
**THE ASSAULT ON INTERNATIONAL LAW: POPULISM AND
ENTROPY ON THE MARCH**

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In the long march of mankind from the cave to the computer a central role has always been played by the idea of law—the idea that order is necessary and chaos inimical to a just and stable existence.¹

One of the important functions of law in any society is to provide stability, predictability and continuity so that people can know how to order their affairs.²

ABSTRACT

This paper explores the effects on international law and the system of international trade and cooperation of inward-looking nationalism and populist political movements, with particular emphasis on actions and rhetoric coming from the United States—since the United States remains the largest player in these areas. The writer suggests that current actions and rhetoric of several world leaders destroy the regime of international law and order. During the time of Grotius—credited by many as the father of modern international law—two issues were of paramount importance: (1) the recognition and respect for state sovereignty; and (2) the need for states to work together in some fashion to reap the benefits of such cooperation. Building on Grotius' system, at the end of World War II, the victorious States fashioned a system of law and institutions designed primarily to keep the world from again falling into devastating, murderous war. The States agreed to multilateral treaties and created institutions, such as the United Nations, the World Bank, and later, the World Trade Organization (“WTO”). They sought to strengthen the bonds of economic and political cooperation, while fostering the peaceful settlement of disputes, and inspiring trade and economic development to lift entire peoples out of poverty and create a world of mutual cooperation and interdependence. This system succeeded, benefitting many, including the United States.

Some seventy years later, the system—and rule of law itself, in some cases—is being attacked and maligned. Thus, the system has begun to unravel. One reason for this collapse is that the world has changed since 1945. Society and technology, in some cases, outrun the ability of some aspects of international law and global institutions to keep up. Globalization, or rather its uncontrolled aftermath, perhaps leads to another reason. Governments lack the wisdom to protect large portions of their populations from the harms resulting from global incursions and

1. MALCOLM N. SHAW, INTERNATIONAL LAW 1 (6th ed. 2008).

2. FRANK B. CROSS & ROGER LEROY MILLER, THE LEGAL ENVIRONMENT OF BUSINESS 2 (9th ed. 2015).

displacements. Populist leaders seeking to mobilize support use this situation to their political advantage. This often results in blaming the globalizing world and things foreign for intra-state problems. Accordingly, a number of countries wish to overturn the status quo. These countries look inward instead of outward. They thus turn to nationalism and populism for answers and protection from “the other,” instead of trying to fix the system through negotiation and consensus. Many countries elect populists or nationalists as their leaders. This inward-looking political resolve accelerates the unraveling of international law, treaties, and institutions by calling for complete withdrawal from time tested treaty regimes and institutions. This calls into question the future reliability and viability of the international system. It can be particularly disheartening when a very important player—such as the United States—becomes the leading detractor of the system. The system needs tending, maintenance, and tweaking, instead of destruction. But, nationalism and populism seem intent on the latter. Destruction of the system may become a costly move for the world. Poverty, rather than prosperity, may result.

INTRODUCTION

Treaties are, in a general sense, the basis of international law and current international system. As exemplified later in this paper, treaties provide, among other things, predictability in an otherwise chaotic world. On the other hand, many current world leaders provide unpredictability with their behavior. Vladimir Putin, of Russia, told his military leaders in a speech on December 22, 2016 that Russia must increase and strengthen its nuclear military capabilities.³ On the same day, President-elect Donald J. Trump of the United States sent a Tweet declaring that the United States should expand and strengthen its nuclear capabilities “until such time as the world comes to its senses regarding nukes.”⁴ If either or both States carry out these admonitions, they will join a club with only one current member, North Korea, who flaunts violation of international law and treaty commitments respecting nuclear weapons. Currently, no countries prevent North Korea’s nuclear ambitions (sanctions notwithstanding), although the current U.S. President seems to be

3. See generally *Expanded Meeting of the Defence Ministry Board*, PRESIDENT OF RUSS. (Dec. 22, 2016), available at <http://en.kremlin.ru/events/president/news/53571> (last visited Nov. 15, 2018) (publishing Russian President Vladimir Putin’s speech to the Defence Ministry Board).

4. Michael D. Shear & James Glanz, *Trump Says the U.S. Should Expand Its Nuclear Capacity*, N.Y. TIMES (Dec. 22, 2016), available at https://www.nytimes.com/2016/12/22/us/politics/trump-says-us-should-expand-its-nuclear-capability.html?_r=0 (last visited Nov. 15, 2018).

trying to do so.⁵ Certainly, nobody will stop either Russia or the United States if they attempt to undertake such activities.

In September of 2016, the United Nations General Assembly unanimously adopted the New York Declaration of Refugees and Migrants, known as the United Nations Global Compact on Refugees (“Global Compact”).⁶ The idea focused on creating ways for the global community to deal more equitably and humanely with the large flows of refugees and migrants. In February of 2018, the United Nations High Commissioner for Refugees drafted the Global Compact for signature by the United Nation Member States.⁷ Before adoption of the Global Compact the United States abruptly withdrew, notifying the United Nations on December 2, 2017 that it no longer sought to take part.⁸ The United States stated that the Global Compact undermined the country’s sovereignty.⁹

In 2006, a pair of pre-eminent scholars and former U.S. State Department officials stated that “[t]he system of international institutions that the United States and its allies built after World War II and steadily expanded over the course of the Cold War is broken [and] [e]very major institution . . . face[s] call for major reform.”¹⁰ If this stands true, one reason stems from the fact that the world has changed, in some cases outpacing the ability of international law and institutions to keep up—much like what happens to domestic law in the face of rapidly changing technology. Automation and globalization, or rather their uncontrolled aftermath, perhaps lead to another reason—governments lack the wisdom to protect large portions of their populations from the harms resulting from technology changes or global incursions and displacements. Looking for someone or something to blame, leaders and would-be leaders blame the globalized world and foreign actors and their behavior. Accordingly, many countries wish to reverse the status quo. Now countries look inward, instead of outward, turning to nationalism and populism for answers and for protection from “the other.” Many countries elect populists or nationalists as leaders. Authoritarian governments like Russia, China,

5. See James Freeman, *Trump and Kim: The Movies*, WALL ST. J. (June 14, 2018), available at <https://www.wsj.com/articles/trump-and-kim-the-movies-1529006106> (last visited Nov. 15, 2018).

6. Faith Karimi, *U.S. Quits UN Global Compact on Migration, Says It'll Set Its Own Policy*, CNN (Dec. 3, 2017), available at <http://www.cnn.com/2017/12/03/politics/us-global-compact-migration/index.html> (last visited Nov. 15, 2018).

7. *Id.*

8. *Id.*

9. *Id.*

10. G. JOHN IKENBERRY & ANN-MARIE SLAUGHTER, *FORGING A WORLD OF LIBERTY UNDER LAW* 22 (2006).

and North Korea wish to upend the status quo. Today, extreme nationalism and populism gain ground in the governance of States around the world, to a degree not seen since just before World War II. This inward-looking political resolve accelerates the unraveling of international law, treaties, and institutions by, in some cases, calling for complete withdrawal from time tested treaty regimes and institutions. This calls into question the future reliability and viability of the international system as a whole. The international system remains bound together through laws upon which States generally rely and respect, but this system of laws faces danger.

An understanding of both the law in general and international law may allow one to comprehend the nature of why the international legal system faces danger. Exploration of the concepts of law, its usefulness, and why people and institutions obey it is necessary, since law creates the foundation and framework upon which organized society is built and revolves. This includes the society of the Nation-States.

I. RESPECT FOR THE LAW

If we live in a city or close to one, or if we live in a modern setting under any circumstances, we, without even thinking about it, depend upon the efforts of others who provide the goods, services, and technology that make our current way of life acceptable to us. We do not even notice those others upon whom we rely. Of course, we know that under ideal circumstances, we could plant our own corn and beans; we could create a fishing pole from a tree limb and fish in streams and lakes; we could make a bow and arrow and hunt for game; or, if we understand how (or read about it), we could eventually find the raw materials and maybe even construct firearms and powder and bullets to shoot, and thus hunt more efficiently. But very few of us do all of that, or even wish to. How many of us could make our own computer, telephone, or automobile? If we were abruptly forced to provide all of our needs for ourselves, we would face trouble, and our life style would change. We rely on others—on experts, on specialists—elsewhere. In other words, we exist in a network of interdependence and our current civilization depends on it. We became accustomed to dependence and most of us no longer possess skills that would enable us to live off the land, fending for ourselves as our ancestors did, nor do we wish to. We would find it challenging, or at least uncomfortable, to survive if we were not able to count on the fruits of interdependence.¹¹

11. See generally VAUGHAN LOWE, INTERNATIONAL LAW: A VERY SHORT INTRODUCTION (2015).

A group of people, a tribe, or a society based on interdependence require rules that provide coherence, stability and predictability. We buy and sell things; we drive automobiles; we borrow money; we own things; we build and invest in companies; and we desire protection of our property rights in all of those things. If one could not predict that one's contracting partner would fulfill her obligations under the contract that one proposes, why would one enter into the contract? If one did not believe that one's property rights would remain protected, why would one wish to own anything, to buy anything, or to invest in anything? For example, if one could not predict that most people respect the traffic laws, one would fear to travel on the roads. Furthermore, banks would not lend if society did not respect their loan agreements. In other words, for an orderly society of interdependence to function, and in order for the commerce that supports it to function, we need rules. Those rules, or what we call laws, must be respected. Laws provide order and protect people and property from negligence, violence, fraud, and theft. The banker "predicts" that the borrower will pay back the loan. Such an order provides a predictable world in general. We therefore rely upon our network of interdependence; upon our laws; and upon a largely predictable world. We need to live in a society where one can predict that others will live up to their obligations and obey the rules, at least most of the time.

This interdependence exists at the international level for individuals, companies, and most importantly, States. When most of us think of law, we think of it in the context with which we are most familiar. We think of domestic national law, or what international lawyers call "municipal law." Municipal law contains a law giver, normally a legislature, like a parliament or a congress. It also contains a hierarchical judiciary, which interprets the laws created by such legislature, and an executive branch—with police under its control—that enforces the law and the judgments of the judiciary.

II. INTERNATIONAL LAW

International law differs from municipal law. The system of international law contains no executive, no police, and no legislature. International law finds its authority and basis within the consensus of the international community.¹² Nearly 2,000 years ago, the Roman emperor and philosopher Marcus Aurelius (121-180 C.E.) said that "[e]verything

12. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (AM. LAW INST. 1987).

is coordinated, everything works together in giving form to the one universe.”¹³ In a sense, the international law regime functions in this manner, with most countries cooperating and obeying the law the majority of the time. But, if international players, especially big ones, default on the notion of obedience, respect, or cooperation, the system starts to falter and respect for the system and the predictability created by that respect weakens.

III. THE GENESIS OF INTERNATIONAL LAW

One of the principle issues in international law revolves around the notion of sovereignty¹⁴—a State exhibits complete control over a territory and the people in it, and such control remains free from outside interference, thus embodying the idea of independence.¹⁵ This concept of sovereignty provides difficult for some to reconcile with international rules, such as treaty requirements, because they arguably impinge on sovereignty. However, one may equally argue that international law exists to govern international conduct precisely because those sovereign States want to enjoy the benefits of relations with other States. Some of those benefits include: (1) trade; (2) reliable communications and transportation networks; (3) stable State boundaries; and (4) the control, minimization, or eradication of armed conflict. The very act of reaching an international agreement represents an act of sovereignty. Generally, only sovereign States can enter treaties.¹⁶ Those who suggest that treaties manifest a loss of sovereignty, or lead to a loss of sovereignty, may not fully appreciate the reason for treaties or the nature of international law and international relations and how mutual benefits derive from them. One may argue that entering a treaty exhibits no more a loss of sovereignty for a State than entering a contract within the State represents the

13. 7 MARCUS AURELIUS, *MEDITATIONS* (George Long trans., 2005).

14. J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 7 (Humphrey Waldock ed., 6th ed. 1963).

15. U.N. Charter art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

16. See ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 58 (2nd ed. 2007) (stating that treaties are entered into by subjects of international law—between states, between states and international organizations, and between international organizations); see also Vienna Convention on the Law of Treaties, Apr. 24, 1970, 1153 U.N.T.S. 331 [hereinafter Vienna Convention]. The U.S. Senate has not given its advice and consent to the treaty. *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF ST., available at <https://www.state.gov/s/treaty/faqs/70139.htm> (last visited Oct. 5, 2018). The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties. *Id.*

loss of one's individuality and independence—both represent agreements providing mutual benefit.

States must co-exist and cooperate with one another. But, when issues of disagreement arise, conflict must stay to a minimum or at least remain under control, especially if the conflict involves the use of force. International law remains relevant in fomenting, coordinating, and/or controlling all the foregoing.¹⁷ International law is not a new concept; the idea of international legal obligations developed many centuries ago.

Two schools of thought conflict over the origin of international law: (1) those who trace its beginnings to ancient times;¹⁸ and (2) those who maintain that it originated with the treaties of Westphalia in 1648,¹⁹ which ended the European religious wars and created the first European Nation-State system.²⁰

The former view holds that “international law is produced when there are legal relations between two or more States” and for such production to occur, nothing more needs to happen than the existence of a number of States and reciprocal rights and obligations between or among them.²¹ Some say that the first evidence of international relations and treaties began in ancient Sumer around 3,000 B.C.,²² which means legal relations between States occurred at least 5,000 years ago.²³ Later scholars found treaties in ancient Egypt and the Hittite kingdom, among the Babylonians and the ancient Hebrews,²⁴ and in ancient China and India,

17. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 5 (4th ed. 2010).

18. I CARLOS ARELLANO GARCIA, PRIMER CURSO DE DERECHO INTERNACIONAL PÚBLICO 1-2 (4th ed. 1999); *see also* CHARLES G. FENWICK, INTERNATIONAL LAW 5 (4th ed. 1965).

19. *See generally* Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948); CESAR SEPÚLVEDA, DERECHO INTERNACIONAL PÚBLICO 7-11 (5th ed. 1973) (stating that no such thing as international law could exist without the existence of nation-states, which did not exist prior to the Renaissance).

20. SHAW, *supra* note 1, at 26.

21. ARELLANO GARCIA, *supra* note 18. (Of course, the term “State” in this context includes sovereign political entities, such as city-states and small empires, which can be traced back thousands of years, and does not require the modern European style nation-state that evolved around the early renaissance.)

22. *See The Sumerians and Mesopotamia*, KHAN ACADEMY, available at <https://www.khanacademy.org/humanities/ancient-art-civilizations/ancient-near-east1/sumerian/a/the-sumerians-and-mesopotamia> (last visited Nov. 15, 2018) (stating that Sumer is the earliest known civilization in southern Mesopotamia and that Cuneiform writing originated in Sumer).

23. *Id.*

24. The Bible is full of references to boundaries, treaties and diplomats. *See 29 Bible Verses About “Treaty”*, KNOWING JESUS, available at <https://bible.knowing-jesus.com/topics/Treaty> (last visited Nov. 15, 2018).

all around 1,500 B.C.²⁵ Later, the ancient Greeks and Romans became proponents of creating international obligations and rights, doing so regularly.²⁶

In the thirteenth century, a group of German city-states created the Hanseatic League which dominated commercial activity from the thirteenth to the fifteenth century in northern Europe.²⁷ These city-states agreed to a common set of rules or laws, particularly as they pertained to trade, governing themselves under these laws for centuries.²⁸ By the fifteenth century, the Hanseatic League (1241–1569)²⁹ consisted of 150 towns, cities, and centers, located mostly in present-day Germany and in those towns settled by German speakers throughout northern Europe. Italian city-states in the late-Middle Ages followed the same path, creating their own legal structures.³⁰

British law professor and author Malcolm N. Shaw traces the beginnings of modern international law to Francisco Vitoria, a professor of the theology at the University of Salamanca (1480–1546), and to Alberico Gentili, who published *De Jure Belli in 1598*, speaking of the law of war and treaties.³¹ Shaw believes, however, that “Hugo Grotius, a Dutch scholar, who towers over this period and has been celebrated, if a little exaggeratedly, as the [true] father of international law.”³² During the early stages of modern international law, Grotius’ country acted as an important trading nation. In his famous book *De Jure Belli ac Pacis*, finished in 1624, Grotius discussed the freedom of the seas and the law of war.³³

Under the second school of thought, many historians and lawyers believe that modern international law began with the Peace of Westphalia in 1648 and the system of Nation-States it produced.³⁴ After 100 years of bloody inter-Christian warfare, the opponents signed a series of peace

25. ARELLANO GARCIA, *supra* note 18, at 4-5.

26. *Id.* at 22-24.

27. *Id.*; see also Arthur B. Hibbert, *Hanseatic League*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Hanseatic-League> (last visited Nov. 15, 2018).

28. Hibbert, *supra* note 27.

29. CONWAY W. HENDERSON, UNDERSTANDING INTERNATIONAL LAW 12 (2010).

30. JOHN F. MURPHY, THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW 12 (2010).

31. SHAW, *supra* note 1, at 22.

32. *Id.* at 23.

33. *Id.* at 23-24.

34. *Id.* at 26.

treaties known as the Peace of Westphalia. Previously, ancient treaties were designed to either end a war, fix a boundary, or obtain the benefits of trade—the basis of the treaties rested on the premise that each contracting party wanted something from the other party, resulting in a benefit for themselves.

IV. IS INTERNATIONAL LAW REALLY LAW?

In its early history, much less skepticism existed surrounding international law than there is today. Rather, today many debate whether international law constitutes real law. The early writers—presumably practitioners—and States believed it was.³⁵ Yet, skeptics still exist, especially today. Widely read scholars Jack L. Goldsmith and Eric A. Posner, for example, believe “States comply with international law when it is in their interest to do so.”³⁶ The current U.S. National Security Advisor has similar views.³⁷ This does not represent a completely new attitude. In the eighteenth century, Emerich de Vattel also said that sovereign States recognized only those obligations that they consented to, either by custom or treaty.³⁸ Goldsmith and Posner seem to go further, however, and assume that States may agree to something even though they might not abide by that agreement.³⁹

This notion of abiding by the law when it is in one’s interest, and not abiding by it when it is not, is analogous to the notion of “efficient breach” in U.S. contract law. The idea of “efficient breach of contract” perhaps finds its origin from the famous and influential Justice of the Supreme Court of the United States, Justice Oliver Wendell Holmes, and his statement: “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”⁴⁰ Judge Richard A. Posner later popularized this theory in the latter part of the twentieth century and beyond.⁴¹

35. See MURPHY, *supra* note 30, at 12.

36. David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT’L L. REV. 159, 160 (2006).

37. See, e.g., John R. Bolton, *John Bolton on Law: “International Law,” and American Sovereignty*, AEI (Jan. 11, 2011), available at <http://www.aei.org/publication/john-bolton-on-law-international-law-and-american-sovereignty/> (last visited Dec. 23, 2018).

38. LORIF. DAMROSCH ET. AL., INTERNATIONAL LAW: CASES AND MATERIALS AND BASIC DOCUMENTS SUPPLEMENT xxxii (2001).

39. See Sloss, *supra* note 36.

40. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

41. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed. 1986).

Many authors have analyzed this theory. One writer defined the idea that:

[a] party will break the contract if the cost of breaching the contract is less than the cost of compliance with the contract; conversely, a party will comply with the contract if the cost of breaching the contract exceeds the cost of compliance. The legal remedy for breach affects a party's decision to breach. If the penalty is high, few breaches will occur; if the penalty is low, breaches will occur more frequently. Thus, the legal system can achieve an optimal rate of contract breach by awarding the appropriate measure of damages.

There are two legal avenues that permit efficient breach. First, there are a number of domestic legal doctrines, such as impossibility, that completely forgive contractual performance. Second, a party can breach a contract if it is willing to pay the cost of breach, including paying a judgment or a settlement fee. In an efficient breach, the costs of breach will not exceed its benefits, and the party will choose to breach the contract.⁴²

Another writer commented,

[m]any contract theorists find this theory of efficient breach deeply unsatisfactory[,] . . . [and say that] [a]ny theory that claims that contract law should encourage the moral wrong of breach must be based on a false premise.⁴³

In other words, since a contract consists of a promise, or series of promises, the idea of not living up to one's word becomes morally reprehensible. Many economists apparently dislike this theory of efficient breach, and one researcher even stated, "[i]n fact, despite the attention the simple theory of efficient breach still garners, few economically oriented scholars would today defend it."⁴⁴

However, in the international arena, a majority of States respect and obey international law most of the time, choosing not to breach it, even in the interest of efficiency. As mentioned above, in international relations the law vastly differs in structure from municipal law, and yet, despite the coercive power of the State within its boundaries to enforce the law, respect at both the international and municipal level for the law seem generally similar. Municipal law consists of laws, for example, that say we must come to a complete stop at an intersection that contains a stop sign. Most of us stop as required. We stop even though we know that generally—in fact, most of the time—no policeman lurks to see who breaks the law by not stopping. In fact, we can be confident that if we do

42. Richard Morrison, *Efficient Breach of International Agreements*, 23 DENV. J. INT'L L. & POL'Y 183, 184 (1994).

43. Gregory Klass, *Efficient Breach*, in THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 362, 362 (Gregory Klass et. al. eds., 2014).

44. *Id.*

not stop as required, more often than not we will not be caught and fined.⁴⁵ In other words, we know a sanction exists for those caught, we know most are not caught, and yet, we stop anyway. The fact is that to a very large extent the law is based not upon enforcement—because if everyone broke the law, not everyone could possibly be apprehended and punished—but rather out of respect for the law. Law is based upon the idea that it creates a system of protection against chaos, protects property and people from danger, and provides predictability. At the international level, law results from the consensus of the international community; no lawgiver or legislature exists. No policeman lurks at stop signs waiting to apprehend lawbreakers. Yet sanctions do exist and are sometimes applied. For example, the international community enacted sanctions on North Korea, Iran, and Russia for flouting international legal obligations. WTO decisions by the Dispute Settlement Body against law breakers work, and are almost universally respected and given effect.⁴⁶ As a practical matter, at the domestic level and the international level, “the rule of law depends primarily on its subjects’ acceptance of the legitimacy of its prohibitions rather than on the policeman’s gun or nightstick.”⁴⁷ Or, as J. L. Brieryly stated in the twentieth century in his master work *The Law of Nations*,

[t]here are important differences between international law and the law under which individuals live in a State, but those differences do not lie in metaphysics or in any mystical qualities of the entity called state sovereignty. The international lawyer then is under no special obligation to explain why the law with which he (or she) is concerned should be binding.

...

The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a State, is constrained, insofar as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.⁴⁸

45. Of course, we may be involved in a collision with another car if we fail to stop, but that is another matter.

46. ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 211 (2nd ed. 2008). It should be noted that for a variety of political reasons, the WTO Dispute Settlement Mechanism language states that the appellate body will only recommend that certain things be done to bring a rule breaker into compliance; however, most do comply since noncompliance can give rise to sanctions on the part of the adversary. *See id.* at ch. 8.

47. MURPHY, *supra* note 30, at 14.

48. BRIERLY, *supra* note 14, at 55-56.

The United States invaded Iraq in March 2003. Russia sent troops into Ukraine and annexed its province of Crimea in March 2014. China appropriated/created international territory in the oceans under arguments that seem cogent only to itself. All of these acts were in violation of international law, yet the international community seemed powerless to prevent them. Some would argue that since international law cannot stop violations or severely punish the transgressors after the fact to deter future violations, there is no such thing as international law. However as we will see, international law struggles to oblige enforcement in some areas. Each of the foregoing events occurred based upon either the threat or use of force. I would submit that the use of force exists as a *political* act, sometimes based on emotion. International law often finds it difficult to deal with politics and emotion. So even though the international community outlawed the use of force,⁴⁹ countries sometimes resort to it—rules notwithstanding.

Accordingly, we see that some areas of international law appear more susceptible to breach and thus breaches occur more often, particularly in those areas where the decisions are motivated by politics rather than economics, such as in the use of force. Malcolm N. Shaw in his classic *International Law* said, “(T)here can never be a complete separation between law and policy . . . the inextricable bonds linking law and politics must be recognized.”⁵⁰ In rebuttal to Goldsmith and Posner, Kal Raustalia pointed out that “NATO, the WTO, and the UN continue to exist and function,” therefore asking,

why, if international law is so limited, do States keep creating and elaborating it? . . . [P]oliticians, government officials, political and legal theorists, business leaders, development experts, the World Bank and the IMF, and many others around the globe, from liberal and non-liberal societies, from developed countries and developing countries, promote the rule of law as offering a worldwide benefit.⁵¹

And the fact remains, most countries obey international law.

More or less consciously, more or less willingly, all governments give up some autonomy and freedom and accept international law in principle as the price of “membership” in the international society and of having

49. U.N. Charter art. 2, ¶ 4 (stating, “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.”); *see also id.* arts. 41, 43-44, 51 (explaining that force is allowed for self-defense purposes, or when sanctioned by the Security Council).

50. SHAW, *supra* note 1, at 31.

51. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 137 (2004).

relations with other nations. For that reason, too, they accept basic traditional international law, undertaking to do (or not to do) unto others what they would have done (or not done) unto them.⁵²

International law touches each of us on almost a daily basis: we wear clothes and use goods manufactured in a country other than our own; we fly in airplanes from one country to another; we eat seafood coming from one of the many oceans around the world; we wire money abroad; and we make international phone calls and send parcels and letters all over the globe. Additionally, brand names such as McDonalds, Coca Cola, BMW, and Toyota are used and protected all over the world. All these things, and more, are covered by international agreements that we call treaties or conventions. Treaties and conventions are, for the most part, universally respected and effective. Even those treaties—like the Charter of the United Nations, which outlaws the use of force except in very narrow instances and require States to respect the inviolability of another State's territory—are almost universally respected, and when violated often sanctions result.⁵³ For example, this includes Russia's invasion of the Ukraine⁵⁴ and North Korea's repeated flaunting of international law with respect to its nuclear weapons and missile programs.⁵⁵ Even when States violate international law, they justify it with international law, or at least, their interpretation of it.

One of the primary reasons that members of the United Nations followed the United States and George H.W. Bush's administration into the First Gulf War with Iraq was because of the violation of the sanctity of

52. LOUIS HENKEN, *HOW NATIONS BEHAVE* 60 (2nd ed. 1979), reprinted in MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* 8 (2008).

53. O'CONNEL, *supra* note 52, at 11.

54. These sanctions against Russia were not United Nations sanctions approved by the Security Council, since Russia is a member of that body with veto power; rather, sanctions were imposed by a number of countries, including the United States, Japan and the European Union, among others. *See Ukraine and Russia Sanctions*, U.S. DEP'T. OF ST., available at <https://www.state.gov/e/eb/tfs/spi/ukrainerussia/> (last visited Nov. 18, 2018); *see also* Council Decision 2014/145/CFSP, 2014 O.J. (L 78/16) (EU) (concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine); *Ukraine Crisis: U.S., EU, Canada Announce New Sanctions Against Russia*, CBC NEWS (July 29, 2014), available at <http://www.cbc.ca/news/world/ukraine-crisis-u-s-eu-canada-announce-new-sanctions-against-russia-1.2721836> (last visited Nov. 18, 2018); *Japan Formally OKs Additional Russia Sanctions*, DAILY MAIL (Aug. 5, 2014), available at <http://www.dailymail.co.uk/wires/ap/article-2716307/Japan-formally-OKs-additional-Russia-sanctions.html> (last visited Nov. 18, 2018).

55. For example, *see generally* S.C. Res. 2270 (Mar. 2, 2016) (which is the last in a string of such resolutions).

the sovereign State of Kuwait. The Iraqis invaded and occupied Kuwait, in flagrant violation of the Charter of the United Nations.⁵⁶ The other reason was that the Security Council authorized the use of force.⁵⁷ Without authorization by the Security Council, many of the members of the United Nations would likely have failed to enter the First Gulf War. This occurred in 1991. In March of 2003, the George W. Bush administration and Great Britain invaded Iraq, stating that “[i]nternational law allowed invasion under a muddling variety of reasons.”⁵⁸ Later, the George W.

56. “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.” U.N. Charter art. 2, ¶ 4.

57. See S.C. Res. 678 (Nov. 29, 1990).

58. The argument was that the United States could use force against “rogue states” who possessed weapons of mass destruction. Sean D. Murphy, *Assessing the Legality of Invading Iraq*, GW L. FAC. PUBLICATIONS & OTHER WORKS 1, 3 (2004); see also WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 13–16 (2002), available at <https://www.state.gov/documents/organization/63562.pdf> (last visited Nov. 18, 2018). Other expressions of the doctrine may be found in *National Strategy to Combat Weapons of Mass Destruction*, FED’N OF AM. SCIENTISTS (Dec. 2002), available at <https://fas.org/irp/offdocs/nspd/nspd-17.html> (last visited Nov. 18, 2018); *President Bush Delivers Graduation Speech at West Point*, GEORGE W. BUSH WHITE HOUSE, available at <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html> (last visited Nov. 18, 2018) (“our security will require all Americans to be forward-looking and resolute, to be ready for preemptive action when necessary to defend our liberty and to defend our lives”); DONALD H. RUMSFELD, SEC. OF DEF., ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 30 (2002), available at https://history.defense.gov/Portals/70/Documents/annual_reports/2002_DoD_AR.pdf?ver=2014-06-24-153732-117 (last visited Nov. 18, 2018) (“defending the United States requires prevention and sometimes preemption”); Richard N. Haas, *Sovereignty: Existing Rights, Evolving Responsibilities, Remarks at Georgetown University* (Jan. 14, 2003), available at <https://2001-2009.state.gov/s/p/rem/2003/16648.htm> (last visited Nov. 18, 2018). The doctrine of preemptive self-defense was controversial when announced, and there are reasons to doubt its validity on both legal and policy grounds. See, e.g., Michael Byers, *Preemptive Self-Defense: Hegemony, Equality, and Strategies of Legal Change*, 11 J. OF POL. PHIL. 171 (2003) (arguing that through such a doctrine the United States is advocating what amounts to an “imperial system” of international law); Neta C. Crawford, *The Slippery Slope to Preventive War*, 17 ETHICS & INT’L AFF. 30 (2003), available at https://www.carnegiecouncil.org/publications/journal/17_1/roundtable/868 (last visited Nov. 18, 2018) (arguing that a preventive offensive war doctrine undermines international law and diplomacy, both of which can be useful, even to hegemonic powers); John J. Mearsheimer & Stephen M. Walt, *An Unnecessary War*, FOR. POL’Y (Nov. 3, 2019), available at <https://foreignpolicy.com/2009/11/03/an-unnecessary-war-2/> (last visited Nov. 18, 2018) (arguing that Iraq’s leader, Saddam Hussein, was eminently capable of being deterred and did not pose a future threat to the global community). But see generally W. Michael Reisman, *Assessing Claims*

Bush administration went to great lengths to define torture so that the United States' treatment of prisoners fit within the bounds of international law.⁵⁹ Likewise, the United States' October 2, 2001 invasion of Afghanistan occurred only after being sanctioned by the Security Council.⁶⁰ The NATO bombing of Libya that precipitated the fall of Muammar Gaddafi ostensibly commenced under the cover of the Security Council Resolution of 1973.⁶¹

Even when in violation, States generally attempt to justify their actions by claiming permission under international law, arguing that their actions conform to their interpretation of international law. Rarely do States admit that their actions violate international law, and rarely do States attempt to extinguish international law. Therefore, it appears most States wish not to be considered flagrant violators of international law.

We live in a world where individuals and Nation-States depend upon one another much more than they did in the past, and international law now bears even more importance than it once did since the world now lives in an ever-growing system of interrelationships and interdependencies. International law skeptics may voice their harsh critiques, but the current situation prompted Anne-Marie Slaughter to say that in the modern era of globalization "[p]eople and their governments around the world need global institutions to solve collective problems that can only be addressed on a global scale."⁶²

Globalization provides not only greater interdependence, but also disruption and disorder. Maybe as a society we need some changes since any "[I]aw reflects the conditions and cultural traditions of the society within which it operates."⁶³ The social and political values of a society dictate the face of the law governing that society. When public policy or those values change, the law can also change. Now, in the twenty-first century, governments must conquer issues including: (1) international terrorist networks; (2) large multinational corporations, many of which

to Revise the Law of War, 97 AM. J. INT'L L. 82 (suggesting that such a doctrine of preemptive self-defense may contribute to world public order if subjected to appropriate criteria).

59. MURPHY, *supra* note 30, at 40.

60. See S.C. Res. 1368 (Sept. 12, 2001); see also S.C. Res. 1373 (Sept. 28, 2001).

61. See Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, By Vote of 10 in Favour With 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

62. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 8 (2004).

63. SHAW, *supra* note 1, at 43.

are larger than the sovereign Nation-States in which they operate; (3) cybercrimes like hacking and all manner of theft; (4) meddling in the political systems and elections of sovereign States; and (5) new forms of doing business on the internet and otherwise.

International law initially—as conceived by Grotius, at least—concerned itself only maintaining peace and freedom of the seas.⁶⁴ However, now international law expands “to embrace all the interests of contemporary international life.”⁶⁵ Accordingly, international law must be dynamic. That dynamism requires cooperation for the law to keep up with societal changes. Likewise, however, for international law to function, States must respect it.

V. THE LAW OF TREATIES

Although much of international law's creation comes from treaties,⁶⁶ currently U.S. courts do not find natural law theory particularly persuasive. In the nineteenth century, they generally agreed with Vattel,⁶⁷ an eighteenth-century international law theorist who articulated an old idea by saying,

[i]t is a principle of the natural law that one who makes a promise to another confers upon him a valid right to require the thing promised, and that, in consequence, a failure to keep a valid promise is a violation of a right belonging to the promisee and is as clearly an act of injustice as it would be to deprive him of his property. [. . .] Hence, to maintain order and peace among Nations, [. . .] the obligation of keeping faith with one another is as necessary as it is natural and unquestionable. Nations and their rulers should therefore observe their promises and their treaties inviolably.⁶⁸

Another eighteenth century, honor-based view of treaty compliance states that,

64. See generally HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625).

65. SHAW, *supra* note 1, at 44.

66. See AUST, *supra* note 16, at 1 (stating that over 500 multilateral treaties have been deposited with the United Nations. It is estimated that this figure accounts for only about 70 percent of treaties entering into force since the formation of the United Nations. By the time of the outbreak of World War I, there were in the neighborhood of 8,000 international treaties in operation.); see generally UNITED NATIONS TREATY COLLECTION, available at <https://treaties.un.org> (last visited Nov. 14, 2018) (the League of Nations registered 4,834 treaties; between 1945 and 2006, over 54,000 treaties were registered with the United Nations).

67. See Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 326-27 (2001).

68. EMER DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 162 (Charles G. Fenwick trans., 1916) (1758).

[i]f you destroy good faith, you destroy all intercourse between princes, for intercourse depends expressly upon treaties; you even destroy international law, which has its origin in tacitly accepted and presupposed agreements founded upon reason and usage. That treaties must be kept in good faith lest you destroy all this is readily granted, even by those who have learned nothing but treachery [. . .]⁶⁹

VI. WHAT IS A TREATY?

Since international law found its source in the consensus of the international community, treaties now exist as the primary source of international law.⁷⁰ We can compare a treaty to a contract at the municipal level, both in their reason for existence and the method of their creation. For example, within municipal legal systems agreements are formed between and among individuals and entities (think companies or institutions) wishing to gain something from a relationship, and these agreements establish their own rules governing relations, economic or otherwise. The documentation and the measure which sets forth the rules of those relationships generally consists of contracts. We consider a contract to represent a set of promises the law will recognize as worthy of enforcement.⁷¹ The law of contracts—or, more generally, “obligations” in many Civil Law Systems⁷²—contains rules or definitions defining when a contractual relationship arises. These include: (1) what requirements must occur for the formation of contractual obligations; (2) how do parties determine what precisely the obligations are; (3) when did such obligations arise; (4) what constitutes a breach of these obligations; (5) when does a breach arise; (6) how are sanctions for such breach enforced; (7) how does the non-breaching party protect itself or receive compensation for losses occasioned by the breach; and (8) how do parties exit from the relationship, or from obligations arising under the relationship?

This principle of making enforceable promises also persisted at the Nation-State level—between and among international States—for thousands of years,⁷³ and such arrangements are called treaties.⁷⁴ Every State

69. CORNELIUS VAN BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* (Tenney Frank trans., 1930) (1737).

70. *See* Statute of the International Court of Justice, art. 38, ¶ 1.

71. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* (1998).

72. *See* MALCOLM BEJARANO SÁNCHEZ, *OBLIGACIONES CIVILES* 26 (5th ed. 1999).

73. The first international treaty of which we have written evidence occurred between the city-states of Ummah and Lagash in Mesopotamia around the year 3100 B.C. ARRELLANO GARCIA, *supra* note 18, at 3.

74. SHAW, *supra* note 1, at 72.

can enter into a treaty.⁷⁵ The law of treaties deals with many of the same issues that the domestic law of contract discusses, but develops them at the international level.⁷⁶ In international law, treaties are generally the source of written law⁷⁷ as opposed to customary international law, which is not written. Therefore, treaties act as an important element of international law; they work as a tool for both recognition and creation of international legal obligations, and “have always been an indispensable tool of diplomacy.”⁷⁸ We see that “[s]tates transact a vast amount of work using the device of the treaty; . . . wars [are] . . . terminated, disputes settled, territory acquired, special interests determined, alliances are established, international organizations are created,”⁷⁹ the regime of satellites is covered,⁸⁰ and even private or individual rights and obligations are generated.⁸¹

To understand the concept of treaties, one need only think of the concept of contract, for a treaty represents a kind of contract. However, rather than an agreement between individuals or companies, the agreement exists between or among sovereign States. Individuals and companies enter into contracts every day in every country, and they do so because they consider contractual agreements as advantageous arrangements. They believe that they will achieve a desired goal, and they need the cooperation of the other party to attain that goal. Without such desire—and the concomitant belief that that desire will be satisfied thereby—entering into a contract makes little sense. Treaties work the same way: there is a balancing of advantages flowing to participating parties that embodies the general objective of a treaty. If States believe that they will not gain some advantage from the treaty, they have little incentive to enter into it.

Accordingly, “[r]ecognizing the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems,”⁸² Member States of the United Nations created the Vienna Con-

75. Vienna Convention, *supra* note 16, art. 6.

76. See VALERIE EPPS, INTERNATIONAL LAW 55 (4th ed. 2009).

77. HENDERSON, *supra* note 29, at 67.

78. AUST, *supra* note 16, at 2.

79. SHAW, *supra* note 1, at 902-903.

80. *Id.* at 2.

81. See U.N. Convention on Contracts for the Int'l Sale of Goods, U.N. Comm'n on Int'l Trade Law, 1489 U.N.T.S. 3 (Apr. 11, 1980) [hereinafter Convention on Contracts].

82. Vienna Convention, *supra* note 16, pmbl.

vention on the Law of Treaties, which codified prior customary international law on treaties, and in addition created some new norms.⁸³ As to its signatories, the Vienna Convention applies to treaties completed after the Vienna Convention entered into effect.⁸⁴ Where matters do not fall under control of the Vienna Convention, customary international law continues to apply.⁸⁵ Accordingly, despite the fact that the Vienna Convention itself does not apply retroactively, customary international law does apply to any earlier treaties entered into by contracting States. However, since the Vienna Convention codifies existing customary international law, States generally consider it to reflect the norms of law (customary and treaty based) for signatory States and non-signatory States alike. The Vienna Convention is considered a reflection of customary international law by non-signatory States, who consider themselves bound by it,⁸⁶ and by international and domestic tribunals, who apply its terms even to treaties entered into decades before its creation.⁸⁷ In addition to treaties, as already alluded to, another major source of international law is customary international law.

VII. CUSTOMARY INTERNATIONAL LAW

As already considered, organized societies generally contain rules by which they govern themselves. At the State level, these rules are typically called laws. Of course, in earlier, more primitive times, social groups ruled themselves by customs, which they merely remembered and followed because no written texts existed. Varying groups, tribes, and cultures followed different customs. For those groups, such custom or customs eventually came to take on an "aura of historical legitimacy."⁸⁸ This notion of historical legitimacy in the international arena, recognized among States for centuries,⁸⁹ came to define customary international law

83. SHAW, *supra* note 1, at 903.

84. Vienna Convention, *supra* note 16, art. 4.

85. *Id.* at pmb.; *see also id.*, art. 38.

86. AUST, *supra* note 16, at 16; *see also* Vienna Convention, *supra* note 16.

87. AUST, *supra* note 16, at 12-13.

88. SHAW, *supra* note 1, at 72.

89. SEPÚLVEDA, *supra* note 19, at 93.

today and the role it plays in international legal obligations⁹⁰ as international custom, which represents evidence of a general practice, accepted as law.⁹¹

J. L. Brierly, writing before the creation of the Vienna Convention, stated that “[c]ustom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one.”⁹² Generally accepted customary international law binds States. Such customary law came from the practice and behavior of States.⁹³ Nevertheless, State actions generally represent only half of the equation needed to determine the obligations provided by customary international law. States must act in a certain way out of the belief that such acts are legally required; in other words, they must act under *opinion juris*.⁹⁴ Today in the United States, where no treaty or “executive or legislative act or judicial decision” to the contrary exists, courts can enforce customary international law.⁹⁵

For thousands of years, customary international law governed treaties and their formation in the absence of any codification of treaty rules⁹⁶—that is, before the Vienna Convention. Now, States’ obligations respecting the treaties entered into are governed by either the Vienna Convention, customary international law, or both.

“The sovereignty and equality of States represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having a uniform legal personality.”⁹⁷ The United Nations also espouses the proposition that all Member States are equal sovereigns under the law, inasmuch as its charter States that “[t]he Organization is based on the principle of the sovereign equality of all its Members.”⁹⁸ We can therefore begin with the proposition that all States are considered sovereign and equal in that sovereignty. This notion results in “membership of international organizations [as] not obligatory;

90. See Statute of the International Court of Justice, art. 38, ¶ 1. The Statute of the International Court of Justice, in defining the sources of international law, places treaties and customary international law as the primary source of international law to which judges at the International Court of Justice are to refer. *Id.*

91. SEPÚLVEDA, *supra* note 19, at 94-99.

92. BRIERLY, *supra* note 14, at 59.

93. See SHAW, *supra* note 1, at 73.

94. *Id.* at 75.

95. See Al-Qaisi v. U.S., 103 Fed. Cl. 439 (2012), *aff'd*, 474 Fed. Appx. 776 (Fed. Cir. 2012).

96. See BRIERLY, *supra* note 14, ch. 7.

97. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (7th ed. 2008).

98. U.N. Charter, art. 2, ¶ 1.

and the powers of the organs of such organizations to determine their own competence, to take decisions by majority vote, and to enforce decisions, depend on the consent of Member States.”⁹⁹ Accordingly, the signatories to any treaty—that create intergovernmental organizations or otherwise—exist as sovereign States. As such, States hold the freedom to enter into treaties, however denominated.¹⁰⁰ However, this freedom does not come with the freedom to amend or exit from a treaty.

Of course, States cannot exit from treaty obligations whenever they wish, since allowing such an activity would render treaties worthless.¹⁰¹ One must respect treaties just like one must respect contracts, otherwise relations governed thereby would become unpredictable and no one would use either instrument. Accordingly, similar to obligations under the general law of contracts—with which most people in the modern world are familiar—a State cannot relieve itself of the obligation to adhere to and perform pursuant to the terms of a treaty to whose terms that State agreed. The rule of *pacta sunt servanda* (the treaty must be respected), an ancient norm,¹⁰² remains valid in international law.¹⁰³

It follows that the provisions of the Vienna Convention that deal with issues of treaty formation, treaty abrogation, unilateral or multilateral withdrawal from a treaty or its obligations, or expulsion from a multilateral treaty are binding on the signatories of either multilateral or bilateral treaties.¹⁰⁴

99. BROWNLIE, *supra* note 95, at 687-89.

100. The Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention, *supra* note 16, art. 2, ¶ 1(a).

101. KACZOROWSKA, *supra* note 17, at 127.

102. SEPÚLVEDA, *supra* note 19, at 51 (initially, it was simply a matter of customary international law, simply respected by States). By the 19th century the rule was set forth in writing as an international legal obligation. See Andrew Solomon, *Pacta Sunt Servanda*, 3 INTL. JUD. MONITOR (Sept. 2008), available at http://www.judicialmonitor.org/archive_0908/generalprinciples.html (last visited Nov. 18, 2018); League of Nations Covenant (calling for “a scrupulous respect for all treaty obligations”); U.N. Charter art. 2, ¶ 2 (“All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”).

103. Vienna Convention, *supra* note 16, art. 26.

104. For a treatment of these issues, see Vienna Convention *supra* note 16, arts. 39, 42, 54, 57, 58, 60, and 72. In general, the parts of a treaty are not separable and a party may not withdraw from or denounce a particular clause of a treaty unless the treaty so provides. It is generally all or nothing. *Id.* art. 44.

Even though Article 26 of the Vienna Convention, entitled *Pacta Sunt Servata*, states that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith,”¹⁰⁵ sometimes suspension or termination of a treaty becomes necessary and justified¹⁰⁶ under the doctrine of *rebus sic stantibus*. This doctrine allows for treaty abrogation if a fundamental change of circumstances occurred.¹⁰⁷ In emphasizing the stability of treaty obligations, the International Court of Justice stated that this article of the Vienna Convention can only be applied in exceptional circumstances.¹⁰⁸ Accordingly, treaty obligations are meant to contain binding authority; after all, States enter into them voluntarily. Nevertheless, a number of current populist world leaders provide a plethora of reasons to their populations as to why they should abrogate treaty obligations, most of which do not conform to the reasons set forth in the law respecting treaty abrogation or in the treaties themselves.

VIII. THE RESPECT FOR TREATIES AND INTERNATIONAL LAW IN THE UNITED STATES

In the 1900 case *Paquete Habana*,¹⁰⁹ the Supreme Court of the United States stated that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice . . .” The court went on to say:

[f]or this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subject of which they treat.”¹¹⁰

Even earlier than the *Paquete Habana* case, the thirteen seceding American colonies of Great Britain determined that a “decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”¹¹¹ The American colonies believed that international norms of the day required a justification for such drastic action. Therefore, it appears that respect for the norms of international law

105. Vienna Convention, *supra* note 16, art. 26.

106. BRIERLY, *supra* note 14, at 335-39. This doctrine has been valid under customary international law for centuries and was recognized by the Permanent Court of International Justice, who defined it very narrowly. *Id.*

107. *Id.* at 624.

108. AUST, *supra* note 16, at 299.

109. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

110. *Id.*

111. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

existed even before the newly minted sovereign States were a set of United States under a federal constitution.¹¹²

Importantly, the court in *Paquete Habana* recognized: (1) the United States is bound by international law; (2) treaties do have the power of law as set forth in the U.S. Constitution; and (3) customary international law is recognized—in addition to treaties—as a national legal obligation.¹¹³ However, even though the Court stated that “international law is part of our law,” the Justices hedged their bets in the next clause by allowing that either the executive, legislative, or judicial branch could alter this.¹¹⁴ The pronouncement of the Court in *Paquete Habana* remains good law in the United States—until, of course, the Court decides differently.

In the past, the United States breached several treaties,¹¹⁵ despite the fact that treaties hold high importance in U.S. law; after all, the Constitution of the United States says:

. . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹¹⁶

This appears to mean that all courts, federal and state, must rigorously enforce treaties that comply with Constitutional requirements. But courts in the United States, including the Supreme Court of the United States, for an assortment of stated reasons fail to enforce treaties on a variety of occasions. Most courts agree that although a U.S. statute and a treaty may hold equal weight, the latter in time controls;¹¹⁷ the idea is that the “latest sovereign act should govern.”¹¹⁸

Courts decline to enforce treaties that it affirms are non-self-executing. Of course, some treaties are easily distinguished from self-executing. For example, a treaty that by its own terms requires the State to implement legislation in order to give it domestic effect would be considered non-self-executing. Without such legislation, the treaty possesses no domestic effect. But many treaties, on their face, fail to say such

112. Each of the 13 colonies were individually recognized by Great Britain to be “free and independent states.” See *Transcript of Treaty of Paris*, OUR DOCUMENTS, available at <https://www.ourdocuments.gov/doc.php?flash=true&doc=6&page=transcript> (last visited Nov. 13, 2018).

113. See generally *The Paquete Habana*, 175 U.S. 677, 700 (1900).

114. *Id.*

115. See Vagts, *supra* note 67, at 313.

116. U.S. CONST. art. VI, cl. 2.

117. See *Breard v. Greene*, 523 U.S. 371, 376 (1998).

118. Vagts, *supra* note 67, at 314.

things, and the interpretation and enforcement of these treaties are muddled at the high court.¹¹⁹ Both Presidents Reagan and Nixon violated treaty obligations. Earlier, in World War II, U.S. forces violated fixed treaty neutrality obligations by bombing the summer residence of the Pope and Switzerland.¹²⁰ The Supreme Court also ruled that kidnapping a person in Mexico and bringing him to trial in the United States did not breach an extradition treaty between the United States and Mexico.¹²¹

The Vienna Convention on Consular Relations, which the United States ratified, requires that all citizens of the sending State shall have freedom of communications with their consular officers.¹²² For example, if a citizen of a sending State is arrested, the receiving State must notify the Consul of the sending State. This allows the consular officer to visit the prisoner and arrange for his or her legal representation. The treaty also requires the receiving State to notify the prisoner of these rights.¹²³ The United States frequently violates this obligation with impunity.¹²⁴

IX. COMMERCIAL TREATIES

During the 2016 U.S. presidential campaign, trade became a scapegoat, as often is the case in political campaigns. Most people in the United States lack full comprehension of the nature of international trade or regulatory treaties. Therefore, it becomes easy for a campaigner to criticize the status quo; he or she can say anything he or she wishes, and the population often does not know how to judge the validity of the statement. During the 2016 U.S. presidential campaign, nominees blamed trade treaties for more evils than the treaties were guilty of—making for good political rhetoric. The campaigners asserted many conclusions but gave little in the way of cogent support of those conclusions. The facts contradict much of the bombast, as treaties generally do provide ancillary benefits through trade and investment.

Trade treaties, as an example, are important to any nation, including the United States. According to the McKinsey Global Institute, “international trade may have been responsible for about one-quarter of total US

119. *See id.* at 321.

120. *Id.* at 330.

121. *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992).

122. Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 596 U.N.T.S. 261.

123. *See id.*

124. *See, e.g.*, Sandra Babcock, *The Limits of International Law Efforts: Efforts to Enforce Rulings of the International Court of Justice in U.S. Death Penalty Cases*, 62 SYRACUSE L. REV. 183 (2012).

productivity growth over the 1990s and 2000s, and it also provides middle-class consumers with more than a quarter of their purchasing power.”¹²⁵

Some say that the current President of the United States appears intent on dismantling the WTO.¹²⁶ President Trump stated that the United States will not respect WTO rulings and will apply “retaliatory” tariffs if it believes States begin to trade unfairly—these actions are all violations of international obligations.¹²⁷ The Trump administration sent a document to Congress calling for a new, “more aggressive approach” to trade, leading one legal scholar, Eswar Prasad, to say,

[i]f the Trump administration follows through on the proposals in this document, it would be a body blow to the multinational trade system that the U.S. has helped to build up . . . The WTO will lose effectiveness and credibility in trade resolutions if the U.S. decides to walk away.¹²⁸

In January 2018, the Trump administration imposed high tariffs on Korean washing machine and Chinese solar panel imports, saying that it would help U.S. manufacturers who otherwise lacked the ability to compete against government subsidized production abroad.¹²⁹ Some scholars argue that these tariffs contain the potential to destroy tens of thousands of U.S. jobs and will raise prices to consumers.¹³⁰ Even so, international

125. James Manyika, et al., *The US Economy: An Agenda for Inclusive Growth* 20, MCKINSEY GLOB. INST. (2016), available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/Can%20the%20US%20economy%20return%20to%20dynamic%20and%20inclusive%20growth/MGI-US-Economic-Agenda-Briefing-paper-November-2016.ashx> (last visited Nov. 14, 2018).

126. Fareed Zakaria, *The Decline of U.S. Influence is the Great Global Story of Our Age*, WASH. POST (Dec. 28, 2017), available at https://www.washingtonpost.com/opinions/global-opinions/the-decline-of-us-influence-is-the-great-global-story-of-our-times/2017/12/28/bfe48262-ebf6-11e7-9f92-10a2203f6c8d_story.html?utm_term=.358898c06c08 (last visited Nov. 14, 2018).

127. Damian Paletta & Ana Swanson, *Trump Suggests Ignoring World Trade Organization in Major Policy Shift*, WASH. POST (Mar. 1, 2017), available at https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/?utm_term=.04aeb94eb407 (last visited Nov. 14, 2018).

128. *Id.*

129. See David J. Lynch, *Trump Imposes Tariffs on Solar Panels and Washing Machines in First Major Trade Action of 2018*, WASH. POST (Jan. 22, 2018), available at https://www.washingtonpost.com/news/wonk/wp/2018/01/22/trump-imposes-tariffs-on-solar-panels-and-washing-machines-in-first-major-trade-action/?utm_term=.05b5dc6a8dd5 (last visited Nov. 14, 2018).

130. *Id.*

law does appear to allow implementation of tariffs in this manner if the State can justify the action (*rebus sic stantibus*).¹³¹

The United States participates in free trade agreements with 20 countries.¹³² According to the U.S. Chamber of Commerce, free trade agreements and multilateral trade agreements are profitable for U.S. based exporters.¹³³ The Chamber of Commerce also reported that over time the world became a hostile place for U.S. exporters—U.S. exports face higher tariffs than most competitors in the same markets in which it does not have multilateral or a bilateral free trade agreements. The United States ranked 130th out of 138 countries in respect of the tariffs faced on its exports.¹³⁴ Additionally, the United States is party to 72 Trade and Investment Framework Agreements, which “all serve as a forum for the United States and other governments to meet and discuss issues of mutual interest with the objective of improving cooperation and enhancing opportunities for trade and investment.”¹³⁵

X. BILATERAL INVESTMENT TREATIES

The United States has entered 42 Bilateral Investment Treaties.¹³⁶ Those treaties provide for non-discriminatory treatment toward U.S. investment in the signatory countries.¹³⁷

131. See General Agreement on Tariffs and Trade, art. XIX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

132. *Free Trade Agreements*, OFF. OF THE U.S. TRADE REP., available at <https://ustr.gov/trade-agreements/free-trade-agreements> (last visited Nov. 14, 2018) (listing that these countries are Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore).

133. John G. Murphy, *The Open Door of Trade: Assessing the Benefits of America's FTAs*, U.S. CHAMBER OF COM. (Feb. 9, 2015), available at <https://www.uschamber.com/above-the-fold/the-open-door-trade-assessing-the-benefits-america-s-ftas> (last visited Nov. 14, 2018).

134. *Id.*

135. *Trade & Investment Framework Agreements*, OFF. OF THE U.S. TRADE REP., available at <https://ustr.gov/trade-agreements/trade-investment-framework-agreements> (last visited Nov. 14, 2018).

136. *Enforcement and Compliance*, TRADE COMPLIANCE CTR., available at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited Nov. 14, 2018) (providing a list of bilateral investment treaties); see also *Enforcement and Compliance*, TRADE COMPLIANCE CTR., available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (last visited Nov. 14, 2018) (providing a list of various trade agreements).

137. *Bilateral Investment Treaties*, OFF. OF THE U.S. TRADE REP., available at <https://ustr.gov/trade-agreements/bilateral-investment-treaties> (last visited Oct. 22, 2018) (also noting that these treaties provide for limits on expropriation and prompt, adequate and effective compensation if expropriation does occur; prompt and fair

XI. INTELLECTUAL PROPERTY TREATIES

“The law of intellectual property affords protection for the products of the human mind and defines the legal rights of owners and users of such products.”¹³⁸ The notion of intellectual property protection, for the inventor, owner, or author is to protect the time, creative thought, promotional costs, and other resources used in the development of such intellectual property. If someone other than the owner or inventor used such property without the attendant creation resource cost, the true owner or inventor would be disadvantaged by the activity of the usurper. The world’s intellectual property law regime finds its basis primarily in multilateral treaties and a few international institutions created by treaty. Owners of intellectual property rely on the protection provided by this regime. “Of significant concern to business persons is the need to protect their rights in intellectual property, which in today’s world may exceed the value of physical property,”¹³⁹ Intellectual property remains an important component of business at both the national and international level.¹⁴⁰ President Trump stated, “[w]e will protect American workers and American intellectual property, through strong enforcement of our trade rules.”¹⁴¹ It is unclear what President Trump meant by “trade rules,”

transferability of money into and out of the host country; a limitation on performance requirements imposed by the host country; the ability to submit to arbitration an investment dispute with the host country, without the need to use the courts in the host country; and the ability to appoint the top management of the investor’s choice).

138. KURT M. SAUNDERS, *INTELLECTUAL PROPERTY LAW, LEGAL ASPECTS OF INNOVATION AND COMPETITION* 5 (2016).

139. CROSS & MILLER, *supra* note 2, at 320.

140. First-ever figures reveal that nearly one-third of the value of manufactured products sold around the world comes from “intangible capital,” such as branding, design, and technology, according to a WIPO study of the global value chains companies use to produce their goods. *New WIPO Study Gives First-Ever Figures on Value of “Intangible Capital” in Manufactured Goods*, WIPO (Nov. 20, 2017), available at http://www.wipo.int/pressroom/en/articles/2017/article_0012.html (last visited Nov. 15, 2018). The World Intellectual Property Report 2017 examines the crucial role of intangibles such as technology, design, and branding in international manufacturing. Intangible capital will increasingly determine the fate and fortune of firms in today’s global value chains. This amount, some \$5.9 trillion in 2014, shows that intangible capital contributes twice as much to the total value of manufactured goods as buildings, machinery, and other forms of tangible capital. This underscores the growing role of intellectual property, which is frequently used to protect intangible and related assets in the worldwide economy. *Id.*

141. Lesley Wroughton, *Trump Vows to Protect U.S. Intellectual Property, Without Directly Blaming China*, REUTERS (Jan. 31, 2018), available at <https://www.reuters.com/article/us-usa-trade-china/trump-vows-to-protect-u-s-intellectual-property-without-directly-blaming-china-idUSKBN1FK0GM> (last visited Nov. 14, 2018).

since he appears not to like trade rules. However, his administration actively pursues China for what he terms “China’s theft of U.S. intellectual property”.¹⁴² Will the president of the United States therefore uphold and respect intellectual property treaties as opposed to most others?

The value of intellectual property is growing and is extremely important in the United States, representing an estimated one-third of the value of all business in the United States—45 percent of the U.S. GDP¹⁴³—while also supporting over 45 million jobs, or about 30 percent of all employment in the country.¹⁴⁴ Intellectual property drives 52 percent of U.S. exports.¹⁴⁵

The impact of economic innovations and the intellectual property system and rights which promote their development is evident across the globe. Indeed, innovation played a much larger role in the economic progress of the United States over the course of the 20th century than, for example, increases in capital investment or even improvements in the skills and education of workers.¹⁴⁶

Today, individuals around the world enjoy the products and services tied to innovations that come from countries other than their own, much of which is protected by intellectual property laws and treaties. As such, innovation covered by or related to intellectual property plays a major role in economic development.¹⁴⁷

142. See Alex Capri, *As Trump Turns Up Heat On China Over Trade and Intellectual Property, Will It Backfire?*, FORBES (Mar. 2, 2018), available at <https://www.forbes.com/sites/alexcapri/2018/03/02/as-trump-turns-up-heat-on-china-over-trade-and-intellectual-property-will-it-backfire/#770e509427bc> (last visited Nov. 14, 2018).

143. SAUNDERS, *supra* note 138, at 1.

144. U.S. PATENT AND TRADEMARK OFFICE, INTELLECTUAL PROPERTY AND THE U.S. ECONOMY, 2016 UPDATE ii, available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf> (last visited Nov. 20, 2018).

145. U.S. CHAMBER OF COMMERCE, U.S. CHAMBER OF COMMERCE 2017 SPECIAL 301 SUBMISSION 2, available at <http://www.theglobalipcenter.com/wp-content/uploads/2013/01/USCC-2017-Special-301-Submission-Final.pdf> (last visited Nov. 14, 2018).

146. See generally Kevin A. Hassett and Robert J. Shapiro, *What Ideas Are Worth: The Value of Intellectual Capital And Intangible Assets in the American Economy*, SONECON, available at http://www.sonecon.com/docs/studies/Value_of_Intellectual_Capital_in_American_Economy.pdf (last visited Dec. 23, 2018).

147. See generally *id.* at 4.

The United States is a party in 30 multilateral treaties governing intellectual property.¹⁴⁸ Abrogation of treaties in any major sphere, or creating an atmosphere that calls into question the respect for continued international legal norms, may endanger the respect for the ownership and protection of intellectual property rights by undermining respect for and expectations from treaties in general, including intellectual property rights treaties. The Constitution of the United States allows Congress to enact laws to protect both copyright and patent rights.¹⁴⁹ The drafters of that document realized the importance of protecting creative works.¹⁵⁰ Without the sure knowledge that one's creative works will receive legal protection, who would bother to create them? Who would bother to invest in products or services covered by trademarks or service marks? Such activity would become risky. One could argue that this calls into question treaties that protect the intellectual property rights of U.S. citizens as an abrogation of the duty—or at least the spirit of that duty—to protect intellectual property rights as set forth in the U.S. Constitution. So far, no statement of intent to revoke intellectual property treaties has been reported in the United States, but President Trump often voices his dislike of multilateral treaties.¹⁵¹ If States around the world believe that other States will fail to abide by their treaty obligations in general, how will States respond, even if intellectual property treaties are not specifically singled out? Will States respect their treaty obligations when the State believes the other party may not live up to its treaty obligations?

Over 75 percent of global GDP, and therefore demand, lies outside the United States.¹⁵² Accordingly, companies based in the United States exporting goods or services, or those operating outside the United States, are, to a large degree, dependent on countries complying with their treaty obligations and enforcing the laws protecting such companies' intellectual property rights.

148. See generally *United States of America*, WIPO, available at <http://www.wipo.int/wipolex/en/profile.jsp?code=US> (last visited Nov. 14, 2018) (providing a list of IP-related multilateral treaties).

149. U.S. CONST. art. I, § 8, cl. 8.

150. CROSS & MILLER, *supra* note 2, at 320.

151. Gregory Krieg, *Donald Trump's Art of Undoing the Deal*, CNN (Oct. 6, 2017), available at <https://www.cnn.com/2017/10/06/politics/donald-trump-ending-deals/index.html> (last visited Nov. 14, 2018).

152. Robbie Gramer, *Infographic: Here's How the Global GDP Is Divvied Up*, FOR. POL'Y (Feb. 24, 2017), available at <https://foreignpolicy.com/2017/02/24/infographic-heres-how-the-global-gdp-is-divvied-up/> (last visited Dec. 23, 2018).

XII. THE ATTACK ON TREATIES

Some heads of State and some who aspire to become heads of State encourage the breach of international legal obligations. They encourage the abrogation of treaty obligations by their States. In an interview with *The New York Times* in March 2016 during the presidential campaign, Donald Trump said that Japan and South Korea might need to get their own nuclear weapons arsenal.¹⁵³ In an interview, Marine Le Pen, who narrowly lost the election for president of France, was asked her view on the Russian annexation of the Crimea and stated, “I absolutely disagree that it was an illegal annexation: a referendum was held and residents of Crimea chose to rejoin Russia.”¹⁵⁴

As President, Donald Trump pulled the United States out of the Paris Climate Agreement, which the country agreed to abide by.¹⁵⁵ He not only threatened to charge a tariff on the importation of Chinese goods and Mexican goods; he did place a tariff on Chinese made solar panels and washing machines made in South Korea.¹⁵⁶ He then placed tariffs—citing national security concerns in an attempt to get around the law and treaty obligations, which outlaw such measures—on hitherto friendly allies and trading partners, such as Mexico, Canada, the European Union, and China.¹⁵⁷ These moves elicited retaliatory tariffs from all targeted countries,¹⁵⁸ which will, according to the Chinese—and many in the

153. Melissa Chan, *Here's What Donald Trump Has Said About Nuclear Weapons*, TIME (Aug. 3, 2016), available at <http://time.com/4437089/donald-trump-nuclear-weapons-nukes/> (last visited Nov. 14, 2018).

154. Tom Batchelor, *Marine Le Pen Insists Russian Annexation of Crimea Is Totally Legitimate*, THE INDEP. (Jan. 3, 2017), available at <http://www.independent.co.uk/news/world/europe/marine-le-pen-crimea-russia-putin-ukraine-illegal-annexation-france-front-national-fn-a7507361.html> (last visited Nov. 20, 2018).

155. Bob Fredericks, *Trump Pulls US Out of Paris Climate Deal*, N.Y. POST (June 1, 2017), available at <https://nypost.com/2017/06/01/trump-pulls-us-out-of-paris-climate-deal/> (last visited Nov. 20, 2018). 197 States signed the Paris agreement, and 181 have ratified it so far. *Paris Agreement—Status of Ratification*, U.N. CLIMATE CHANGE, available at <https://unfccc.int/process/the-paris-agreement/status-of-ratification> (last visited Nov. 20, 2018).

156. Ana Swanson & Brad Plumer, *Trump Slaps Steep Tariffs on Foreign Washing Machines and Solar Products*, N.Y. TIMES (Jan. 22, 2018), available at <https://www.nytimes.com/2018/01/22/business/trump-tariffs-washing-machines-solar-panels.html> (last visited Nov. 20, 2018).

157. Paul Wiseman & Christopher Rugaber, *Trump's Tariffs: A Closer Look at What They Are and How They Will Work*, USA TODAY (July 9, 2018), available at <https://www.usatoday.com/story/money/economy/2018/07/09/trump-tariffs-what-they-how-they-work/767230002/> (last visited Nov. 5, 2018).

158. Ana Swanson & Jim Tankersley, *Mexico, Hitting Back, Imposes Tariffs on \$3 Billion Worth of U.S. Goods*, N.Y. TIMES (June 5, 2018), available at

press—trigger a destructive trade war.¹⁵⁹ When countries, especially one as essential to the world economy as the United States, take such actions, aside from simply being a potential legal violation, it creates an air of uncertainty for all. As a society, we believe one virtue of the law: when the law is respected, it provides predictability. With such rhetoric and actions, the world may be entering an era of unpredictability.

During the past 10 years, the United States became the world's largest target country for foreign direct investment, absorbing two trillion dollars in investment.¹⁶⁰ Foreign investment helps the balance of payments while creating and supporting jobs. However, foreign direct investment may be declining in the United States.¹⁶¹ Certainly, the United States' seemingly hostile attitude towards foreign relations may fail to entice foreign investment. Ninety-five percent of the world's potential customers live outside the United States.¹⁶² Multilateral trade agreements lower barriers to trade, encouraging U.S. exporters to sell their goods abroad. States do not lower their trade barriers just because a country such as the United States wants them to; they do so because they get something in return, usually reciprocity of lowered barriers, thus facilitating mutual trade. In this sense, trade agreements and treaties facilitate international trade.

<https://www.nytimes.com/2018/06/05/us/politics/trump-trade-canada-mexico-nafta.html> (last visited Nov. 5, 2018); see also Ian Austen, *Trade War and Canadian Pride Mix in Retaliatory Tariffs Against U.S.*, N.Y. TIMES (June 30, 2018), available at <https://www.nytimes.com/2018/06/30/business/canada-day-tariffs-trade.html> (last visited Oct. 5, 2018); Joyce M. Rosenberg, *Trade Pain: Small Companies Hit By Import, Export Tariffs*, U.S. NEWS (July 11, 2018), available at <https://www.usnews.com/news/best-states/new-york/articles/2018-07-11/trade-pain-small-companies-hit-by-import-export-tariffs> (last visited Nov. 5, 2018); Raymond Zhong, *China Strikes Back at Trump's Tariffs, But Its Consumers Worry*, N.Y. TIMES (July 6, 2018), available at <https://www.nytimes.com/2018/07/06/business/china-trump-trade-war-tariffs.html> (last visited Nov. 5, 2018).

159. Robert Delaney & Zhou Xin, *Trump Threatens China With Even More Tariffs*, INKSTONE NEWS (June 19, 2018), available at <https://www.inkstone-news.com/politics/trump-threatens-yet-more-tariffs-against-china/article/2151375> (last visited Nov. 5, 2018).

160. Manyika et al., *supra* note 125.

161. Susan Ariel Aaronson, *Does Trump's Tough Trade Talk Only Undermine Investment in the U.S.?*, MACLEANS (Oct. 10, 2017), available at <https://www.macleans.ca/opinion/does-trumps-tough-trade-talk-only-undermine-foreign-investment-in-the-u-s/> (last visited Nov. 5, 2018).

162. *95% of the World's Consumers Live Outside the United States*, U.S. CHAMBER OF COMMERCE (May 15, 2012), available at <https://www.uschamber.com/ad/95-worlds-consumers-live-outside-united-states> (last visited Nov. 5, 2018).

The U.S. International Trade Commission organized a study to analyze the impact of certain trade treaties on the U.S. economy. The study analyzed multilateral Uruguay Round agreements as well as 15 U.S. bilateral and regional trade agreements, including the North American Free Trade Agreement (“NAFTA”).¹⁶³ The study found that these treaties positively affected the overall economy of the United States,¹⁶⁴ contrary to the otherwise repeated claims of politicians. However, the ratification of new treaties appears to be declining, both as measured by the actions of the United States and when viewed on a world-wide basis.¹⁶⁵

Furthermore, when the Permanent Court of International Justice developed the modern definition of what constitutes customary international law shortly after World War I, less than 60 sovereign States in the world existed. Most of these States were happily governed by a Eurocentric model of international law. Today, the United Nations consists of 193 members.¹⁶⁶ Finding customary rules, or general practices accepted as law, was arguably easier¹⁶⁷ in the earlier days. Now that the United Nations consists of such a diverse membership of States, cultures, customs, and ways of viewing the world, customary international law becomes less customary—and thus harder to identify—and treaties become more complicated to negotiate. Many countries no longer accept a Eurocentric model of international law. Perhaps even the system by which international law is created is changing somewhat and becoming more elusive to pin down. If so, it likely begs for more interstate cooperation rather than less.

The international legal system, like any other system, requires updating; it always requires progress, and as stated above, exists only in an atmosphere of respect. It requires that each State can trust that other

163. The study included: U.S. bilateral agreements with Israel and Canada; the North American Free Trade Agreement; the Uruguay Round Agreements; U.S. bilateral agreements with Jordan, Singapore, Chile, Australia, Morocco, and Bahrain; a U.S. Regional trade agreement (CAFTA-DR) with the Dominican Republic and five Central American countries, including El Salvador, Honduras, Nicaragua, Guatemala, and Costa Rica; and five more U.S. bilateral agreements, with Oman, Peru, Korea (KORUS), Colombia, and Panama. *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures*, USITC Pub. 4614 (2016), at 27.

164. *Id.* at 17.

165. Bart M.J. Szewczyk, *Custom and Treaties as Interchangeable Instruments of National Policy*, 108 AM. J. INT'L L. UNBOUND 41, 41 (2014).

166. See *Member States*, U.N., available at <http://www.un.org/en/member-states/index.html> (last visited Nov. 20, 2018).

167. Szewczyk, *supra* note 165, at 42.

States will abide by their obligations. Absent such trust, absent such tending to—updating perhaps—entropy will occur.¹⁶⁸ Perhaps the Second Law of Thermodynamics can give us a glimpse of what could happen to this system of international law upon which we all depend. Saibal Mitra, a professor of physics at Missouri State University, in describing the Second Law stated: “[a]t a very microscopic level, it simply says that if you have a system that is isolated, any natural process in that system progresses in the direction of increasing disorder, or entropy, of the system.”¹⁶⁹ Mitra went on to say that all processes result in an increase in entropy.¹⁷⁰ Accordingly, in an isolated system (one that is not taking on energy (meaning a system that nobody is bothering to keep in order)), entropy always increases over time. “Closed systems inexorably become less structured, less organized, less able to accomplish interesting and useful outcomes . . . [Because of this,] there are so many more ways for things to go wrong than for them to go right.”¹⁷¹

Therefore, we must constantly strive to fix things, maintain them in the order in which we set them up, or make them better—because left alone, entropy will occur and things will break down and disorganize themselves. This can happen to the international legal system, just as with any other system. It happens if no outside force exists to ensure no such breakdown occurs. A breakdown will occur much faster under application of a negative or disorganizing outside force. Today, such disorganizing forces are abounding.

President Trump and a variety of world leaders speak ill of multilateralism.¹⁷² Inward looking rhetoric, nationalistic political action or inaction, and the disavowal of treaty regimes and international institutions

168. *Entropy*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (2nd ed. 1999) (“a state of disorder, as in a social system, or a hypothetical tendency toward such a state”).

169. Jim Lucas, *What is the Second Law of Thermodynamics?*, LIVE SCIENCE (May 22, 2015) available at <https://www.livescience.com/50941-second-law-thermodynamics.html> (last visited Nov. 14, 2018)

170. *Id.*

171. *Steven Pinker On the Second Law of Thermodynamics: Why Things Fall Apart in the Physical World and in Our World, Too*, WALL ST. J. (Dec. 31, 2016), available at <https://graphics.wsj.com/image-grid/year-end-science/3671/steven-pinker-on-the-second-law-of-thermodynamics> (last visited Nov. 14, 2018).

172. *Trump Signals Shift from Obama's Focus on Multilateralism*, HONOLULU STAR ADVERTISER (Dec. 27, 2016), available at <http://www.staradvertiser.com/2016/12/27/breaking-news/trump-signals-shift-from-obamas-focus-on-multilateralism/> (last visited Nov. 14, 2018); see also Dermot Hodson, *Why Europe Has to Stand up to Victor Orban*, POLITICO (May 1, 2017) available at <https://www.politico.eu/article/europe-stand-up-to-viktor-orban-hungary-legisla->

can amount to a disorganizing force exerted on the current multilateral regime of international law, when what it needs is an organizing force.

[This disorganizing force is occurring precisely when we now live in a . . .] world in which the radical acceleration in the flows of capital, people, goods, images and ideologies—subjects and objects, in short—across the face of the globe has brought even the most remote parts of the world in contact with metropolitan centers. However, globalization suggests something much more profound about the modern world than the simple fact of growing interconnectedness. It implies a fundamental reordering of time and space.¹⁷³

XIII. IS THE WORLD ACTING IN ITS OWN SELF INTEREST?

Populism generally needs to identify enemies and rallies people around an “us versus them” mentality.

[Generally,] [p]opulism can claim popularity in economic downturns, blaming the downturn on someone. A charismatic leader—whether a member of the downtrodden group or not—identifies with them and rallies their support by whipping up anxiety and division; there has to be an enemy. Often the enemy are the “elites” or “big business”.¹⁷⁴

In 2004 Cas Mudde,^[175] a political scientist at the University of Georgia, offered a definition that has become increasingly influential. In his view populism is a “thin ideology”, one that merely sets up a framework: that of a pure people versus a corrupt elite. (He contrasts it with pluralism, which accepts the legitimacy of many different groups.) This thin ideology can be attached to all sorts of “thick” ideologies with more moving parts, such as socialism, nationalism, anti-imperialism or racism, in order to explain the world and justify specific agendas. Poland’s Mr Kaczynski, a religious-nationalist populist, pushes for a Catholic takeover of his country’s institutions from elite secular liberals. The Dutch Mr. Wilders, a secular-nationalist populist, demands a crackdown on Islam (in defence of gay rights) and reviles the multicultural elite. Spain’s Podemos, an anarchist-socialist populist party, pushes to seize vacant buildings owned

tion-ceu/ (last visited Nov. 14, 2018); Gabriela Baczynska, *EU Heads Toward Action on Poland After Merkel Joins Fray*, REUTERS (Sept. 4, 2017), available at <https://www.reuters.com/article/us-poland-eu-ruleoflaw-analysis/eu-heads-toward-tougher-action-on-poland-after-merkel-joins-fray-idUSKCN1BF15D> (last visited Nov. 14, 2018).

173. THE ANTHROPOLOGY OF GLOBALIZATION: A READER 5 (Jonathon Xavier Inda & Renato Rosaldo eds., 2002).

174. Frederick V. Perry, *OpEd: What Are WE Doing to The World?*, FLA. INT’L U. BIZ NEWS (July 17, 2018), available at <https://biznews.fiu.edu/2018/07/oped-what-are-we-doing-to-the-world/> (last visited Nov. 20, 2018).

175. See generally Cas Mudde, U. OF GEOR.: SCHOOL OF PUB. AND INT’L AFF., available at <https://spia.uga.edu/faculty-member/cas-mudde/> (last visited Nov. 14, 2018) (noting that Cas Muddle is a Dutch political scientist who focuses on political extremism and populism in Europe).

by banks and distribute them to the poor, and attacks “la casta” (the elite caste).

This “thin ideology” definition of populism seems apt in Britain, where Brexiteers denounce experts, refer to themselves as “the people” and boast of having “smashed the elite.”¹⁷⁶

In discussing populism in Latin America, an article in *The Economist* stated:

Populism is full of contradictions. It is above all anti-elitist but creates new elites. It claims to favour ordinary people against oligarchs. But as Messrs Dornbusch and Edwards pointed out, “at the end of every populist experiment real wages are lower than they were at the beginning.” Populism brought mass politics to Latin America, but its relationship to democracy is ambivalent. Populists crusade against corruption, but often engender more.¹⁷⁷

In any event, “the other” often becomes cast as the enemy, whether it consists of foreigners—groups who do not look like, speak like, or behave like “us”—or simply the “elites.” Some believe that populist movements in Europe currently threaten the continued viability of the European Union.¹⁷⁸ Others clearly state that Populist movements in Europe now cause severe unity problems and threaten the continent’s political unity.¹⁷⁹ Millions of Europeans are frightened by terrorist attacks, fed up with refugees—or at least the hype surrounding them—and suffer from high unemployment and slow economic growth. In Sweden, the far-right ultra-nationalist party became the most popular political party in the country,

[and] [a]s with Sweden, so with Europe. Across the continent, right-wing populists are gathering steam. This year’s migrant influx has proved a huge boon to politicians hostile to Islam, immigration[,] and the European Union. The attacks in Paris on November 13th have added fear of terrorism to the mix. In France the National Front (FN) took 28% of the vote in the first round of regional elections. In Poland voters have tossed out a pro-European centrist government in favour of the religious-

176. M.S., *What Is Populism?*, THE ECONOMIST (Dec. 19, 2016), available at <https://www.economist.com/blogs/economist-explains/2016/12/economist-explains-18> (last visited Nov. 14, 2018).

177. *The Return of Populism*, THE ECONOMIST (Apr. 12, 2006), available at <http://www.economist.com/node/6802448> (last visited Nov. 14, 2018).

178. Szu Ping Chan, *Political Unrest Threatens to Tear Apart the Eurozone, Warns Pimco*, THE TELEGRAPH (June 2, 2016), available at <http://www.telegraph.co.uk/business/2016/06/02/political-unrest-threatens-to-tear-apart-the-eurozone-warns-pimco/> (last visited Nov. 14, 2018).

179. Stefan Theil, *Berlin’s Balancing Act*, FOR. AFF. (Sept./Oct. 2017), available at <https://www.foreignaffairs.com/articles/germany/2017-08-15/berlins-balancing-act> (last visited Nov. 14, 2018).

nationalist Law and Justice (PiS) party. Besides Sweden, anti-immigrant parties are at or near the top of the polls in the Netherlands, and governing or sharing power in Denmark and Hungary. In country after country, fringe movements are entering the mainstream, firing up voters who feel despised by governing elites, and threatening to scramble the European project.¹⁸⁰

Many populations of European Union countries conclude that the European Union no longer helps them. Instead, they look to local populist parties and nationalist politicians who reject pan-European solutions and promise to restore jobs, protect their culture, close borders, and restore pride in their respective nations.

This rings particularly true in Eastern Europe.¹⁸¹ Some of the newer members of the European Union—coming from the former Soviet Bloc—seem not to believe in a need for the cession of certain sovereignty rights for the good of the whole, or even for their own good. Poland, Hungary, Slovakia, and Romania are fighting the European Union's climate change initiatives.¹⁸² Hungary battles the European Union over a variety of issues, and its foreign minister vowed not to allow controls from Brussels, desiring less meddling rather than more.¹⁸³ Hungary and Poland continue to defy the European Union by refusing to take in asylum seekers as agreed.¹⁸⁴ Furthermore, Poland elected a populist government that, according to the leadership of the European Union, “flout[s] the rule

180. *The March of Europe's Little Trumps*, THE ECONOMIST (Dec. 10, 2016), available at <https://www.economist.com/news/europe/21679855-xenophobic-parties-have-long-been-ostracised-mainstream-politicians-may-no-longer-be> (last visited Nov. 14, 2018).

181. *A Loss of Faith in the E.U.*, N.Y. TIMES (Sept. 18, 2016), available at <https://www.nytimes.com/2016/09/19/opinion/a-loss-of-faith-in-the-eu.html> (last visited Nov. 14, 2018).

182. James Kanter, *Poland Leads Charge to Delay European Climate Reforms*, N.Y. TIMES (Oct. 6, 2008), available at <https://green.blogs.nytimes.com/2008/10/06/poland-leads-charge-to-delay-european-climate-reforms/> (last visited Nov. 14, 2018).

183. Krisztina Than, *Hungary Rejects 'Dead End Street' of Ceding Powers to EU*, REUTERS (Sept. 13, 2017), available at <https://www.reuters.com/article/us-eu-hungary-minister/hungary-rejects-dead-end-street-of-ceding-powers-to-eu-idUSKCN1B01GP?il=0> (last visited Nov. 14, 2018).

184. Gabriela Baczynska, *Poland Defies EU Over Taking in Asylum-Seekers*, REUTERS (May 18, 2017), available at <https://www.reuters.com/article/us-europe-migrants-eu-poland/poland-defies-eu-over-taking-in-asylum-seekers-idUSKCN18E2JN> (last visited Nov. 13, 2018).

of law” and turns away from the values and the requirements of the European Union, to which it committed as a requirement to membership.¹⁸⁵ Indeed, the country stifles free press and the judiciary,¹⁸⁶ raising concern in the European Union over the curtailment of press freedom in both Hungary and Poland.¹⁸⁷

Populism and rampant nationalism are present in many parts of Europe today. Italy now has a populist government,¹⁸⁸ and they are defying the European Union’s regulations as well.¹⁸⁹ In the Czech Republic, citizens re-elected a populist leader who uses anti-Muslim rhetoric and slowly ruptures his nation’s relationship with Western Europe, despite the Czech Republic’s membership in the European Union.¹⁹⁰ Right wing populism seems to gain resonance, even in Germany. The Alternative for Deutschland (“AfD”), a radical and extremely vocal party, disrupted political rallies of mainstream politicians like Angela Merkel and won over a dozen seats in parliament in a national election in late 2017, effectively changing the political discussions in that body.¹⁹¹

185. Wojciech Moskwa & Rodney Jefferson, *Poland’s Populist Turn*, BLOOMBERG (Dec. 25, 2017), available at <https://www.bloomberg.com/quick-take/poland> (last visited Nov. 13, 2018).

186. *Id.*; see also Drew Hinshaw, *Poland Steps Up Purge of High Court*, WALL ST. J. (July 14, 2018), available at <https://www.wsj.com/articles/poland-steps-up-supreme-court-purge-1531508976> (last visited Nov. 13, 2018).

187. *Poland: The EU’s Media Freedom Conundrum*, AL JAZEERA (Jan. 17, 2016), available at <http://www.aljazeera.com/programmes/listeninpost/2016/01/poland-eu-media-freedom-conundrum-160116092802033.html> (last visited Nov. 13, 2018).

188. Jason Horowitz, *Italy’s New Populist and Anti-Establishment Government Is Sworn In*, N.Y. TIMES (June 1, 2018), available at <https://www.nytimes.com/2018/06/01/world/europe/italy-government-populist.html> (last visited Nov. 13, 2018).

189. Giuseppe Fonte & Angelo Amante, *Italy Hikes Deficit, Defying E.U. As Economy Minister Cave In*, REUTERS (Sept. 27, 2018), available at <https://www.reuters.com/article/us-italy-budget/italy-hikes-deficit-defying-eu-as-economy-minister-caves-in-idUSKCN1M70W2> (last visited Nov. 13, 2018).

190. Marc Santora, *Czech Republic Re-elects Milos Zeman, Populist Leader and Foe of Muslim Migrants*, N.Y. TIMES (Jan. 27, 2018), available at <https://www.nytimes.com/2018/01/27/world/europe/czech-election-milos-zeman.html> (last visited Nov. 13, 2018).

191. *German Election: How Right-Wing Is Nationalist AfD?*, BBC (Oct. 13, 2017), available at <http://www.bbc.com/news/world-europe-37274201> (last visited Nov. 13, 2018); see also *German Elections 2017: Full Results*, THE GUARDIAN (Sept. 25, 2017), available at <https://www.theguardian.com/world/ng-interactive/2017/sep/24/german-elections-2017-latest-results-live-merkel-bundestag-afd> (last visited Nov. 13, 2018).

During her election campaign, Marine Le Pen, the far-right nationalist,¹⁹² mentioned above, who nearly won the election of the presidency in France, rallied crowds saying she wanted to terminate usage of the Euro, while promising a referendum of France's membership in the European Union.¹⁹³ In Austria, a far right-wing populist, Norbert Hofer, who threatened the entrance of Muslims to his country and promised to "put Austria first," appeared close to winning election for president of Austria,¹⁹⁴ but faced elimination at the ballot box.¹⁹⁵

As a candidate and later as president, Donald Trump took a hard line on Mexico, criticizing its immigrants for entering the United States, insisting that Mexico pay for a border wall, and excoriating NAFTA.¹⁹⁶ Manuel López Obrador, Mexico's populist firebrand, the former Mayor of Mexico City, and the winner of the 2018 presidential election,¹⁹⁷ said that he would "cancel any deal that hurts Mexico."¹⁹⁸

The anti-Mexico rhetoric coming from the White House leading up to an election year in Mexico¹⁹⁹ proved counterproductive. No two countries cooperate so much on so many topics as do the United States and

192. Marysia Nowak & Becky Branford, *France Elections: What Makes Marine Le Pen Far Right?*, BBC (Feb. 10, 2017), available at <http://www.bbc.com/news/world-europe-38321401> (last visited Nov. 13, 2018).

193. *Id.*

194. Anthony Faiola, *Austria's Right-Wing Populism Reflects Anti-Muslim Platform of Donald Trump*, WASH. POST (May 19, 2016), available at https://www.washingtonpost.com/world/europe/austrias-right-wing-populism-reflects-anti-migrant-anti-muslim-platform-of-donald-trump/2016/05/19/73368bbe-1c26-11e6-82c2-a7dcb313287d_story.html?noredirect=on&utm_term=.8679d9bec751 (last visited Nov. 13, 2018).

195. *Populism Hits a Snag in Austria's Presidential Election*, THE ECONOMIST (Dec. 4, 2016), available at <https://www.economist.com/news/europe/21711212-far-rights-norbert-hofer-suffers-surprising-loss-populism-hits-snap-austrias> (last visited Nov. 13, 2018).

196. Robbie Whelan & Jacob M. Schlesinger, *U.S., Mexico Spar on NAFTA*, WALL ST. J. (Sept. 1, 2017), available at <https://www.wsj.com/articles/u-s-mexico-sparring-before-nafta-talks-sets-dim-tone-1504258203> (last visited Nov. 13, 2018).

197. Juan Montes & Robbie Whelan, *Andrés Manuel López Obrador, Mexican Leftist, Wins Presidential Election*, WALL ST. J. (July 2, 2018), available at <https://www.wsj.com/articles/mexicans-head-to-polls-to-elect-president-1530454699?mod=searchresults&page=1&pos=16> (last visited Nov. 13, 2018).

198. Whelan & Schlesinger, *supra* note 196.

199. The Mexican general election was held on July 1, 2018. See *Mexico 2018 Elections Timeline*, RICE UNIV.: BAKER INST. FOR PUB. POL'Y, available at <https://www.bakerinstitute.org/mexico-2018-elections-timeline/> (last visited Nov. 8, 2018).

Mexico.²⁰⁰ Aside from the United States' partnership in NAFTA, which was recently re-negotiated,²⁰¹ the United States depends on Mexico for cooperation in fighting the cross-border drug trade, counter terrorism, and stemming the flow of illegal immigrants from Latin America, among other things.²⁰² A cooling of relations could cause Mexico to expel the U.S. counter narcotics agents in the country. Anti-Mexican rhetoric in the United States may give rise to the same attitude in Mexico, especially from Lopez-Obrador. Some find cause for concern,²⁰³ though in the final days of his campaign, Lopez Obrador did tone down his rhetoric.²⁰⁴

The United States worked hard to construct the current international system. The country labored for over 100 years to attempt to overcome international discriminatory tariff barriers on U.S. exports.²⁰⁵ Many

200. Jorge Guajardo, *You Won't Like Mexico When It Is Angry*, POLITICO MAG. (Sept. 11, 2017), available at http://www.politico.com/magazine/story/2017/09/11/donald-trump-us-mexico-relations-215594?utm_source=Fareed%27s+Global+Briefing&utm_campaign=cb9d9cdf9c- (last visited Nov. 8, 2018) (stating that Mexico is the third largest trading partner of the United States, and in 2016, trade between United States and Mexico amounted to over \$579 billion (up from \$135 billion before NAFTA)); see also *U.S.-Mexico Trade Facts*, OFF. OF THE U.S. TRADE REP., available at <https://ustr.gov/countries-regions/americas/mexico#> (last visited Nov. 8, 2018) (in 2016, Mexico was the United States' second largest goods export market; Mexican exporters seem to prefer U.S. suppliers over all others, buying around forty percent of their inputs from the United States, compared to twenty-five percent from Canada); Shannon K. O'Neil, *The Mexican Standoff*, FOR. AFF. (Oct. 2017), available at <https://www.foreignaffairs.com/articles/united-states/2017-08-15/mexican-standoff> (last visited Nov. 8, 2018) (stating that the roughly \$1.6 billion of goods that cross the border each day support some five million U.S. jobs).

201. It is called the U.S. Mexico Canada Agreement. Heather Long, *U.S., Canada and Mexico Just Reached a Sweeping New NAFTA Deal. Here's What's in It*, WASH. POST (Oct. 21, 2018), available at https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.ab170537bf7d (last visited Nov. 8, 2018).

202. Guajardo, *supra* note 200.

203. See Jorge Castañeda, *Where Is Latin America Headed?*, N.Y. TIMES (Dec. 5, 2017), available at <https://www.nytimes.com/2017/12/05/opinion/latin-america-> (last visited Nov. 8, 2018).

204. See Carmen Sesin, *Can Mexico's New President Change the Course of Strained U.S.-Mexico Relations?*, NBC NEWS (July 10, 2018), available at <https://www.nbcnews.com/news/latino/can-mexico-s-new-president-change-course-strained-u-s-n890371> (last visited Nov. 8, 2018).

205. That work really started to gain ground when in 1934 Secretary of State Cordell Hull helped to convince Congress to pass the Reciprocal Trade Agreements Act. See generally *Foreign Trade Agreements*, 19 U.S.C. § 1351 (1934). The Reciprocal Trade Agreements Act gave the president the power to adjust tariffs and to negotiate bilateral trade agreements with other States. *The Reciprocal Trade Agreements Act*, HIST., ART & ARCHIVES: THE U.S. HOUSE OF REPRESENTATIVES (Mar.

countries adopted protectionist policies after World War I and World War II. But inter-war activities in the United States, particularly U.S. trade legislation,²⁰⁶ laid the groundwork for post war General Agreement on Tariffs and Trade (“GATT”) negotiations, and the United States, under the auspices of the multilateral GATT negotiations, consistently worked to chip away at the discriminatory policies toward U.S. goods, making for better trading conditions for the United States.²⁰⁷

Furthermore, President Donald Trump complains about a trade deficit with Canada. Although the United States has a trade deficit with Canada in goods, it has a much higher trade surplus with Canada in services, and Canada seems not to complain about that.²⁰⁸ One may argue that complaining about a bilateral trade deficit with one State is like someone complaining about their deficit with the supermarket. Of course, people have a deficit with the supermarket because they want the food and other goods they buy there, and the supermarket buys nothing from them. But they have a surplus relationship with their employer. Worrying about bilateral trade deficits represents an activity that has no hope of success, because in trade relationships emphasis must follow the rules and access to markets, since a State lacks control over its deficit or surplus with another State in any event.²⁰⁹ Rather, this remains a question of what people wish to buy and wish to sell; States would not import goods if consumers did not wish to purchase them.

Globalization originates from the ground up, not from the top down. Globalization comes from hundreds of millions of consumers making billions of decisions every day. One explanation for deficits comes from people's intent to purchase foreign made goods that they need, often because goods made abroad are cheaper. This gives consumers more buying power than ever before. If people changed their collective minds and stopped buying these goods, globalization would stop. Certainly, those countries that manipulate their currency in order to make their goods cheaper, dump their products, or subsidize their companies so that the playing field of competition is unequal must face punishment for unfair practices. However, in order to stop such behavior, a collective effort

29, 1934), available at <http://history.house.gov/HistoricalHighlight/Detail/36918> (last visited Nov. 12, 2018).

206. *The Reciprocal Trade Agreements Act*, supra note 205.

207. Douglas A. Irwin, *Mr. Trump's Trade War*, WALL ST. J. (Dec. 15, 2017), available at <https://www.wsj.com/articles/donald-trumps-trade-war-1513356667> (last visited Nov. 8, 2018).

208. *Id.*

209. *Id.*

must exist on the part of many trading partners. No one country can punish alone; a country needs allies.

The United States worked very hard in advocating and negotiating the Trans Pacific Partnership (“TPP”) treaty. The purpose of this deal was to eventually create a new single market accounting for 40 percent of world trade. “The pact aimed to deepen economic ties between these nations, slashing tariffs and fostering trade to boost growth. Members had also hoped to foster a closer relationship on economic policies and regulation.”²¹⁰ In addition to the United States, 11 other States participated in the negotiations, which took about three years.²¹¹ It will most likely take longer to negotiate 11 separate bilateral agreements, as the current U.S. administration says it plans to do. These envisioned bilateral agreements’ partners will consist of States who spent the past three years negotiating in good faith only to have the United States pull out at the last minute after the new U.S. President took office. Will those States consider the United States a trustworthy negotiating partner? Dartmouth economist, Douglas A. Irwin, says, referring to the TPP partners, “after seeing how the U.S. has treated its NAFTA trading partners, other countries have not been eager to sign up for talks.”²¹² Pulling out of the TPP means that U.S. goods will face trade barriers in all of these countries, barriers that would not exist if the agreement stayed in place.

A recent article in the *New York Times* reported that other countries leave the United States out of a variety of trade negotiations and that the other States simply move on without the largest economy in the world. Considering the TPP treaty,

[b]usiness interests in the United States are watching with alarm as other countries strike agreements that exclude American exporters. For example, ranchers in Canada and Australia will be able to sell beef at lower prices in Japan than their American competitors, who will be subject to higher tariffs because the United States is not party to the Trans-Pacific Partnership.²¹³

210. *TPP: What Is It and Why Does It Matter?*, BBC (Jan. 23, 2017), available at <http://www.bbc.com/news/business-32498715> (last visited Nov. 8, 2018).

211. The other negotiating states are: Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile, and Peru. Patrick Gillespie, *11 Countries Sign TPP Trade Pact Without the United States*, CNN BUS. (Mar. 8, 2018), available at <https://money.cnn.com/2018/03/08/news/economy/tpp-trump-tariffs/index.html> (last visited Nov. 8, 2018).

212. Irwin, *supra* note 207.

213. Ana Swanson & Jim Tankersley, *As U.S. Trumpets ‘America First,’ Rest of the World Is Moving On*, N.Y. TIMES (Jan. 24, 2018), available at <https://www.ny-times.com/2018/01/24/us/politics/trump-trade-america-first-davos.html> (last visited Nov. 8, 2018).

The United Nations Conference on Trade and Development website states, “[g]lobalization, including a phenomenal expansion of trade, has helped lift millions out of poverty.”²¹⁴ The question remains: what effect does destruction of the current multilateral trading system have on continued expansion?

XIV. THE CURRENT INTERNATIONAL SYSTEM

The United States represents one of the principle architects and driving forces behind the international system established at the end of World War II. The United States believed that construction of a stable system was in its best interest. Consequently, it worked towards this international system by supporting the formation and evolution of the European Union; helping to create NATO; leading the negotiations and signing of the NAFTA, the Paris Climate Accords,²¹⁵ and the Iran Nuclear Accords; pushing for the TPP; and leading the negotiations and signing the GAAT and the WTO Agreements.²¹⁶ All of the foregoing relationships are covered by signed agreements or treaties. The TPP was signed by the 11 other nations, without the United States.²¹⁷ Donald Trump questions the effectiveness of each treaty. President Trump declared some key U.S. foreign policies, active since the end of World War II, as unworkable and outmoded, including: free trade; alliances in Europe and Asia; defense of human rights; commitment to international institutions; and in some cases, the rule of law itself. These all represent the pillars of the United States’ strategy, but President Trump asserts that they no longer should, claiming that they constitute a “bad deal for the United States.”²¹⁸

214. *About UNCTAD*, U.N. CONF. ON TRADE AND DEV., available at <https://unctad.org/en/Pages/aboutus.aspx> (last visited Nov. 12, 2018).

215. Pilita Clark & Tom Mitchell, *U.S. and China Ratify Paris Climate Accord*, FIN. TIMES (Sept. 3, 2016), available at <https://www.ft.com/content/e7a2c4ee-71b8-11e6-bf48-b372cdb1043a> (last visited Nov. 12, 2018).

216. The United States is a signatory to the agreement establishing the World Trade Organization. *Members and Observers*, WTO, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 12, 2018). The United States is also a signatory of the General Agreement on Tariffs and Trade. *The 128 Countries That Had Signed GATT By 1994*, WTO, available at https://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Nov. 12, 2018).

217. Gillespie, *supra* note 211.

218. Walter R. Mead, *What Truman Can Teach Trump*, WALL ST. J. (July 21, 2017), available at <https://www.wsj.com/articles/what-truman-can-teach-trump-1500661673> (last visited Nov. 12, 2018). During President Trump’s June 2017 tour of Europe,

[he] savage[d] or brusquely rebuff[ed] virtually all the political, trade, military and ecological alliances that form the core of the postwar European and North American Peace; in the days [that followed], he went even further, attacking allies and cancelling

President Trump claims that Mexico, China, and Germany all treat the United States poorly. The proof of this assertion, he states, is that the United States has a negative balance of trade with these countries, implying that those countries are not fulfilling their obligations under the agreements.²¹⁹ In a television interview, President Trump stated that the United States constantly loses lawsuits in the WTO²²⁰ and that the WTO “. . . take[s] advantage of us, like you wouldn’t believe.”²²¹ No actual lawsuits exist before the WTO, but there are complaints about someone not abiding by the rules. In reality, the United States wins about 70 percent of the complaints that it files, a better record than any other country. However, it loses most cases filed against it, which coincides with the same trend as most of the other 164 members of the WTO.²²²

Yet, as the respondent (think defendant), the United States won 42 percent of the cases filed against it, which represents a better record than any other country.²²³ This verbal attack on the WTO prompted at least one writer to say that,

[u]ndaunted by facts, the Trump administration has blocked the nominations of jurists to fill vacant seats in the WTO’s Appellate Body. This is no small thing. The Dispute Settlement Body, and the Appellate Body, are where governments go when they think their trading partners are violating WTO rules. This is a hugely important part of what the WTO does.²²⁴

There are now four vacancies. The full complement of judges in the Appellate Body consists of seven judges, so this will create a serious backlog of cases.²²⁵ This appears contrary to the interest of the United States,

the world’s most difficult and important international agreement, the Paris Climate Accord.

Doug Saunders, *Trump’s Retreat From West Could Spur New Start to Democratic World*, GLOBE AND MAIL (June 3, 2017), available at <https://www.theglobeandmail.com/opinion/trumps-retreat-from-west-could-spur-new-start-to-democratic-world/article35188219/> (last visited Nov. 12, 2018).

219. Mead, *supra* note 218.

220. In fact, they are not “lawsuits,” but rather complaints filed with the Dispute Settlement Mechanism of the WTO.

221. John Brinkley, *Trump is Quietly Trying to Vandalize the WTO*, FORBES (Nov. 27, 2017), available at <https://www.forbes.com/sites/johnbrinkley/2017/11/27/trump-quietly-trying-to-vandalize-the-wto/#787aa92b263f> (last visited Nov. 12, 2018).

222. *Id.*

223. *Id.*

224. *Id.*

225. *Appellate Body*, WTO, available at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Nov. 12, 2018).

since dozens of cases are pending on behalf of the country.²²⁶ It will, however, be in the interest of the United States should South Korea and China to file complaints over the recent tariff impositions on washing machines and solar panels by the United States.

The underlying principles are similar in both contract negotiation and treaty negotiation. One normally attempts to maintain a cordial working relationship with the party or parties with whom one wishes to negotiate. Interestingly, the Heads of State of the other two signatories to NAFTA²²⁷—and in turn, their countries—received belittling or insulting comments from President Trump, who said he wished to “renegotiate” the agreement.²²⁸

President Trump stated that the United States will negotiate numerous bilateral trade agreements, rather than multilateral agreements, like the premise of the TPP.²²⁹ The plan is that if such agreements become problematic, the United States will simply break from them.²³⁰ One could surmise that this would be similar to attempting to persuade the owner of a building to lease it to you on a month-to-month basis. Some building owners may; most will likely not. Most lessors would want longer-term relationships. Of course, the same holds true in the majority of business relationships. Likewise, most States want long-term, stable, and predictable relationships. The U.S. President stated that he does not like the “bad deals” of the past, and mistrusts multilateral agreements.²³¹ He says

226. Brinkley, *supra* note 221.

227. The North American Free Trade Agreement, for U.S. purposes, is not a treaty under Article II of the Constitution, with powers set forth in Article III therein. Rather, it is an Executive Agreement, implemented by an act of the U.S. Congress. *See generally* North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

228. *Donald Trump Calls Justin Trudeau “Canada’s Worst President Yet,”* BARRARD STREET J. (May 9, 2017), available at <http://www.burrardstreetjournal.com/trump-trudeau-canadas-worst-president-yet/> (last visited Nov. 12, 2018); *see also* Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, TIME (Aug. 31, 2016), available at <http://time.com/4473972/donald-trump-mexico-meeting-insult/> (last visited Nov. 12, 2018).

229. John Wagner & David J. Lynch, *Trump Said He Would Strike One-On-One Trade Deals. That’s Not Happening*, WASH. POST (Nov. 14, 2017), available at https://www.washingtonpost.com/politics/trump-said-he-would-strike-one-on-one-trade-deals-thats-not-happening/2017/11/14/eced8a4e-c949-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.53567dedac90 (last visited Nov. 12, 2017).

230. *See Trump Says Plans Lots of Bilateral Trade Deals With Quick Termination Clauses*, REUTERS (Jan. 26, 2017), available at <http://www.reuters.com/article/us-usa-trump-trade-idUSKBN15A2MP> (last visited Nov. 13, 2018).

231. Jordan Weissmann, *Trump Has One Big Idea to Fix America’s Trade Deals. It’s Not Very Good*, SLATE, (Feb. 7, 2017), available at

he intends to pull the United States out of the 144-year-old international postal treaty, called the Universal Postal Union.²³² He condemned many countries from his first days in office. “The Germans are bad, very bad,” he said, denouncing Germany’s trade surplus with the United States.”²³³ Peter Navarro, the Trump Administration’s top trade advisor, accused Germany of currency manipulation.²³⁴ Of course, Germany does not negotiate separate trade agreements,²³⁵ and does not have its own currency. Germany is a member of the European Union and of the Eurozone.²³⁶ Germany actually—at least up until now—became one of the most important allies of the United States.²³⁷ The anti-treaty attitude of the U.S.

<https://slate.com/business/2017/02/the-big-problem-with-trumps-trade-strategy.html> (last visited Nov. 13, 2018); see also Mead, *supra* note 218.

232. Glenn Thrush, *Trump Opens New Front in His Battle With China: International Shipping*, N.Y. TIMES (Oct. 17, 2018), available at <https://www.nytimes.com/2018/10/17/us/politics/trump-china-shipping.html> (last visited Nov. 14, 2018).

233. Don Lee, *Trump Wants To Cut Bilateral Trade Deals, But What If Nobody Comes to the Table?*, L.A. TIMES (May 26, 2017), available at <http://www.latimes.com/business/la-fi-trump-trade-strategy-20170526-story.html> (last visited Nov. 13, 2018).

234. Shawn Donan, *Trump’s Top Trade Adviser Accuses Germany of Currency Exploitation*, FIN. TIMES (Jan. 31, 2017), available at <https://www.ft.com/content/57f104d2-e742-11e6-893c-082c54a7f539> (last visited Dec. 12, 2018); see also Geoffrey Smith, *Donald Trump’s Top Trade Adviser Just Slammed Germany*, FORTUNE (Jan. 31, 2017), available at <http://fortune.com/2017/01/31/donald-trumps-top-trade-adviser-currency-manipulator-germany/> (last visited Dec. 12, 2018).

235. *Id.*

236. See Randall Hansen, *Trump, Merkel and the Future of the Transatlantic Relationship*, GLOBE AND MAIL (June 2, 2017), available at <https://www.theglobeandmail.com/news/world/trump-merkel-and-the-future-of-the-transatlantic-relationship/article35188239/> (last visited Nov. 13, 2018) (“as the Transatlantic Relationship frays, the most powerful liberal-democratic bloc in the world . . . will weaken, and the confidence of the autocrats will grow *in confidence*.”) (emphasis added); see also James Rothwell & Barney Henderson, *Donald Trump Refuses to Shake Angela Merkel’s Hand as Key Meeting Gets Off to Frosty Start*, THE TELEGRAPH (Mar. 17, 2017), available at <http://www.telegraph.co.uk/news/2017/03/17/donald-trump-meet-angela-merkel-white-house-make-break-meeting/> (last visited Nov. 13, 2018) (describing that Germany is one of the United States’ most important allies, yet the President of the United States has publicly derided Chancellor Angela Merkel and treated her with seeming contempt); Julian Borger, *Trump Clashes With German Leaders as Transatlantic Tensions Boil Over*, THE GUARDIAN (May 30, 2017), available at <https://www.theguardian.com/world/2017/may/30/donald-trump-germany-angela-merkel-election> (last visited Nov. 13, 2018).

237. According to the United States Department of State, “in 2015, the United States became Germany’s fourth largest supplier of goods.” *U.S. Relations With Germany*, U.S. DEPT. OF STATE (July 3, 2018), available at

administration may find its basis in fear of multilateral trade agreements because a State must surrender too much sovereignty. Most populist leaders espouse similar beliefs.

Certainly, this became one of the arguments for Brexit and is an on-going priority of the British government, inasmuch as their analysis of the frameworks for trade finds that “the more comprehensive the trade relationship, the greater the curtailment of national sovereignty.”²³⁸ So the British also wish to rely, to a large extent, on bilateral trade agreements.²³⁹ Great Britain struggles with considerable hiccups since voting to leave the European Union, now finding itself in the throes of negotiating its exit.²⁴⁰ Facing a divorce from the European Union, one of the problems for the United Kingdom is that the remaining European Union member states, combined, became Britain's largest trading partner,

<https://www.state.gov/r/pa/ei/bgn/3997.htm> (last visited Nov. 13, 2018). It goes on to say that,

[t]he U.S. and German trade relationship is driven by massive mutual investment. In 2015, German direct investment in the United States was worth \$255 billion, while U.S. direct investment in Germany was worth \$108 billion. German investments in the United States focus largely on manufacturing and wholesale, as well as finance and insurance. Altogether, U.S. affiliates of German firms employ over 670,000 American workers. Together, our companies represent over one million jobs on both sides of the Atlantic.

Id. The State Department further says that “Germany is one of the United States’ closest and strongest allies in Europe. U.S. relations with Germany are based on our close and vital relationship, as friends, trading partners, and allies sharing common institutions.” *Id.*

If alienation of allies is his goal, President Trump’s efforts in that direction seem to be bearing fruit. According to a survey done by the Pew Research Center, over half of Germans in October of 2017 believe that the relationship between the United States and Germany are bad to somewhat bad. Jacob Poushter, *How Americans and Germans View Their Countries’ Relationship*, PEW RES. CTR. (Dec. 4, 2017), available at <http://www.pewresearch.org/fact-tank/2017/12/04/how-americans-and-germans-view-their-countries-relationship/> (last visited Nov. 13, 2018).

238. *Brexit: The Options for Trade* 3, (Dec. 13, 2016), available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/72/72.pdf> (last visited Nov. 27, 2018).

239. *Id.*

240. See Adam Bienkov, *Brexit Negotiations Are Grinding to a Halt as Britain Refuses to Discuss Divorce Bill*, BUS. INSIDER (July 19, 2017), available at <http://www.businessinsider.com/brexit-negotiations-britain-refuses-to-discuss-divorce-bill-michel-barnier-david-davis-2017-7> (last visited Nov. 13, 2018); see also *Hard Brexit Is Unravelling*, THE ECONOMIST (June 28, 2018), available at <https://www.economist.com/britain/2018/06/28/hard-brexit-is-unravelling> (last visited Nov. 13, 2018).

counting for 47 percent (134 billion Pounds Sterling) of the United Kingdom's goods exports and 54 percent (223 billion Pounds Sterling) of their goods imports in 2015.²⁴¹

Brexit can be problematic for the United Kingdom for other reasons. The member states of the European Union do not negotiate trade deals on their own; they negotiate as a trading bloc,²⁴²

[and] [t]he notion that a country can have complete regulatory sovereignty while engaging in comprehensive free trade with partners is based on a misunderstanding of the nature of free trade. Modern FTAs [Free Trade Agreements] involve extensive regulatory harmonisation in order to eliminate non-tariff barriers, and surveillance and dispute resolution arrangements to monitor and enforce implementation. The liberalisation of trade thus requires States to agree to limit the exercise of their sovereignty . . . As a general rule, the deeper the trade relationship, the greater the loss of sovereignty.²⁴³

Further, some believe that at least one holdout will occur in the Brexit negotiations with the EU; this means that one Member State that will not go along with what the United Kingdom wants. If that happens, the United Kingdom may potentially lose its trade relationship with its largest trading partner.²⁴⁴

In her first speech at the United Nations, President Trump's ambassador to the United Nations, Nikki Haley, warned other members that those countries who do not back (or "have the backs of") the United States are in for some unspecified action on the part of the United States.²⁴⁵ It remained unclear in what areas the United States required backing, or what would happen to those countries who did not "back" it. This appeared to be a threat from the United States, but a murky one that could sow seeds of uncertainty among previously friendly nations.

Contention abounds in the world. As a presidential candidate, Donald Trump promised to build a wall along the Mexican border and tem-

241. *Brexit: The Options for Trade*, *supra* note 238, at 8.

242. Consolidated Version of the Treaty on the Functioning of the European Union arts. 207(2-3) & 218(3), May 9, 2008, 2008 O.J. (C 115) 47.

243. Rohini Acharya, *TPP, Brexit, and After: The Uneasy Future of Deep Economic Agreements*, 111 AM. SOC'Y INT'L L. PROC. 89, 89 (2017), available at <https://www.cambridge.org/core/journals/proceedings-of-the-asil-annual-meeting/article/wto-procedures-to-monitor-rtas/C29B8A1C5BE801018CBF7A4C5F3E20FC> (last visited Nov. 23, 2018).

244. *Id.*

245. Somini Sengupta, *Nikki Haley Puts U.N. on Notice: U.S. Is 'Taking Names'*, N.Y. TIMES (Jan. 27, 2017), available at <https://www.nytimes.com/2017/01/27/world/americas/nikki-haley-united-nations.html> (last visited Nov. 11, 2018).

porarily bar Muslim immigrants from entering the United States. He repeated those sentiments as president. As a candidate, the U.S. President put in question the continued commitment of the United States to its NATO allies, accusing them of not living up to their commitments; he said that foreign aid should be reduced, though he toned down the rhetoric about exiting NATO, at least for now.²⁴⁶ He still insults his counterparts in the organization;²⁴⁷ he praised Russia's president Vladimir Putin and promised to disavow trade treaties and agreements;²⁴⁸ he accused Mexico and China—two of the United States' most important trading partners—of dumping and vowed to apply retaliatory tariffs on their products; and he suggested that certain Asian allies should develop their own nuclear weapons, thereby encouraging the proliferation of those weapons, encouraging those nations to breach treaty obligations.

During his campaign, Donald Trump also denounced the South Korea Free Trade Agreement with the United States as a disaster, “a ‘job killing . . . disaster,’” and demanded that South Korea pay for all the costs of maintaining U.S. troops in the country.²⁴⁹ As president, in the midst of re-negotiation of the Free Trade Agreement with South Korea, he threatened to pull out of the relationship altogether.²⁵⁰

An important point that many leaders and their populations may miss is that the multilateral trading system, based on agreed upon commitments, supports the lifestyles of people on a global scale, making food,

246. Jonathan Allen, Geoff Bennett, & Hallie Jackson, *Trump Says Leaving NATO Is 'Unnecessary,' Claims Allies Will Boost Funding*, NBC NEWS (July 12, 2018), available at <https://www.nbcnews.com/politics/white-house/trump-says-leaving-nato-unnecessary-claims-allies-will-boost-funding-n890806> (last visited Nov. 11, 2018).

247. Jeremy Diamond, *Trump Opens NATO Summit With Blistering Criticism of Germany, Labels 'Delinquent'*, CNN (July 11, 2018), available at <https://www.cnn.com/2018/07/10/politics/donald-trump-nato-summit-2018/index.html> (last visited Nov. 11, 2018).

248. Peter Baker, *Donald Trump's Victory Promises to Upend the International Order*, N.Y. TIMES (Nov. 9, 2016), available at <https://www.nytimes.com/2016/11/09/world/donald-trumps-victory-promises-to-upend-the-international-order.html> (last visited Nov. 11, 2018).

249. 두루미, *Trump Denounces Korea-US FTA as 'Disaster' Demands S. Korea Pay All Costs for Troop Presence*, KOREA HERALD (Sept. 16, 2016), available at <http://www.koreaherald.com/view.php?ud=20160916000046> (last visited Nov. 11, 2018).

250. Doug Palmer, Megan Cassella, & Andrew Restuccia, *Trump Mulling Withdrawal From Korea Trade Deal*, POLITICO (Sept. 2, 2017), available at <https://www.politico.com/story/2017/09/02/trump-south-korea-trade-withdrawal-242283> (last visited Nov. 11, 2018).

goods, and services available, and also making them largely cheaper and much more accessible to people in general.

In 2017, the nations of the world exported over \$17.2 trillion billion of goods and trade in services was \$5.25 trillion in the same period, and \$5.25 trillion of trade in services.²⁵¹ The WTO consists of 164 members.²⁵² This represents the vast majority of the States of the world, so one can safely assume that most of the world's trade falls under WTO rules. 89 States also appear as parties to the United Nations Convention on Contracts for the International Sale of Goods,²⁵³ which governs now considerably more than two-thirds of the world's trade in goods.²⁵⁴ Of the top 20 exporting nations in the world, only Taiwan, India, The United Arab Emirates and the United Kingdom are not parties.²⁵⁵

CONCLUSION

Randomly imposing import duties on the goods of fellow WTO (and NAFTA) members, despite the contortions of the Trump administration to characterize the actions as required for national security concerns,²⁵⁶ likely constitutes a breach of the NAFTA and the WTO accords. If States

251. *Strong Trade Growth in 2018 Rests on Policy Choices*, WTO, (Apr. 12, 2018), available at https://www.wto.org/english/news_e/pres18_e/pr820_e.htm (last visited Nov. 11, 2018).

252. *Members and Observers*, WTO, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 18, 2018).

253. *Convention on Contracts*, *supra* note 81.

254. See generally Franco Ferrari, *What Sources of Law for Contracts for International Sale of Goods? Why One Has to Look Beyond the CISG*, 25 INT'L REV. OF L. AND ECON. 314 (2005).

255. *Top 20 Export Countries Worldwide in 2017 (in Billion U.S. dollars)*, STATISTA, available at <https://www.statista.com/statistics/264623/leading-export-countries-worldwide/> (last visited Nov. 11, 2018); see also *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, U.N. COMM. ON INT'L TRADE L., available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited Nov. 11, 2018) (stating that:

[t]he purpose of the CISG is to provide a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs . . . The contract of sale is the backbone of international trade in all countries, irrespective of their legal tradition or level of economic development. The CISG is therefore considered one of the core international trade law conventions . . .).

256. Henry Fernandez, *Trump Tariffs Are About National Security: Peter Navarro*, FOX BUS. (May 31, 2018), available at <https://www.foxbusiness.com/politics/trump-tariffs-are-about-national-security-peter-navarro> (last visited Nov. 11, 2018).

act in contravention of or disavow their obligations under the WTO accords, the United Nations Convention on Contracts for the International Sale of Goods, the Charter of the United Nations, or other multilateral conventions and treaties, such actions can undermine the universal respect for international law and can cause the commercial and political systems that bind the world together to loosen.

A few months before the U.S. presidential elections of 2016, a respected commentator for the *Financial Times*,²⁵⁷ worrying about the upheavals and crises that buffeted the world and about what might transpire in the upcoming elections said,

Mr. Putin is trying to redraw borders in Europe, the Middle East is in flames, European unity is fracturing, jihadi terrorism is spreading, pluralism is challenged by authoritarianism, China is contesting the status quo in the South China Sea and its neighbours are rearming in response, populists are storming citadels across advanced democracies. To Mr. Trump, the answer is American retreat. He wants to build walls.²⁵⁸

In a variety of countries, elected leaders portray institutions like the press or the judiciary—and in the United States, Congress or its members, the FBI, and the National Intelligence Apparatus—as enemies of the people. Even among some of the most established democracies like Britain, rising distrust of institutions weakens social cohesion.²⁵⁹

The current U.S. administration says it wants “fair trade,” and appears to define that by the bilateral balance of payments with each trading partner to be without U.S. deficits. This goal, coupled with this definition, makes the United States appear willing to trash treaty obligations in search of this goal. It should be noted that President Trump championed and signed new tax legislation passed by the U.S. Congress that creates a

257. Philip Stephens is a commentator and author. He is associate editor of the *Financial Times* where, as chief political commentator, he writes twice-weekly columns on global and British affairs. “He joined the *Financial Times* in 1983 after working as a correspondent for Reuters in Brussels and has been the FT’s economics editor, political editor and editor of the UK edition. He was educated at Wimbledon College and at Oxford university.” *Philip Stephens*, FIN. TIMES, available at <https://www.ft.com/comment/columnists/philip-stephens> (last visited Nov. 11, 2018).

258. Philip Stephens, *The Trumpian Threat to the Global Order*, FIN. TIMES (Sept. 23, 2016), available at <https://www.ft.com/content/3f16e476-7e5c-11e6-8e50-8ec15fb462f4> (last visited Nov. 11, 2018).

259. Michael Parkinson, *Brexit Puts Social Cohesion at Risk—Abroad, at Home and Locally*, UNIV. OF LIVERPOOL NEWS (June 26, 2018), available at <https://news.liverpool.ac.uk/2016/06/28/eu-ref-brexit-puts-social-cohesion-risk-abroad-home-locally/> (last visited Nov. 11, 2018).

deficit of nearly \$1.5 trillion.²⁶⁰ Difficulty arises when attempting to reconcile those two things; the logic appears evasive. If someone goes to an auto dealer and purchases an automobile for \$25,000, they then have a trade deficit with the dealer in the amount of \$25,000. However, they also have the automobile that they want, something they did not have before and would never have without paying for it.

The McKinsey Global Institute studies the issue of global trade and manufacturing. It believes that one real issue respecting the U.S. trade debate is that less than one percent of U.S. companies export, far less than any other advanced economy.²⁶¹ Germany represents the third largest exporter in the world.²⁶² Germany, for example, contains a nine percent share of the world's merchandise exports, larger than that of the United States, whose economy is four times the size of Germany.²⁶³ Only one percent of all U.S. companies export.²⁶⁴ If more companies involved themselves in trade, such activity would arguably create a positive impact on trade deficits. Strategically encouraging a change possesses the potential to turn around U.S. trade deficits.

U.S. business must harness the force of digital technology and globalization. The United States must encourage its businesses to seek foreign markets. Doing so would increase exports, and with digital technology, finding foreign buyers becomes easier than ever before.²⁶⁵ Productivity growth will not occur without investment, and investment in the United States as a percentage of GDP has declined steadily over the last few decades. Despite historically low interest rates and public out-

260. Jim Tankersley, *How the Trump Tax Cut Is Helping Push the Federal Deficit \$1 Trillion*, N.Y. TIMES (July 25, 2018), available at <https://www.nytimes.com/2018/07/25/business/trump-corporate-tax-cut-deficit.html> (last visited on Nov. 6, 2018).

261. Gary Pincus, James Manyika, & Sree Ramaswamy, *Here's How to Get the U.S. Economy to Grow 3.5 Percent or More*, MCKINSEY GLOB. INST. (Dec. 2016), available at <https://www.mckinsey.com/featured-insights/employment-and-growth/heres-how-to-get-the-us-economy-to-grow> (last visited Nov. 6, 2018).

262. *Germany*, OEC, available at <https://atlas.media.mit.edu/en/profile/country/deu/> (last visited Nov. 6, 2018).

263. *Export Generation: Germany*, WORLD BANK, available at http://siteresources.worldbank.org/ECAEXT/Resources/258598-1284061150155/7383639-1323888814015/8319788-1324485944855/06_germany.pdf (last visited Nov. 6, 2018).

264. Jonathan Cummings et al., *Growth and Competitiveness in the United States: The Role of Its Multinational Companies*, MCKINSEY GLOB. INST., (June 2010) available at <https://www.mckinsey.com/featured-insights/americas/growth-and-competitiveness-in-us> (last visited Nov. 6, 2018).

265. Pincus, Manyika, & Ramaswamy, *supra* note 261.

cries regarding infrastructure and the education system, public investment continued to decrease (going from 6.5 percent of GDP in 1960 to 3.4 percent in 2014).²⁶⁶ Private sector investment reached an all-time low in the past 30 years. Some say that the United States must invest in its companies, especially small and medium sized companies.²⁶⁷

When influential States—States with whom others have important trading and political relationships—or States possessing global leaders (either politically, morally, or both) commence fissures of their political or social framework, this lessens the confidence of others in the continued leadership or dependability of such State. If one couples that with outright withdrawal from or denunciation of important multilateral treaties, or threats to breach treaty obligations, this marks the decline in universal respect and predictability provided by the international legal regime upon which the world depended for so long. Decreased trade and dysfunctional international relationships will likely follow. Populism sounds good to citizens who see themselves as left behind by the unfamiliar and impersonal wave of globalization or technology. History shows us that it hardly works in practice, rarely delivering on its promises. Withdrawing from the world will likely provide an increase in poverty, not the desired decrease.

A variety of ways exist in which the executive and judicial branches of the United States justify or approve the breach of treaty obligations, the withdrawal from them, or the disrespect of widely accepted customary international law. There may be a price for that. Opportunistic conduct by governments, whether in the name of nationalism, State interest, or simple defiance, can give rise to an erosion in the predictability generated by expected cooperation. As already stated, in today's globalized world cooperation is imperative. Very least, an inward-looking approach could deprive the United States a seat at the table when important matters are discussed and resolved; without the presence of the United States, such issues might not be resolved. At worst, the United States could suffer retaliation from a variety of States. This writer at least believes a better way exists. We must avoid what Christoph Royer calls “the lure of simplistic ideologies and deceiving moral certainties,”²⁶⁸ something

266. *Id.*

267. Rana Foroohar, *U.S. Trade Problems Begin at Home Not Abroad*, FIN. TIMES (Nov. 9, 2017), available at <https://www.ft.com/content/14b4ef1e-cbab-11e7-ab18-7a9fb7d6163e> (last visited Nov. 11, 2018).

268. Christof Royer, *The Renaissance of Right-Wing Populism: Learning from the Case of Austria*, GLOB. POL. (May 31, 2016), available at <http://global-politics.co.uk/wp/2016/05/31/renaissance-right-wing-populism-responses-learning-case-austria/> (last visited Nov. 18, 2018).

many political candidates use to drive populations to support them and their agendas. Governments bear the duty to educate their citizens of realities and to sift through the ideas of false scapegoats. Furthermore, governments must attempt to understand the full impact of globalization and the wave of new technology displacing and often impoverishing their citizens. They must inspire all citizens to believe that they all are citizens of the same country; that all must work together, shouldering the burdens in unison. Governments must help update outdated skills. The less fortunate need education and training, specifically training in new, innovative ways to allow citizens to fully confront the twenty-first century as equal citizens partaking in the universal wealth and prosperity that globalization can bring if fully understood and if the aftermath in its wake is controlled. Governments must create jobs, repair infrastructure, and increase investment in research.

Leaders should encourage optimism, not gloom. States must use multilateralism to: alleviate climate change; combat terrorism; counter cybersecurity threats and money laundering; deal with ocean pollution; conduct safe air travel; and ensure fair terms of trade. No State will be able to achieve this alone considering the vast array of needs, even though it may take some State leaders a while to comprehend this roadblock. If, as President Trump declares, the current leader of the United States is a great negotiator, maybe he took his stance in international law in order simply to move the needle of negotiations in his direction. That is, after all, one negotiation strategy favored by some. In the International Economic Forum in Davos, Switzerland, Donald Trump told government and business leaders from around the globe that the United States was a willing trade partner, seeking foreign investment, and might even entertain an amended TPP treaty.²⁶⁹ Furthermore, major economies of the world are expanding, creating jobs and perhaps lessening fears of widespread gloominess.²⁷⁰

Of course, this recovery remains fragile and economists fear that some current trends might end the growth. For example, the polemic between the U.S. President, Donald J. Trump, and the North Korean leader,

269. Rebecca Ballhaus & Peter Nicholas, *Trump Promotes the U.S. as 'Open for Business' in Davos Speech*, WALL ST. J. (Jan. 26, 2018), available at <https://www.wsj.com/articles/trump-to-promote-u-s-as-open-for-business-in-davos-speech-1516962420> (last visited Nov. 13, 2018).

270. Peter S. Goodman, *Every One of the World's Big Economies Is Now Growing*, N.Y. TIMES (Jan. 27, 2018), available at <https://www.nytimes.com/2018/01/27/business/its-not-a-roar-but-the-global-economy-is-finally-making-noise.html> (last visited Nov. 6, 2018).

Kim Jong Un—which seems currently stumbling along on hold²⁷¹—may derail growth, while fear persists that the biggest area of concern regards the rhetoric coming out of Washington to punish China and other trading partners because of their trade balances with the United States and because of intellectual property rights.²⁷² Currently, the United States has imposed tariffs on solar panels, washing machines, and billions of Chinese goods—moving from rhetoric to action.

Damaging the international economic legal regime will unlikely make a nation prosperous. Evidence indicates that the direct opposite will occur, and not only will the States who condemn or destroy suffer, but such action could impoverish the world. The rhetoric and actions of nationalist or populist leaders make one wonder whether society faces the future with hope and confidence or with fear. The world needs more cooperation, not less. The leaders of the world must work together to reach a mutually beneficial consensus on the rules governing the world and the global trading system. If the modern world's changes have outrun the rules, then their consensus needs to take such changes into account.

Leaders and their governments must follow the rule of law and condemn those who defy it. If international law needs changing, governments must work to fix it. Cooperation is key. We must look to the future with confidence rather than fear. The writer suggests that national leaders must provide a model for their citizens and others to emulate. Only then, when everyone—or at least most of the people—follow most of the rules most of the time, will our domestic and international society work. Only then will we all live in a predictable, prosperous, and peaceful world.

271. Courtney McBride, *Pompeo Lowers Expectations for a Summit Plan in North Korea Visit*, WALL ST. J. (Oct. 5, 2018), available at <https://www.wsj.com/articles/pompeo-lowers-expectations-for-a-summit-plan-in-north-korea-visit-1538777494?mod=searchresults&page=1&pos=6> (last visited Nov. 11, 2018).

272. Lingling Wei & Bod Davis, *How China Systematically Pries Technology from U.S. Companies*, WALL ST. J. (Sept. 26, 2018), available at <https://www.wsj.com/articles/how-china-systematically-pries-technology-from-u-s-companies-1537972066?mod=searchresults&page=1&pos=2> (last visited Nov. 11, 2018); see also Richard N. Hass, *The Crisis in U.S.-China Relations*, WALL ST. J. (Oct. 19, 2018), available at <https://www.wsj.com/articles/the-crisis-in-u-s-china-relations-1539963174?mod=searchresults&page=1&pos=8> (last visited Nov. 11, 2018).