formal international law in the climate context. In addition to the treaty, the Paris Climate Conference also produced a pledging platform open to all. Indeed, the state pledging platform within the climate treaty was only one piece of a larger pledging landscape the 2015 conference created. U.N. Secretary-General Ban Ki-moon opened the conference by calling for “all hands on deck,” meaning not just States Parties, but anyone able

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<sup>41</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 17.

<sup>42</sup> *Id.* art. 4.2.

<sup>43</sup> *Id.* art. 4.9 (“Each Party shall communicate a nationally determined contribution every five years.”).

<sup>44</sup> *Id.* art. 4.8 (requiring parties to ensure that their nationally determined contributions are clearly communicated); art. 4.12 (“Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.”).

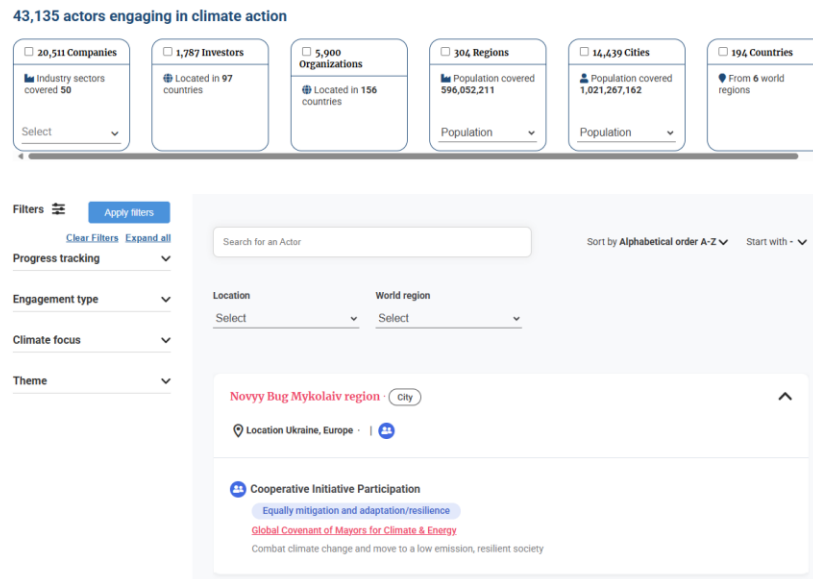
<sup>45</sup> *Id.* art. 4.3 (“Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution”); art. 3 (“The efforts of all Parties will represent a progression over time.”).

<sup>46</sup> *Id.* art. 4.3 (“Each Party’s successive nationally determined contribution will represent . . . its highest possible ambition . . .”).

<sup>47</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, *supra* note 17, art. 4.13 (requiring parties to “account” for their nationally determined contributions); art. 14.2 (requiring parties to periodically and publicly take stock of their collective progress).

to contribute to the climate mitigation project.<sup>48</sup> And so, the States Parties meticulously designed and announced a Non-State Actor Zone for Climate Action (NAZCA) platform and a corresponding Global Climate Action portal, with details included in the covering adoption instrument for the climate treaty. Rather than relying on just the state pledges and any corresponding regulations states might make to fulfil their pledges, the Non-State Actor Zone cut out the middleman of the state, taking the project right to individual groups.<sup>49</sup> After fifteen years of Global Compact pledges, the blueprint was familiar.

Like the Global Compact, the Global Climate Action Portal also upgraded its functionality over time, later launching “the tracking of voluntary climate action with the inclusion of the progress made by individual actors registered in the portal.”<sup>50</sup> Now, website viewers can search among the 43,135 (at print) “actors engaging in climate action” evaluating for themselves the ambition of each actor’s pledge and the progress each has achieved.<sup>51</sup>



*NAZCA Global Climate Action Portal, Actor Tracking page*

<sup>48</sup> Ban Ki-moon, *Remarks to COP21 Presentation of Draft Outcome Document*, U.N. (Dec. 12, 2015), <https://perma.cc/M975-URRY>.

<sup>49</sup> Conference of the Parties to the United Nations Framework Convention on Climate Change, 21<sup>st</sup> Sess., Decision 1/CP.21, FCCC/CP/2015/10/Add.1, at Preamble (expressing intention to “mobilize stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples”).

<sup>50</sup> *Actor Tracking*, NAZCA GLOBAL CLIMATE ACTION, <https://perma.cc/5Y28-5XW3> (last accessed Feb. 28, 2025).

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

Prospective participants can simply email information about their initiative and climate goals to a NAZCA email address.<sup>52</sup> If accepted, the groups will be invited to provide progress information through an annual tracking process. All information provided on the portal is “as reported,” and unendorsed.<sup>53</sup>

#### D. Pledging Goes Viral

The pledging idea soon leapt far beyond these U.N.-sponsored fora, reaching actors of every kind around the globe. Climate pledging platforms are often layered and interconnected, where a pledge through one platform opens the door to the next.

The Science Based Targets initiative (SBTi) invites members to “align [their] corporate voluntary greenhouse gas reduction targets with climate science,” that is, to “set a science-based target.”<sup>54</sup> The clothing retailer H&M Group, for example, “commits to reduce absolute scope 3 GHG emissions 56% by FY2030 from a FY2019 base year.”<sup>55</sup> The initiative claims over 10,000 members as of this writing.<sup>56</sup> Ambitious companies who join the SBTi can, in turn, join other campaigns, like the We Mean Business Coalition. We Mean Business links a number of business-facing pledging campaigns together, crowing that “2023 saw a 44% increase in companies making ambitious climate commitments through SBTi, SME Climate Hub, The Climate Pledge and others annually.”<sup>57</sup>

The Glasgow Financial Alliance for Net Zero (GFANZ) attempts to coordinate pledging efforts for the financial sector.<sup>58</sup> GFANZ, while launched by a U.N. Special Envoy on Climate Action and Finance, claims now to be a “stand-alone, private-sector group that focuses on supporting efforts within the financial services sector to achieve the Paris Agreement objectives.”<sup>59</sup> GFANZ “brings together CEOs and leaders from the financial services sector to support the

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<sup>52</sup> *Tracking and Recognition*, NAZCA GLOBAL CLIMATE ACTION, <https://perma.cc/9L4X-6NT3> (last accessed Apr. 24, 2025).

<sup>53</sup> *Cooperative Initiative Tracking*, NAZCA GLOBAL CLIMATE ACTION, <https://perma.cc/K73D-83EH> (last accessed Feb. 28, 2025).

<sup>54</sup> *Set Science-Based Emission Reduction Targets*, UN GLOBAL COMPACT, <https://perma.cc/A763-KPDQ> (last accessed Feb. 28, 2025).

<sup>55</sup> *Supplier Engagement Case Study – H&M Group*, SCIENCE BASED TARGETS, <https://perma.cc/PV3L-SK25> (last accessed May 13, 2025).

<sup>56</sup> *Id.*

<sup>57</sup> *Progress*, WE MEAN BUSINESS COALITION, <https://perma.cc/EH95-B8A5> (last accessed Feb. 28, 2025).

<sup>58</sup> GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, <https://perma.cc/KYZ5-UENX> (last accessed Feb. 28, 2025).

<sup>59</sup> *About Us*, GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, <https://perma.cc/3N84-23GQ> (last accessed Feb. 28, 2025).

transition to a net-zero economy.”<sup>60</sup> Among other things, GFANZ helps with transition planning for “financial services sector participants [who] independently decide to align their businesses and portfolios to net zero”<sup>61</sup>—that is, GFANZ supports entities that have made climate pledges.

Subnational actors have also joined the pledging movement. One of the most well-known is the C40 Cities initiative, a network of mayors that are united in action to confront the climate crisis.”<sup>62</sup> Participating cities must publish 1.5°C-compatible climate action plans.<sup>63</sup> The Under2 Coalition and Climate Mayors are other entrants. Under2 boasts membership of 270 subnational governments representing more than 50% of the global economy.<sup>64</sup> Under2 pledges must include a greenhouse gas inventory, near- and long-term reduction targets, and a plan aligned with those targets.<sup>65</sup> Climate Mayors is “a bipartisan network of nearly 350 U.S. mayors” that “represent[s] 46 states and nearly 60 million Americans;”<sup>66</sup> participants sign pledges “committing to the Paris Agreement.”<sup>67</sup> The Japan Climate Initiative and the European Climate Pact have also launched pledging campaigns.<sup>68</sup>

The Global Compact, the Paris Climate Agreement, and exploding diversity of climate pledging platforms are examples of a means of ordering that has spread to many issue areas, launched and hosted by many kinds of groups, including international organizations, substate entities, “independent” organizations, and other non-state groups.

Consider the World Economic Forum and its Davos-based pledging forum. Outcomes at Davos take the form of pledges: “lists of announcements made by private and/or public stakeholders about initiatives and partnerships launched in the broad direction of required action.”<sup>69</sup> These pledges encompass a vast diversity

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<sup>60</sup> *Id.*

<sup>61</sup> *Financial Institution Net-zero Transition Plans*, GLASGOW FINANCIAL ALLIANCE FOR NET ZERO, <https://perma.cc/5HYF-7YK9> (last accessed Apr. 17, 2025).

<sup>62</sup> *About C40*, C40 CITIES, <https://perma.cc/2BWY-5GLD> (last accessed Feb. 28, 2025).

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

<sup>64</sup> *Under2 Coalition*, CLIMATE GROUP, <https://perma.cc/8ACD-K965> (last accessed Feb. 28, 2025).

<sup>65</sup> *Under2 Memorandum of Understanding*, CLIMATE GROUP, <https://perma.cc/8BPJ-YERW> (last accessed Feb. 28, 2025).

<sup>66</sup> CLIMATE MAYORS, <https://perma.cc/HJW7-9F78> (last accessed Feb. 28, 2025).

<sup>67</sup> *Who We Are*, CLIMATE MAYORS, <https://perma.cc/A2BE-8HXP> (last accessed Feb. 28, 2025).

<sup>68</sup> JAPAN CLIMATE INITIATIVE, <https://perma.cc/4LRF-PYWK> (last accessed Feb. 28, 2025); *Pledging Guidance for Companies*, EUROPEAN CLIMATE PACT 1 (2009), <https://perma.cc/NL9K-ZUL3>.

<sup>69</sup> Georgios Kostakos, *The Privatisation of Global Governance: Forget New York, Keep Davos?*, EUROWEST (Apr. 2, 2020), <https://perma.cc/RG7E-Y5XZ> (critiquing these pledges as “collections of apples and pears—different partners, different budgets, different targets—which are very difficult to aggregate, to assess the expected actual result on people and planet, and to monitor implementation in practice”).

of topics such as protecting the world's forests, increasing diversity and inclusion in the workplace, facilitating a circular capital equipment industry, lowering emissions, reducing packaging waste, and training workers in digital skills.<sup>70</sup>

Other non-state and multistakeholder groups have adopted this format. The Paris Peace Forum is a World Economic Forum look-alike, with multiplying pledging initiatives, including the Net Zero Space initiative reviewed at the outset of this essay.<sup>71</sup> Ceres, the investor watchdog group, has also turned to pledging platforms, like its Ceres Ambition 2030 initiative.<sup>72</sup> Pledging platforms are popping up in the areas of biodiversity, forest protection, the circular economy, packaging waste, labor practices and training, fair trade practices, and in many other areas. The CEO pledge asks CEOs to make commitments with respect to inclusive workplaces.<sup>73</sup> The Giving Pledge targets philanthropists.<sup>74</sup> The Antimicrobial Resistance Industry Alliance calls for pledges to lobby in favor of the conservation of antibiotics.<sup>75</sup> The Parity Pledge requires commitments to race and gender diversity in corporate boardrooms.<sup>76</sup> Famously, the Association for Lou Gehrig's (ALS) Ice Bucket Challenge caused a major viral moment when it asked individuals to pledge money and publicize the cause by dousing themselves in buckets of ice water.

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<sup>70</sup> See Durkee, *supra* note 13, at 31 (reviewing these initiatives).

<sup>71</sup> See generally PARIS PEACE FORUM, <https://perma.cc/HFU6-HAGL> (last accessed Mar. 31, 2025). The Paris Peace Forum counts as its supporters “states and multilateral organizations, but also NGOs, companies, development agencies, foundations, philanthropies, religious groups, associations, think tanks, universities, and civil society at large.” *Id.* Its agenda is to be “the place where heads of state and international organizations work hand in hand with civil society and the private sector to build new forms of collective action . . . [and] put the spotlight on those who implement concrete actions by advancing worldwide governance projects.” *Id.*

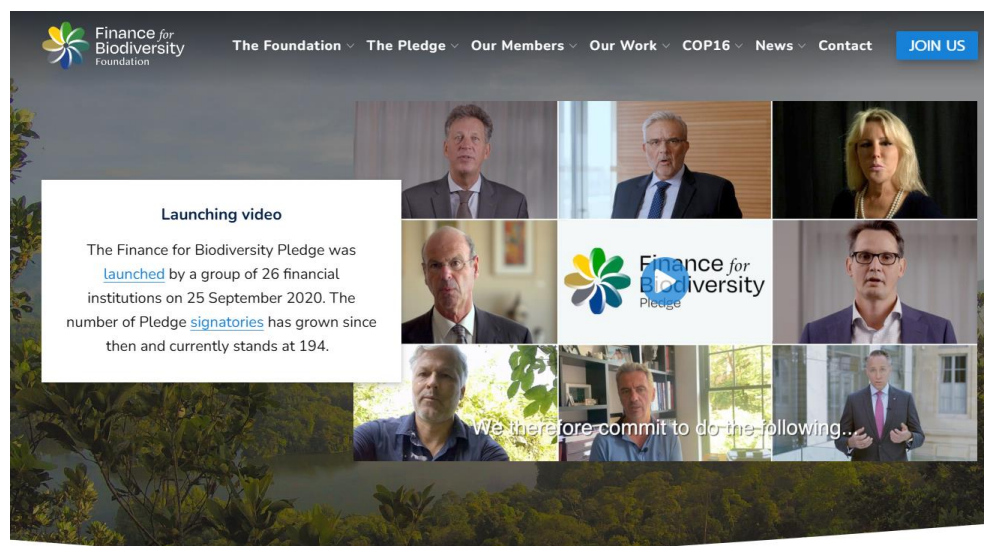
<sup>72</sup> Mindy Lubber, *An Urgent Call To High-Emitting Sectors: It's Time For Climate Action*, FORBES (Sept. 2, 2021), <https://perma.cc/8XDQ-36PN> (reporting that the initiative asks “the biggest emitters to ratchet up the ambition of their corporate climate goals, create robust transition action plans, and provide disclosure about how they’re achieving interim targets by 2030”).

<sup>73</sup> *Pledge*, CEO ACTION FOR DIVERSITY & INCLUSION, <https://perma.cc/8LEF-XDP4> (last accessed Mar. 31, 2025).

<sup>74</sup> *About the Giving Pledge*, THE GIVING PLEDGE, <https://perma.cc/F8RT-XP5B> (last accessed Mar. 31, 2025).

<sup>75</sup> *AMR Industry Declaration*, AMR INDUSTRY ALLIANCE, <https://perma.cc/8AUE-55WP> (last accessed Feb. 28, 2025).

<sup>76</sup> *Take the Parity Pledge*, PARITY.ORG, <https://perma.cc/U7NN-5CXN> (last accessed Apr. 17, 2025).



*The Finance for Biodiversity Foundation, About the Pledge page.*

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The internet has enabled, facilitated, and disseminated the pledging phenomenon. Paradigmatic 20th century forms of cooperation required physical presence at a treaty conference or in another forum, and the “platform” was the conference itself and the treaty depository. With the internet revolution, international organizations and other groups can launch major pledging projects online, using online repositories to collect, disseminate, and publicize pledges. Pledging platforms depend for their success on the open internet and the technological capacity of the organizations that develop and host them. Their popularity as an ordering device existing alongside, within, and outside the international legal order brings a range of potential implications.

#### IV. IMPLICATIONS

What are the implications of click-to-commit global problem solving? How does the technologically facilitated pledging order relate to the international legal order?

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<sup>77</sup> *Ice Bucket Challenge Dramatically Accelerated the Fight Against ALS*, ALS ASS'N (June 4, 2019), <https://perma.cc/DTB9-C6CV>.

## A. Values

In contrast to the post-war rules-based international order, the pledging order exhibits its own values, specifically the interrelated values of volunteerism and pluralism.

Beginning with volunteerism, consider that pledges are not the product of legislative deliberations or contractual negotiations, and that pledging is formally “non-cooperative.”<sup>78</sup> Instead of legislation or contract, its format might be described as “potluck” governance, or loosely organized volunteering within a common structure. Pledging entities do not negotiate, they simply declare their intentions. While it is true that some pledges may be a product—to some degree—of informal bargaining, the pledges themselves are individually determined, independent, and not formally related to any other pledges. The pledging order thus encourages voluntary action and innovation. It is organized on a principle of prosocial volunteerism rather than legislative institutionalization.

Volunteerism as a core value brings several implications. First, volunteering can encourage ambition and experimentation but offers little in the way of accountability for compliance or sanction for non-compliance. Does tracking progress on a website really provoke deep, substantive change? Even in the context of formal international law, pledging can be “fragile and prone to defections” because “[s]tates cannot compel other states to submit an ambitious [pledge] or punish states for falling short.”<sup>79</sup> Between states, such as in the Paris Climate Agreement, pledging marks a retreat from the high-water mark of postwar organization in the late 20th century. For example, in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, states adopted a treaty in an attempt to set a universal moral code. Subsequent decades brought increasing moves toward constitutionalization of world affairs. Pledging marks a different move: institutionalization and legalization only at the margins, and near-complete autonomy for system participants. This is even more true when the pledging platform is hosted and populated by substate or nonstate entities. It is not incidental that pledging uses the socially inflected language of “ambition” rather than the legally-inflected “obligation.” Instead of formal sanctions, the pledging order relies on social and reputational mechanisms to encourage productive activity.

Second, volunteering requires authority only over oneself or the unit for which one volunteers, not a broader public authority, as is required for legislative authority. Pledges are meant to constrain only the pledgor. Pledging thus de-

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<sup>78</sup> See, e.g., Carlo Carraro, *A Bottom-Up, Non-Cooperative Approach to Climate Change Control: Assessment and Comparison of Nationally Determined Contributions (NDCs)* 4–14 CTR. ECON. POLICY RSCH. Discussion paper No. 12627 (2018).

<sup>79</sup> Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?*, 46 *ECOLOGY L.Q.* 865, 886 (2019).

emphasizes status, encouraging productive commitments by any kind of actor—public or private, national or municipal. “As the legal order of states gives way to something much more fluid,” Simon Chesterman says, “we may be seeing a move from status to function.”<sup>80</sup> This is exactly the shift the pledging order exemplifies.

This brings us to the second core value of the pledging order: pluralism. While the order reflects shallower cooperation and a move away from the constitutional ambitions of the 20th century, it draws participation from a deeper bench of actors. It fosters experimentation and overlapping projects aiming at the same goal. The order is equalizing, minimizing the importance of distinctions between formal law and informal (or non-) law, between public and private, between national and subnational.

Taken together, these features create a kind of order organized around mutual production of useful activity, rather than an order of mutual restraint, as the post-World War II order was meant to be. The pledging order perhaps highlights the increasing importance of what we might call *proactive* orders—ordering not to restrain power, but to produce activity helpful to the common good. This shift tracks the shifting nature of emerging problems: the existential threats of the current context are not just warring neighbors, but climate change, orbital debris, biodiversity degradation, and pollution. These problems require activity and innovation, not just restraint. An order organized around activity might require less constitutionalism—fewer common rules that restrain or prevent a return to power relations—and more effort: common effort, independent effort, or simply effort of any kind. Perhaps it also reflects the fact that in the case of aggregate public goods, productive governance activity can come from many sources beyond just national governments.

The jury is out on whether an order founded on pluralistic volunteerism can effectively solve important global problems. So far, the data is not promising, especially in the climate change arena. Yet it is unclear whether any other course of action would be more effective. This brings us to the relationship between pledging and other forms of formal international law.

## B. Relationship

What do we make of the pledging order, with its own values that differ from the classic values of the 20th century rules-based liberal international order? The relationship between the two orders could be competitive, complementary, or unrelated.

Pledging could be *unrelated*, or irrelevant to international legal ordering. This seems plausible on first blush. For example, the Net Zero Space initiative is not

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<sup>80</sup> See Simon Chesterman, *How ‘Public’ is Public International Law? Towards a Typology of NGOs and Civil Society Actors*, 24.2 GLOB. GOV. 159, 167 (2018) (analogizing this to the medieval shift from status to contract).

replacing efforts to address space junk by others, including the U.N. Committee on the Peaceful Use of Outer Space (COPUOS). If pledging does not obstruct legal development, it seems to be at worst a harmless sideshow, and at best a means of contributing to the substantive goals of the legal order.

Pledging could instead be *competitive* with the rules-based international order. Consider the problem of orbital debris. COPUOS is unlikely to generate legal materials on space debris that are capable of working their way into binding treaty law, as the same geopolitical challenges that thwart robust multilateralism in other areas also affect space law. Using pledging platforms to cut out the state middleman and address space actors directly appears to be a better alternative, but it could create a public impression that the problem is being adequately solved. This misimpression could, according to a public choice analysis, blunt the public's call for more, and more effective, formal binding law.<sup>81</sup> While correlation does not entail causation, there are suspicious examples of this diminution of public attention among the case studies in this essay. The launch of the U.N. Global Compact coincided with the U.N.'s turn away from pursuing international regulation of corporate actors. In the climate arena, pledges of many sorts by many kinds of actor appear to be the main mechanism for forward momentum on the climate problem, both inside and outside of formal international law. Pledging as an order could compete with international law in that it could sap the attention of interest groups, international organizations, governments, and treaty conference participants, thwarting international legal progress.

A sunnier possibility is *complementarity*. Soft law norms can sometimes lead to hard law. Perhaps pledging is a way to break ice on difficult problems, lowering the barriers to formal legal development. Pledging could also shore up trust in supranational governance, allaying legitimacy concerns about the international system that have inspired waves of populist isolationism. Samantha Besson and José Luis Martí have identified concerns with representativeness, democratic equality, and deliberation that should inspire a shift toward self-governing political communities.<sup>82</sup> The click-and-commit pledging order may offer an instantiation of this principle by devolving governance to smaller units—individual pledging entities—rather than global legislative bodies constituted by states.

## V. CONCLUSION

Pledging is not the only way international actors are organizing their affairs. The click-and-commit pledging order exists within and alongside the international

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<sup>81</sup> See, e.g., Jane S. Shaw, *Public Choice Theory*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS (1st ed. 2001), <https://perma.cc/9U6J-G5TM> (summarizing approach and concerns of public choice theory).

<sup>82</sup> Samantha Besson & Jose Luis Marti, *Legitimate Actors of International Law-making: Towards A Theory of International Democratic Representation*, 9 JURISPRUDENCE 504, 516 (2018).

legal order. Yet the values of this emerging order—voluntariness, all-hands-on-deck pluralism, function over status, and buzzy publicity—are seemingly growing, spreading, and permeating global problem-solving efforts. The future of this order and its relationship to international law are worth our attention.

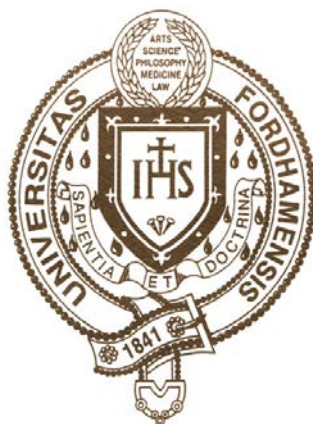
The European Space Agency just proudly announced two new partnerships to address space junk. What form did they take? A pledge and a pledging platform, of course. Both are multistakeholder efforts. The ESA pledged to work with the U.N. “to increase global understanding and consolidate knowledge on space debris, to disseminate information on the latest research” and so on.<sup>83</sup> Meanwhile, in partnership with the World Economic Forum, the ESA is launching the “Space Sustainability Rating.” Actors can “voluntarily engage . . . to demonstrate sustainability commitment.”<sup>84</sup> Click here to join.

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<sup>83</sup> *ESA and the United Nations Team Up for Space Debris*, THE EUR. SPACE AGENCY, <https://perma.cc/6E43-F3B3> (last accessed Feb. 28, 2025).

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

# Fordham University School of Law



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## **The International Order, International Law, and the Definition of Security**

By

HARLAN GRANT COHEN  
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*Forthcoming*

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# The International Order, International Law, and the Definition of Security

Harlan Grant Cohen\*

## ABSTRACT

*As economic security has seemingly moved to the center of American and European foreign policy, both the United States and the European Union have broadened their interpretation of international law rules governing security, coercion, and intervention. But these interpretations are not exactly new, echoing developing state interpretations of international law that developed states had long ago seemingly rejected. How are these once moribund interpretations of security, force, and coercion being brought back to life?*

*This essay argues that these interpretative shifts highlight the role of the international order as an interpretative mechanism within international law. Borrowing from the work of Robert Cover, it explains the ways that the international order acts as a jurispactic agent within the system, judging which interpretations live on and which are cast aside. As global power shifts, the international order shifts with it, potentially reopening interpretative fights over international law. Today's fights over the meaning of security, force, and coercion thus reflect both the realities of a changing order and the battle to shape the one to come.*

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## I. INTRODUCTION

On December 27, 2023, the European Union (EU) gained a new, potent armament in an increasingly weaponized global economy. With the entry into force of the Anti-Coercion Instrument (ACI), the European Commission was empowered by the European Parliament and Council to respond quickly and unilaterally to the “economic coercion” of its members.<sup>1</sup> “[T]he imposition of tariffs, restrictions on trade in services and trade-related aspects of intellectual property rights, and restrictions on access to foreign direct investment and public procurement,”<sup>2</sup> would all be at the Commission’s ready “to defend its interests and those of its Member States on the global stage.”<sup>3</sup>

The ACI is a momentous development marking significant shifts within international law and in international politics. Adopted in part to respond to perceived Chinese economic bullying of countries like Lithuania,<sup>4</sup> the ACI reflects the world’s increasingly potent multipolarity. Adopted against the backdrop of Russia’s invasion of Ukraine, massive EU economic sanctions against Russia,<sup>5</sup> and Russian threats to Europe’s energy supply,<sup>6</sup> the ACI captures the increasing weaponization of interdependence and the global economy.<sup>7</sup> Adopted amidst the United States’ ongoing blockade of World

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<sup>1</sup> European Commission Press Release IP/23/6804, New tool to enable EU to withstand economic coercion enters into force (27 December 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6804](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6804).

<sup>2</sup> *Id.*

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

<sup>4</sup> See, e.g., Tom Ruys and Felipe Rodríguez Silvestre, *Economic Statecraft: A Closer Look Inside the European Union’s Expanding Toolbox*, 51 GA. J. INT’L & COMPAR. L. 647, 662 (2023). Lithuanian businesses were being denied access to the Chinese market and many speculated that it was in retaliation for Lithuania decision to allow Taiwan to open an office in the country. See Anti-coercion instrument: the EU’s new weapon to protect trade, Published: 20-09-2023, Last updated: 03-10-2023 - 14:41, <https://www.europarl.europa.eu/topics/en/article/20230915STO05214/anti-coercion-instrument-the-eu-s-new-weapon-to-protect-trade#:~:text=China's%20coercion%20of%20Lithuania,with%20Taiwan%20in%20June%202021> (describing Lithuania situation).

<sup>5</sup> See, e.g., Ingrid Melander and Gabriela Baczynska, *EU Targets Russian Economy After 'Deluded Autocrat' Putin Invades Ukraine*, REUTERS, February 24, 2022, 4:49 PM EST, <https://www.reuters.com/world/europe/eu-launch-new-sanctions-against-russia-over-barbaric-attack-ukraine-2022-02-24/>.

<sup>6</sup> See, e.g., Liz Alderman, *As Russia Threatens Europe’s Energy, Ukraine Braces for a Hard Winter*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/business/ukraine-russia-energy-europe.html>.

<sup>7</sup> See, e.g., ABRAHAM L. NEWMAN & HENRY FARRELL, UNDERGROUND EMPIRE: HOW AMERICAN WEAPONIZED THE WORLD ECONOMY (2023); Henry Farrell and Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INTERNATIONAL SECURITY 42–79 (Summer 2019).

Trade Organization (WTO) Appellate Body appointments, which had since 2019, limited the effect of WTO dispute settlement,<sup>8</sup> the ACI seems to reflect the EU's own wavering commitment to multilateral dispute resolution.<sup>9</sup> And adopted as part of the EU's new Economic Security Strategy,<sup>10</sup> the ACI marks the European Commission's intensifying "geoeconomic"<sup>11</sup> turn – the Commission's growing belief that that economics and geopolitics are (again) inextricably intertwined, requiring it to take a more assertive geopolitical role.<sup>12</sup>

Less noticed, though perhaps more momentous and more symbolic of international law's current moment, is the ACI's interpretation of international law on coercion, force, and security. In a preamble justifying the legality of the ACI, the EU Regulation cites the 1970 United Nations General Assembly "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"<sup>13</sup> for the proposition that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."<sup>14</sup> According to the ACI, this rule "reflects customary international law and is thus binding in the relations between third countries, on the one part, and the Union and its Member States, on the other."<sup>15</sup> Later, the Regulation unpacks this rule further: "Coercion is prohibited and therefore a wrongful act under international law when a country

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<sup>8</sup> See, e.g., Rachel Brewster, *WTO Dispute Settlement: Can We Go Back Again?*, 113 AM. J. INT'L L. UNBOUND 61, 64-66 (2019); Kathleen Claussen, *The Other Trade War*, 103 MINN. L. REV. HEADNOTES 1, 1-19 (2018). See also Harlan Grant Cohen, *Culture Clash: The Sociology of WTO Precedent*, in PRECEDENTS AS RULES AND PRACTICE 99, 99-102, 111-24 (Amalie Frese and Julius Schumann, eds., 2021).

<sup>9</sup> See, e.g., Freya Baetens and Marco Bronckers, *The EU's Anti-Coercion Instrument: A Big Stick for Big Targets*, EJIL:TALK!, January 19, 2022, <https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/>.

<sup>10</sup> See European Commission, Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy," (June 20, 2023), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0020&qid=1687525961309>.

<sup>11</sup> See, e.g., Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655 (2019).

<sup>12</sup> See, e.g., Matthias Matthijs and Sophie Meunier, *Europe's Geoeconomic Revolution*, FOREIGN AFFAIRS, September–October 2023; Henrique Choer Moraes, *The Changing Logic of International Economic Law*, 27 UCLA J. INT'L L. & FOR. AFF. 115, 118-19 (2024) (describing how the EU is "refashioning itself to become a geoeconomic actor").

<sup>13</sup> G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, at 121, (Oct 24, 1970) [hereinafter Friendly Relations Declaration].

<sup>14</sup> Eur. Parl. Regulation 2023/2675 of 22 November 2023 on the Protection of the Union and Its Member States from Economic Coercion by Third Countries, 2023 O.J. (L 2675) 1.

<sup>15</sup> Id.

deploys measures such as trade or investment restrictions in order to obtain from another country an action or inaction which that country is not obliged to perform under international law and which falls within its sovereignty, and when the coercion reaches a certain qualitative or quantitative threshold, depending both on the objectives pursued and the means used.”<sup>16</sup> These descriptions of international law are coupled with a reasonably broad definition of economic coercion triggering Commission powers: “[E]conomic coercion exists where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State.”<sup>17</sup>

Together, these statements of international law reflect a significant shift in the EU’s legal position.<sup>18</sup> For many decades, stretching back before the United Nations Charter,<sup>19</sup> developing states have dreamed of banning economic coercion under international law, asserting broader definitions of force, coercion, and security. Listing economic coercion as a form of prohibited intervention in the Friendly Relations Declaration was one of their greatest victories,<sup>20</sup> and it has since been an anchor for their continued efforts. But European states, despite some ambivalence toward U.S. sanctions, have largely fought these efforts. Developing states have regularly supported declarations at the United Nations condemning unilateral economic sanctions.<sup>21</sup> EU member states had consistently and conspicuously abstained or voted against the resolutions, even as they drew more support from elsewhere in the world.<sup>22</sup> This should hardly be surprising. Despite disagreements with the United States over their use, European states continue to use sanctions for a variety of purposes.<sup>23</sup>

And it looked increasingly like developing state efforts had failed. Over the past few years, a series of scholars have assessed again arguments that

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<sup>16</sup> Id., 3.

<sup>17</sup> Id., 7.

<sup>18</sup> Ruys and Rodríguez Silvestre, *supra* note 4, at 666 (describing the ACI’s declaration of international law a “marked departure”).

<sup>19</sup> See Mohamed S. Helal, *On Coercion in International Law*, 52 N.Y.U. J. INT’L L. & POL. 1, 51-52 (2019) (describing Latin American efforts and prohibition of economic coercion to “obtain...advantages of any kind” in Charter of the Organization of American States).

<sup>20</sup> Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 27, 48 (1973). See also Jessica Whyte, *The Opacity of Economic Coercion*, YALE J. INT’L L., June 21, 2023, <https://www.yjil.yale.edu/the-opacity-of-economic-coercion/>.

<sup>21</sup> See Ruys and Rodríguez Silvestre, *supra* note 4, at 665. For fuller discussion, see Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE J. INT’L L. 176, 187-88 (2017).

<sup>22</sup> Ruys and Rodríguez Silvestre, *supra* note 4, at 665; Hofer, *supra* note 21, at 188.

<sup>23</sup> *Why the EU Adopts Sanctions*, EUROPEAN COUNCIL & COUNCIL of the EUROPEAN UNION, <https://www.consilium.europa.eu/en/policies/why-sanctions/> (last visited Sept. 20, 2024).

economic coercion violated international law and found them lacking. Assessing Venezuela's claims that U.S. sanctions against the country constitute a crime against humanity, Dapo Akande, Payam Akhavan, and Eirik Bjorge conclude that "[w]hile the right to adopt sanctions is not unlimited, international law allows considerable freedom of action in respect of unilateral measures of this kind."<sup>24</sup> They find that Sarah Cleveland was correct in concluding that "[n]othing in customary international law...appears to bar the use of economic coercion."<sup>25</sup> Antonios Tzanakopoulos finds no "fundamental right to be free from economic coercion."<sup>26</sup> And "[i]n spite of frequent calls for the cessation of such practice," Alexandra Hofer concludes that "a prohibition of [unilateral coercive measures] has not crystalized."<sup>27</sup> As multiple observers point out, even as the International Court of Justice endorsed the contents of the Friendly Relations Declaration in its *Nicaragua v. United States* decision, it found that the United States' "total embargo" did not violate customary international law, suggesting an extraordinarily high bar for unlawful economic coercion.<sup>28</sup>

Against this backdrop, the EU's adoption of developing world interpretations might seem surprising.<sup>29</sup> The ACI seems to imagine a considerably less onerous test for illegal economic coercion than European states might previously have supported. (If economic coercion had to meet the standard of *Nicaragua* to trigger the ACI, the ACI would likely never be triggered.) What might explain this sudden about-face?

Widen the aperture and the ACI's interpretation no longer appears so anomalous. Over the past few years, efforts to broaden definitions of security, coercion, and force within international law have become nearly ubiquitous. As incisive observers have chronicled,<sup>30</sup> states have increasingly been proffering definitions of security extending far beyond traditional military force to include

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<sup>24</sup> Dapo Akande, Payam Akhavan, & Eirik Bjorge, *Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral*, 115 AM. J. INT'L L. 493, 512 (2021).

<sup>25</sup> *Id.* at 498 (citing Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 53 (2001)).

<sup>26</sup> Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT'L & COMPAR. L. 616, 633 (2015).

<sup>27</sup> Hofer, *supra* note 21, at 212. Of course, other observers disagree, as will be discussed *infra*.

<sup>28</sup> See, e.g., Baetens & Bronckers, *supra* note 9; Akande, Akhavan, & Bjorge, *supra* note 24, at 498; Ruys and Rodríguez Silvestre, *supra* note 4, at 665.

<sup>29</sup> At least two Irish members of the European Parliament, Clare Daly and Mick Wallace, noted the irony during debate over the ACI, calling out the hypocrisy of worrying about economic coercion against Europe while saying nothing about U.S. sanctions against Iran or EU pressure on Georgia. See European Parliament [https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-02-ITM-014\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-02-ITM-014_EN.html) (last visited Sept. 20, 2024).

<sup>30</sup> J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L. J. 924 (2020); J. Benton Heath, *Making Sense of Security*, 116 AM. J. INT'L L. 289, 289 (2022). See also Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793 (2020).

risks posed by pandemics, climate change, artificial intelligence, financial crisis, and economic growth.<sup>31</sup> Across a varied landscape of international rules, covering human rights, trade, export controls, investment screening, investment protection, states are arguing that “security” powers and exceptions need to be reinterpreted. Narrow definitions were naïve and quaint, we’re increasingly told. And notably, it’s no longer just developing states pushing for reinterpretation; on the contrary, it’s developed states taking the lead.<sup>32</sup> It is the United States that has most notably declared that “economic security is national security.”<sup>33</sup>

These efforts at reinterpretation are not just words. These arguments about the meaning of security, coercion, and force have supported the increasing weaponization of the global economy.<sup>34</sup> Japan and South Korea,<sup>35</sup> India and China,<sup>36</sup> China and Australia,<sup>37</sup> Saudi Arabia and Qatar<sup>38</sup> fight local skirmishes with tariffs and bans (on exports and imports), while potentially larger trade wars between the United States, China, and Europe loom large.<sup>39</sup> States around the world are scrutinizing parts of their economies and asking whether they need to be protected against foreign competition, whether by walling them off behind

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<sup>31</sup> See, e.g., Dan W. Drezner, *How Everything Became National Security and National Security Became Everything*, FOREIGN AFFAIRS (August 12, 2024) <https://www.foreignaffairs.com/united-states/how-everything-became-national-security-drezner>.

<sup>32</sup> The dissonance of arguing that economic security is security, but that economic sanctions cannot be considered forcible coercion has not apparently bothered developed state capitals.

<sup>33</sup> U.S. DEP’T of COMMERCE, 2018–2022 STRATEGIC PLAN at 16, [https://2017-2021.commerce.gov/sites/commerce.gov/files/us\\_department\\_of\\_commerce\\_2018-2022\\_strategic\\_plan.pdf](https://2017-2021.commerce.gov/sites/commerce.gov/files/us_department_of_commerce_2018-2022_strategic_plan.pdf). See also Henry Farrell and Abraham Newman, *The New Economic Security State: How De-risking Will Remake Geopolitics*, FOREIGN AFFAIRS, November–December 2023.

<sup>34</sup> See, e.g., Mona Pinchis-Paulsen, *Let’s Agree to Disagree: A Strategy for Trade-Security*, 25 J. INT’L ECON. L. 527, 528 (2022).

<sup>35</sup> See Catherine Kim, *The Escalating Trade War Between South Korea and Japan, Explained*, VOX, 9 August 2019 at 4:30 PM EDT, <https://www.vox.com/world/2019/8/9/20758025/trade-war-south-korea-japan>; Simon Denyer, *Japan-South Korea dispute escalates as both sides downgrade trade ties*, WASH. POST, 2 August 2019 at 4:20 AM EDT; Request for Consultations by the Republic of Korea, *Japan–Measures Related to the Exportation of Products and Technology to Korea*, WTO Doc. WT/DS590/1, (Sept. 16, 2019).

<sup>36</sup> Government of India Press Information Bureau, *Government Bans 59 Mobile Apps Which Are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order*, 29 June 2020 at 8:47 PM, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206>.

<sup>37</sup> See, e.g., *Australia has faced down China’s trade bans and emerged stronger*, THE ECONOMIST, May 23rd 2023.

<sup>38</sup> See Panel Report, *Saudi Arabia-- Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS567/R, (June 16, 2020).

<sup>39</sup> Dewey Sim and Orange Wang, *With EU tariffs and the US rivalry, will China be battling 2 trade wars at once?*, SOUTH CHINA MORNING POST, 1 Nov 2024, 10:32am, <https://www.scmp.com/news/china/diplomacy/article/3284690/eu-tariffs-and-us-rivalry-will-china-be-battling-2-trade-wars-once>; Camille Gijs, *EU braces for two-front trade war with US and China*, POLITICO, October 31, 2024 6:55 pm CET, <https://www.politico.eu/article/donald-trump-europe-trade-war-united-states-china-tariffs/>

tariffs<sup>40</sup> and investment screens<sup>41</sup> or by starving competitors of key components<sup>42</sup> or financing.<sup>43</sup> And states are surveying key strategic economic chokepoints – control over intellectual property or banking or critical minerals – to map powers and vulnerabilities.<sup>44</sup> Sanctions regimes against Iran or Russia, momentous in-and-of themselves, are increasingly seen as testing sites of defensive and offensive economic weaponry.<sup>45</sup> The ACI might be a European story – a reflection of the EU’s need to develop common policies and tools to combat economic statecraft that many individual states already had<sup>46</sup> – but it is

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<sup>40</sup> See, e.g., Philip Blenkinsop, *EU Slaps Tariffs on Chinese EVs, Risking Beijing Backlash*, REUTERS, October 30, 2024 1:33 AM EDT, <https://www.reuters.com/business/autos-transportation/eu-slaps-tariffs-chinese-evs-risking-beijing-payback-2024-10-29/>; *America’s 100% Tariffs on Chinese EVs: Bad Policy, Worse Leadership*, THE ECONOMIST, May 15th 2024.

<sup>41</sup> See Sarah Bauerle Danzman and Sophie Meunier, *Mapping the Characteristics of Foreign Investment Screening Mechanisms: The New PRISM Dataset*, 67 INT’L STUD. Q. (June 2023); Sarah Bauerle Danzman, *Investment Screening in the Shadow of Weaponized Interdependence* 257 in THE USES AND ABUSES OF WEAPONIZED INTERDEPENDENCE (Daniel Drezner, Henry Farrell, and Abraham Newman, eds. 2021).

<sup>42</sup> See Shola Lawal, *Tech wars: Why has China banned exports of rare minerals to US?*, AL JAZEERA, Dec. 4, 2024, <https://www.aljazeera.com/news/2024/12/4/tech-wars-why-has-china-banned-exports-of-rare-minerals-to-us#ixzz8tYIXekgS> (describing “tit-for-tat” U.S. bans on exports of semiconductor chip making equipment to China and Chinese bans on exports of rare earth materials to United States); David Pierson, Keith Bradsher, and Ana Swanson, *China Bans Rare Mineral Exports to the U.S.*, N.Y. TIMES, Dec. 3, 2024, <https://www.nytimes.com/2024/12/03/world/asia/china-minerals-semiconductors.html> (same).

<sup>43</sup> The United States has recently developed a system to scrutinize and ban U.S. investment in specific Chinese high-tech efforts. See, e.g., Farhad Jalinous, Karalyn Mildorf, Cristina Brayton-Lewis, David Jividen, & Jason Burgoyne, *US Outbound Investment Program Takes Effect in January: What You Need to Know*, WHITE & CASE, 13 November 2024, <https://www.whitecase.com/insight-alert/us-outbound-investment-program-takes-effect-january-what-you-need-know>; Barath Harithas, *Anatomy of a Technology Blockade: Unpacking the Outbound Investment Order*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, July 15, 2024, <https://www.csis.org/analysis/anatomy-technology-blockade-unpacking-outbound-investment-order>.

<sup>44</sup> See generally NEWMAN AND FARRELL, *supra* note 7.

<sup>45</sup> See, e.g., Georgi Kantchev and Lingling Wei, *China is Studying Russia’s Sanctions Evasion to Prepare for Taiwan Conflict*, WALL ST. J., Updated Dec. 1, 2024 12:01 am ET, <https://www.wsj.com/world/china/china-is-studying-russias-sanctions-evasion-to-prepare-for-taiwan-conflict-5665f508>; Gina Chon, *Russia is Dry Run for Bigger China Sanctions Test*, REUTERS, February 25, 2022, 11:42 AM EST <https://www.reuters.com/markets/asia/russia-is-dry-run-bigger-china-sanctions-test-2022-02-25/>; Matthew Karnitschnig, *Iran Teaches Russia its Tricks on Beating Oil Sanctions*, POLITICO, November 9, 2022 8:37 pm CET, <https://www.politico.eu/article/iran-russia-cooperation-dodging-oil-sanctions/>.

<sup>46</sup> See, e.g., Christian Freudlsperger and Sophie Meunier, *When Foreign Policy Becomes Trade Policy: The EU’s Anti-Coercion Instrument*, 62 J. COMMON MARKET STUD. 1063, 1066-67 (2024) (“In comparison with its main competitors on the geoeconomic field, first and foremost the United States and China, but also rising powers such as India or Brazil..., the EU suffers from a clear institutional disadvantage.”).

also part-and-parcel of a much broader one encompassing much of the world. It reflects a worldwide rethinking of the relationship between economic strength and security, now manifesting itself in myriad policies.

Altogether, an interpretative tide seems to be turning, with a wave of attempts to redefine security crashing against doctrinal sea walls initially built by the U.S. and its allies. As the wall erodes, the line between sea and sand, economy and security, contract and coercion, permission and prohibition shifts. All of a sudden, commanding doctrinal fortresses built on seemingly dry land seem precariously perched. Efforts to shore up their foundations seem increasingly fools errands, at odds even with the demands of their own inhabitants.

These shifting interpretive sands provide an opportunity to explore how international law and international order interact, to explore why some interpretations prevail (for a time), while others fall away, and why interpretations once shunned might suddenly reemerge. How were developing state interpretations of force, security, and coercion suppressed and how are they being revived?

This essay argues that the secret lies in the shifting international order itself. There seems to be some consensus that the shape of the international order matters for international law. That conventional wisdom is apparent in current fights between leaders over whether to characterize the order as a “liberal international order,” or a “rules based international order,” or an “international order underpinned by international law.”<sup>47</sup> It is also reflected in a growing consensus that the current order is shifting and that the flux is affecting international law.<sup>48</sup> But the relationship between international order and international law is never fully articulated. It is presumed rather than explained.

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<sup>47</sup> See, e.g., John Dugard, *The Choice Before US: International Law or a 'Rules-Based International Order'?*, 36 LEIDEN J. INT'L L. 223 (2023) (lambasting the idea of a “rules-based” order); Henry Gao, *Promising Trail or Perilous Trap? Engaging China in the WTO and Beyond*, 116 AM. J. INT'L L. UNBOUND 46, 48 (2022) (describing contestation between the U.S.’s rules-based order and China’s “international order underpinned by international law”). Cf. Ian Hurd, *The Science of World Order*, INT'L POL. (June 2024).

<sup>48</sup> See, e.g., Ruys and Rodríguez Silvestre, *supra* note 4, at 649 (observing that we are “gradually shifting from a rules-based international order to a power-based one”); Ziya Öniş and Mustafa Kutlay, *The New Age of Hybridity and Clash of Norms: China, BRICS, and Challenges of Global Governance in a Postliberal International Order*, 45 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL (2020) (“There appears a quasi-consensus among scholars from different theoretical traditions that the international order is shifting rapidly.”); Anu Bradford, Stavros Gadinis, and Katerina Linos, *Unintended Agency Problems: How International Bureaucracies are Built and Empowered*, 57 VA. J. INT'L L. 159, 159 (2018) (“The ground underneath the entire liberal international order is rapidly shifting.”); Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 347 (2017) (describing effects of “the shift towards a multipolar international order”).

This essay argues that the international order is (among other things) an interpretive institution. To use Robert Cover's terms (as this essay will), it is the international order that exercises the powers of jurispathy in international law, choosing which of the many visions of international law will prevail.<sup>49</sup> A plural, horizontal system of law lacking courts and legislatures of universal and compulsory jurisdiction promotes jurisgenesis. Many interpretations of international law terms are possible; many visions of international law can be imagined. It is the international order that cuts off these blooms and imposes some level of uniformity. But the international order is a shapeshifter, whose preferences shift with each new form. As the international order shifts, once favored interpretations, courtiers of the system, may lose their standing at court; those once shunned may, in turn, be elevated. The shape and character of the international order matter because they adjudge meaning in international law.

This essay uses the shifting meaning of security to explore how international order shapes international law. Part I describes the rise and fall of developing state efforts to establish economic pressure as a potential unlawful form of force or coercion in international law during the first few decades following World War II. Seeking to explain why those efforts stalled, Part II introduces the work of Robert Cover, highlighting his description of the relationship between the law-creating community and the law-destroying court. Part III searches for that law-destroying, or "jurispathic," element in the international system and identifies the international order itself. Part IV returns to the present and explores how a shifting international order has revived legal meanings regarding force, coercion, and security that had long been stuck in stasis. It ends by highlighting in Part V the current contest over the nature of the international order and in turn, the meaning and content of international law rules going forward.

## II. INTERNATIONAL LAW BLOOMS

For a time, worldmaking in international law seemed possible.<sup>50</sup> Following World War II, institutions were being built, new treaties were being drafted, and basic legal principles were being rethought. While some international lawyers were busy designing the United Nations, the World Bank,

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<sup>49</sup> See Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 28 (1983).

<sup>50</sup> See, e.g., Sundhya Pahuja and Anna Saunders, *Rival Worlds and the place of the Corporation in International Law*, in Von Bernstorff and Dann (eds), *THE BATTLE FOR INTERNATIONAL LAW: SOUTH-NORTH PERSPECTIVES ON THE DECOLONIZATION ERA* (OUP, 2019); ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* (2019).

the International Monetary Fund, the General Agreement on Tariffs and Trade, and regional organizations, others were drafting human rights agreements and recodifying international humanitarian law. And as new states were welcomed into the international law community, those negotiation rooms grew more and more crowded. The creative energy must have been as invigorating as the negotiations were exasperating. In that moment, reform must have seemed possible; a more just world could be imagined.

For developing states, the moment presented an opportunity to put forward their views, to surface the injustices of imperial international law, and to lobby for reforms that might fulfil promises of sovereign equality instilled in the new UN Charter.<sup>51</sup> Latin American states, informed by their experience, had been arguing for some time that economic coercion violated principles of sovereign equality and international law.<sup>52</sup> In line with this tradition, during the drafting of the UN Charter, Brazil proposed enshrining a prohibition on economic coercion.<sup>53</sup> Brazil's proposal would have extended the prohibition of Article 2(4) to cover "the threat or use of economic measures in any manner inconsistent" with the United Nations' purposes.<sup>54</sup> The conference's rejection of that proposal is often cited as evidence that Article 2(4) prohibition on the use of force does not include economic measures. The record though is actually more ambiguous. "During the discussion of the amendment the Belgian delegate suggested that Brazil was underestimating the reach of the phrase 'in any other manner,' which had been added to the original text,"<sup>55</sup> and "the Report of Rapporteur of Committee I to Commission I included a statement that 'the unilateral use of force of similar coercive measures is not authorized or admitted.'"<sup>56</sup> This ambiguity left enough space for continued arguments<sup>57</sup> about the meaning of "force" prohibited by the Charter,<sup>58</sup> arguments that would spill

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<sup>51</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196 (2005) (explaining how postcolonial leaders sought "the liquidation of imperialism in its widest meaning, with all its political, military, economic and psychological implications.").

<sup>52</sup> See Helal, *supra* note 19, at 51 (detailing Latin American efforts during the nineteenth and twentieth centuries); Lori Fisler Damrosch, *Politics Across Border: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989) ("The Latin American States are specially sensitive to the concept of nonintervention, in view of painful episodes in many of their histories, and are justifiably proud of their contribution to the legal formulation of the norms.").

<sup>53</sup> See *id.*; Jacob Batinga, *Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2(4)*, 41 WISC. INT'L L. J. 103, 110 (2024); Yehuda Z. Blum, *Economic Boycotts in International Law*, 12 TEX. INT'L L. J. 5 (1977).

<sup>54</sup> Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 994 (1974).

<sup>55</sup> *The Use of Nonviolent Coercion*, *supra* note 54, at 994.

<sup>56</sup> *Id.* at 994 (quoting Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 387, 400 (1945)).

<sup>57</sup> See, e.g., Batinga, *supra* note 53, at 111 (recounting Bolivia's argument that severe unilateral economic sanction should constitute an act of aggression).

<sup>58</sup> *Id.* at 995 n.43 (citing commentators including Julius Stone and Rosalyn Higgins).

out into the open during debates over the Vienna Convention on the Law of Treaties 20 years later. Latin American states did succeed in recording a more specific prohibition in Article 20 of the Charter of the Organization of American States (OAS): “No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.”<sup>59</sup>

Latin American states would have more back-up in debates over the international law of treaties. By the time the International Law Commission presented its draft articles on the law of treaties to the UN General Assembly, decolonization was in full-swing, and an alliance of “new” or “dissatisfied”<sup>60</sup> states from Africa, Asia, and Latin America would line-up behind efforts to recognize a right against economic coercion. At the Vienna Conference on the Law of Treaties in 1968 and 1969, the primary point of contention was a rule voiding “coerced” treaties. According to what would become article 52 of the eventual convention, “[a] treaty is void if its conclusion has been procured by threat or use of force.”<sup>61</sup> Latin American states again took the lead in arguing for the provision as a codification of longstanding international law,<sup>62</sup> rebuffing contrary arguments by countries like Switzerland and the United Kingdom.<sup>63</sup> The real sticking point of the conference though was whether economic coercion could be included in its scope. The stakes were obviously high. If many treaties past and present between the former imperial powers and the new states could be characterized as the product of military coercion, far more (all?) could be characterized as products of economic pressure. The stability of all treaties was seemingly pitted against the justice of the international system.

Once again, much of the debate turned on a proposed addition to the text. Nineteen states put forward an amendment that would explicitly include “economic or political pressure” as conditions voiding a treaty.<sup>64</sup> The proposal would lead to a major confrontation.<sup>65</sup> Developing states argued that economic pressure could be just as coercive as military force. The representative of the

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<sup>59</sup> Org. of American States [OAS] Charter art. 20, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. Thank you to Mohamed Helal for drawing the connections back to this source.

<sup>60</sup> Stuart S. Malawer, *A New Concept of Consent and World Public Order*, 4 VAND. J. TRANSN'T'L L. 1, 4 n.11 (1972) (quoting Friedheim, *The “Satisfied” and “Dissatisfied” States Negotiate International Law: A Case Study*, 18 WORLD POL. 20 (1965)).

<sup>61</sup> Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679.

<sup>62</sup> *Id.* at 10-11.

<sup>63</sup> *Id.* at 11-12.

<sup>64</sup> Richard D. Kearney and Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 533 (1970) (listing Afghanistan, Algeria, Bolivia, Congo (Brazzaville), Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, United Arab Republic, United Republic of Tanzania, Yugoslavia, and Zambia as sponsors).

<sup>65</sup> *Id.* at 532-34 (describing the episode as a “major confrontation” and “heated” and the debate as “vehement” and vociferous”).

United Arab Republic “pointed out that economic pressure could be more effective than the threat or use of military pressure in reducing the country’s power of self-determination, especially if its economy depended on a single crop or the export of a single product.”<sup>66</sup> Algeria’s representative argued further that “the era of the colonial treaty was past or disappearing, but...some countries had resorted to new and more insidious methods...to maintain and perpetuate bonds of subjection.”<sup>67</sup> “Political independence could not be an end in itself,” they continued. “[I]t was illusory if it was not backed up by economic independence.”<sup>68</sup>

The amendment would not be put up for a vote. “The course of the debate had made it clear that if the amendment were put to a vote it would carry by a substantial majority.”<sup>69</sup> But opponents found the amendment so intolerable that they threatened to wreck the whole conference if it passed. Instead, as a compromise, the delegates agreed (by a vote of 102 to 0, with four abstentions) to a separate Declaration annexed to the Final Act of the conference condemning “the threat or use of pressure in any form, military, political, or economic...in order to coerce another State to perform any act relating to the conclusion of a treaty...”<sup>70</sup>

Nonetheless, ambiguity remained. Even as Japan emphatically argued that the Declaration was not an amendment,<sup>71</sup> the old question about the definition of “threat or use force” remained open. States that had supported the Nineteen State Amendment argued that the Declaration was an authoritative interpretation of prohibited “force” under Article 2.4 of the UN Charter. They argued that “the prohibition against the use of economic and political pressure had already become a rule of customary international law.”<sup>72</sup> Delegates from France, Canada, and the Netherlands pushed back, arguing that “force” under the UN Charter referred only to military force.<sup>73</sup> In truth, the International Law Commission itself was responsible for the ambiguity. Recognizing the “[s]ome members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion,” the Commission decided to define coercion by reference to the terms in the UN Charter, leaving the “precise scope of acts covered...to be determined in practice by

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<sup>66</sup> Malawer, *supra* note 60, at 16.

<sup>67</sup> Kearney and Dalton, *supra* note 64, at 533.

<sup>68</sup> *Id.* at 534.

<sup>69</sup> *Id.* at 534.

<sup>70</sup> *Id.*; Malawer, *supra* note 60, at 17-18.

<sup>71</sup> Malawer, *supra* note 60, at 19.

<sup>72</sup> *Id.* at 17.

<sup>73</sup> *Id.* at 19-20.

interpretation” of that document.<sup>74</sup> As one contemporary observer concluded, “the debates in 1968-69 evidenced neither consensus nor unanimity, but only a poorly understood compromise over the Nineteen-State Amendment that made more uncertain an already uncertain future.”<sup>75</sup>

While the potential effects of coercion on treaties were being debated, elsewhere in the UN system, states were working on a declaration that might define the meaning of force, aggression, and non-intervention under the Charter. In 1963, the UN General Assembly established a Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,<sup>76</sup> and asked it to study basic principles including the Charter’s prohibition on the use of force, duties of cooperation and non-intervention, and commitment to peaceful resolution of disputes, sovereign equality, and self-determination.<sup>77</sup> Many of the debates between developing and developed states over economic action carried over into the committee’s work.

The definition of “force” was again at issue. Over the following six years, multiple groups of developing states put forward proposals to include economic pressure within the definition.<sup>78</sup> (Apparently, they did not see rejection of Brazil’s amendment in 1945 as dispositive.) As usual, developed states pushed back, arguing as the United Kingdom did, that “force” meant armed force, and only armed force.<sup>79</sup> These disputes couldn’t be fully resolved. The text of the eventual resolution again uses the term “force” without defining it. As one contemporary observer explained, “[i]t was tacitly agreed to ‘paper over’ this difference by elevating the text to a sufficient level of abstraction to hide the difference; it is therefore possible to read many of the paragraphs on principle as consistent with either view.”<sup>80</sup> Proponents of the narrow view of force could point to the military acts used as examples of prohibited force in the resolution;<sup>81</sup> proponents of broader views could point to the resolution’s

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<sup>74</sup> Kearney and Dalton, *supra* note 64, at 533. Oddly, Kearney and Dalton suggest that this makes it clear that the Commission was not including economic acts within the scope of the provision. Malawer disagrees, arguing that “the Commission deliberately created a vague loophole” and describing the result as “intentional vagueness.” Malawer, *supra* note 60, at 21-22.

<sup>75</sup> Malawer, *supra* note 60, 20-21.

<sup>76</sup> Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT’L L. 713, 713 (1971). Rosenstock explains the origins of the committee’s ungainly title in *id.* n.1.

<sup>77</sup> *Id.*; Batinga, *supra* note 53, at 111.

<sup>78</sup> See Batinga, *supra* note 53, at 112 (listing Algeria, Cameroon, China, Czechoslovakia, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic, and Yugoslavia among proponents).

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

<sup>80</sup> Rosenstock, *supra* note 76, at 724.

<sup>81</sup> *Id.* at 725.

preamble, “[r]ecalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any States.”<sup>82</sup>

Developing states were more successful with the resolution’s treatment of the principle of non-intervention.<sup>83</sup> Debate over that principle took place against a Cold War backdrop, in which the United States and Soviet Union jockeyed for favor with the developing world. After a sometimes-bitter fight that started with a U.S. argument that the only duty of the states not to intervene in each other’s affairs was not to use force under Article 2.4,<sup>84</sup> the committee converged around language tracking that of the OAS Charter.<sup>85</sup> In its final form, the Friendly Relations Declaration of 1970 proclaimed: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>86</sup> Even as questions lingered about its legal status, the declaration was seen as a victory for developing states, a potential foundation stone in a New International Economic Order that might put new states on more even playing field with old.<sup>87</sup>

The resolution was put to the test a decade and half later. In 1984, Nicaragua brought a claim against the United States at the International Court of Justice, arguing that the United States’ actions against its government, including support for Nicaraguan rebels (the Contras), mining Nicaragua’s harbors, and economic embargo violated international law.<sup>88</sup> The eventual 1986 decision seemed to represent a high-water mark for these developing state arguments, a victory in principle that ended up being read as a practical defeat. The Court leaned heavily on the Friendly Relations Declaration, which it found reflected customary international law.<sup>89</sup> In so doing, the Court affirmed the principle of non-interference, holding that “[t]he principle of noninterference

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<sup>82</sup> Friendly Relations Declaration, *supra* note 13, at 122. As Akande, Akhavan, and Bjorge note, the provision was included in the preamble specifically because it could not get the support necessary to be included among the operative principles of the resolution. Akande, Akhavan, and Bjorge, *supra* note 24, at 497 (citing Helen Keller, *Friendly Relations Declaration* (1970), in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, para. 8 (Rüdiger Wolfrum ed., online ed. 2009), at <http://www.mpepil.com>).

<sup>83</sup> See Whyte, *supra* note 20.

<sup>84</sup> U.N. Charter, art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>85</sup> Rosenstock, *supra* note 76, at 727-29. See *supra* note 59 and accompanying text.

<sup>86</sup> Friendly Relations Declaration, *supra* note 68.

<sup>87</sup> Whyte, *supra* note 20.

<sup>88</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14 (June 27).

<sup>89</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, *passim* (June 27).

involves the right of every state to conduct its affairs without outside interference.”<sup>90</sup> “Intervention is wrongful,” the Court explained, “when it uses methods of coercion in regard to such choices, which must remain free ones.”<sup>91</sup> Describing the “elements of coercion” as “particularly obvious in the case of an intervention which uses force,”<sup>92</sup> the Court opened the door for finding that nonforcible measures could be unlawfully coercive as well. The elements for a claim of unlawful economic coercion seemed to be in place. But, when faced with the U.S. trade embargo, described by some commentators as “the most common, and potentially most severe, economic actions that can be employed against a state,”<sup>93</sup> the Court balked: “At this point, the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.”<sup>94</sup>

The Court’s decision seemed like a reluctant recognition of reality. Writing soon after the *Nicaragua* decision, Lori Damrosch asked whether nonforcible efforts, like economic pressure, to change other states’ internal politics could violate international law. “A conception of the norm that would prohibit these forms of nonforcible involvement in domestic politics is problematic,” Damrosch observes, “because state practice diverges markedly from it.”<sup>95</sup> “Both superpowers [] use economic leverage to affect local politics in Central America, southern Africa and elsewhere,” she notes. “But the superpowers are hardly the only states that attempt to exert transnational political influence.”<sup>96</sup> Since 1986, the use of economic sanctions has only increased.<sup>97</sup>

And since 1986, the tenor of the discourse around economic coercion has shifted as well. Although developing states continue to rail against sanctions

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<sup>90</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, ¶ 202 (June 27).

<sup>91</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, ¶ 205 (June 27).

<sup>92</sup> *Id.*

<sup>93</sup> Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. INT’L L. 345, 370 (2009).

<sup>94</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, ¶ 245 (June 27). See Baetens & Bronckers, *supra* note 9 (“But in that case the Court held that even a trade embargo imposed by the United States on Nicaragua did not breach the customary law principle of non-intervention. In other words, economic coercion does not easily violate international law; this depends very much on the circumstances.”).

<sup>95</sup> Damrosch, *supra* note 52, at 2.

<sup>96</sup> *Id.* See also Whyte, *supra* note 20, who, while pushing back against the supposed consensus, nonetheless recognizes that the challenge in demarcating a rule against economic coercion “was that the postcolonial world was saturated with coercion.”

<sup>97</sup> See, e.g., Jeff Stein and Federica Cocco, *How Four U.S. Presidents Unleashed Economic Warfare Across the Globe*, WASH. POST, July 25, 2024.

and economic coercion, the resolutions they sponsor<sup>98</sup> seem to move farther and farther from the mainstream of international law interpretation. Rather than focus on the continuing disagreement over the rules,<sup>99</sup> an increasing number of scholars focus on the nonbinding nature of these resolutions (and prior ones they cite, like the Friendly Relations Declaration<sup>100</sup>), the absence of language of obligation or right, and the dearth of developed state votes in their favor.<sup>101</sup> The gravity of the interpretative conversation seems to have shifted; increasingly, it is developing states and their allies who have failed to meet their burden of proving a “new” rule of international law.<sup>102</sup> If once ambiguous drafting had left the interpretative scale in equipoise, the balance had now shifted. Arguments that extreme economic sanctions might violate a separate duty like human rights remain live, but increasingly, the mainstream view seems to be that standing alone, there is no “fundamental right to be free from economic coercion.”<sup>103</sup>

What happened to the once open field of interpretative possibilities? How has it been replaced by such singular oaken interpretative certainty? Power seems like the obvious answer. Developed states simply outlasted their poorer counterparts. The prevailing interpretation is a reflection of the prevalent power and a map of the political order, a reminder of where real power is centered.

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<sup>98</sup> See Hofer, *supra* note 21, at 187-88 (describing resolutions).

<sup>99</sup> See Whyte, *supra* note 20 (“In fact, the legal status of unilateral economic sanctions does not exist.”).

<sup>100</sup> See Akande, Akhavan, & Bjorge, *supra* note 24, at 497.

<sup>101</sup> See Aaron Fellmeth, *Unilateral Sanctions Under International Human Rights Law: Correcting the Record*, YALE J. INT’L L., September 6, 2023, <https://www.yjil.yale.edu/unilateral-sanctions-under-international-human-rights-law-correcting-the-record/>; Hofer, *supra* note 21, at 195-96.

<sup>102</sup> See Hofer, *supra* note 21, at 195 (“the resolutions addressed above do not satisfy the required criteria for establishing the formation of an autonomous customary norm prohibiting economic coercion, or even an emerging prohibition.”).

<sup>103</sup> Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE J. INT’L & COMPAR. L. 616, 633 (2015). See also Akande, Akhavan, & Bjorge, *supra* note 24, at 501 (“It is generally accepted, no doubt correctly, that a rule of customary international law against economic sanctions does not exist.”); Nathanael Tilahun and Obiora Okafor, “Humanizing” *Economic Sanctions?: Lessons from International Humanitarian Law*, YALE J. INT’L L. 7, June 14, 2024 (“There is still debate on the delimitation of the legitimate circumstances under which economic sanctions could be adopted and by whom; but the usage of sanctions, as such, is now almost beyond legal debate.”); Fellmeth, *supra* note 101. Notably, developing states may be hedging their views as well. The final declaration of the most recent BRICS Summit (BRICS is a group of emerging market states led by Brazil, Russia, India, China, and South Africa) “call[s] for the elimination” of “unilateral coercive measures, inter-alia in the form of unilateral economic sanctions and secondary sanctions that are contrary to international law,” seemingly suggesting that not all such measures are currently unlawful. See *Kazan Declaration, Strengthening Multilateralism for Just Global Development and Security*, XVI BRICS Summit, Kazan, Russian Federation, October 23, 2024, p. 7, para. 22, [https://cdn.brics-russia2024.ru/upload/docs/Kazan\\_Declaration\\_FINAL.pdf?1729693488349783](https://cdn.brics-russia2024.ru/upload/docs/Kazan_Declaration_FINAL.pdf?1729693488349783).

But this answer seems too blunt to explain the subtlety of scholarly arguments. Notably, the legal observers quoted above do not suggest that powerful states have changed the rules. They could argue that practice has simply superceded any ambiguity, ending any arguments with force. International law recognizes such arguments, most notably through customary international law. But they do not make this argument.<sup>104</sup> These scholars argue from within international law doctrine and in the language of interpretation and exegesis. The power of developed states is lurking, but its influence is subtler. It is to that influence that we must now turn.

### III. THE NOT-SO-CONSTANT GARDENER

The blossoming of interpretations of force, coercion, and security after World War II might have sounded familiar to Robert Cover. Cover reversed many people's assumption about the locus of lawmaking and legal interpretation. For Cover, interpretation and legal meaning are not products of the state or institutions but of normative communities and their members. The making of legal meaning is a bottom-up, rather than top-down process. As members of these communities tell shared narratives of right and wrong, of normative commitment, they make their law. These communities are in this sense "jurisgenerative."<sup>105</sup>

This process of "jurisgenesis"<sup>106</sup> is natural, dynamic, and creative. It is a product of living in a community and the need for shared expectations. But is also "radically uncontrolled."<sup>107</sup> "Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters."<sup>108</sup> Agreements on the law recorded in sacred documents are almost immediately subject to disagreements about interpretation. "[T]he meaning of such a text is always 'essentially contested.'"<sup>109</sup>

This means that the problem is not generating legal meaning, but controlling it. "The forces of jurisgenesis" are "too fertile."<sup>110</sup> Social cohesion, retaining a normative community with some minimal shared understanding of legal commitment requires some mechanism to choose some meanings over

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<sup>104</sup> One could of course simply believe these scholars naïve or delusional. They might be. But that explanation robs us of the opportunity to explore how powerful states actually exert influence in the international legal system, to explore the mechanism through which power is transmogrified into law.

<sup>105</sup> Cover, *supra* note 49, at 15

<sup>106</sup> *Id.* at 11

<sup>107</sup> *Id.* at 17.

<sup>108</sup> *Id.* at 15

<sup>109</sup> *Id.* at 17

<sup>110</sup> *Id.* at 16.

others. For some communities, this might require “expulsion and exile of the potent flowers of normative meaning.”<sup>111</sup> For others, it might require the institutions of state. Courts arise to solve the problem of “Polynomia,” or “too much law.”<sup>112</sup> Courts “characteristically do not create law, but kill it.”<sup>113</sup> Contrasted with the jurisgenerative community, courts are, in Cover’s terms, “jurispathic.”<sup>114</sup> The role of courts is not “making” law but “choosing” law. Courts are engaged in “social control,”<sup>115</sup> in “domination,”<sup>116</sup> and in “violence.”<sup>117</sup>

Robert Cover was writing in the context of domestic constitutional law, but his description of the lawmaking process is perhaps even more potent for understanding international law.<sup>118</sup> As international law witnessed a flowering of new courts and decisionmaking bodies in the 1990’s and 2000’s, some scholars turned to Cover’s descriptions to help explain what they might mean for the system.<sup>119</sup> A series of new bodies were discovering the powers of jurispathy. Cover’s work provided a potent line of critique and argument for caution.

But it is Cover’s description of the jurisgenerative nature of the community which should resonate most clearly with international lawyers. In the domestic context, Cover’s description ran up against prevailing positivist presumptions that law was made by officials and through institutions, not the people themselves. It seemed to blur the line between law and norms. In international law, lacking such formal institutions, the jurisgenerative nature of the community is obvious.<sup>120</sup> Law was traditionally made and interpreted in the arguments between states and developed in application to specific

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<sup>111</sup> *Id.* at 16

<sup>112</sup> Cover, *supra* note 49, at 41.

<sup>113</sup> *Id.* at 53.

<sup>114</sup> *Id.* at 53.

<sup>115</sup> *Id.* at 10-17.

<sup>116</sup> *Id.* at 16, 43.

<sup>117</sup> *Id.* at 47.

<sup>118</sup> See, e.g., generally Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2004); Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 136 (Margaret A. Young ed., 2012).

<sup>119</sup> See, e.g., Christiane Wilke, *Review Essay: Implicated in Violence: Socio-Legal Approaches to International Humanitarian Law and International Criminal Law*, 10 LONDON REV. INT’L L. 105, 130 (2022) (discussing the jurispathic potential of the International Criminal Court); Barrie Sander, *The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT’L L. 299, 303 (2018) (describing international criminal courts as jurispathic); Andrea Bianchi, *Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy*, 4 J. INT’L DISP. RESOL. 457, 473 n. 53 (2013) (describing the jurispathic nature of the ICJ); Ming-Sung Kuo, *The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT’L L. 997, 1002 (2009) (describing Global Administrative Law as jurispathic).

<sup>120</sup> See Berman, *supra* note 118, at 303.

circumstances.<sup>121</sup> The everyday work of diplomats was rife with legal meaningmaking, and Cover's bottom-up model of jurisgenesis seems to capture processes of customary international lawmaking.

Postwar debates over the meaning of force, coercion, and security epitomize this process. States with shared texts but different normative narratives were contesting legal meaning. UN Charter promises of sovereign equality<sup>122</sup> and an international politics free from the threat of force<sup>123</sup> carried different meaning for developing and developed states. Whereas newly independent developing states interpreted these terms through a narrative of redemption, in which the system would finally throw off the shackles of imperial domination, developed states read them through a narrative of conflict management, stability, and peace. Narratives of justice vied with narratives of consent. Promises of a new world vied with promises of prosperity through peace.

But how would those narratives be reconciled? Cover's pluralist description of the law is often read (rightly) as a call for normative pluralism. Recognizing the violence of their choices should humble courts. Faced with the normative imaginings of the community before them, Cover asks courts to exercise their powers of jurispathy sparingly. "Judges are people of violence," but they "are also people of peace,"<sup>124</sup> and they have the ability to make decisions that respect multiple narratives and reconcile community members with one another. "We ought to stop circumscribing the *nomos*," he writes. "[W]e ought to invite new worlds."<sup>125</sup>

But this pluralist reading misses the other side to Cover's account. Choosing meaning cannot entirely be avoided. Living together in a community requires pairing the creative force of jurisgenesis with the violence of social control. The world-making function must be paired with the "world-maintaining"<sup>126</sup> one. "Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent, in their discourse, wary and violent in their interactions."<sup>127</sup> "The state of unredeemed controversy, the problem of too much law," for Cover requires "the authority of courts."<sup>128</sup>

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<sup>121</sup> Cf. Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1507 (2020) ("Most actors approach CIL not as detached observers assessing different normative positions against certain preestablished criteria but as advocates advancing their own preferences.").

<sup>122</sup> UN Charter art. 2(1).

<sup>123</sup> UN Charter, art. 2(1).

<sup>124</sup> Cover, *supra* note 49, at 53

<sup>125</sup> *Id.* at 68.

<sup>126</sup> *Id.* at 13.

<sup>127</sup> *Id.* at 16

<sup>128</sup> *Id.* at 41.

Cover's pluralist instinct thus assumes the presence of such world-maintaining courts. But what happens when no courts are present? Even today, at a time when international law is full of courts and tribunals, all of them are severely limited in their jurisdiction.<sup>129</sup> Their axe of jurispathy is blunted; they can wound certain meanings and interpretations, but they cannot kill.<sup>130</sup> At the time though of these postwar controversies over force, coercion, and security, even these courts were largely missing from the system. If states are to be held together in a common community (arguably, the very purpose of international law), who will wield the power of jurispathy? How will dogma be policed? How will legal meaning be confined?

The bluntest answer, perhaps descriptive of pre-war imperial international law, is not the metaphorical violence of courts, but the very real violence of powerful states – gunboats and gatling guns.<sup>131</sup> This is the dark side of Cover's unfettered legal flourishing; ideological battles will be fought and won with sword rather than pen.<sup>132</sup> And raw power did arguably have something to do with the rejection of developing state interpretations of force, coercion, and security. Developed states simply imposed sanctions and economic pressure knowing that the poorer states opposing them lacked the wealth necessary to push back. But the actual rejection of developing state interpretations seems subtler than that. The power of developed states worked through international law argumentation and doctrine rather than (solely) from outside of it. The question is how: How did (does) international law translate political power into legal jurispathy?

#### IV. THE JURISPATHTIC INTERNATIONAL ORDER

The jurispathic agent, the killer of meaning in the international legal system, in those decades after World War II and now, is the international order.

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<sup>129</sup> See, e.g., Andrew Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 786 (2012).

<sup>130</sup> See Harlan Grant Cohen, *The Primitive Lawyer Speaks!: Thoughts on the Concepts of International and Rabbinic Laws*, 64 VILL. L. REV. 665, 674-75 (2019); Harlan Grant Cohen, *International Precedent and the Practice of International Law* 172, in *NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM* (Michael A. Helfand, ed. 2015).

<sup>131</sup> Cf. Cover, *supra* note 49, at 16. For Cover, courts may engage in violence, but compared to the violence of unfettered fights over meaning, courts are institutions of peace. See *id.* (“The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.”).

<sup>132</sup> “Consider, for instance, how the Massachusetts Bay Colony handled basic controversies during its first decades. The holistic integrity of the colony was maintained by exclusion and expulsion; the expulsion of Roger Williams and Anne Hutchinson are examples of this approach.” *Id.* at 16 n.41.

What could this mean? How could the order, an abstract description of power arrangements, act as a juridical, interpretative force?

Although the international order is a contested concept, it nonetheless captures a common and common-sense understanding that global power is constrained and constructed by particular, prevalent relationships and rules.<sup>133</sup> Debates rage about its exact shape at any particular time, but across diverse methodological and ideological accounts, a common understanding of the concept can be discerned. “On the most basic level, orders connote patterned or structured relationships among units.”<sup>134</sup> Translated to the international sphere, an “order” can be understood as “an organized group of international institutions that help govern the interactions among the member states.”<sup>135</sup> Put another way, international order might be defined as “the governing arrangements among a group of states including its fundamental rules, principles, and institutions.”<sup>136</sup> “International order regards how rules, institutions, law, and norms produce and maintain patterns of relating and acting.”<sup>137</sup>

Importantly, international order is thus distinct from both international law and pure power relations,<sup>138</sup> instead describing the way the two relate, constraining and constructing each other over time. In an ordered system, international actors do not relate to each other simply through raw power, but instead filter that power through rules and institutions that help manage expectations, structure cooperation, and minimize disputes. Those rules and institutions, in turn, reshape power relations by changing the pathways through which power is exerted.

The influence of the order on international legal arguments can be seen in the fate of postwar arguments over force, coercion, and security. At the outset of the period, the order was only coming together. The war had reshaped power in ways that were still evolving. Much of Europe had been devastated, and the United States and Soviet Union were emerging as dominant, competing

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<sup>133</sup> See, e.g., Melissa J. Durkee, *The Pledging World Order*, 48 YALE J. INT’L L. 1, 34 (2023) (“The term ‘world order’ is frequently used in international relations.”).

<sup>134</sup> David A. Lake, Lisa L. Martin, and Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, INT’L ORG. 75, Spring 2021, pp. 225–57, at 228.

<sup>135</sup> John J. Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT’L SECURITY 7, 9 (2019).

<sup>136</sup> JOHN IKENBERRY, AFTER VICTORY 23 (2001). See also Christian Reus-Smit, *The Liberal International Order Reconsidered*, 167 in AFTER LIBERALISM? (R. Friedman et al. eds., 2013).

<sup>137</sup> Michael Barnett, *International Progress, International Order, and the Liberal International Order*, CHINESE J. INT’L POL., 2021, 1–22, at 4. See also Hedley Bull, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 8 (4th ed. 2002) (“By international order I mean a pattern of activity that sustains the elementary or primary goals of the society of states, or international society.”).

<sup>138</sup> See, e.g., Mearsheimer, *supra* note 135, at 9 n.3.

powers. Different states now found space to assert their views, as Latin American leadership in these debates demonstrates.<sup>139</sup> And onetime colonies could take advantage of both European weakness and U.S.-Soviet rivalries to finally assert their independence and voice. Meanwhile, institutions were being built and rules rewritten. In this uncertain, emerging order, an increasingly diverse set of states competed through new institutions like the United Nations or the International Law Commission to shape the rules to come. Stakes were high; the arrangement of power in the eventual order was at stake. A world in which economic pressure was prohibited would arrange power in truly new ways – a true new international economic order.

But by the 1980's, the order had solidified in ways that restored some older power structures. Developed states managed to leverage continuing economic disparities to reassert a commanding role in the system. Power that had once been maintained by institutions of empire had been reaffirmed through rules supporting global capital.

Developing world arguments crashed against what developed states asserted was simply the impregnable reality of international relations. ILC Special Rapporteur on the Law of Treaties in the 1960's, Sir Humphrey Waldock, worried that a prohibition on economic coercion could destabilize the whole treaty regime. "Sir Waldock suggested that the operation of political and economic pressure is part of the normal working of the relations between states, especially in international economic relations."<sup>140</sup> Such sentiments were echoed regularly over the decades that followed, gaining force as developed states regained economic power.

Following the debt-crises of the early 1980's, that asserted reality solidified into a very material, physical reality, as developing states were forced to turn to developed ones for relief.<sup>141</sup> The emerging Washington Consensus solidified these realities further, simultaneously elevating the free flow of capital to a normative principle and normalizing "conditionality," the explicit conditioning of economic support on internal political change.<sup>142</sup> And the rise

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<sup>139</sup> See discussion *supra* notes 52-87 and accompanying text.

<sup>140</sup> Malawer, *supra* note 60, at 23. See also Whyte, *supra* note 20 ("In an integrated world economy, representatives of wealthy industrialized states argued, a prohibition on economic coercion risked jeopardising many 'normal and useful transactions among states' including 'international agreements for the exploration or development of natural resources' and commodity exchange agreements—whether fair or not.").

<sup>141</sup> See, e.g., Ruth Gordon, *The Dawn of a New, New International Economic Order*, 72 L. & CONTEMP. PROBS. 131, 145-52 (2009).

<sup>142</sup> See, e.g., *id.*; Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255, 1277-79 (2016) ("These policies are designed to promote a system based on the Washington Consensus, laden with its Western emphasis on developing countries without regard to the social effects—an invasion of sovereignty.").

of the Liberal International Order following the end of the Cold War<sup>143</sup> reinforced these trends by bestowing upon sanctions a moral role in supporting human rights and suppressing terrorism.<sup>144</sup> Economic power was lauded as aspirational, and sanctions were everywhere. Arguments that international law banned economic pressure looked increasingly implausible.

So far, this story might sound like the traditional operation of custom, or perhaps just power politics. Powerful states used their positions of power to practice international relations in a particular way. Unable to physically stop these states, developing states could do nothing but protest, and the rules changed around them. But the interpretative story we've told is subtler than that. The progress of debates over force, coercion, and security within international law sounds in legal argument rather force. What we see are not simply external legislative shifts or external political shocks. International lawyers are not simply throwing their hands up and saying, "oh well, we lost" (some are), but are actually recalibrating their views on good and bad interpretations. The results they reach are framed as a product of good legal interpretative craft, not brute reality.<sup>145</sup> This is not to deny the brute force of states, but rather a recognition of how state power is intermeshed with the legal rules and interwoven in legal institutions.

Power instantiates itself in myriad complex ways throughout international legal institutions.<sup>146</sup> Legal arguments are not just abstract ideas in the mind. They gain their power and force through actual arguments, repeated and replayed and reframed with different interlocutors.<sup>147</sup> And the order shapes that argumentative space.

As arguments are made in the international system, they must pass through a gauntlet of power. Arguments about international law must flow

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<sup>143</sup> There are debates about whether the Liberal International Order started after World War II, see Lake, Martin, & Risse, *supra* note 134, at 224, or only after fall of the Soviet Union, see Mearsheimer, *supra* note 135, at 8. It is fairly accepted though that the system enters a different phase after the latter. Cf. Anne Orford, *Regional Orders, Geopolitics, and the Future of International Law*, 74 CURRENT LEGAL PROBS. 149, 170 (2021).

<sup>144</sup> See, e.g., Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1 (2001). Shifts in the financial system enhanced U.S. sanctions power in ways that made sanctions far more potent. See Newman & Farrell, *supra* note 7.

<sup>145</sup> Were we ready to simply call these international lawyers naïve, we could end discussion here. Instead, we want to understand how those international lawyers develop their beliefs in better or worse interpretations.

<sup>146</sup> Cf. Robert W. Cox, *Gramsci, Hegemony and International Relations: An Essay in Method*, 12 MILLENNIUM: J. INT'L STUD. 162, 172 (1983) ("There is an informal structure of influence reflecting the different levels of real political and economic power which underlies the formal procedures for decisions.").

<sup>147</sup> Cf. JUTTA BRUNNÉE AND STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010).

through government bureaucracies,<sup>148</sup> through military chains of command,<sup>149</sup> through domestic political bodies,<sup>150</sup> through international organizations,<sup>151</sup> and into and out of multi-member international courts and tribunals.<sup>152</sup> As they travel, they must persuade an array of individuals with egos, personalities, and strong opinions.

The power realities of the order manifest themselves throughout. The order subtly and not so subtly dictates whose lawyers occupy positions along that gauntlet, their training, and their basic assumptions about the world.<sup>153</sup> Lawyers from around the world may be encouraged to train or work or live in particular metropolises,<sup>154</sup> where their perceptions of interpretative possibilities are subtly shaped by their teachers, their peers, and the news around them.<sup>155</sup> Manifesting through government budgets, power might dictate how often arguments can be made and repeated and the number and length of submissions and briefs. Appearances before and submissions to international organizations are of course costly.<sup>156</sup> Despite some efforts to help poorer states engage more fully in international legal processes,<sup>157</sup> power disparities remain rife.<sup>158</sup>

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<sup>148</sup> See, e.g., Oona Hathway, *National Security Lawyering*, 68 UCLA LAW REVIEW 2 (2021); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT'L L. 359 (2013).

<sup>149</sup> See, e.g., David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT'L L. 315 (2013).

<sup>150</sup> See, e.g., Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

<sup>151</sup> See, e.g., Joost Pauwelyn & Krzysztof Pelc, *Who Guards the "Guardians of the System"? The Role of the Secretariat in WTO Dispute Settlement*, 116 AM. J. INT'L L. 534 (2022).

<sup>152</sup> See, e.g., Lee Epstein & Jack Knight, *How Social Identity and Social Diversity Affect Judging*, 35 LEIDEN J. INT'L L. 897 (2022); Tomer Broude, *Behavioral International Law*, 163 PA. L. REV. 1099, 1143-49 (2015).

<sup>153</sup> Writing from a neo-Gramscian perspective, Cox observes that "[e]lite talent from peripheral countries is co-opted into international institutions in the manner of *transformismo*. Individuals from peripheral countries, though they may come to international institutions with the idea of working within to change the system, are condemned to work within the structures of passive revolution." Cox, *supra* note 146, at 173.

<sup>154</sup> See, e.g., ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 51-129 (2017) (mapping educational flows in international law).

<sup>155</sup> People aren't brainwashed (though perhaps some are); they are just social beings constructed by their relationships, and their relationships are subtly shaped by the order.

<sup>156</sup> See, e.g., Gregory Shaffer, Michelle Ratton Sanchez, & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L. J. 383, 406-11 (2008) (describing financial hurdles to WTO participation).

<sup>157</sup> See, e.g., Kim Van der Borgh, *The Advisory Center on the WTO Law: Advancing Fairness and Equality*, 2 J. INT'L ECON. L. 723 (1999).

<sup>158</sup> See, e.g., Mark Daku & Krzysztof J. Pelc, *Who Holds Influence over WTO Jurisprudence?*, 20 J. INT'L ECON. L. 233 (2017) (finding a country's wealth and legal experience may give it greater sway over the content of WTO rulings).

Power dictates who has the microphone more often. This may be built into the formal rules: The UN Security Council, the most powerful security institution in international law, grants permanent membership and a veto to five states – China, France, Russia, the United Kingdom, and the United States.<sup>159</sup> The International Monetary Fund (IMF), one of the most powerful economic institutions, uses weighted voting based on member financial contributions that favors the largest economies.<sup>160</sup> But it also manifests in less formal ways like the tacit agreements that split IMF and World Bank leadership between Europe and the United States<sup>161</sup> or the presumption that the five permanent UN Security Council members will each have a judge on the ICJ.<sup>162</sup> Such tacit agreements are mirrored in smaller ways throughout the international bureaucracy.

And in a system based largely on consent, power can dictate which obligations states take on, when tribunals have jurisdiction, and when decisions might be ignored. (“Essential” states need make no special guarantees to attract partners; powerful states may be more able to withstand cajoling, shaming, or threats.) These choices dictate the types of cases and issues likely to be dealt with, and dealt with more often, in international tribunals, subtly allocating some international law issues to the doctrinal decisionmaking of “objective” international arbitrators and others to realist jawboning of state practice. It should be no surprise that a robust tribunal-based jurisprudence has developed

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<sup>159</sup> U.N. Security Council, Voting System, <https://main.un.org/securitycouncil/en/content/voting-system> (describing visiting and veto power of five permanent members).

<sup>160</sup> Votes at the IMF are allocated to each state based on its financial contribution to the organization. IMF Members' Quotas and Voting Power, and IMF Board of Governors, Last Updated: September 17, 2024, <https://www.imf.org/en/About/executive-board/members-quotas>. See also Dennis Leach, *Voting Power in the Governance of the International Monetary Fund*, 109 ANNALS OF OPERATIONS RESEARCH 375 (2002) (“The most important decisions require special majorities of 85% of votes, giving the USA – with over 17 percent – an effective veto.”). For a piercing look at the ways power within the IMF translates into geopolitical power, along with a discussion of how those are supported by international law interpretations of “coercion,” see Zohra Ahmed, *The Price of Consent*, 49 YALE J. INT’L L. 208 (2024).

<sup>161</sup> “According to an informal agreement among their member countries, the U.S. nominee is chosen as the World Bank president and a European candidate (typically French or German) is appointed as managing director of the International Monetary Fund (IMF).” MARTIN A. WEISS, CONG. RSCH. SERV., R42463, SELECTING THE WORLD BANK PRESIDENT, CONGRESSIONAL RESEARCH SERVICE, (2019) at 1, 3-5.

<sup>162</sup> See RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN, & PHILIPPE SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS 26-29 (2010). But see Dapo Akande, *ICJ Elections 2017: UN General Assembly and Security Council Elect Four Judges to the ICJ But fail to Agree on a Fifth, yet again! + Trivia Question*, EJIL:TALK!, November 11, 2017, <https://www.ejiltalk.org/icj-elections-2017-un-general-assembly-and-security-council-elect-four-judges-to-the-icj-but-fail-to-agree-on-a-fifth-yet-again-trivia-question/> (noting that “[t]he tradition of there being a Judge of the nationality of each P5 member is not an unbroken one.”).

to constrain state decisions affecting foreign investment<sup>163</sup> but not regarding sanctions or export controls. As developing states recognized in the debates over the VCLT,<sup>164</sup> consent can only be so meaningful in the face of economic incentives and pressure.<sup>165</sup>

Most of all, in a horizontal system that demands at least some solidarity with the rules and decisions, interpreters must always have an eye of how others might react to their decisions, a reality that undoubtedly shapes interpretations, even if only subconsciously. Judges on the ICJ had to think about the effect of finding against the United States in a case in which the United States rejected jurisdiction entirely.<sup>166</sup> They also had to consider how a decision opening the door to claims of economic coercion might be received. The extent to which their calculus regarding the two effected their final votes in the *Nicaragua* decision is difficult to know.<sup>167</sup>

The order thus is not just the hazy way power is channeled through and constructed by institutions and law. Brought into tighter focus, the order is a blueprint, a map through the spaces for international action and argument. It is the list of phone numbers, and fax numbers, web forms and email addresses, office and meeting room numbers that traces a line through the people who will be called and the processes that will be invoked as correspondence is drafted, as briefs are submitted, as declarations and resolutions are negotiated, as actions are taken. Law and power cooperate in determining the path that line takes and who one meets along the way.

One might thus imagine the order, with its assemblage of corridors, negotiating tables, and courtrooms, as Cover's court stretched out across time and place. (Courts too are only abstract descriptions of the people and procedures they embody.) The order creates a grinding machine of interpretative fora and officials through which any argument must pass. The

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<sup>163</sup> See, e.g., generally WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (2022); JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN, AND MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME (2017).

<sup>164</sup> See *supra* notes 61-75 and accompanying text.

<sup>165</sup> Cf. Ahmed, *supra* note 160 (describing interaction between IMF loans and Pakistan's consent to U.S. use of force within its territory).

<sup>166</sup> As was the case in *Nicaragua v. United States*, discussed *supra* notes 89-94 and accompanying text. See generally Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 81 AM. J. INT'L L. 206 (1987).

<sup>167</sup> Some have suggested that the ICJ's decision to accept jurisdiction in the case, while costing it legitimacy (and future jurisdiction) with the United States reestablished its credibility with a much broader audience of states around the world who had doubted its willingness to stand up to Great Powers. Some have also suggested that the decision was a necessary antidote to the Court's rejection of jurisdiction in the *South-West Africa* case, a case where many believed that the Court worried too much about the response of powerful states. See, e.g., Orford, *supra* note 143, at 169.

order exercises jurisprudence, not through the swift action of a supreme court decision, but through a long, tortuous beating. The reality of power relations slowly grinds certain interpretations down, making them seem naïve or wrongheaded or unrealistic; consensus starts to solidify against them. Meanwhile, power backs its interpretations with brute force and undermines opportunities to solidify other views. It is power, of course, that allows the United States and Europe to consistently vote against resolutions condemning sanctions without political consequence.<sup>168</sup>

As Cover suggested, if a legal community is to remain a single legal community, it needs means to choose between legal meanings.<sup>169</sup> For Cover, such mechanisms always operate in the mode of domination and social control. In international law, in the absence of authoritative interpreters with compulsory jurisdiction, it is the order as a whole that exercises that function and makes that choice.

But the international order is not just a description of raw power; it is a manifestation of that power as organized and arrayed by legal rules and institutions. Even as we recognize the way power influences interpretation through the international order, it is important not to lose sight of the ways that the order constrains power. Once that legal and institutional machinery is built, the powerful and their arguments must pass through it too. Seeking to support a “liberal international order” that might favor certain values in interpreting international law, developed states supported human rights treaties, human rights bodies, and human rights mandates throughout the international system.<sup>170</sup> As economic coercion fell to international law’s cutting room floor, human rights increasingly elbowed their way to center of the story.<sup>171</sup> Arguments for limits on sanctions as unlawful intervention or use of force gave way to arguments for limits from human rights.<sup>172</sup> Officials trained to downplay concerns of economic coercion were also trained to be sensitive to concerns for human rights. While one set of arguments could be brushed aside, another could not.<sup>173</sup> Neither individual human rights to due process nor broader

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<sup>168</sup> See Hofer, *supra* note 21, at 187-88.

<sup>169</sup> See *supra* notes 125-128 and accompanying text.

<sup>170</sup> See Mearsheimer, *supra* note 125; Tom Ginsburg, *Authoritarian International Law*, 114 AM J. INT’L L. 221, 223 (2020). See also Samuel Bashfield and Elena Katselli Proukaki, *The Rules-Based Order, International Law and the British Indian Ocean Territory: Do As I Say, Not As I Do*, 23 GERMAN L. J. 713, 715 (2022).

<sup>171</sup> See, e.g., Iryna Bogdanova, *Human Rights and Unilateral Economic Sanctions: A New Perspective on a Twisted Relationship* 171, 191-200 in EUROPEAN YEARBOOK OF HUMAN RIGHTS 2023 (Philip Czech, et al, eds. 2023).

<sup>172</sup> See generally DEVIKA HOVELL, *THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING* (2015).

<sup>173</sup> See, e.g., Erika de Wet, *From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, 12 CHINESE J. INT’L L. 787 (December 2013); Elizabeth F.

community rights to food and health could totally be ignored.<sup>174</sup> The liberal ideals instantiated throughout the order kept those arguments alive and successfully commanded (at least some) reforms to sanctions processes.<sup>175</sup>

## V. ECONOMIC SECURITY REEMERGES

But as powerful as the international order is, it is also limited as a jurispactic actor. Informal and disaggregated, the order lacks the ability to fully kill off possible interpretations of the law. There's simply no final, authoritative blow to point to. Instead, the order can only banish those disfavored interpretations to the argumentative peripheries.<sup>176</sup> They are the arguments we imagine but don't express, disciplined by fear of being laughed at or dismissed. In exile though, those interpretation live on, ready to return when the order shifts in their direction. And the order is currently shifting.

Broad interpretations of force, coercion, and security never did die.<sup>177</sup> They have lived on in UN General Assembly resolutions,<sup>178</sup> in the reports of

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Defeis, *Targeted Sanctions, Human Rights, and the Court of First Instance of the European Community*, 30 *FORDHAM INT'L L. J.* 1449 (2006).

<sup>174</sup> See, e.g., Elena Chachcko, *Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law*, 113 *AJIL UNBOUND* 157 (2019); Michael Fakhri, *Situating Unilateral Coercive Measures Within a Broader Understanding of Systemic Violence*, *YALE J. INT'L L.* ONLINE, June 23, 2023, <https://www.yjil.yale.edu/situating-unilateral-coercive-measures-within-a-broader-understanding-of-systemic-violence/>.

<sup>175</sup> Andrej Lang, *Alternatives to Adjudication in International Law: A Case Study of the Ombudsperson to the ISIL and Al-Qaida Sanctions Regime of the UN Security Council*, 117 *AM. J. INT'L L.* 48 (2023); HOVELL, *supra* note 172.

<sup>176</sup> Cf. Cover, *supra* note 49, at 15-16 ("The radical instability of the paideic nomos forces intentional communities - communities whose members believe themselves to have common meanings for the normative dimensions of their common lives - to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning."). Of course, the order might literally banish certain interpretations by declaring states who refuse to give them up "rogues." Cf. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011).

<sup>177</sup> See Whyte, *supra* note 20.

<sup>178</sup> See G.A. Res. 76/191, *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries* (Dec. 17, 2021); G.A. Res. 77/214, *Human Rights and Unilateral Coercive Measures* (Dec. 15, 2022); see also *supra* notes 21-22 and accompanying text.

rapporteurs,<sup>179</sup> and the work of critical scholars.<sup>180</sup> But they have also lived on in arguments farther from international law's core. A mirror image of the UN Charter's rules on force and coercion can be found in the security exceptions to various international agreements. These exceptions allow states to take actions that might otherwise be prohibited – expropriation of foreigners' property,<sup>181</sup> implementation of import or export barriers,<sup>182</sup> even violations of certain human rights<sup>183</sup> – when the state's security is sufficiently threatened.<sup>184</sup>

The security exceptions and prohibitions on force and coercion are the flipside of the same coin; all recognize the primordial nature of security within the international legal system, the inviolability of the system's basic building block – states, and the need to protect them against existential threats. All of these concepts – force, aggression, coercion, and security – are tied closely to principles of self-determination, sovereignty, and their protection. The concept

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<sup>179</sup> Idriss Jazairy (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures), *Rep. of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, U.N. Doc. A/HRC/30/45 (10 August 2015); Alena F. Douhan (Special Rapporteur on the Negative Impact of Unilateral Coercive Measures), *Rep. of Secondary Sanctions, Civil and Criminal Penalties for Circumvention of Sanctions Regimes and Overcompliance with Sanctions*, U.N. Doc. A/HRC/51/33 (July 15, 2022).

<sup>180</sup> See, e.g., Whyte, *supra* note 20; Tahar Boumedra, *Economic Coercion under International Law*, 2 AFRICAN SOCIETY OF INT'L AND COMPAR. L. PROC. OF THE SECOND ANN. CONF. (March 1990), 81-83.

<sup>181</sup> These clauses differ between investment treaties, but Article XI of the United States-Argentina BIT presents a common formulation: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests." Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement And Protection of Investment, Arg.-U.S., Nov. 14, 1991; T.I.A.S. No. 94-1020.

<sup>182</sup> The key exception here is Art. XXI of the General Agreement on Tariffs and Trade (GATT), which in relevant part provides that "Nothing in this Agreement shall be construed... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests." General Agreement on Tariffs and Trade, art. XXI (1947).

<sup>183</sup> See, e.g., Article 4 of the International Covenant on Civil and Political Rights, which provides that "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation." International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>184</sup> Recognizing the tight relationship between these concepts, the GATT security exception specifically makes space for UN Security Council power to respond to a breach of the peace or act of aggression. GATT, art. XXI(c) ("Nothing in this Agreement shall be construed..." "(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."). Security, aggression, force, and coercion are all intimately connected.

of the *domaine réservé*, the essential core of state prerogative, recurs in doctrines defining the boundaries of each.<sup>185</sup>

Whether threats to a state's economy could count as threats to a state's security warranting exception have lingered for some time, appearing, for example, in Argentina's defense of potential violations of investment treaties justified as necessary to protect the country from spiraling economic crisis.<sup>186</sup> But alongside arguments that other non-forcible measures, including cyberattacks, misinformation campaigns,<sup>187</sup> and climate change<sup>188</sup> can threaten security, arguments about economic security have reemerged, this time from developed states.

The rise of China as a power within the international system seems to have been a key trigger for these arguments.<sup>189</sup> Various developed states have started to express anxiety that Chinese economic power could threaten their security. These apparent threats take various forms. For some, the anxiety emanates from the digitalization of warfare and the transformation of basic technology into "dual-use" goods.<sup>190</sup> Artificial intelligence and advanced semiconductors are key ingredients in both economic and military power, as are key raw materials that fuel them, including rare earths. These issues may emerge in current China's WTO challenges to U.S. semiconductor export controls<sup>191</sup>

<sup>185</sup> See, e.g., Helal, *supra* note 19. See also Katja S. Zeigler, *Domaine Réservé*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAWS (2013) (describing the *domaine réservé* as "closely linked [to the] principle of sovereignty of states").

<sup>186</sup> See, e.g., *Cont'l Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶¶ 84-89 (Sept. 5, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 367 (Sept. 28, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>; *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶¶ 324-26 (May 22, 2007), <https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 217-19 (Oct. 3, 2006), <https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf>; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶¶ 344-52 (May 12, 2005), <https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>.

<sup>187</sup> See, e.g., Helal, *supra* note 19.

<sup>188</sup> See, e.g., Ari Hawkins, *Is Climate Change an Emergency at the WTO?*, POLITICO (Jun. 3, 2024, 10:00 AM), <https://www.politico.com/newsletters/weekly-trade/2024/06/03/is-climate-change-an-emergency-at-the-wto-00161186>; Samantha Franks, *Exploring Climate Security to Article XXI of the GATT*, 20 WASH. U. GLOB. STUD. L. REV. 523 (2021); Cf. Mark Nevitt, *Is Climate Change a Threat to International Peace and Security?* 42 MICH. J. INT'L L. 527 (2021) (connecting climate change's threat to security to UN Charter definitions for Security Council action).

<sup>189</sup> See generally Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AM. J. INT'L L. 622 (2021).

<sup>190</sup> *The United States Announces Export Controls to Restrict China's Ability to Purchase and Manufacture High-End Chips*, 117 AM. J. INT'L L. 144 (2023).

<sup>191</sup> Dispute Settlement, *United States — Measures on Certain Semiconductor and other Products, and Related Services and Technologies*, WTO Doc. WT/DS615 (Dec. 12, 2022).

and Inflation Reduction Act subsidies,<sup>192</sup> both of which the United States has justified with relation to national security.<sup>193</sup> For others, the security threat is more general, a recognition that military power is dependent on a strong economy, including manufacturing capacity, energy availability, and overall wealth. The presence of competition for these resources threatens security.<sup>194</sup> These arguments have already been test-run in WTO challenges to U.S. aluminum and steel tariffs, ostensibly enacted because of the threat to American security of Chinese overproduction of the two metals.<sup>195</sup>

The echoes of earlier developing state arguments about economic security grow louder. These attempts to reinterpret these security clauses reflect a belief that nonforcible measures can threaten a state's essential security, that a state's economy is essential to a state's life and sovereignty and that an attack on it can be as devastating to state health as an attempt to dismember it by force. We've heard these arguments before – from developing states.<sup>196</sup>

But the link between these arguments about economic security and older arguments about the definition of force and coercion becomes fully apparent in the EU Anti-Coercion Instrument.<sup>197</sup> The arguments once made by developing states are returning from exile. Developed states are now the ones arguing that economic pressure and interference can constitute unlawful intervention under international law, and they are using the same sources – in particular, the Friendly Relations Declaration<sup>198</sup> – to support their cause.

How have these arguments returned? The international order is transforming as power arrangements within it shift. And with these shifts, developed states, the former guardians of definitional fences between economy and security, are opening the gates and inviting these meanings back in.<sup>199</sup>

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<sup>192</sup> Dispute Settlement, *United States — Certain Tax Credits Under the Inflation Reduction Act*, WTO Doc. WT/DS623 (Mar. 26, 2024).

<sup>193</sup> See, e.g., *Joe Biden's Effort to Remake the Economy is Ambitious, Risky—And Selfish*, THE ECONOMIST, February 4, 2023 (“The idea is that, with government action, America can reindustrialize itself, bolster national security, revive left-behind places, cheer up blue collar workers and dramatically reduce its carbon emissions all at the same time.”); Ming Du, *International Economic Law in the Era of Great Power Rivalry*, 57 VAND. J. INT'L L. 723, 761-62 (2024).

<sup>194</sup> Du, *supra* note 193, at 760-61.

<sup>195</sup> The United States lost before the WTO panel, Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/552/556/564 (Jan. 30, 2023), but it does not appear that the decision has much impact on U.S. interpretations; see Statement from USTR Spokesperson Adam Hodge (9 December 2022), <https://ustr.gov/about-us/policy-offices/press-office/pressreleases/2022/december/statement-ustr-spokesperson-adam-hodge>.

<sup>196</sup> See *supra* notes 64-68 and accompanying text.

<sup>197</sup> See *supra* notes 1-28 and accompanying text.

<sup>198</sup> See *supra* notes 13-17 and accompanying text.

<sup>199</sup> Shifting orders, like a change in court personnel, should be fertile ground for divergent interpretations, potentially opening doors to arguments that established orders had already shut. Interpretative confusion may, in turn, be an indicator of an order in flux.

Although there are debates about the extent of these power shifts,<sup>200</sup> there is widespread recognition that the world is entering a more multipolar era.<sup>201</sup> China's rise is at the center of these conversations, but it is not alone. While global inequality remains a reality, wealth and power have been redistributed in ways that diminish the overwhelming stature of the United States and Europe. The United States and Europe cannot assume that others will follow their lead.<sup>202</sup>

But the order in 2024 is not the postwar order of post-colonial potential nor the potential order postcolonial states imagined. Even as old interpretations are reemerging, they are being used in different ways and for different purposes than proposed by their prior proponents. The EU and United States may have seen their relative power shrink, but they remain among the most powerful actors in the world, capable of leveraging their economic power in ways few other states can. And their concerns about economic coercion have centered on one very specific economic actor – China.

As the EU and United States reassert notions of economic security, these realities are shaping their legal interpretations. Certainly, European and U.S. sanctions policies cannot be considered unlawful economic coercion, they would explain.<sup>203</sup> Their sanctions programs target states that are violating international law; states do not have a right to violate international law; actions violating international law are thus outside any state's *domaine réservé*; and demanding changes to such policies through economic sanctions would not violate any rule against nonintervention.<sup>204</sup> Calls by developing states to declare

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<sup>200</sup> Compare Jo Inge Bekkevold, *No, the World Is Not Multipolar*, FOREIGN POLICY, September 22, 2023 with Emma Ashford and Evan Cooper, *Yes, the World Is Multipolar*, FOREIGN POLICY, October 5, 2023. See also Daniel W. Drezner, *It's Not a Multipolar World*, DREZNER'S WORLD, June 5, 2023, <https://danieldrezner.substack.com/p/its-not-a-multipolar-world>.

<sup>201</sup> See, e.g., Mearsheimer, *supra* note 135, at 8 n.2 (“This article assumes that the world became multipolar in or close to 2016.”). See also Harlan Grant Cohen, *Multilateralism's Life-Cycle*, 112 AM. J. INT'L L. 47, 52-54 (2018) (collecting sources).

<sup>202</sup> See Ash Ü. Bâli, *Weapons Against the Weak*, YALE J. INT'L L., June 29, 2023 (“[S]anctions are a far less effective lever to enforce American preferences where potential targets might seek assistance from U.S. rivals and those rivals, in turn, are better able to resist when threatened with sanctions themselves.”).

<sup>203</sup> In response to the European Commission's request for feedback on the proposed ACI, the Czech Republic's Ministry of Industry and Trade noted the need to recognize that economic coercion is an instrument of foreign policy. See European Commission Public Consultation, *Trade – Mechanism to Deter & Counteract Coercive Action by non-EU Countries* (2021), [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-counteract-coercive-action-by-non-EU-countries/public-consultation\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12803-Trade-mechanism-to-deter-counteract-coercive-action-by-non-EU-countries/public-consultation_en).

<sup>204</sup> See Marko Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117 AM. J. INT'L L. 601, 609-12, 622-23 (2023) (“If, however, the sanctions were directed against policies or choices that fall outside the reserved domain, they would not violate the prohibition of intervention, again even if we regarded them as coercive.”). It is not hard to find some rule of international law that another state might be violating. See Ziegler, *supra* note 185 (observing

unilateral sanctions regimes unlawful thus continue to fall on deaf ears in the Global North even as those same states decry economic pressure to change their own policies, potential hypocrisy not lost on a few more critical members of the European Parliament during ACI debates.<sup>205</sup> Nor are Europe's longstanding complaints about U.S. economic pressure, including secondary sanctions on EU businesses, imagined as the ACI's target.<sup>206</sup> That sort of economic diplomacy between friends seems different in kind from the potential malicious economic pressure of a political rival and potential military enemy. The reinvigorated notions of economic sovereignty are being refashioned to work for developed rather than developing states, perhaps even to developing states' disadvantage.

But the door to these alternative interpretations of economic security has been reopened, enlarging the argumentative space. Whether the EU and United States will be able to constrain these interpretations in exactly these ways will depend on how the order continues to shift both inside and outside international legal institutions that the EU and United States cannot totally control. Expanding definitions of security seem to be spreading. The list of states invoking "security" as a justification for their actions continues to grow, often in situations having nothing to do with the EU, United States, or China, as the disputes between South Korea and Japan<sup>207</sup> or Saudi Arabia and Qatar<sup>208</sup> demonstrate.<sup>209</sup> At the same time, the sheer magnitude of the sanctions adopted

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the "there are hardly any subject-matters or policy areas today that are inherently removed from the international sphere"). Without any clear proportionality principle for economic sanctions, this justification for economic pressure becomes conveniently capacious.

<sup>205</sup> "Madam President, we're supposed to believe that the economic coercion is something that the bad guys do, and we need this law to defend ourselves. But, of course, everybody knows that's a barefaced lie. We play the victim while engaging in exactly the same thing ourselves." Eur. Parl. Deb. (Oct. 10, 2023) (Remarks of Ms. Daly) ([https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-02-ITM-014\\_EN.html](https://www.europarl.europa.eu/doceo/document/CRE-9-2023-10-02-ITM-014_EN.html)); "The US economic war on Iran cost EU industries more than EUR 24 billion between 2018 and 2020 alone. That's not to mention the tens of thousands of Iranian civilians that were killed as well by the US sanctions." *Id.* (Remarks of Mr. Wallace).

<sup>206</sup> "When Washington imposes the worst economic coercion in the world with the extraterritoriality of American law, we let it happen... It is therefore quite obvious that we will never use this tool against our main competitor and nonetheless ally, the United States." *Id.* (Remarks of Mr. Mariani); "Some people here seem to have forgotten that the law was initiated to counteract US coercion against the EU. A few years on, with the EU companies still victim to US secondary sanctions, there's barely a mention of it in this document. Instead, it's all about bending the knee to the US, getting stuck into their tit-for-tat trade war against China." *Id.* (Remarks of Ms. Daly); "This law barely mentions the US attacks on the EU's industry. Instead, it frames the US targets as our targets and sets us up to have a sanctions regime just as arbitrary, brutal and murderous as that of the US." *Id.* (Remarks of Mr. Wallace).

<sup>207</sup> See *supra* note 35.

<sup>208</sup> See *supra* note 38.

<sup>209</sup> See Benn Steil and Elisabeth Harding, *How Washington Killed the World Trade Organization*, BARRON'S, Dec 12, 2024, 10:14 am EST, <https://www.barrons.com/articles/how-washington->

against Russia following its invasion of Ukraine, and their almost-necessary impact on third-states faced with trade disruptions and heightened commodity prices<sup>210</sup> seems to be reigniting interest in the scope and governance of lawful sanctions.<sup>211</sup> And the increased multipolarity that drove EU and US reinterpretations is also shifting power within the institutions – the courts and international organizations<sup>212</sup> – where these interpretations will be debated.

But most of all, a second Trump administration in the United States has some observers wondering whether the EU may use the ACI against the United States rather than China,<sup>213</sup> potentially opening a rift over whose economic statecraft is really most coercive. Although the ACI was adopted as a direct response to China, its first seeds were laid in the aftermath of the first Trump administration's near-global steel and aluminum tariffs.<sup>214</sup> The European Commission at the time recognized it lacked the tools to respond quickly if

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[killed-the-world-trade-organization-biden-trump-f2505304?st=xWbJYN](#) (finding a recent “surge” in national security notifications at the WTO: Since 2017, “Mexico has filed 14, Switzerland 12, Brazil 10, and Saudi Arabia 8.”).

<sup>210</sup> See, e.g., Alex Kozul-Wright, *Year of War in Ukraine Left Developing Nations Picking Up Pieces*, AL JAZEERA, February 23, 2023, <https://www.aljazeera.com/economy/2023/2/19/a-year-of-war-in-ukraine-has-left-developing-countries-picking-up-pieces>; Joseph Glauber and David Laborde, *How Sanctions on Russia and Belarus are Impacting Exports of Agricultural Products and Fertilizer*, IFPRI BLOG, November 9, 2022, <https://www.ifpri.org/blog/how-sanctions-russia-and-belarus-are-impacting-exports-agricultural-products-and-fertilizer>; Nicholas Mulder, *The Sanctions Weapon*, FINANCE AND DEVELOPMENT 20, 23 (June 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/06/the-sanctions-weapon-mulder>.

<sup>211</sup> See, e.g., Jeff Stein and Federica Cocco, *How Four U.S. Presidents Unleashed Economic Warfare Across the Globe*, WASH. POST, July 25, 2024 at 5:00 a.m., <https://www.washingtonpost.com/business/interactive/2024/us-sanction-countries-work/>.

<sup>212</sup> See, e.g., Daniel F. Runde and Austin Hardman, *Great Power Competition in the Multilateral System*, CSIS: CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, October 23, 2024 (“The United States, historically dominant in these forums, now faces increasing competition from China and other emerging powers.”).

<sup>213</sup> See, e.g., Ruben Dewitte and Inga Fechner, *Why the EU still holds a Trump card in the face of rising trade tensions*, ING, 27 November 2024, <https://think.ing.com/articles/eu-us-trade-strategy/>. See also Agathe Demarais and Abraham Newman, *Europe Must Unlock Its Geoeconomic Power: The EU Needs a New Strategy to Defend Against Coercion*, FOREIGN AFFAIRS, November 14, 2024, <https://www.foreignaffairs.com/europe/europe-must-unlock-its-geoeconomic-power>.

<sup>214</sup> Koen Verhelst, *Locked and loaded? The EU Weapons to Fight Trump's Trade War*, POLITICO, November 18, 2024 1:37 pm CET, <https://www.politico.eu/article/eu-export-import-ling-fight-donald-trump-us-trade-war-wto-anti-coercion-instrument-subsidies/> (“[W]hile there was speculation that it might be used against China — for instance when Beijing bullied Lithuania — Trump's first round of tariffs in 2018 were the very reason to devise it.”); *MEPs adopt new trade tool to defend EU from economic blackmail*, NEWS: EUROPEAN PARLIAMENT, March 3, 2023, <https://www.europarl.europa.eu/news/en/press-room/20230929IPR06122/meps-adopt-new-trade-tool-to-defend-eu-from-economic-blackmail> (“The Commission proposed the mechanism in December 2021, driven by a demand from the European Parliament and in response to economic pressure exerted by the US during the Trump administration, along with numerous confrontations between the EU and China.”).

attacked in a trade war. Over the course of a generally cooperative relationship with the Biden administration, the EU seemed more forgiving of potentially aggressive US economic actions, whether exclusion of EU vehicles from valuable electric vehicle subsidies,<sup>215</sup> massive subsidies to American semiconductor and green energy producers,<sup>216</sup> or pressure on EU companies like ASML to stop selling advanced semiconductor technologies to China.<sup>217</sup> The EU may not be so patient in the face of an all-out tariff attack by the United States lobbed by a less than friendly administration. New interpretative alliances, perhaps against the legality of U.S. secondary sanctions (a longtime European complaint)<sup>218</sup> or against weaponization of the banking infrastructure,<sup>219</sup> might be floated. Alternatively, rather than averting increased weaponization of the world economy, the ACI may become symbolic of total economic war, as the world's three largest economic actors raise increasingly high economic barricades to protect their home economies against potentially ever-more-dangerous economic threats.

## VI. THE SHAPE OF ORDER

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<sup>215</sup> See, e.g., *US and EU try to repair rifts over electric-vehicle policies*, ECONOMIST INTELLIGENCE UNIT, June 22, 2023, <https://www.eiu.com/n/us-eu-electric-vehicle-policies/>.

<sup>216</sup> See, e.g., Olivier Knox, *Europe's not happy with Biden's Inflation Reduction Act*, Wash. Post, January 17, 2023, <https://www.washingtonpost.com/politics/2023/01/17/europe-not-happy-with-bidens-inflation-reduction-act/>; News Wire, *Why EU leaders are upset over Biden's Inflation Reduction Act*, FRANCE24, December 16, 2022, <https://www.france24.com/en/europe/20221216-why-eu-leaders-are-upset-over-biden-s-inflation-reduction-act>.

<sup>217</sup> See, e.g., Marta Biino, *US likely to pressure EU for more curbs on China exports, ASML says*, SEMAFOR, October 26, 2024 at 2:06 PM EDT, [https://www.yahoo.com/news/us-likely-pressure-eu-more-180603949.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce\\_referrer\\_sig=AQAAAJzYv1wBO\\_yPHJc6rRBtlwIg8JwtxCM4LlpjtmMyzm2o6q\\_97S7\\_42X\\_4OW2gj5MM-Be00XMslukFdtmpF0AB\\_KE4\\_T1ydsW2iPOUW7SJ9Cihc5P1O5Xa2g-UhpqzPX2SCui6Pbv-\\_oOVBvsdI1Mq32QQ8TWROJRxHTpF5eB3mhp](https://www.yahoo.com/news/us-likely-pressure-eu-more-180603949.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAAJzYv1wBO_yPHJc6rRBtlwIg8JwtxCM4LlpjtmMyzm2o6q_97S7_42X_4OW2gj5MM-Be00XMslukFdtmpF0AB_KE4_T1ydsW2iPOUW7SJ9Cihc5P1O5Xa2g-UhpqzPX2SCui6Pbv-_oOVBvsdI1Mq32QQ8TWROJRxHTpF5eB3mhp).

<sup>218</sup> See, e.g., Maria Shagina, *Europe Expands Its Sanctions Reach*, FOREIGN POLICY, October 7, 2024, 10:24 AM, <https://foreignpolicy.com/2024/10/07/sanctions-russia-evasion-eu-europe-uk-secondary-economic-warfare/> (“Washington’s allies have long been concerned about its liberal use of so-called secondary sanctions, which are extraterritorial restrictions that penalize foreign companies that do business with U.S. adversaries, even if the companies are based in friendly countries.”); Tom Ruys and Cedric Ryngaerts, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, 0 BRIT. YB. INT’L L 1, 111 (2020) (“The wide extraterritorial reach of US secondary sanctions legislation is a well-known phenomenon .... It has long been a thorn in the side of the EU and its Member States, as well as various non-EU countries.”).

<sup>219</sup> See, e.g., Ruys and Ryngaerts, *supra* note 218, at 100-105; Robin Wigglesworth, Polina Ivanova, and Colby Smith, *Financial warfare: will there be a backlash against the dollar?*, FINANCIAL TIMES, April 7, 2022, <https://www.ft.com/content/220db8f2-2980-410f-aab8-f471369ac3cf>.

It is here that the stakes for international law of debates over the nature of the international order finally become clear. Characterizations of the order have themselves recently become controversial. Once partaking of Western references to a “liberal international order,”<sup>220</sup> the United States and allies have more recently adopted the language of a “rules-based order.”<sup>221</sup> The re-characterization has not gone unnoticed or uncriticized. In its place and in apparent contradiction, Chinese leaders have invoked an “international law-based order” or an order “underpinned by international law.”<sup>222</sup> The characterizations seem fairly consequential to those invoking them, reflecting at the very least heavily considered and vetted state policy. But why would such characterizations matter, beyond mere rhetorical flourishes?

Recognizing the international order is it itself an interpretative agent helps brings these debates over how to characterize the order into sharper focus. Characterizations of the order as “liberal” or “rules-based” or “international law-based” or “underpinned by international law”<sup>223</sup> are both attempts to describe and normative claims on the ways power and rules interact in the order.<sup>224</sup> Interpreters need interpretative rules-of thumb, gap-fillers, views about the purposes of the legal system that can help choose between interpretations in harder cases. These may be explicit or implicit. These characterizations are efforts to describe the interpretative biases the order (including the varied officials arrayed along its pathways) does and/or should employ in resolving ambiguities and filling gaps in the rules.

In characterizing the order as “liberal,” Western states seemed to suggest a thumb on the scale in favor of certain “individual rights and certain core liberal values (democratic rule, individual freedom, rule of law, market-based economies, and so on).”<sup>225</sup> The characterization acted as a justification for weighting those rules more heavily than other international law rules that seemed to favor sovereign equality and sovereign choices. A liberal order might more quickly pierce the veil of the state to assert the rights of individuals living

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<sup>220</sup> See, e.g., G. John Ikenberry, *The end of liberal international order?*, 94 INT’L AFF. 7, 7 (2018).

<sup>221</sup> See, e.g., Dugard, *supra* note 47; Walt, *supra* note 224 (“A ready ability to use the phrase “rules-based international order” seems to have become a job requirement for a top position in the U.S. foreign-policy apparatus.”).

<sup>222</sup> Gao, *supra* note 47; Cai Congyan, *On the “International Law-Based International Order,”* 44 SOC. SCI. IN CHINA 20 (2023).

<sup>223</sup> See, e.g., Dugard, *supra* note 47; Gao, *supra* note 47; Cai, *supra* note 222.

<sup>224</sup> See Stephen Walt, *China Wants a ‘Rules-Based International Order,’ Too*, FOREIGN POLICY, March 31, 2021, 11:48 AM (“The question is who gets to write the codes—and whether the United States will live up to its own.”).

<sup>225</sup> See *id.*; Ikenberry, *supra* note 220, 7 (2018) (describing the liberal order as one “organized around economic openness, multilateral institutions, security cooperation and democratic solidarity”).

there or might more quickly condemn state policies that interfere with property and contract rights. More recently, American and European political figures have been using “rules-based” order instead.<sup>226</sup> The term might seem more neutral – international law provides rules after all – but many observers have noted an apparent intention to demarcate something other than just international law. A rules-based order might be broader than public international law, drawing in a range of nonbinding agreements and norms that some states had not specifically agreed to.<sup>227</sup> This notion might sweep in a range of softer standards-making or best practices processes promoted by the West, with or without much input from the rest of the world.<sup>228</sup> Alternatively, a “rules-based” order might be narrower than international law, emphasizing some rules over others or notions of “fair play” over strict adherence to the law.<sup>229</sup> (This ambiguity may explain its attractiveness to certain states.) The notion might explain why some violations of international law could be brushed aside while others should be seen as existential threats. For detractors though, most notably, Russia and China, the “rules-based order” is mere “camouflage”<sup>230</sup> for Western opportunism and “particularist Western and liberal notions of global order.”<sup>231</sup> A “rules-based” order is simply an attempt by Western states to pick and choose among the rules that might apply.<sup>232</sup>

Chinese officials have in turn proposed their alternative – an international order “underpinned by international law”<sup>233</sup> or an “international law based”<sup>234</sup> international order, a characterization that focuses on the UN Charter and leans into state sovereignty, consent, and agreement.<sup>235</sup> States

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<sup>226</sup> See, e.g., Walt, *supra* note 224.

<sup>227</sup> See Stefan Talmon, *Rules-based Order v. International Law?*, GPIL – GERMAN PRAC. IN INT’L L., Jan. 20, 2019 (quoting Russian Foreign Minister Sergey Lavrov).

<sup>228</sup> See *id.*

<sup>229</sup> See Dugard, *supra* note 47.

<sup>230</sup> Talmon, *supra* note 227 (quoting Russian Foreign Minister Sergey Lavrov).

<sup>231</sup> Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but not Binding Under International Law*, 24 MELB. J. INT’L L. 24 (2021).

<sup>232</sup> See Gao, *supra* note 47, at (quoting Geng Shuang, the Deputy Permanent Representative of China to the United Nations, critique “the ‘so-called ‘rule-based international order’ ‘advocated by a small number of countries’ could be as amorphous as its proponents want”).

<sup>233</sup> See, e.g., *How it happened: Transcript of the US-China opening remarks in Alaska*, NIKKEIASIA, March 19, 2021 22:54 JST, <https://asia.nikkei.com/Politics/International-relations/US-China-tensions/How-it-happened-Transcript-of-the-US-China-opening-remarks-in-Alaska> (quoting Chinese Director of the Office of the Central Commission for Foreign Affairs Yang Jiechi: “What China and the international community follow or uphold is the United Nations-centered international system and the international order underpinned by international law, not what is advocated by a small number of countries of the so-called rules-based international order.”).

<sup>234</sup> See *id.*; Cai, *supra* note 222.

<sup>235</sup> See *id.* These formulations echo earlier ones developed in Joint Declarations on international law issued by Russia and China in 2016. *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, 25 June 2016 17:07,

should be held their agreements—neither more nor less. And in the absence of explicit agreements to contrary, states should respect each other’s sovereignty and sovereign choices. Most recently, the BRICS states, a group of emerging markets led by Brazil, Russia, India, China, and South Africa, endorsed a “multipolar world order,”<sup>236</sup> an apparent announcement that going forward, more states’ interests and views of international law would need to be taken into account.<sup>237</sup> A multipolar international order might express suspicion of legal interpretations endorsed only by Western or developed states and require a broader consensus among global power centers.

What are all of these characterizations of the international order, and why would they legally matter? Fundamentally, these characterizations are arguments about how the order should choose between legal meanings. They act as claims on the interpretative tools of the international order, arguments about how interpretive arguments should be resolved or gaps filled. Each characterization of the order acts as a claim on the myriad officials and institutions judging international law arguments, serving as an argument for where the order’s axe of jurisprudence should fall. A “liberal international order” might justify unilateral sanctions against states for human rights violations<sup>238</sup> that

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[https://archive.mid.ru/en/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2331698](https://archive.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2331698) (upholding “a just and equitable international order based on international law”). See also Ingrid (Wuerth) Brunk, *China, Russia, and International Law*, LAWFARE, Monday, July 11, 2016, 8:30 AM, <https://www.lawfaremedia.org/article/china-russia-and-international-law> (“First, the Joint Declaration explicitly emphasizes the ongoing importance of the sovereign equality of states to international law, an emphasis likely meant to highlight that some aspects of human rights law, the right to democracy, and the responsibility to protect are based on the views of some but not all states.”); Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, EJIL:TALK!, July 15, 2016, <https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/> (“In their Joint Declaration, Russia and China emphasize state sovereignty and non-intervention in the internal or external affairs of states.”).

<sup>236</sup> *Kazan Declaration*, *supra* note 103, at 2 para. 6.

<sup>237</sup> *Id.* (“We note the emergence of new centres of power, policy decision-making and economic growth, which can pave the way for a more equitable, just, democratic and balanced multipolar world order.”). See also Trang (Mae) Nguyen, *International Law as Hedging: Perspectives from Secondary Authoritarian States*, 114 AJIL UNBOUND, 237 (2020) (describing small authoritarian states’ preference for a “pluralist vision of international law”).

<sup>238</sup> See Milanovic, *supra* note 204, at 622-23. Sarah Cleveland’s argument in favor of unilateral sanctions against human rights abuses could be read to exemplify this sort of interpretive drift. On the one hand, Cleveland explains that such sanctions should only be based on obligations both states have accepted. On the other hand, she suggests that the United States should “look to international standards” including “the definitions set forth in international instruments and acting consistently with the interpretations and recommendations of intergovernmental bodies such as the Human Rights Committee, the ILO, and NGOs.” Cleveland, *supra* note 25, at 85. Many sanctions targets would likely observe that none of the latter are formally binding.

an “international law-based order,” might condemn.<sup>239</sup> A “rules-based order” might explain why Chinese economic espionage violates international law,<sup>240</sup> even when hard law rules condemning may be hard to find. The contest to define the order will thus decide innumerable doctrinal debates – just as it did in the past.

## VII. CONCLUSION

Fights about the nature of the international order and the reopening of old arguments about the place of economic power in international law are thus intimately connected. It was the old order, acting as a juridical force, that had rejected once vital interpretations of concepts like force, intervention, and security. With global power relations shifting though, the order is now in flux, its fundamental biases less clear. Arguments are being reopened, and old discarded interpretations suddenly again look plausible.<sup>241</sup> How those arguments will be resolved and in whose favor will turn on how the order resolidifies. Today’s fights are as much about the shape of that eventual order as they are over these particular rules of international law.

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<sup>239</sup> See, e.g., *The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law*, *supra* note 235, at paras 6, 7 (invoking “international order based on international law” and condemning “unilateral sanctions” not authorized by the UN Security Council).

<sup>240</sup> See, e.g., Elizabeth Economy, *An order aligned with Chinese values, Debate: China and the Rules-Based Order*, LOWY INSTITUTE, <https://interactives.lowyinstitute.org/features/china-rules-based-order/articles/chinese-order/> (describing economic espionage as one of China’s threats to the “rules-based” order).

<sup>241</sup> See Bâli, *supra* note 202. (“The era of unipolarity that has facilitated such one-sided coercion is, however, drawing to a close, and with it perhaps the age of ever-proliferating sanctions.”).

## EDITORIAL COMMENT

### MULTILATERALISM'S LIFE CYCLE

*By Harlan Grant Cohen\**

#### I. INTRODUCTION

Global and multilateral efforts to provide global public goods, manage global commons, and protect fundamental values have had a rough couple of years. A new U.S. president has expressed his intention to withdraw the United States from the multilateral Paris Agreement on climate change.<sup>1</sup> Citizens of the United Kingdom voted to leave the European Union (colloquially known as Brexit).<sup>2</sup> Following popular opinion, the United States has expressed its intent not to move forward with the Trans-Pacific Partnership (TPP),<sup>3</sup> itself a rejection of the more global approach to trade reflected in the World Trade Organization (WTO). The White House has, instead, promised to transfer its focus to bilateral trade deals.<sup>4</sup> South Africa, Gambia, and Burundi expressed their intent to withdraw from the Rome Statute creating the International Criminal Court (ICC). Although South Africa and Gambia have since rescinded their withdrawal,<sup>5</sup> Burundi has followed through,<sup>6</sup> and the pressures on other African states to withdraw have not abated. A president in the Philippines openly flouts international human rights obligations and has threatened withdrawal from a variety of institutions, including the United Nations.<sup>7</sup> Reading the near daily alerts of threatened withdrawals, it would be fair to worry that the current global system is unraveling.

Of course, the news has not all been bad for these global efforts. China has expressed its support for the Paris Agreement and other global institutions.<sup>8</sup> China also continues to

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<sup>1</sup> Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017).

<sup>2</sup> Anushka Ashthana, Ben Quinn & Rowena Mason, *UK Votes to Leave EU After Dramatic Night Divides Nation*, GUARDIAN (June 24, 2016).

<sup>3</sup> Nicky Woolf, Justin McCurry & Benjamin Haas, *Trump to Withdraw from Trans-Pacific Partnership on First Day in Office*, GUARDIAN (Nov. 22, 2016).

<sup>4</sup> William Mauldin, *Trump's Big Gamble: Luring Countries into One-on-One Trade Deals*, WALL ST. J. (Jan. 27, 2017).

<sup>5</sup> Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017).

<sup>6</sup> Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017).

<sup>7</sup> *Philippines President Threatens to Quit 'Stupid' UN in Foul Mouthed Tirade Over War on Crime*, TELEGRAPH (Aug. 21, 2016).

<sup>8</sup> *China's Xi Pledges to Support Paris Climate Agreement*, AL JAZEERA (May 9, 2017).

negotiate its own mega-regional trade agreement in Asia—the Regional Comprehensive Economic Partnership (RCEP).<sup>9</sup> While the United States has moved on from the TPP, its onetime partners in the agreement have continued to talk,<sup>10</sup> and may have reached an agreement.<sup>11</sup> And the threatened withdrawals from the ICC by members of the African Union (aside from Burundi) may never come about.

How should we understand these events? It is extraordinarily difficult to conceptualize broad trends while they are still ongoing, and trying to identify broad trends from the wide range of events mentioned, let alone to explain them, is a perilous task. Many different lines could be drawn through such a wide range of events/data points, revealing very different stories about the world, including perhaps, that these events are not connected at all. Moreover, many of these events seem highly contingent; a few votes in one direction or another in certain countries might radically alter our perception of these trends. All of this said, global negotiating dynamics do seem to be changing.<sup>12</sup> Multilateralism seems to have lost at least some of its appeal to some states, and it is worth exploring what phenomena may be sapping the strategy of its vigor.

This essay explores the possibility that multilateralism and multilateral institutions have a life cycle. This is not how we normally think about institutional arrangements and choices. Certainly, debates rage over the shape global arrangement should take from unilateral to bilateral to regional or global. But those debates usually focus on fitting tools to goals. We rarely think of these choices as time-bound—that particular strategies may ripen or spoil or have expiration dates. To the extent we do imagine such arrangements developing over time, we often fall into progress narratives in which global solutions build upon themselves, in which bilateral arrangements beget regional ones, regional ones beget global multilateral ones, and multilateral solutions should and will deepen over time.

In fact, though, current events highlight another possibility: that institutional strategies and arrangements have life cycles, that as the world adapts to those arrangements, the effectiveness of those solutions or strategies may change, even wane. Institutional arrangements transform negotiating dynamics, creating new realities that bring different challenges and require different solutions.

This insight suggests a seeming paradox: that the anti-globalist turns described above are a reflection not of multilateralism's failures, but of its successes. The great multilateral institutions of the post-World War II world—the General Agreement on Tariffs and Trade (GATT) and the WTO, the United Nations, human rights treaties, the Rome Statute of the International Criminal Court—reflected efforts to increase and spread global wealth, stability, and peace (among other goals). And while much work remains to be done, these institutions have in many ways succeeded. Wealth and power are now widely dispersed across the world.<sup>13</sup> Human rights remain under serious threat (in some places, more than before<sup>14</sup>), but

<sup>9</sup> Richard Javad Heydarian, *This Is How a Superpower Commits Suicide*, WASH. POST (Nov. 13, 2017); Jennifer Amur, *4 Things to Watch Now That the U.S. Has Withdrawn from TPP Trade Deal*, WASH. POST (Jan. 23, 2017).

<sup>10</sup> Motoko Rich, *The Trade Deal Trump Killed Is Back in Talks Without U.S.*, N.Y. TIMES (July 14, 2017).

<sup>11</sup> Shawn Donnan, *Long Live the TPP — Pacific Trade Pact Survives Largely Intact*, FIN. TIMES (Nov. 13, 2017).

<sup>12</sup> See José E. Alvarez & Benedict Kingsbury, *AJIL at 111*, 111 *AJIL* 1, 2–3 (2017).

<sup>13</sup> See *infra* text at notes 41–47.

<sup>14</sup> See Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 *TEX. L. REV.* 279 (2017).

institutions have developed tools that can be effective, at least some of the time.<sup>15</sup> Success, however, has fundamentally changed the calculus of individual states, and in turn, their views of global goals and multilateral strategies. The success of multilateralism may have made that strategy more difficult over time.<sup>16</sup>

The success of post-World War II mass multilateralism, this essay argues, has had four profound and intertwined effects on global negotiating dynamics, which together should shift and may be shifting states away from that strategy. The first is true global multipolarity.<sup>17</sup> Current global institutions were founded against a backdrop of unipolarity, bipolarity, or even tripolarity. It is fair to ask whether those institutions are mere reflections of earlier power relations that no longer exist, whether existing global institutions are compatible with true multipolarity.

Multipolarity highlights a second effect of success: the diminishing value of issue linkages. When one or a few wealthy, powerful states dominate the international order, they can demand much more of others. Previously, in return for access to markets or security, the United States, the Soviet Union, and the European Union could demand that other states sign up to rules in which those other states had little to no interest. True multipolarity, though, radically diminishes the force of those linkages. Smaller states no longer “need” the more powerful ones in the same way. They may be powerful or wealthy enough to hold out for better deals. They may have greater relative regional power that offsets losses in dealing with traditional global powers. And, the wider dispersion of power means that the more traditional powers now face competition. No state is essential.

This second effect combines with a third—the increased effectiveness of these institutions—to further change global negotiating dynamics. For states with little interest in particular institutions, greater effectiveness means greater cost. If the value of linkages decreases while the costs of membership increase, states may have little incentive to remain. For other states, effectiveness results in real benefits, increasing the value of membership. This though can make it easier for certain states to free-ride on the regime, betting that they can benefit from the global goods the regime produces, even as they seek special benefits at everyone else’s expense.

Fourth and finally, multipolarity and success may change what states fundamentally want out of these negotiations, increasing focus on relative as opposed to absolute welfare. In an era of massive wealth and power disparities, all states can focus on the absolute gains of global agreements. Raising the welfare of the poorest serves the interests of the wealthy, and the poorest want only to better their position. Multipolarity, however, changes that dynamic. Studies in behavioral economics have shown that people often care more about relative wealth than absolute. At the international level, the United States worries about its shrinking wealth relative to China or Mexico, questioning trade agreements that, while valuable to the United

<sup>15</sup> See, e.g., Gráinne de Búrca, *Human Right Experimentalism*, 111 AJIL 277, 303–04 (2017); Pamela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT’L L. & POL. 97 (2012).

<sup>16</sup> None of this is meant to suggest that multilateralism’s success is *the* cause of any current backlashes. Each of these multilateral regimes has its own complex narrative, and the crises these regimes face are specific to them. In any given case, the factors noted here may not be the dominant sources of regime discontent. Instead, this essay highlights a series of structural effects of multilateralism’s success that *can* undermine a multilateral regime.

<sup>17</sup> Whether multilateralism actually “caused” multipolarity is impossible to say. It is fair to say that the wider dispersion of wealth and power it represents was among the desired effects of post-World War II multilateralism and that multipolarity might thus be seen as a sign of multilateralism’s success.

States, give their rivals too large a share of the growing pie.<sup>18</sup> President Trump complains openly about how little other members of the North Atlantic Treaty Organization (NATO) are paying for their defense.<sup>19</sup> China and India, worried about the environment, worry equally that new environmental rules will burden them more than others, hurting their relative global position.<sup>20</sup>

The events listed above may thus best be described as the growing pains of an increasingly mature, successful, global system. But if multilateralism's success makes further multilateralism more difficult, those seeking to solve global problems and provide global public goods face a quandary. The last part of this essay thus suggests some ways forward. Again paradoxically, as multilateral institutions deepen, the best strategies to achieve global solutions may be ones that encourage competition rather than foster cooperation. Regional, club, and national strategies may need to pick up where multilateralism leaves off.

A few notes on the terms used in this essay. Multilateralism, the primary focus of this discussion, describes a problem-solving strategy or organizing principle. It describes the choice to include, involve, and gain the agreement of as many states as possible to solve global problems or produce global benefits. In this sense, multilateralism is a relative concept. While multilateralism connotes a number larger than one (unilateralism) or two (bilateralism), it cannot be boiled down to a specific number or geometry of states. The twelve (or now eleven) state negotiations of the TPP look like multilateralism when compared to bilateral trade deals; it looks like multilateralism's antithesis when compared to the 164 members of the WTO. The same can be said of the relationship between regional human rights arrangements and the broader United Nations-sponsored international one. Instead, multilateralism describes a preference—a belief that, all things being equal, broader more inclusive regimes would best solve the problems at hand, whether functionally or normatively.

Multilateralism is thus distinct both from the multilateral institutions that may reflect or embed that strategy and from the dispersion of state power in the system (polarity). Preferences for multilateralism may be embedded in the design of particular multilateral institutions; the WTO and the United Nations, for example, establish/dictate multilateral fora and decision-making processes. If states' preference for multilateralism wanes, those processes may become less effective, grind to a halt, or fall into disuse as states seek out other strategies in other fora. Nonetheless, other aspects of the multilateral institution may survive, or even thrive. Even as states look to regional agreements to deepen economic integration,<sup>21</sup> the WTO continues on, providing support, with the support of its members, for existing

<sup>18</sup> *Trade, at What Price?*, ECONOMIST (Apr. 2, 2016).

<sup>19</sup> David E. Sanger & Maggie Haberman, *Donald Trump Sets Conditions for Defending NATO Allies Against Attack*, N.Y. TIMES (July 20, 2016).

<sup>20</sup> See, e.g., Jonathan Zasloff, *Choose The Best Answer: Organizing Climate Change Negotiation in the Obama Administration*, 103 NW. U. L. REV. COLLOQUY 330, 333 (2009); Lavanya Rajamani, *The Climate Regime in Evolution: The Disagreements that Survive the Cancun Agreements*, 5 CARBON & CLIMATE L. REV. 136, 138 (2011) ("Developing countries, in particular Brazil, South Africa, India and China (BASIC) are reluctant to accept global goals for emissions reductions in the absence of an acceptable and equitable burden sharing arrangement. In their view, without such an arrangement, these goals will translate into effective limits on their development."); *Catching Up with China*, ECONOMIST (Oct. 10, 2015).

<sup>21</sup> ... or threaten the WTO more directly. See Gregory Shaffer, Manfred Elsig & Mark Pollack, *The Slow Killing of the World Trade Organization*, HUFFINGTON POST (Nov. 17, 2017), at [https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization\\_us\\_5a0cccd1de4b03fe7403f82df](https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization_us_5a0cccd1de4b03fe7403f82df).

agreements.<sup>22</sup> In fact, as will be explained below, it may be an institution's ability to perform its existing functions well (or well enough) that makes unilateral efforts or non-multilateral negotiations of further commitments more attractive.<sup>23</sup> And as scholars of regime complexity have observed, it may be easier to layer new institutions and arrangements on top of old ones than to replace them completely.<sup>24</sup>

Similarly, multilateralism is distinct from polarity. There may be some structural relationships between the choice of negotiation strategy and the shape of power relations. As will be explored below, multilateralism may be easier to pursue in a unipolar world, where it may be more attractive to both the dominant power and others. By contrast, multipolarity may pose distinct challenges to multilateralism.<sup>25</sup> Some scholars have suggested that polarity may itself follow cycles or patterns as states adapt to the power wielded by others.<sup>26</sup> That said, as multilateralism is in part ideological—a *belief* in broader, more inclusive solutions—power dispersions are not entirely dispositive. A dominant state may prefer to wield its power either unilaterally or to leverage its power in bilateral relations.<sup>27</sup> Competing states may believe that only multilateral efforts will solve the problems they see or create the benefits they seek.<sup>28</sup>

It is also important to clarify the meaning and limits of the life cycle metaphor. The metaphors of “cycles” or stages are often used to describe purported “laws” of development. The business cycles described by political economists, for example, imply an element of inexorability, with periods of expansion, crisis, recession, and recovery doomed or blessed to repeat indefinitely.<sup>29</sup> So too Marxist stages of development<sup>30</sup> suggest a single inexorable trajectory for the world. To the extent to which business cycles suggests that success naturally creates conditions that lead to crisis and failure, there is an analogy to life cycles of multilateralism described here. But the image of a life cycle is meant to describe something different—not the inexorable repetition of the cycle, but the natural life of an organism. By life cycle, I mean to suggest a process of change over time that might follow some common patterns but which will also be different for different individuals and different species. Things are born, mature, and decline, but the exact forms those stages take may differ. At different stages of maturity,

<sup>22</sup> One obvious factor in both the continued survival of an institution and its ability to adapt in the face of the forces described here is the relative perceived value it continues to generate for its members. The more value it seems to produce, the stronger it will likely be.

<sup>23</sup> See *infra* text at notes 91–96 (describing the potential for free-riding).

<sup>24</sup> See Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, ANN. REV. L. & SOC. SCI., 10 (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3085043](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085043).

<sup>25</sup> See *infra* text at notes 60–88.

<sup>26</sup> See, e.g., Barry R. Posen, *Emerging Multipolarity: Why Should We Care?*, 108 CURRENT HIST. 347 (2009); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

<sup>27</sup> See John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 381–82 (1982) (distinguishing the trade liberalizing preferences of nineteenth century British Empire from the mercantilist views of the seventeenth century Dutch Empire).

<sup>28</sup> See Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

<sup>29</sup> See, e.g., JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* (1954); ARTHUR F. BURNS & WESLEY C. MITCHELL, *MEASURING BUSINESS CYCLES* (1946). Some scholars have suggested that business cycles themselves (not analogies to them) may explain shifts internationally between cooperation and competition. See, e.g., James Cassing, Timothy J. McKeown & Jack Ochs, *The Political Economy of the Tariff Cycle*, 80 AM. POL. SCI. REV. 843 (1986).

<sup>30</sup> See, e.g., Karl Marx, *Preface to a Contribution to the Critique of Political Economy*, reprinted in THE MARX-ENGELS READER 3–6 (Robert C. Tucker ed., 2d ed. 1978) (outlining Marx's notion of “historical materialism”).

different challenges may emerge, some the natural result of maturation itself. And as organisms die, they give way to something new,<sup>31</sup> though the new organism may carry forward the DNA of its forebears as it develops in new directions. Even as multilateral institutions may wane, the rules and processes they created will likely continue on as part of the unilateral or bilateral or “minilateral”<sup>32</sup> efforts that replace or displace them. Moreover, while life cycles too suggest repetition, our interest is often less in the way things stay the same than in the way organisms individually adapt to those common, repeated forces.<sup>33</sup> So too here, our interest is in the forces unleashed by multilateralism’s success and the room (or lack thereof) left for adaptation.

One final preliminary note: the forces suggested in this essay are not meant to be determinative. Current pressures on multilateral institutions reflect highly contingent events (e.g., domestic political outcomes) that may only be partly related to global institutions. The structural forces this essay identifies should instead be seen as common background pressures against which contingent events will play out. Sometimes, actors or events will exploit them or make them worse, stoking centrifugal forces within the system. At other times though, actors and events will help these institutions stave off these pressures. Actors may find new sources of multilateral value for states, may reinforce the ideological commitment to multilateral solutions, or embed multilateralism in domestic law and politics.<sup>34</sup> External crises may boost the once-waning value of multilateral cooperation. Structure is not destiny. Like aging though, it may be a reality we all need to face.

## II. THE RISE OF MULTIPOLARITY

The arrival of multipolarity has been prophesized for some time. In the United States, Secretary of State Madeline Albright<sup>35</sup> and Vice President Joe Biden have at various points talked of the arrival of a multipolar world.<sup>36</sup> In 2008, the U.S. National Intelligence Council’s Global Trends series predicted “a global multipolar” international system by 2025.<sup>37</sup> China’s President Xi Jinping has spoken positively of a shift to multipolar world, describing the shift as a feature of Chinese policy.<sup>38</sup> And just last January, European Council President Donald

<sup>31</sup> . . . with the notable exception of the immortal jellyfish, *Turritopsis dohrnii*.

<sup>32</sup> See, e.g., CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT (2014).

<sup>33</sup> In this sense, the idea that organizing principles like multilateralism may have life cycles might be at one with studies of international law as an autopoietic system, which suggest that the system will adapt to such forces by pushing towards different methods of organization when such seem necessary. See, e.g., Anthony D’Amato, *Groundwork for International Law*, 108 AJIL 650 (2014); Anthony D’Amato, *International Law as an Autopoietic System*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 335 (Rudiger Wolfrum & Volcker Roeben eds., 2005); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

<sup>34</sup> See *infra* text at notes 120–22.

<sup>35</sup> See Elizabeth Dickinson, *New Order: How “the Multipolar World” Came to Be*, FOR. POL’Y (Oct. 15, 2009) (cataloguing the various references to multipolarity).

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

<sup>37</sup> U.S. NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD, at vi (2008).

<sup>38</sup> See, e.g., Jane Perlez, *Leader Asserts China’s Growing Importance on Global Stage*, N.Y. TIMES (Nov. 30, 2014) (quoting Xi saying, “The growing trend toward a multipolar world will not change”).

Tusk noted the shift.<sup>39</sup> Over this period of time, countless journalists and academics have predicted, promoted, described, or bemoaned the shift.<sup>40</sup>

And the facts on the ground back up these assertions. Many numbers and studies can be cited to demonstrate the widening dispersion of wealth and power, but the World Bank's 2011 Global Development Horizon's report, "Multipolarity: The New Global Economy" is emblematic.<sup>41</sup> "Emerging and developing countries' share of international trade flows has risen steadily, from 26 percent in 1995 to an estimated 42 percent in 2010," the World Bank observed. "Much of this rise has been due to an expansion of trade not between developed countries and developing countries, but among developing countries."<sup>42</sup> "Similarly," the report continues, "more than one-third of foreign direct investment in developing countries currently originates in other developing countries."<sup>43</sup> "Emerging economies have also increased their financial holdings and wealth. Emerging and developing countries now hold three-quarters of all official foreign exchange reserves (a reversal in the pattern of the previous decade, when advanced economies held two thirds of all reserves). . . ."<sup>44</sup>

As the report summarizes:

By 2025, six major emerging economies—Brazil, China, India, Indonesia, the Republic of Korea, and the Russian Federation—will collectively account for more than half of all global growth. Several of these economies will collectively account for more than half of the global growth rate. This new global economy, in which the centers of growth are distributed across both developed and emerging economies, is what GDH 2011 envisions as a multipolar world.<sup>45</sup>

Since 2011, there has been an overall downturn in global trade, putting pressure on many developing states.<sup>46</sup> Nonetheless, the general dispersion of economic power has continued. By 2016, Christine Lagarde, Managing Director of the International Monetary Fund reported that "as a group, emerging and developing economies now account for almost 60 percent of global GDP, up from just under half only a decade ago."<sup>47</sup>

This dispersion of economic power is changing alliances and partnerships. Along with its One Belt, One Road initiatives in Eurasia, China has developed an ambitious program of infrastructure investment in Africa.<sup>48</sup> China is also now actively wooing traditional U.S.

<sup>39</sup> James Kanter, *Trump Threatens Europe's Stability, A Top Leader Warns*, N.Y. TIMES (Jan. 31, 2017).

<sup>40</sup> See, e.g., William Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1 (2015); CHARLES A. KUPCHAN, *NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN* (2012); PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* (1987).

<sup>41</sup> WORLD BANK, *GLOBAL DEVELOPMENT HORIZON 2011: MULTIPOLARITY: THE NEW GLOBAL ECONOMY* (2011).

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 3.

<sup>46</sup> UN Conference on Trade and Development, *Key Statistics and Trends in International Trade 2015*, UN Doc. UNCTAD/DITC/TAB/2015/1 (2015).

<sup>47</sup> Christine Lagarde, *The Role of Emerging Markets in a New Global Partnership for Growth*, INT'L MONETARY FUND (Feb. 4, 2016), at [https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp020416#P26\\_3019](https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp020416#P26_3019).

<sup>48</sup> Winslow Robertson & Lina Benabdallah, *China Pledged to Invest \$60 Billion in Africa. Here's What That Means*, WASH. POST (Jan. 7, 2016).

allies.<sup>49</sup> Australia, Canada, and various European states joined the China-sponsored Asia Infrastructure Investment Bank, despite United States opposition.<sup>50</sup> And the dispersion of power is not limited to economics. India and China have both been projecting their military power into the Indian Ocean, with India establishing a base in the Seychelles and China establishing one in Djibouti (where the United States already has a base).<sup>51</sup> The Economic Community of West African States (ECOWAS) has taken on a significant military and peace-keeping role in West Africa.<sup>52</sup> As Charles Kupchan has observed, “the landscape is one in which power is diffusing and politics diversifying.”<sup>53</sup>

In some ways, this new multipolarity might seem like the fulfillment of the mission of post-World War II multilateralism,<sup>54</sup> which promised to secure freedom and security<sup>55</sup> while growing and spreading wealth.<sup>56</sup> But even if it might have been desired or predicted, this multipolarity is, nonetheless, something new in the post-World War II world. The major multilateral institutions that were born and grew up in that world did so against very different power structures. Bipolarity dominated early on, with the United States and the Soviet Union dominating their spheres and competing for allies.<sup>57</sup> The latter part of the period has often been described as unipolar, with the United States the one and only superpower.<sup>58</sup> At various other points, one or another state or group of states has emerged as an alternative pole on some issues, whether the non-aligned states, the European Union,<sup>59</sup> or China.

Political scientists have studied the different shapes into which differing numbers of poles pull the international system.<sup>60</sup> For the purposes of this essay, the key distinction though is a relative one: the more limited the number of poles, or the more the system is dominated by a limited number of powerful players, the more limited the negotiation options for less powerful ones. Less powerful states will have fewer partner options and less negotiating leverage. Moreover, polarity is relative. Depending on the issue, power may be dispersed differently, among different or different numbers of states. And what may look like unipolarity,

<sup>49</sup> Jane Perlez, *China Showers Myanmar With Attention, as Trump Looks Elsewhere*, N.Y. TIMES (July 19, 2017).

<sup>50</sup> *China-Led AIIB Approves 13 New Members, Canada Joins*, REUTERS (Mar. 23, 2017).

<sup>51</sup> Peter Harris, *How to Live in a Multipolar World*, NAT'L INTEREST (Jan. 3, 2016).

<sup>52</sup> *Building Peace in West Africa*, AFR. RENEWAL (April 2004).

<sup>53</sup> KUPCHAN, *supra* note 40, at 3.

<sup>54</sup> The current multipolarity is, of course, the product of many converging historical events, in which multilateral institutions have played but a role. While it would perhaps go too far to suggest that multilateralism “caused” the current multipolarity, it would be fair to say that multipolarity was a desired outcome and that multilateral institutions played a role in encouraging and fostering it.

<sup>55</sup> See, e.g., UN Charter pmbl. (including as goals, to “promote social progress and better standards of life in larger freedom,” and “to maintain international peace and security”); International Covenant on Civil and Political Rights, pmbl., Dec. 16, 1966, 999 UNTS 171 (recognizing that “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

<sup>56</sup> See, e.g., Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 UNTS 154 (“Recognizing . . . that there is need . . . to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade.”).

<sup>57</sup> See, e.g., Kenneth Waltz, *The Stability of a Bipolar World*, 93 DAEDALUS 881, 888 (1964).

<sup>58</sup> See, e.g., Robert Jervis, *Unipolarity: A Structural Perspective*, 61 WORLD POL. 188, 190 (2009); G. John Ikenberry, *Institutions, Strategic Restraint, and the Persistence of American Postwar Order*, 23 INT'L SEC. 43 (1998–1999).

<sup>59</sup> See, e.g., Andrew Moravcsik, *Europe: Rising Superpower in a Bipolar World*, in RISING STATES, RISING INSTITUTIONS: CHALLENGES FOR GLOBAL GOVERNANCE 151 (Alan S. Alexandroff & Andrew F. Cooper eds., 2010).

<sup>60</sup> See, e.g., Jervis, *supra* note 58; Posen, *supra* note 26; Ikenberry, *supra*, note 58; WALTZ, *supra* note 26.

bipolarity, or tripolarity for the global system, may feel like something else for specific states. The bipolar-era of the Cold War would have looked to many less powerful states like unipolarity; given a particular set of policy preferences, a state really had one possible partner for negotiations. Western European states had no other option on trade than to negotiate with the United States. (Some states may have tried to play the United States and the Soviet Union off of one another, sometimes with success, but life in the Non-aligned Movement was difficult to maintain, as either great power could simply decide that an insufficiently loyal ally was already in the other camp.) Similarly, if two powerful states or group of states generally agree on policy (e.g., a consensus between the United States and European Union), they may look like a single negotiating pole to less powerful states. The key difference here seems to be between more limited and less limited numbers of poles. When power is less widely dispersed, each state negotiating with the poles will have the less negotiating leverage, and the policy preferences of the poles will win out more often. As power is more widely dispersed, negotiating leverage becomes more widely dispersed, increasing the leverage of less powerful states and decreasing that of the more powerful ones. More diverse policy preferences will be reflected in negotiations and in agreements.

It has always been assumed that multipolarity would change global negotiating dynamics. But the focus has been almost entirely on the role the new great-ish powers would play.<sup>61</sup> On the one hand, Brazil, Russia, India, China, and perhaps South Africa (the BRICs states) would use their newly attained leverage to push against North Atlantic dominance of global institutions, holding out for deals and rules more in line with their preferences. On the other, gaining wealth and power from global institutions as a whole, these states would become more invested in them, more likely to try to bend them to their will than undermine them entirely. With more, diverse, powerful states invested in these regimes, these regimes might actually become more, rather than less, stable.

What this essay suggests is that the impact of true multipolarity may be more fundamental, unleashing dynamics that might unravel the very fabric of global, multilateral institution building.

### III. THE DECREASING VALUE OF LINKAGES

The optimistic assumption about existing multilateral institutions is that the states that have joined them and ratified the underlying agreements genuinely “wanted” to be a part of them. States may have fought hard during the negotiating process, standards might have been watered down or changed to bring along stragglers, but those fights and concessions serve as proof that the states involved were seriously weighing the costs and benefits of membership. When states have ratified these agreements, it is because they have decided that as a matter of state policy, the benefit of the agreement outweighs the sovereignty costs associated with binding those states’ hands.<sup>62</sup>

But what if this hard-fought consensus is nothing more than a mirage created by prior power dynamics? What if the perceived benefit of the agreement for states is not the global

<sup>61</sup> See Burke-White, *supra* note 40.

<sup>62</sup> See Barbara Koremenos, Charles Lipson & Duncan Snidal, *Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001) (describing assumptions)

good it seeks to provide but the good will of the institution's sponsors that ratification might seem to buy?

Issue linkages are usually discussed in explicit terms. States may specifically link ratification of one particular agreement with access to some other, different benefit. The European Union has explicitly linked membership in the customs union with membership in the European Convention on Human Rights.<sup>63</sup> The European Union has also linked special trade benefits for states outside the Union to compliance with specific policies to prevent drug trafficking.<sup>64</sup> These sorts of linkages undoubtedly play a role in corralling straggler states into various global agreements, but the assumption is that it would simply be too expensive for sponsor states to rely entirely on these extra-regime incentives. Most states will have to accept the benefit of that regime itself as sufficient if truly global institutions are to succeed. Thus, many linkages are within the agreements themselves. Within the Trans-Pacific Partnership, for example, the United States linked market access to compliance with the Convention on the International Sale of Endangered Species.<sup>65</sup> And the WTO itself is such an agreement. By treating most of the agreements under the WTO umbrella as part of a single undertaking that all members must accept, market access is effectively linked with rules regarding health and safety regulations and intellectual property, among many others.<sup>66</sup> A state cannot get one without agreeing to the others.

Explicit linkages may also play a role in compliance, though the effectiveness of these cross-regime linkages has been questioned. Reputation-focused theories of compliance suggest that a negative reputation for compliance can make other desirable agreements less likely or most costly; states will demand more in negotiations from a state known not to respect its agreements. The effect is to force states to consider not only the costs of non-compliance with one agreement, but the costs of non-compliance for negotiating other different, future ones as well.<sup>67</sup> While such reputational considerations undoubtedly play a role in compliance calculations, there has always been some question whether non-compliance with agreements in one issue area can be consistently linked with negotiations in others.<sup>68</sup> Do states that violate their human rights agreements really have a harder time negotiating trade agreements? While states may consider other states' reputation for compliance in their negotiations, they may assume that the drivers of non-compliance in one issue area are not really relevant to compliance in another. An autocratic regime may have an easier time complying with its trade agreements (it may not have to worry about divided government or popular opinion) than with its human rights agreements. A liberal democracy may face the opposite pressures. There has also been

<sup>63</sup> See Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 (P 0001) 0390.

<sup>64</sup> Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc. WT/DS246/AB/R (adopted April 20, 2004).

<sup>65</sup> Rachael Bale, *How the Trans-Pacific Partnership Will—and Won't—Protect Wildlife*, NAT'L GEO. (Nov. 5, 2015).

<sup>66</sup> See, e.g., Peter K. Yu, *The RCEP and Trans-Pacific Intellectual Property Norms*, 50 VAND. J. TRANSNAT'L L. 673, 738 (2017) (describing intellectual property obligations as part of the World Trade Organization's "single undertaking"); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 27 (2014) (describing how the Uruguay round's "single undertaking" impacted members' regulatory space).

<sup>67</sup> See, e.g., ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2007).

<sup>68</sup> See Rachel Brewster, *The Limits of Reputation on Compliance*, 1 INT'L THEORY 323 (2009).

some question as to how states value the reputational costs of each instance of non-compliance.<sup>69</sup> In many cases, doubt about the actual reputational cost may guarantee that in the calculus of non-compliance, the cost of potential issue linkage is set so low that it has little effect on the state's decision.

At the point of ratification though, assigning even a small value to potential issue linkages might be enough to incentivize states to join a multilateral agreement. In contrast to the optimistic view above, we might imagine most multilateral attempts to provide global goods as being of relatively low salience to the great majority of states. Orbiting a core of key states driving the negotiations, may be a much larger set of states for whom the issues discussed simply are not that important. Leaders in many countries, not just poor or unstable ones, may have relatively short time horizons. Solving global goods problems may not be high on their list of priorities. If those short time horizons make the value of joining low, they also make the costs of complying low as well. Many states may see any negative reactions to potential non-compliance as a distant problem to be solved by a future government. This concern has been raised, for example, regarding ratifications of human rights agreements.<sup>70</sup> The question is why illiberal states with poor human rights records would join human rights treaties at all, given how difficult (and unlikely) it would be for them to comply. One answer is that they can benefit from the positive vibes associated with the news of ratification, while discounting the costs associated with any future non-compliance and its associated consequences.<sup>71</sup>

Realists have argued that global institutions are mere reflections of hegemonic policies.<sup>72</sup> One need not be a realist though to worry that multilateralism actually masks hegemony. Various scholars have studied the apparent emergence of global or regional scripts.<sup>73</sup> States seem to adopt policies, create institutions, and join agreements in patterns that can be explained only as attempts to mimic states with which they hope to be associated.<sup>74</sup> This phenomenon is often described in sociological terms: state leaders are socialized to views of what the “right” sort of states do and wish to be seen as part of that club.<sup>75</sup> But this phenomenon can also be explained in terms of incentives and issue linkages. States adopt these positions because there are benefits to being in the club—club goods available to like-minded or like-behaving states are not readily available to others.<sup>76</sup> Following the script and joining the agreement may make other desirable deals more likely. Departing from the script or failing to join

<sup>69</sup> See *id.* at 328–30; see also Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231, 244 (2009).

<sup>70</sup> See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 77 (2009).

<sup>71</sup> *Id.* at 80.

<sup>72</sup> See Ruggie, *supra* note 27, at 381 (describing view).

<sup>73</sup> See Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism*, 50 INT'L ORG. 325 (1996).

<sup>74</sup> Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

<sup>75</sup> Beth Ann Simmons, *Treaty Compliance and Violation*, 13(1) ANN. REV. POL. SCI. 273, 286 (2010) (explaining that “compliance with certain international environmental agreements can be expensive for industry, at least initially. Where violators can be excluded from certain international ‘club goods,’ however, compliance rates can be improved.”).

<sup>76</sup> *Id.*

may make other deals that much more difficult. The script tells the story of a set of implicit linkages between certain behaviors and club benefits.

In an era of limited poles, the combination of low policy salience and high discount rates may make the limited, ephemeral value of positive vibes or good will valuable enough to tip the scales in favor of mass ratification. There is probably also a tipping point—a number of ratifications that establish ratification as part of the script. The Rome Statute may reflect some of these realities. There has been some debate as to whether state ratifications of the Rome Statute were sincere,<sup>77</sup> with empirical studies of ratification patterns suggesting a variety of different, sometimes contradictory explanations.<sup>78</sup> It is possible though that many of the states now reconsidering their relationship with the ICC had little interest in the ICC when they ratified the statute. Instead, recognizing that the ICC was unlikely to turn its attention to them in the short term, they willingly accepted the positive vibes associated with ratification. Once a critical mass had ratified, other less-than-interested states might have felt pressure not to be seen among the supposed “outlaw” states unwilling to submit themselves to global rules. Ratification may have seemed a small cost to pay not to be branded a “rogue” state. Early on, Canada and European states did lobby other states to ratify and worked hard, together with NGOs and others, to make ratification part of a global script.<sup>79</sup> With the United States and other opponents of the ICC apparently content to remain silent on these efforts,<sup>80</sup> ratification might have seemed to carry only good will benefits. States also did seem to ratify in regional clusters and in relatively rapid succession,<sup>81</sup> both suggesting strategic rather than normative considerations.<sup>82</sup>

Multipolarity though radically changes the value of these explicit and implicit linkages. Where the linkages have been explicit, as for example at the WTO, changes in the relative distribution of wealth may make it easier for states to renegotiate the basic deal. Renegotiating existing deals is difficult at the WTO, but the BRICs have been successful in changing the deal going forward, essentially blocking the developed state agenda during the Doha rounds. Most renegotiation of trade though is happening outside the WTO, where states are seeking their own best deals through bilateral and regional free trade agreements.<sup>83</sup> The fact that many of these free trade agreements may be technically illegal under WTO law (failing to

<sup>77</sup> See Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79 L. & CONTEMP. PROBS. 275 (2016). Beth Ann Simmons and Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225 (2010).

<sup>78</sup> While Beth Simmons and Allison Danner found that evidence that states ratified in order to make credible commitments to international justice, see Simmons & Danner, *supra* note 77, Terence Chapman and Stephen Chaudoin found that states most likely to ratify were those with the least reason to fear prosecution. Terence L. Chapman & Stephen Chaudoin, *Ratification Patterns and the International Criminal Court*, 57 INT’L STUD. Q. 400 (2012). Jay Goodliffe and Darren Hawkins found that the best predictor of Rome Statute ratifications was actually trade relations and security alliances. Jay Goodliffe & Darren Hawkins, *A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations*, 71 J. POLS. 977 (2009).

<sup>79</sup> DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 68 (2014).

<sup>80</sup> *Id.* at 68–69.

<sup>81</sup> *Id.* at 69. See also the chronological list of states parties to the Rome Statute, at [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/states%20parties%20\\_%20chronological%20list.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/states%20parties%20_%20chronological%20list.aspx).

<sup>82</sup> See SIMMONS, *supra* note 70, at 90–92.

<sup>83</sup> See, e.g., generally Warren Maruyama, *Preferential Trade Arrangements and the Erosion of the WTO’s MFN Principle*, 46 STAN. J. INT’L L. 177 (2010).

meet the requirements of GATT Article XXIV),<sup>84</sup> but that virtually none have been challenged there,<sup>85</sup> could itself be thought of as a tacit renegotiation of the deal. States no longer have to accept the linkages embedded within the WTO's single-undertaking model.

But it is in the areas where the linkages were implicit that the impact of multipolarity is most radical and destabilizing. Under the global script model, the value of joining a multilateral agreement was very small—the possible promise of good will. That promise of good will becomes a rounding error in multipolar state calculus. Newly wealthy or empowered states have themselves more leverage of their own in negotiations, assets of their own to use in negotiating the deals they want. But even poorer, less powerful states have more leverage. They can play one set of partners off others, holding out for the deals that are truly in their best interests. Playing one screenwriter off the other, they can actually renegotiate some of the lines in their scripts.

As proof of the influence of global scripts, scholars have observed disconnects between states' external commitment and internal behaviors.<sup>86</sup> Such scholars have suggested that over time, the former may influence the latter, moving the states to actual compliance.<sup>87</sup> In the short term though, this observation recognizes the inherent instability of these commitments. Until internal behaviors or attitudes change, state commitments may be highly sensitive to external power shifts.

If the pessimistic story is true, then many global, multilateral institutions may either unravel or be gutted by multipolarity. The incentives to remain or comply may no longer be there. Keeping everyone together may require either sweetening the deal for each individual member (tacitly allowing non-WTO conforming free trade agreements) or decreasing the downside risk by weakening the overall agreement (accepting the views of African states on official immunity<sup>88</sup>).

#### IV. THE DOWNSIDE OF SUCCESS

Paradoxically, the diminished power of linkages may be compounded by the increasing effectiveness<sup>89</sup> of these various multilateral institutions. For those states who had little interest in the institutions in the first place, and who perceive little short-term benefit from these institutions, the effectiveness of the institution is a cost. As the institutions take hold, states may see increasing pressure to come into compliance with the institutions' rules, whether on trade, human rights, investment protection, or criminal justice. States' chosen policies may face

<sup>84</sup> See, e.g., Meredith Kolsky Lewis, *The Prisoners' Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?*, 11 CHI. J. INT'L L. 631, 646, n. 55 (2011) (observing that it is "evident that a great many FTAs" do not cover "substantially all trade" as required by GATT Article XXIV and citing European and Japanese free trade agreements as examples).

<sup>85</sup> See *id.* at 652–53.

<sup>86</sup> RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 2013 (describing "isomorphism" and "decoupling").

<sup>87</sup> *Id.*

<sup>88</sup> See Max Du Plessis & Dire Tladi, *The ICC's Immunity Debate – The Need for Finality*, EJIL: TALK! (Aug. 11, 2017), at <https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality>.

<sup>89</sup> Effectiveness is a concept itself worthy of analysis. See, e.g., Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AJIL 225 (2012); Timothy L. Meyer, *How Compliance Understates Effectiveness*, 108 AJIL UNBOUND 93 (2014). I use "effectiveness" here simply to describe an institution's relative ability to achieve the goals (or at least the perceived goals) of the regime in which it is embedded.

challenge at international organizations, in front of international courts and tribunals, and even in domestic courts. Costs associated with membership in a particular institution may range from economic sanctions, awards of compensation, judicial criticism, NGO shaming and pressure, to negative public opinion at home. It is key that, for the state receiving little perceived benefit from the institution, even bad publicity may be enough of a cost to make withdrawal seem reasonable, particularly if the costs of withdrawal seem low. African states considering withdrawal from the Rome Statute may have already crossed that threshold. Given other states' inconsistent commitment to the ICC, they may rightly see the costs of withdrawal will also be low. Venezuela too may have crossed that threshold with regard to the Inter-American Human Rights system.<sup>90</sup> Withdrawal is unlikely to do relevant damage to the Maduro government's already exceedingly low reputation for human rights, giving that government little reason to stay in and face continued shaming. The Duterte government in the Philippines may be thinking through similar math with regard to the ICC, United Nations, and other institutions. At the very least, President Duterte's threat of leaving<sup>91</sup> may change the calculus of his critics who do not want to lose the limited leverage they have.

Of course, for at least some states, increasingly effective institutions should provide some benefits. States can rely on the WTO to guarantee that the benefits they bargained for are protected. Members of the UN Convention on the Law of the Sea (UNCLOS) benefit from increased security and stability for shipping, fishing, and mining. All of these benefits should raise the costs of withdrawal and/or non-compliance. The problem is that this calculus is true for many members of that institution. With so many states reliant on those institutions' continued success, free-riding becomes a real, viable strategy.

States know that they can withdraw from, violate, or cheat on the agreement without it falling apart. Others have too much invested in it. China, the United States, the European Union, and others can play hard and fast with WTO rules, knowing that the overall agreement and the benefits they receive will not go away. In particular, those states have negotiated free trade agreements hard to square with WTO rules. Few have challenged them though,<sup>92</sup> almost certainly for fear that a successful challenge would undermine either their own such agreements or the WTO as a whole. Better for everyone to look the other way. Similarly, the United Kingdom has consistently fallen back on the continued presence of the WTO and its rules both to justify Brexit and as supposed leverage in its negotiations with the rest of the European Union.<sup>93</sup> The United States has long been able to rely on the stability created by UNCLOS even as it remains outside.<sup>94</sup> China has largely ignored the Permanent Court

<sup>90</sup> Joanna Harrington, *Venezuela Denounces American Convention on Human Rights*, EJIL:TALK! (Sept. 12, 2012), at <https://www.ejiltalk.org/category/international-tribunals/inter-american-commission-on-human-rights>.

<sup>91</sup> See TELEGRAPH, *supra* note 7.

<sup>92</sup> See Lewis, *supra* note 84, at 651, 652–53; Joost Pauwelyn, *Legal Avenues to 'Multilateralizing Regionalism': Beyond Article XXIV*, in MULTILATERALIZING REGIONALISM CHALLENGES FOR THE GLOBAL TRADING SYSTEM (Richard Baldwin ed., 2009).

<sup>93</sup> *EU, Britain Agree to Seek Same WTO Quotas After Brexit: Sources*, REUTERS (Oct. 3, 2017).

<sup>94</sup> See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 242–43 (2004); See also José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 444 (2003) (observing that the United States would only join the ICC if it could be convinced that it "will not simply be able to free-ride on international institutions that apply only to others").

of Arbitration's decision against it with regard to China's actions in the South China Sea,<sup>95</sup> knowing that it would still benefit from the regime elsewhere in the world.<sup>96</sup>

## V. RELATIVE V. OVERALL WELFARE

A third driver of instability associated with both multipolarity and institutional success may be a state preference for policies and rules that increase relative welfare at the expense of general welfare. The general assumption underlying many of our current global, multilateral institutions is that the goal is to increase overall welfare. Some side payments might be necessary to guarantee that all participants see some benefit, but so long as all do, the deal has been thought of as a successful one. (Of course, sometimes, whether everyone is truly benefitting or benefitting sufficiently/fairly has been a serious question—see, e.g., the bilateral investment regime.)

But this assumption may be naïve, a pro-social illusion conjured by uni- or, at least, limited polarity. In a period of unipolarity, with wide gaps in wealth between the powerful states sponsoring the regime and those seeking to join it, guaranteeing that everyone gets at least some benefit may be enough for everyone. Poor states are eager for whatever help they can get to develop. Rich states are happy to help poor states develop to create more opportunities for their producers and investors. Multipolarity may undermine this consensus.

Studies in behavioral psychology suggest that individuals are more concerned with positional welfare than real welfare.<sup>97</sup> In many studies, individuals will reject deals that make them better off, but in ways they feel disproportionately advantage others.<sup>98</sup> Studies of wealth and happiness also strongly suggest that individuals are less affected by absolute gains in salary or spending power than by relative ones.<sup>99</sup> What matters most is what they are earning compared to a peer group.<sup>100</sup> Moreover, losses in status compared to that peer group are felt more strongly than gains.<sup>101</sup> These effects are further compounded with increases in wealth. Above a certain level of absolute wealth, status and positional wealth seems to be of increased importance.<sup>102</sup>

Applied at the level of the state, one might then expect states to become more sensitive to status and positional wealth as the wealth differences between them shrink and they begin to look like peers (or rivals). Moreover, one might expect the traditionally wealthy or powerful to react more strongly and negatively to the changes.<sup>103</sup>

<sup>95</sup> *China Refuses South China Sea Arbitration Award*, XINHUA NEWS (July 12, 2016); Jane Perlez, *Tribunal Rejects Beijing's Claims in South China Sea*, N.Y. TIMES, July 12, 2016, at A1.

<sup>96</sup> See, e.g., *Your Rules or Mine?*, ECONOMIST (Nov. 13, 2014) (suggesting China may be free-riding on law of the sea rules rather than supporting them).

<sup>97</sup> See, e.g., Anne van Aaken, *Behavioral International Law & Economics*, 55 HARV. INT'L L.J. 421, 428 (2014); Ori Heffetz & Robert Frank, *Preferences for Status: Evidence and Economic Implications* (Johnson School Research Paper Series #05-09 July 2008); E. Fehr & K.M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. ECON. 817 (1999); DAVID MYERS, *THE PURSUIT OF HAPPINESS* 43–44 (1992).

<sup>98</sup> Fehr & Schmidt, *supra* note 97, at 826.

<sup>99</sup> *Id.* at 821; Christina Starmans, Mark Sheskin & Paul Bloom, *The Science of Inequality: Why People Prefer Unequal Societies*, GUARDIAN (May 4, 2017).

<sup>100</sup> Heffetz & Frank, *supra* note 97, at 13–14.

<sup>101</sup> *Id.* at 26–27; van Aaken, *supra* note 97, at 427, 429.

<sup>102</sup> Heffetz & Frank, *supra* note 97, at 26–27; Richard A. Easterlin, Robson Morgan, Malgorzata Switek & Fei Wang, *China's Life Satisfaction, 1990–2010*, 109 PNAS 9775 (June 19, 2012).

<sup>103</sup> Cf. Jeffrey Berejikian, *The Gains Debate: Framing State Choice*, 91 AM. POL. SCI. REV. 789 (1997).

Of course, there are serious questions whether biases visible in individuals carry over to states or across the principal-agent relationship. State decisions are often made by groups rather than individuals and on behalf of the public interest rather than their own. Both can change the decision-making logic. Some state policy may be enough in the hands of individuals that their biases may carry through to decisions on the state's behalf. But one does not have to assume states act on individual leaders' biases to see how these biases may play a role in decisions on these global goods. Even if states are not swayed by relative as opposed to real welfare, voters and public opinion likely are—as the vote in favor of Brexit in the United Kingdom and the popularity in the United States of Donald Trump's rhetoric about China, Mexico, and South Korea likely demonstrates.

The rise and demise (?) of the Trans-Pacific Partnership illustrates how the success of multilateral institutions and resulting multipolarity combined with concerns regarding positional welfare can reshape global negotiations. The GATT and WTO have been remarkably successful at growing overall global welfare and helping distribute global wealth more equitably.<sup>104</sup> But that success has not led to more and deeper multilateral integration at the WTO. On the contrary, negotiations there have ground to a halt, at least in part due to disagreements about the distribution of benefits from prior and future deals.<sup>105</sup> The action has instead moved to regional and bilateral free trade areas, often dominated by one or a couple of dominant economic actors. One complaint about the TPP was that it seemed to create little to no new trade.<sup>106</sup> Instead, its main impact seemed to be to divert trade from one supply chain located in particular states (in particular China) to a different one based in others.<sup>107</sup> In lieu of cooperation through the WTO, states are competing for the spoils of trade through regional trade agreements.<sup>108</sup>

But the same forces driving regional trade agreements also risk tearing them apart. Voters in the United States worry that Mexico and Canada have benefited more than the United States from the North American Free Trade Agreement (NAFTA), China more from the WTO, South Korea more from the Korea-U.S. Trade Agreement.<sup>109</sup> The concern that the TPP might mean more of the same was a key factor in its anemic public support and its eventual abandonment by the presidential candidates. Brexit seemed to reflect similar voter concerns about the relative benefits of EU membership.<sup>110</sup>

<sup>104</sup> See DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* 110 (2011) (observing that “the world economy has achieved unprecedented levels of growth since World War II. Nothing in history comes even close.”).

<sup>105</sup> *Id.* at 258–59; Editorial Board, *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016).

<sup>106</sup> Alex Rogers, *Meet the Critics of President Obama's Trade Deal*, TIME (Apr. 27, 2015).

<sup>107</sup> Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHI. J. INT'L L. 370, 386–87 (2015).

<sup>108</sup> See Alter & Raustiala, *supra* note 24, at 10.

<sup>109</sup> Felicity Lawrence, *Trump is Right: NAFTA Is a Disaster. But US Workers Aren't the Big Losers*, GUARDIAN (Nov. 18, 2016); Robert B. Zoellick, *The Case for Trade, and Why American Leaders Need to Make It*, HARV. BUS. REV. (Sept. 19, 2016); *The Impact of China Joining the WTO*, WALL ST. J. (May, 22, 2017); Damian Paletta, *Trump Preparing Withdrawal from South Korea Trade Deal, a Move Opposed by Top Aides*, WASH. POST (Sept. 2, 2017).

<sup>110</sup> Bruce Stokes, *Brexit Vote Highlighted UK's Discontent with EU, but Other European Countries Are Grumbling too*, PEW RES. CTR. (June 24, 2016), at <http://www.pewresearch.org/fact-tank/2016/06/24/brexit-vote-highlighted-uks-discontent-with-eu-but-other-european-countries-are-grumbling-too>; *Brexitland Versus Londonia*, ECONOMIST (Jul. 2, 2016).

One symbol associated with the rise of economic populism in various developed states over the past year is the “elephant graph” created by Branko Milanović.<sup>111</sup> The graph shows the global change in real income from 1998–2008 by income percentile. Starkly, much of the world—the 10th–65th income percentiles along with the very top earners—have experienced massive growth in real income over that period. One group, though, has not—the 75th–85th income percentiles. While the first group is disproportionately located in the new economic powerhouses of Asia, the second is disproportionately represented by the middle class of the older developed states.<sup>112</sup> The sense by some Brexit and Trump voters that they have been relative “losers” in the current multilateral institutions is not pure fantasy and seems to be driving their policy preferences.

This heightened concern for relative gains, growing out of greater multipolarity and combined with the shifting costs and benefits of cooperation through multilateral institutions, may be casting a shadow over security cooperation as well. In a bipolar world, NATO served the interests of both the United States and its allies well. The United States could see NATO as essentially an extension of U.S. security policy. Even if it had to sometimes bow to its allies’ demands,<sup>113</sup> cooperation with European allies (and Canada) expanded U.S. power and served the U.S. agenda. European states, while at times bristling under U.S. dominance, nonetheless needed U.S. support. In a multipolar world, where Russia may or may not be the top security concern of the United States and where other NATO states are themselves more powerful, particularly economically, NATO might look more like constraint than a tool to some in the United States—both with regard to U.S. priorities and U.S. actions. Trump’s complaints about the relative benefits and costs borne by the United States and its European allies<sup>114</sup> may not be so surprising.

A similar story might be told about the role of the United Nations, which for a brief time following the end of the Cold War looked like it might become the central forum for global security. For the United States, enjoying its unipolar moment, working through the United Nations may have allowed it to get greater buy-in for its policies. And multilateral support may have lowered the costs of pursuing U.S. policies—enough to outweigh the perceived costs of multilateral engagement (much of the time). For other states, bringing U.S. policy into the United Nations, while clearly strengthening the United States, may have carried the promise of some increased voice and the possibility of placing some constraints on the hegemon’s actions. In an increasingly multipolar world, those perceptions of the relative value of cooperation through the United Nations may be shifting. For the United States, action through the United Nations may look more like a constraint than a force multiplier. At

<sup>111</sup> Branko Milanović, *The Greatest Reshuffle of Individual Incomes Since the Industrial Revolution*, VOX (July 1, 2016), at <http://voxeu.org/article/greatest-reshuffle-individual-incomes-industrial-revolution>.

<sup>112</sup> For a terrific discussion of this graph, see Anthea Roberts, *Being Charged by an Elephant: A Story of Globalization and Inequality*, EJIL:TALK! (Apr. 19, 2017), at <https://www.ejiltalk.org/being-charged-by-an-elephant-a-story-of-globalization-and-inequality>.

<sup>113</sup> See, e.g., generally MARC TRACHTENBERG, *A CONSTRUCTED PEACE: THE MAKING OF THE EUROPEAN SETTLEMENT, 1945–1963* (1999) (describing how the United States maintained its authority within NATO by making sometime concessions to its NATO allies).

<sup>114</sup> Philip Rucker, Karen DeYoung & Michael Birnbaum, *Trump Chastises Fellow NATO Members, Demands They Meet Payment Obligations*, WASH. POST (May 25, 2017).

the same time, for other actors like Russia, China, and Saudi Arabia<sup>115</sup> (not to mention Iran), eager to flex their newfound muscles, the UN may seem an embodiment of old power dynamics and structures, out of which they had been left.<sup>116</sup> Action moves from the halls of UN headquarters to the ground in Ukraine, Syria, the South China Sea, and Yemen, where the situation looks much more like a free-for-all, in which cooperation is more likely to be bilateral and opportunistic than long-term and multilateral. Of course, on issues on which the United States, or others, may feel like it cannot act alone or with a small group of allies, where only mass multilateral action is perceived to be useful, like the North Korean nuclear threat, the United Nations may continue to be seen as the best working forum. Overall though, states' individual security priorities seem to be taking precedence over more systemic concerns about global peace and security.

## VI. THE COSTS OF MULTILATERALISM

Seeking global or near global agreements and institutions is a choice. Regime designers need to carefully balance the costs and benefits of a broader agreement. Such agreements bring clear benefits. A broader agreement including more players can solve distributional problems by increasing the range of possible trades to give more players a "win." This is perhaps most obvious in trade agreements, where states might only be willing to open a market for particular reciprocal concessions that only some states can provide. The United States might not have anything valuable enough to trade with Canada for the opening of its dairy market; however, a three-way trade that promises access to Japan's beef and pork market might get the job done.<sup>117</sup> But the principle applies in other contexts as well. The United Nations Convention on the Law of the Sea<sup>118</sup> overcame the limitations of prior agreements by broadening scope and membership.<sup>119</sup> States that might have had irreconcilable preferences in bilateral negotiations were able to find beneficial policy trades in a multilateral one. A broader agreement also spreads the political and material costs of chosen policies, limiting regulatory leakage to those outside the agreement, and guaranteeing the cooperation of all those needed to supply a global public good.

But broader agreements also come with well-recognized costs. Bringing in more parties, particularly those with limited interests in the regime, may require thinner agreements. The International Covenant on Civil and Political Rights may have to be more accepting of reservations and accept weaker enforcement mechanisms than regional human rights agreements in order to garner near universal membership. A global climate change agreement may need to be less ambitious and less enforceable than a bilateral or regional deal between states with shared interests and/or resources. The result of this choice is twofold. First, and most obviously, it risks watering down the agreements to the point where they may only marginally provide the desired global public good, if at all. Many advocates in each area might suggest

<sup>115</sup> See, e.g., J. Dana Stuster, *Saudi Power Play Sends Shockwaves Abroad*, LAWFARE (Nov. 14, 2017), at <https://www.lawfareblog.com/saudi-power-play-sends-shockwaves-abroad>.

<sup>116</sup> Cf. Alter & Raustiala, *supra* note 24, at 10 (describing strategies of regime shifting).

<sup>117</sup> See, e.g., Bill Curry, *The ABCs of TPP*, GLOBE & MAIL (Oct. 5, 2015).

<sup>118</sup> See generally United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397.

<sup>119</sup> See Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681, 694 (1992).

they give up too much. But second, this choice also decreases the value of the agreement for each member. And if the value of the agreement is too small, the agreement may become highly unstable. When material or political circumstances change and the costs of the agreement rise, the perceived benefits of staying in the agreement may be too low to keep a state in. Losing the benefits of the agreement may no longer be a meaningful incentive to deter withdrawal or non-compliance.

## VII. WHAT COMES NEXT?

This does not necessarily mean that global, multilateral deals are a bad idea in a multipolar age. Thin agreement on certain basic principles may be valuable even if thicker agreements are impossible. Such thin agreement can shift future unilateral, bilateral, and regional negotiations in particular directions. Global agreements may also empower other actors to bring their power to bear on states, whether transnational NGOs, epistemic communities of scientists, economists, or soldiers, corporations, or domestic political actors and lawyers. Human rights advocates can use agreements ratified by the state in that state's own courts.<sup>120</sup> U.S. military lawyers will push back against suggestions that the Geneva Conventions are "quaint."<sup>121</sup> A range of groups will lobby to keep the United States in the Paris Accord. And while the South African government may see little benefit in remaining a party to the Rome Statute, their Constitutional Court may make it more difficult to withdraw and rescind their commitment.<sup>122</sup>

But to the extent to which there has been a blanket preference for global-scale multilateral deals to provide global public goods,<sup>123</sup> that preference may need to be rethought. Providing global public goods in a multipolar world may require smaller deals that can guarantee states specific, desirable club goods. International justice, for example, might have to move to the local level, take local interests more directly into account, and promise specific realizable benefits to the country or countries in question.<sup>124</sup> And this may be the case even if the resulting deals are less efficient or effective in providing the broader good. Enhancing protections for endangered species or labor rights through TPP-like free trade areas, with all of that model's flaws, may be more durable and effective than attempts to work through the global

<sup>120</sup> See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2007).

<sup>121</sup> See, e.g., Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1098 (2006) ("It is noteworthy, however, that these U.S. policies have been protested most strongly by the uniformed military. . . ."); Tim Golden, *Tough Justice: After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES (Oct. 24, 2004) ("Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness.").

<sup>122</sup> James Macharia, *South African Court Blocks Government's ICC Withdrawal Bid*, REUTERS (Feb. 22, 2017). Multilateralism might be supported by constructivist strategies of internationalization and socialization even as rationalist calculi in its favor begin to run out. But these strategies may be on a clock. If the idea is to bring a large number of states into a regime in hopes of acculturating their leaders and populations to that institution's norms, that process cannot take forever. Those norms need to become anchored before the rationalist calculus shifts against continued membership.

<sup>123</sup> See José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT'L L. 393, 394 (2000) ("Multilateralism is [international lawyers'] shared secular religion.").

<sup>124</sup> See Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1 (2010).

multilateral Convention on the International Trade in Endangered Species. Local, bilateral, and regional environmental governance may more effectively get actors to change their policies than global multilateral ones. Tim Meyer, for example, has noted how local clean energy plans that favor local providers can overcome political obstacles better than national or multilateral efforts.<sup>125</sup> The cost is borne as an externality by others; such costs though may be the inevitable byproduct of multipolar, post-multilateral policymaking.

Notably, while these other-shape solutions may be less efficient from a global policy perspective, they may be fairer or more just along other metrics.<sup>126</sup> These structural realities thus dovetail well with other critiques of multilateralism-for-multilateralism's-sake, including concerns that multilateral solutions are not neutral, that they may favor certain interests over others, and that a more pluralist perspective that encourages bespoke policy choices may be more normatively desirable.<sup>127</sup> One can hear echoes of older concerns about the "democracy deficit" of multilateral institutions<sup>128</sup> beneath current voter complaints in the United Kingdom, United States, and elsewhere that multilateral institutions ignore them in favor of others. Deeper, broader integration may not always be better. Seeing multilateralism's structural limits may help reveal some of its normative ones as well.

Policymakers will also have to think hard about whether providing any particular global good really does require universal or near universal participation. An agreement between the states with the most emissions may be more important for progress on climate change than a broader agreement that can win everyone's support. And while some aspects of a problem may require near universal cooperation, other discrete aspects may take the form of aggregate effort or even single-best-effort public goods.<sup>129</sup> Norm-setting and implementation may require different strategies and different shape agreements. For the former, global multilateral deals may continue to be the best strategy; for the latter they may not. Policymakers may have to break complex problems into their component parts and devise an effective strategy for solving each. Recognizing multilateralism's limits may make policymaking more complicated, but it may also make it more thoughtful.

<sup>125</sup> Timothy L. Meyer, *How Local Discrimination Can Promote Global Public Goods*, 95 Bos. U. L. Rev. 1937 (2015).

<sup>126</sup> See, e.g., Alvarez, *supra* note 123, at 399 ("The tendency to stress the virtues of multilateral solutions, narrowly understood to mean liberal institutions on the model of the UN, artificially restricts the range of available prescriptions for modern human rights dilemmas.").

<sup>127</sup> See, e.g., RODRIK, *supra* note 104, at 233–80 (making the case for an international economic order that grants states more room to plot their own policy directions); Ramji-Nogales, *supra* note 124 (arguing that the legitimacy of international criminal justice is judged by how well it speaks to local conditions and needs); Margaret M. deGuzman, *The Global-Local Dilemma and ICC Legitimacy*, in LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal & Geir Ulfstein eds., 2018) (same).

<sup>128</sup> See, e.g., Alvarez, *supra* note 123; Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AJIL 489 (2001).

<sup>129</sup> SCOTT BARRETT, *WHY COOPERATE* (2007).