
SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE

SYRACUSE UNIVERSITY COLLEGE OF LAW

ARTICLES

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Sovereignty, & Environmental Security in a Networked World

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the March

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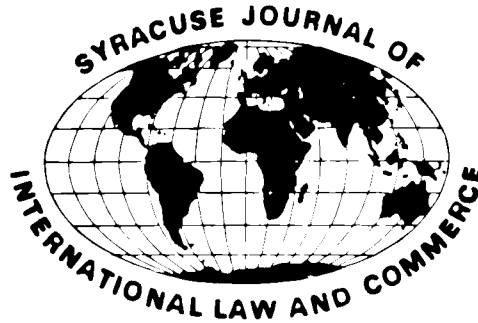
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**REVISITING THE WTO RARE EARTHS DISPUTE—LAW,
TRADE, SOVEREIGNTY, & ENVIRONMENTAL SECURITY IN
A NETWORKED WORLD**

Marvin L. Astrada*

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INTRODUCTION

In 1992, Deng Xiaoping, then-leader of China, reported that:

[t]here ‘is oil in the Middle East; there is rare earth in China.’ His comment spawned a crash program to develop and exploit China’s vast reserves of [these strategic] metals . . . Seven years after Deng’s remarks his successor, Jiang Zemin, ordered the Chinese state to go a step further

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... [by] '[i]mprov[ing] the development and applications of rare earth'
... 'and [converting] ... the resource advantage into economic superiority.'¹

The unstated equivocation of rare earths elements to oil refers to the very high strategic and economic value of the former in the realms of technology and trade. Rare earths not only possess properties that render them valuable from an asset-investment perspective, but they are also employed in the development of military technologies that directly impact a State's national security calculus. Broadly speaking, in the realm of technology rare earths are "vital to many modern technologies, including consumer electronics, computers and networks, communications, clean energy, advanced transportation, health care, environmental mitigation, and national defense."² The Chinese State effectively realized Deng Xiaoping's mandate to harness and enhance its resource advantage into economic and strategic superiority over rare earths production for the global market. This realization compelled its trading partners, led by the United States, to file a complaint with the World Trade Organization ("WTO") seeking to rein in China's near virtual monopoly over production.³ What the complainants termed distortion and manipulation of the market, however, China termed "minerals diplomacy,"⁴ a form of soft power that China successfully harnessed to enhance and exert diplomatic, strategic, and economic leverage over its trading partners.⁵ Arguing from a

1. Blake Hounshell, *Is China Making a Rare Earth Power Play?*, FOR. POL'Y (Sept. 23, 2010), available at http://blog.foreignpolicy.com/posts/2010/09/23/is_china_making_a_rare_earth_power_play (last visited Nov. 7, 2018); see also CINDY HURST, CHINA'S RARE EARTH ELEMENTS INDUSTRY: WHAT CAN THE WEST LEARN? (2010).

2. U.S. DEP'T OF DEF.: OFF. OF THE INSPECTOR GEN., PROCEDURES TO ENSURE SUFFICIENT RARE EARTH ELEMENTS FOR THE DEFENSE INDUSTRIAL BASE NEED IMPROVEMENT 1 (2014), available at <https://media.defense.gov/2014/Jul/07/2001713380/-1/-1/1/DODIG-2014-091.pdf> (last visited Nov. 8, 2018) [hereinafter PROCEDURES TO ENSURE SUFFICIENT RARE EARTH ELEMENTS].

3. See Lesley Stahl, *Modern Life's Devices Under China's Grip? From Smartphones to Cars and Defense Missiles, Modern U.S. Life Depends on Rare Earth Elements but China Dominates the Industry*, CBS NEWS (Mar. 22, 2015), available at <https://www.cbsnews.com/news/rare-earth-elements-china-monopoly-60-minutes-lesley-stahl/> (last visited Nov. 7, 2018).

4. See Thomas E. Ricks, *China's Minerals Diplomacy and You*, FOR. POL'Y (Sept. 30, 2010), available at http://ricks.foreignpolicy.com/posts/2010/09/30/china_s_minerals_diplomacy_and_you (last visited Nov. 7, 2018).

5. See Esther Pan, *China's Soft Power Initiative*, COUNCIL ON FOR. REL. (May 18, 2006), available at <https://www.cfr.org/backgrounder/chinas-soft-power-initiative> (last visited Nov. 7, 2018) (describing Chinese soft power).

traditional sovereignty and security perspective, wherein the State is supreme in determining policy related to security interests, China claimed its unilateral right to restrict trade in rare earths. The complainants, however, appealed to treaty obligations and employed international trade law to force China to drop its restrictions.

In this work, the rare earths dispute is analyzed as an exemplar of the systemic complexity that undergirds present global affairs, and how “the era of cheap rare earths”⁶ reflects a changing global context that impacts mainstays in the realm of law and its role in post-modern international relations, namely the nexus between law, sovereignty, and security in a networked world (hereinafter “LSSN”). This work will analyze the dispute through the lens of complexity and systems theory to flesh out the emerging issues and challenges that States face in a post-modern, inter-linked, and highly inter-dependent global context. The dispute will empirically anchor the analysis below, fleshing out how sovereignty and security manifest in present inter-State relations, and how the foregoing are impacted and effectuated in law.

I. THE RARE EARTHS DISPUTE: LAW IN INTERNATIONAL RELATIONS

This dispute highlights the important role that soft power plays in the conduct of foreign policy, and how States adapt to a world wherein hard power capabilities are not feasible, effective, efficient, and/or desirable means to employ in procuring national security and strategic foreign policy objectives. Complainants in the dispute wanted free, fair global trade, no unfair competitive advantages, and demanded that China not “skirt the rules” of the WTO.⁷ China, on the other hand, argued that it considered its domestic security concerns—with over a billion people “and the fastest growing economy in the world, China is faced with the challenging task of ensuring it has adequate natural resources to sustain economic growth, while also trying to appease the international community, which has been protesting China’s cuts in rare earth export quotas.”⁸

6. *China Exclusive: Experts Say No More Cheap Rare Earths From China*, GLOB. TIMES (Mar. 13, 2012), available at <http://www.globaltimes.cn/content/700030.shtml> (last visited Nov. 7, 2018); see also *China Trade Ministry Increases Rare Earth Export Quota*, BBC NEWS (May 18, 2012), available at <http://www.bbc.com/news/business-18112986> (last visited Nov. 7, 2018).

7. Julie Pace, *Obama Warns China on Trade Policy-President: Don't 'Skirt the Rules' With Rare Earth Minerals*, DAILY CAMERA (Mar. 13, 2012), available at http://www.dailycamera.com/ci_20167633/obama-warns-china-trade- (last visited Nov. 7, 2018).

8. HURST, *supra* note 1, at 18.

China “gradually reduced its annual tonnage of export quotas from 2006 to 2009, then cut the tonnage of allowed exports by more than half in the second half of 2010.”⁹ China then “increased rare earth export quotas [in 2012].”¹⁰ Relying upon a traditional understanding of sovereignty and power in international relations, China claimed that any export restrictions imposed were in line with its sovereign right to regulate environmental protection, initiate sustainable production, and to privilege Chinese economic and strategic interests over others. Complainants countered this claim by asserting that Chinese protectionism was simply unjustified because export restrictions, regardless of China’s concern with domestic environmental issues, were fomenting “trade and investment distorting behavior.”¹¹ China’s counter-arguments, rooted in sovereignty as the controlling principle in international relations, were ultimately rejected by the WTO. The WTO’s legal interpretation of governing law privileged the trade interests of member States, which superseded China’s traditional interpretation of sovereignty and security based on State supremacy within its borders.

The dispute involving global trade and rare earths, the international legal organization charged with its regulation (WTO), and State sovereignty thus provides a working case study to analyze the complexities of law, sovereignty, and security in an increasingly interdependent and inter-connected international system. Due to the interdependent, complex, and systemic nature of global trade, and the international legal mechanism of the WTO to facilitate global trade, the European Union (“EU”), United States, Japan (complainants), and China found that they were all obligated to cooperate to resolve the dispute employing soft power in the form of law, trade, and mutual inter-linked interests that impacted each party’s national security.¹² Furthermore, it is important to note and

9. Keith Bradsher, *China to Tighten Limits on Rare Earth Exports*, N.Y. TIMES (Dec. 28, 2010), available at <https://www.nytimes.com/2010/12/29/business/global/29rare.html> (last visited Nov. 7, 2018).

10. *China Trade Ministry Increases Rare Earth Export Quota*, supra note 6.

11. Leo W. Gerard, *USW Applauds Administration Trade Actions*, PR NEWSWIRE (Mar. 13, 2012), available at <https://www.prnewswire.com/news-releases/usw-applauds-administration-trade-actions—requesting-consultations-with-china-on-export-restraints-on-rare-earth-minerals-other-products-signing-legislation-to-ensure-that-government-can-apply-countervailing-duties-to-subsid-142472585.html> (last visited Nov. 7, 2018).

12. See ENVTL. CHANGE & SEC. PROGRAM, WOODROW WILSON INT’L CTR. FOR SCHOLARS, BACKDRAFT: THE CONFLICT POTENTIAL OF CLIMATE CHANGE ADAPTATION AND MITIGATION 21-22 (Geoffrey D. Dabelko et al. eds, 2013), available at https://www.wilsoncenter.org/sites/default/files/ECSP_REPORT_14_2_BACKDRAFT.pdf (last visited Nov. 5, 2018).

analyze the fact that the WTO embodies a cooperative legal mechanism designed to ameliorate the anarchy that permeates international relations. “WTO rules and procedures agreed to by all countries that join the organization and its treaties, offer a structured, law-based system to adjudicate disputes between states—and for states to hold each other accountable to the rules to which all agreed.”¹³ In the case of rare earths, the complainants shared a common interest: having recourse in a viable and legitimate set of operative rules governing trade relations, as well as ensuring that China, as a member of the WTO, adhered to the rules governing trade relations.¹⁴

The dispute highlights the fact that the economic and strategic properties of rare earths are part of a broader international system, in which integration of States and their interests find expression in international legal mechanisms, thereby helping States navigate the complexities of a globalized world. Notions of sovereignty, security, and unalloyed supremacy within borders have thus been impacted by soft power in the form of law, broadly speaking. China’s reliance on traditional interpretations of each concept, ordering principle (e.g., State supremacy within its borders and placement of its wellbeing above all competing interests), and the complainant’s and WTO’s rejection of said reliance, indicates how the LSSN differs from a more traditional articulation of bedrock ordering principles in international relations.¹⁵ The dispute’s importance is clear: “[i]t demonstrates that the EU, Japan, and the United States can come together to pressure China to change its policies, if those policies do not accord with the global rules.”¹⁶ The “global rules” are part of an expansive and complex soft power legal network that have and continue to actively affect State thought and policy in the international system. When considering long-term trade relations, it is in the strategic and economic interests of all parties involved in the dispute to trade with each other. Global trade in an increasingly interdependent and interconnected world poses a challenge to pure *realpolitik* notions of sovereignty. Unlike the relatively straightforward sovereignty argument put forth by

13. Stacy VanDeveer, *Rare Earth Politics, Cooperation, and the WTO*, GERMAN MARSHALL FUND (Mar. 20, 2012), available at <http://www.gmfus.org/blog/2012/03/20/rare-earth-politics-cooperation-and-wto> (last visited Nov. 7, 2018).

14. *See id.*

15. *See* HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (7th ed., 2006) (providing a critical analysis of international relations); *see also* ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999) (providing a critical analysis of international relations).

16. VanDeveer, *supra* note 13.

China, the challenge in the dispute for complainants was to increase trade networks and volume of trade while avoiding “near total dependence on China—or any single country—for vital materials. When such dependence exists, [trading partners] want to constrain the ability of a monopolyholder to use that dependence against them.”¹⁷ The dispute makes it very clear that rare earths entail high stakes in the global economy, and that governments and industry have substantial political and strategic interests in determining how to interpret the LSSN in the present global system.

The dispute illuminates, among other things, the role of law and non-State actors on the character and content of international relations and foreign policy generally, and international trade and economy specifically. Within the LSSN, the WTO can be viewed as a complex legal cooperative network, which, in turn, is reflective of a complex system view of international relations.¹⁸ The emergence of complex cooperative networks in inter-State relations facilitated changes in how States interact within the context of an international system rooted in anarchy, balance of power, and realpolitik. Complex cooperative networks grounded in soft power present challenges and opportunities for States within the traditional System of States order.¹⁹ Soft power, which plays a significant role in the conduct of inter-State relations, was evident in the case of China, rare earths, and the WTO. Soft power networks like the WTO provide sources for State engagement based on more complex interaction because of the integrative effect that networks (such as economic trading partnerships) have on international order and relations grounded in a traditional hard power System of States paradigm.²⁰ A Society of States, on the other hand, is premised on soft power (e.g., law and economy).²¹ Society includes international network-based mechanisms involving global economy and trade, which substantively impact, expand, and reconfigure the perceptions and behavior of international actors.

Soft power, when contrasted with hard power—namely, the use of force embodied in military capability—differs distinctly because States’ influence in international affairs is relational and fluid in nature;

17. *Id.*

18. Note: The material that follows in the remainder of this section is drawn from MARVIN L. ASTRADA & FÉLIX E. MARTIN, *RUSSIA AND LATIN AMERICA: FROM NATION-STATE TO SOCIETY OF STATES* 10-45 (2013).

19. See HENDRIK SPRUYT, *THE SOVEREIGN STATE AND ITS COMPETITORS: AN ANALYSIS OF SYSTEMS CHANGE* (1996) (discussing of System of States).

20. See generally Adam Watson, *Systems of States*, 16 *REV. INT’L STUD.* 99 (1990).

21. See HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (4th ed., 2002) (discussing Society of States).

concepts, perceptions, and interpretation are rooted in a systemic context, giving rise to complex and adaptive behavior. China's rationale for maintaining its sovereign right to regulate rare earths production as it saw fit was rejected by its trading partners which privileged rule of law, trade, open markets, and free trade—in sum, the collective interest of the WTO members over a State's exercise of its full sovereign right to domestic environmental regulation—reflects the rise of complex adaptive behavior brought about, in part, by the rule of law. At its core, soft power reflects a State's capacity to influence other States' policy through persuasion based on mutual self-interests rather than force.²²

[P]ower can be wielded in three ways: threat of force (stick), inducement of payments (carrot) or shaping the preferences of others. Soft power eschews the traditional foreign policy implements of carrot and stick, relying instead on the attractiveness of a nation's institutions, culture, politics and foreign policy, to shape the preferences of others.²³

Soft power found powerful expression in international relations in the form of Complex Cooperative Networks (“CCN”).²⁴ The role of CCNs in inter-State relations was readily observable in the rare earths dispute, wherein the WTO articulated in its ruling (and wherein all parties involved conceded) that the collective interest of the membership outweighed China's sovereign right over economic production. Rule-based legal regimes such as the WTO compromise State sovereignty; in a complex world, China's assertion to exercise pure sovereignty exemplifies what may be termed an antiquated perception of inter-State relations that are increasingly governed by a LSSN rooted in rule-based regimes that seek to enhance and facilitate the collective interests of its members.

Revisiting the rare earths dispute thus provides a case study that illuminates a larger phenomenon in international relations. The dispute is an exemplar of global trade assuming the properties of a transformative mechanism vis-à-vis the societal notion of international organizations that transcends traditional international relations ordering principles. The dispute is an empirical case study that supports the contention that global trade, as a form of soft power and complex adaptation, provides an alternative basis for developing complex, systemic “institutional mechanisms,” i.e., CCNs such as the WTO, that directly impact the conduct of States. The dispute thus exemplifies how States are affected by the

22. See generally Joseph S. Nye, Jr., *Soft Power*, 80 FOR. POL'Y 153 (1990) (discussing soft power and its role in international relations).

23. JONATHAN MCCLORY, THE NEW PERSUADERS: AN INTERNATIONAL RANKING OF SOFT POWER 1 (2010); see generally Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 94 (2008).

24. See ASTRADA & MARTIN, *supra* note 18, at 10-45.

transformative shifts ushered in by the diffusion of power in a complex and networked world.

II. A COMPLEX SYSTEMS APPROACH TO INTERNATIONAL RELATIONS: CONCEPTUALIZING & CONTEXTUALIZING THE PRESENT LSSN

How do CCNs emerge, and what enables them to act effectively so that the LSSN is directly impacted by entities such as the WTO? CCNs are premised on the notion of adaptive, evolving systems comprising state relations as opposed to fixed systems of knowledge and understanding.²⁵ A Complex Adaptive System (“CAS”) is comprised of layers of networked, interactive systems of knowledge that inform, complement, and produce opportunities and possibilities for the emergence of CCNs.²⁶ What exactly is a system? A system can be viewed as “(a) a set of units or elements [that] is interconnected so that changes in some elements or their relations produce changes in other parts of the system, and (b) the entire system exhibits properties and behaviors that are different from those of the parts.”²⁷ A system, individually and collectively, is composed of regularly interacting parts that give rise to systemic activities within an interdependent set of organizational relationships.²⁸ International relations are comprised of complex, interactive, interdependent, and interconnected systems. In the case of global trade and economy, the interactivity of a variety of variables (parts) to produce a system of interaction, interconnectivity, and engagement (economy) beyond hard power principles of international organization is embodied in the WTO as a CCN. In an international system, parts necessarily become “changed by

25. See generally Ludwig Von Bertalanffy, *The History and Status of General Systems Theory*, 15 ACAD. OF MGMT. J. 407 (1972); ASTRADA & MARTIN, *supra* note 18, at 10-45.

26. ASTRADA & MARTIN, *supra* note 18, at 14.

27. ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 6 (1997).

28. See generally Ervin Laszlo, *The Systems View of the World: A Holistic Vision for Our Time Advances*, in SYSTEMS THEORY, COMPLEXITY, AND THE HUMAN SCIENCES (Alfonso Montuori ed., 2nd ed. 1996); ERVIN LASZLO, THE SYSTEMS VIEW OF THE WORLD: THE NATURAL PHILOSOPHY OF THE NEW DEVELOPMENTS IN THE SCIENCES (1972); JAMES ROSENAU, TURBULENCE IN WORLD POLITICS (1990) (providing examples of systems analysis in international law); INIS CLAUDE, POWER AND INTERNATIONAL RELATIONS (1962) (providing examples of systems analysis in international law); MORTON KAPLAN, SYSTEM AND PROCESS IN INTERNATIONAL POLITICS (1957) (providing examples of systems analysis in international law); JACK SNYDER & ROBERT JERVIS, COPING WITH COMPLEXITY IN THE INTERNATIONAL SYSTEM (1993) (providing examples of systems analysis in international law).

their mutual association; hence, their whole becomes more than just the sum of the parts.”²⁹

Complex networks that produce, and are produced by, systemic interconnectivity are interactive, adaptive, and multidimensional, and broaden possibilities for inter-State engagement. States in the international system can thus be viewed and characterized as consisting of organized, interdependent and complex institutionalized networks³⁰ that are products and producers of systemic networked interaction(s). A complex adaptive system:

(1) . . . consists of inhomogeneous, interacting adaptive agents. Adaptive means capable of learning[, transforming, and adapting, and] . . . (2) [a]n emergent attribute of a CAS is a property of the system as a whole which does not exist at the individual elements (agents) level . . . [T]o understand a complex system one has to study the system as a whole . . .³¹

[I]ndividual agents (parts or units) [become] the collective base elements of the system that interact and then adapt in response to interactions, thus allowing for maximization of the potential for the individual parts to realize and work cooperatively toward fulfilling common self-interests and goals.³²

The WTO is an example of a legal CCN established to facilitate global trade and bolster the global economy. It requires a certain degree of surrendering of sovereignty to acquire benefits derived from the WTO as a rule-based regime designed to place free trade at the forefront of States’ economic relations. In the rare earths dispute, the WTO functioned as a cooperative mechanism that trumped China’s claim to unmitigated sovereignty over its domestic affairs subject to membership in the WTO legal regime.³³ Cooperation embodied in the WTO’s rule of law approach to

29. LUDWIG VON BERTALANFFY, *A SYSTEMS VIEW OF MAN* ix (Paul A. LaViolette ed., 1981).

30. See Ludwig Von Bertalanffy, *supra* note 25; see generally Charles McClelland, *The Function of Theory in International Relations*, 4 J. OF CONFLICT RESOL. 303 (1960).

31. E. Ahmed, A. S. Elgazzar, & A. S. Hegazi, *An Overview of Complex Adaptive Systems*, MANSOURA J. MATHEMATICS 1, 1-2 (2005), available at <https://arxiv.org/pdf/nlin/0506059.pdf> (last visited Nov. 9, 2018); see generally Kevin J. Dooley, *A Complex Adaptive Systems Model of Organization Change*, 1 NONLINEAR DYNAMICS, PSYCHOL., & LIFE SCI. 69 (1997); M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER & CHAOS* (1992).

32. ASTRADA & MARTIN, *supra* note 18, at 16; see generally HIERARCHY THEORY: THE CHALLENGE OF COMPLEX SYSTEMS (Howard H. Pattee ed., 1973).

33. See generally Elizabeth Smythe & Peter J. Smith, *Legitimacy, Transparency, and Information Technology: The World Trade Organization in an Era of Contentious Trade Politics*, 12 GLOB. GOVERNANCE: A REVIEW OF

inter-State relations, within a competitive, yet highly integrated and networked system, contains an outgrowth of States “learning” to ameliorate anarchy and its consequences.

In the case of international relations, interaction, while subject to change and “evolution,” also retains degrees of consistency, which enables a network-based system of governance to emerge despite the prevalence of anarchy.³⁴ In the case of international relations, a systematic set of concepts and practices (tangible and intangible) are utilized by international actors who work in tandem within an interdependent set of organizational relationships to conceive, interpret, articulate, and implement globalist notions of international economic order via CCNs such as the WTO.³⁵

In a CAS, the agents as well as the system contain complex adaptive actors that distinguish and learn the differences between optimal and sub-optimal outcomes. Complexity and adaptation procure self-similarity on a systemic level. Self-similarity involves the notion that a self-similar object is approximately similar to the system in which it is emplaced, and has similar properties as one or more of the parts that constitute the system—coastlines, for example, are statistically self-similar in that parts of them show the same statistical properties at many scales.³⁶

Self-similarity also applies to States; i.e., individuated sovereignty, for example, finds expression in systemic anarchy—the two are based on the property of sovereignty, each feeding into the other.³⁷ Self-similarity, within the context of an emergent society of States, enables CCNs to create . . . networked ties of connectivity based on systemic and systematic engagement that creates venues [for] cooperation that, [in turn, has the effect of attenuating the effects] of an anarchical global context based on material power and the balancing of [hard] power to attain a [less

MULTILATERALISM AND INTL. ORGS. 31 (2006) (discussing legitimacy of WTO and international trade).

34. See ASTRADA & MARTIN, *supra* note 18, at 17; see generally INTERNATIONAL RELATIONS THEORY AND THE END OF THE COLD WAR (Richard N. Lebow & Thomas Risse-Kappen eds., 1996); EDWARD H. CARR, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (Michael Cox ed., 2001).

35. See MARVIN L. ASTRADA, AMERICAN POWER AFTER 9/11 1-22 (2010).

36. See generally Benoît Mandelbrot, *How Long Is the Coast of Britain? Statistical Self-Similarity and Fractional Dimension*, 156 SCI. 636 (1967).

37. ASTRADA & MARTIN, *supra* note 18, at 18; see generally Mandelbrot, *supra* note 36; Raoul R. Nigmatullin et al., *Self-Similarity Principle: The Reduced Description of Randomness*, 11 CENT. EUR. J. PHYSICS 724 (2013); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 MIT PRESS 391 (1992).

volatile and at times] a temporary cessation of hostilities and contextual volatility.³⁸

The fact that international relations take place in an anarchic systemic context does not necessarily imply that there are no degrees of agency available to the constituent components of the system. “States are rarely found in complete isolation from each another. Most inhabit relatively stable systems of other independent states which impinge on their behavior.”³⁹ Within a “System of States” context, while overarching principles that delimit certain structural parameters—namely anarchy, material considerations, use of force, security, and balance of power—States have degrees of agency as to how best to attain policy goals embedded in self-interest and security.⁴⁰ Sovereignty, in theory, provides the basis for diversity in State perceptions and behavior. Hence, political, social, and economic organization take a variety of forms in the international system. Within the context of a System or Society of States, agency is both individualized (state level) and collective (systemic level). Within a Society of States, agency produces, or rather is the precursor for, the emergence of a collective intelligence, reflected in CCNs, which, in turn, can be considered the products and producers of cooperation. Indeed, such cooperation manifested in CCN’s, such as the WTO, have complex adaptive potential because globalism is rooted in one of the most basic and “universal” structures that under-gird social systems of order, i.e., some form of commerce (trade).⁴¹

CCNs also impact inter-State relations. A global economic, socio-political, and cultural mesh network is not a new phenomenon—indeed, international affairs have been “World Wide Webbed and Internetted [sic] since Rome began to import silks from China in roughly 200 BCE.”⁴² Yet, the prominence and growing reliance on, and independent efficacy of, CCNs ushered in different modalities of power-diffusion. In the case of the rare earths dispute, China was forced to confront and ultimately concede to the collective interest embodied in the WTO as a rule-based legal regime to effectuate trade interest of all members at the expense of China’s sovereign right to determine for itself regulations

38. ASTRADA & MARTIN, *supra* note 18, at 18.

39. ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 10 (Steve Smith et al. eds., 1999).

40. See generally Walter Carlsnaes, *The Agency-Structure Problem in Foreign Policy Analysis*, 36 INT’L STUD. Q. 245 (1992); see also Wendt, *supra* note 37, at 335.

41. HOWARD BLOOM, THE GENIUS OF THE BEAST: A RADICAL REVISION OF CAPITALISM 22 (2010).

42. *Id.* at 47.

pertaining to domestic economic affairs and security interests. The WTO thus provides States with an ability to act upon and effectuate specific goal-orientated tasks based on collective interpretations of interests.⁴³

CCNs can be classified as having “weak” or “strong” degrees of agency, depending on the level of integration, subject matter, level of expertise, financial resources, and issue-area or topic relevance to the more powerful State actors or agents and interests that transect the international community. Whether weak or strong, agents in a CAS are interactive, complex entities whose contacts and engagement go beyond basic or minimal contacts with other agents in the international or global system. The systemic context of anarchy, their being a lack of an accepted, central, global power formally charged with administering the international system for all agents, establishes a shared space and bounded space of engagement.⁴⁴ This shared anarchical space, despite its lack of formal ordering mechanism accepted by all agents (e.g., a compulsory global legal code that is applied and enforced uniformly throughout the entire system) provides a basis for shared cooperative rules of engagement that, in turn, help shape the rules of formation vis-à-vis the character and content of relations and interactions, which further creates ties based on shared knowledge and communication.⁴⁵ In the case of international organization and the variegated CCNs, interestingly under a CAS, CCN’s assumed degrees of agency that helped lay the foundations for, high degrees of global integration absent within a purely System of States paradigm. CCNs, as alternative sites for the possible resolution of conflict and the basis for cooperative, networked interaction, provide alternative infrastructures upon which to base State-to-State interaction. As Flores-Mendez notes, “[i]nfrastructures provide the regulations that agents follow to communicate and to understand each other, thereby enabling knowledge sharing.”⁴⁶ Infrastructures in the form of networks (e.g., legal regimes) are viable means to integrate States, and give rise to formal mechanisms that can help better effectuate a collective or shared interest. CCNs, as agents helping to facilitate governance, present States with the potential for new social structures, new cultural logics, more centralized and cooperative approaches, solutions to shared problems, new international

43. See generally Roberto Flores-Mendez, *Towards the Standardization of Multi-Agent System Architectures: An Overview*, 5.4 ACM CROSSROADS 18 (1999).

44. For a critical discussion of anarchy, see generally Pat Moloney, *Hobbes, Savagery, and International Anarchy*, 105 AM. POL. SCI. REV. 189 (2011).

45. ASTRADA & MARTIN, *supra* note 18, at 20.

46. *Id.*

norms, and alternative means to obtain objectives and define purpose and identity.⁴⁷

III. THE LSSN, THE STATE & THE INTERNATIONAL SYSTEM⁴⁸

Soft power based networks, as products of globalization processes, have helped integrate States to an unprecedented degree.⁴⁹ The WTO is premised on establishing long-term networks of cooperation in the realm of global trade. Through institutionalized rule-based CCNs, States systematically engage each other through basic, minimal contacts such as trade, with interaction taking place among politically organized units that are “self-conscious and self-regulating entities.”⁵⁰ A System of States forms when at least two States engage in minimal contacts that impact the respective States’ perceptions and conduct, with each State acting in concert with one another in a systemic context.⁵¹ Society develops when States go beyond basic minimal contacts and engage in complex behavior, effectively networking and integrating the agents and interests that form the working parts of systemic interaction. Each social entity, system, and society, is involved in and based upon the nature and degree of interaction among politically organized units. These interactions are based upon overarching ordering principles that guide relations and behavior within an order. Under a society paradigm of global order, “the more states are in contact with one another and agree to the same principles, the more they homogenize.”⁵² The WTO can be viewed as an expression of this phenomenon.

The traditional System of States has been committed to sovereignty, to preserving the integrity of State supremacy within designated

47. See generally Neil MacCormick, *Beyond the Sovereign State*, 56 MODERN L. REV. 1 (1993); Robert O. Keohane & Joseph S. Nye, Jr., *Transnational Relations and World Politics: An Introduction*, 25 INT’L ORG. 329 (1971).

48. Note: The material that follows in the remainder of this section is drawn from ASTRADA & MARTIN, *supra* note 18.

49. For a discussion of the precursor to this state of affairs as manifested in the present, see Louis W. Pauly, *The Institutional Legacy of Bretton Woods: IMF Surveillance, 1973–2007*, in ORDERLY CHANGE: INTERNATIONAL MONETARY RELATIONS SINCE BRETTON WOODS 189-210 (David Andrews ed., 2008).

50. Barry Buzan, *From International System to International Society of States: Structural Realism and Regime Theory Meet the English School*, 47 INT’L ORG. 327, 327-31 (1993).

51. ASTRADA & MARTIN, *supra* note 18, at 27; see also BULL, *supra* note 21, at 9-10.

52. HELGA TURKU, ISOLATIONIST STATES IN AN INTERDEPENDENT WORLD 37 (2009).

geopolitical borders. Sovereignty has been the preeminent value and ordering principle of international relations since the Peace of Westphalia.⁵³ A commitment to sovereignty drove the internal and external dimensions of the modern State. Modern States adhered to absolutist notions of sovereignty in their internal policy choices and external policy and military objectives. The Westphalia notion of sovereignty, intricately linked to the nation as a constitutive feature of the State, to welfare as the legitimating drive of the State, and to the balance of powers has been a key structural component of States' external strategy.⁵⁴ In the present era of international relations, a structural transformative shift took place, and rigid adherence to notions of geopolitical borders and sovereignty are "gradually losing the central role they played in the modern era."⁵⁵ Since the institutionalization of the global, political, and economic order after WWII, the organization and management of world affairs were premised on an intimately networked, integrated global liberal-economic system. Globalization has become a product as well as producer of the complex super-network and sub-networks emerging on the world stage that, in turn, fomented a Society of States. Society indicates a substantive transformation of international order that involves grafting societal notions onto the preexisting System of States.

Sovereignty and security have been jointly and severally impacted by law as manifested in the rise of CCNs and their impact on inter-State relations. The use of CCNs to obtain strategic interests contributes to the complexity of State perception and behavior, as an analysis of the rare earths dispute illustrates. CCNs have become more and more relevant to statecraft, and provide viable alternatives to (sometimes) counterproductive use of resources and negative effects of employing force to obtain a State's goals. Continued use of trade, investment, and cooperative ventures in all aspects of relations has informed the "learning" of States and other agents in the system. This learning involves embracing values and conduct not always in line with a purely States system view of international order, as is the case in the rare earths dispute. Indeed, universal notions of human rights, justice, and the renunciation of war as a tool of foreign policy (e.g., the Kellogg-Briand Act) constitute examples of the type of values expressed in CCNs and take hold in the present

53. For a discussion of the significance of the Peace of Westphalia for international relations, see generally Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INTL. HISTORY REV. 569 (1999).

54. Ari Afilalo & Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHICAGO J. INT'L L. 725, 730 (2006).

55. *Id.* at 731.

configuration of international order and inter-State relations.⁵⁶ The high degrees of “intensification of worldwide social relations, which link distant localities in such a way that local happenings are shaped by events occurring miles away, and vice versa,”⁵⁷ are comprised of a CAS that is itself the product of the innumerable fusions that are taking place among and between various CCN sub-systems.⁵⁸

Trade dramatically affects the fabric of the State’s system. Global economic ties have been established through intense and intertwined CCNs, such as the WTO. Because CCNs possess this potential, they pose challenges to a States system conception of international order. Challenges, however, do not imply incompatibility or irreconcilable differences. Indeed, it seems that States “learned” how to harness the power of CCNs for obtaining strategic interests and other non-security-related goals. The social principles that animate and underlie CCNs, namely cooperation, have political, social, and ideological implications for the conduct of international affairs from a State’s system perspective.⁵⁹

CCNs represent an emergent shift from “government” to “governance,” effectuating a “significant erosion of the boundaries separating what lies inside a government and its administration and what lies outside them.”⁶⁰ The use and primacy of force, and a sovereign’s decision to employ force in international relations, certainly does not become effaced from inter-State relations, but various complexities and externalities based on intimately and inextricably integrated networks now come into play in addition to the use of force and the accumulation and projection of material power.⁶¹ Machiavelli’s notion that gold does not win wars, for example, perhaps represents an antiquated concept due to a globalized economy, wherein the power of CCNs to significantly impact and contour international affairs through soft power has become a viable proposition.⁶²

56. See, e.g., INTERNATIONAL CRIME & JUSTICE (Mangai Natarajan ed., 2010).

57. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990).

58. ASTRADA & MARTIN, *supra* note 18, at 30.

59. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INTL. L. 503 (1995); Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. OF INTL. L. 367 (1998).

60. Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369, 369 (2001); see generally Roy J. Eidelson, *Complex Adaptive Systems in the Behavioral and Social Sciences*, 1 REV. OF GEN. PSYCHOL. 42 (1997).

61. ASTRADA & MARTIN, *supra* note 18, at 39.

62. See generally RICHARD K. BETTS, CONFLICT AFTER THE COLD WAR, ARGUMENTS ON CAUSES OF WAR AND PEACE (2nd ed. 2004).

Accordingly, a CAS perspective provides a conceptual framework for critically analyzing the changes that came about in the LSSN nexus due, in part, to the rise of complex CCNs, such as the WTO. The WTO is part of a networked system that enables “[n]ew ways of seeing’ that ‘lead to new ways of being . . . [In a global economy, CCNs] are our lenses, our looking glasses, and our tools. They can refashion more than the way we see . . . [they] can reshape reality.”⁶³ One need not to subscribe to idealism to observe the possibility for concepts and ideas to substantively and substantially impact thought and practice. New ways of perceiving international actors, State relations, non-State actors in global governance, the use of soft power strategies and technologies, as well as the very fabric of order on the world stage, are integrated into “new” rules of formation under a Society of States ethos.⁶⁴ International affairs thus comprise “a domain of interlocked (intercalated and mutually triggering) sequences of States, established and determined through . . . interactions between structurally-plastic state-determined systems.”⁶⁵ Basic, minimal contacts provide the basis for the evolution of more complex, intricate, and inextricable ties that transcend mere self-interest or minimal basic contact. In the case of the dispute, China attempted to employ the traditional states system lens to claim its sovereign right to reject WTO members’ complaint regarding its economic and strategic policies pertaining to rare earths. The WTO’s ruling, as well as China’s acquiescence, illuminates a reconfiguration of the LSSN from a purely sovereignty-based perception of international relations generally, and international trade specifically.

As discussed below, China casted its argument against the complaint in terms of sovereignty as understood in the traditional sense of the term, such as the one posited by Jean Bodin. For Bodin, “sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth, which the Latins call *Majestas*.”⁶⁶ Furthermore, for Bodin,

63. ASTRADA & MARTIN, *supra* note 18, at 39 (quoting BLOOM, *supra* note 41, at 373).

64. See MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE AND DISCOURSE ON LANGUAGE* 38 (1972); see also Francisco J. Varela, *Autonomy and Autopoiesis*, in *SELF-ORGANIZING SYSTEMS: AN INTERDISCIPLINARY APPROACH* 15 (Gerhard Roth & Helmut Schwegler eds., 1981).

65. Humberto R. Maturana, *The Organization of the Living: A Theory of the Living Organization*, 7 *INT’L J. OF MAN-MACHINE STUD.* 313, 316 (1975).

66. Jean Bodin, *STAN. ENCYCLOPEDIA PHIL.* (July 30, 2018), available at <http://plato.stanford.edu/entries/bodin/#4> (last visited Nov. 9, 2018).

a sovereign is one who is exempt from obedience to the laws of his predecessors and more importantly, those issued by himself. Sovereignty rests in being above, beyond or exempted from the law . . . exception from being subject to the law is the quintessential condition of sovereignty.⁶⁷

A State exercising supreme power and authority over a geopolitical and legally defined, recognized territory, while possessing a monopoly over the use of force to compel obedience, under-girded the notion of sovereignty employed by China in its counter-argument. Sovereignty enables a State to take actions that always place its weal at the apex of competing interests.⁶⁸ Military capacity, natural resources, geographic considerations, technological capacity, level of economic development, the projection of force and coercive power—these factors are inextricably linked with the perpetuation and augmentation of sovereign State power in a System of States.

Conflict, violence, and war—mainstays on the world stage—have, among several other reasons, been waged by the State to protect basic territorial integrity, which are inextricably linked with sovereignty. In turn, these mainstays are intimately associated with other key System of States ordering precepts, namely balance of power, rational/strategic thought and interests, and military power as the *sine qua non* of State power.⁶⁹ Societal notions of order, premised on soft power, such as the institutionalization of diplomacy, cooperation, and the instauration and connectivity of States via CCNs result in complex networks that have the effect of hard wiring State and non-State actors in unprecedented ways, and are antithetical to rigid and static notions of a territoriality and a singular focus on traditional notions of an LSSN based in a Systems of States view of world order. In a Society of States, CCNs thus become nodes of connectivity, fostering the proliferation of sophisticated, interactive,

67. Erik Empson, *Jean Bodin on Sovereignty*, GENERATION ONLINE, available at <http://www.generation-online.org/p/fpbodin1.htm> (last visited Nov. 13, 2018).

68. The discussion that follows about strategic thought and interests is drawn from MARVIN L. ASTRADA, STRATEGIC CULTURE: CONCEPT AND APPLICATION 5-6 (2010).

69. For discussions of how each of the aforementioned concepts impact sovereignty in a system of states paradigm, see generally JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH (Julian H. Franklin ed., 1992); J. A. HALL, STATES IN HISTORY (1986); JOSEPH R. STAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE (1970); F. H. HINSLEY, SOVEREIGNTY (2nd ed., 1986); NICHOLAS G. ONUF, *Sovereignty: Outline of a Conceptual History*, 16 ALTERNATIVES: GLOB., LOC., POL. 425 (1991); Janice Thomson, *State Sovereignty in International Relations: Bridging the Gap Between Theory and Empirical Research*, 39 INTL. STUD. Q. 213 (1995); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001).

mutually dependent and supportive networks. In the modern States system, CCNs function as data connectors, based primarily on reciprocity, contracts (rules), economic and rational self-interest, creating global governance structures such as the WTO. Global governance “includes international rules or laws, norms or ‘soft law,’ and structures such as formal international organizations (IGOs), as well as improvised arrangements that provides decision-making processes, information gathering and analytic functions, dispute settlement procedures, operational capabilities for managing technical and development assistance programs, relief aid and force deployments.”⁷⁰

IV. THE RARE EARTHS DISPUTE: CONTEXTUALIZING THE LSSN IN A COMPLEX, NETWORKED WORLD

Rare earth elements (“REE”):

[have been on] the list of strategic mineral stock for the US and other western governments. Many years ago the US closed its own Mountain Pass mines of rare earths in California, and had long relied on China’s supply to meet domestic demand. The reasons for the US to choose this approach were sound: cheap international price, domestic protest over mining pollution, and apparently, strategic resource conservation.⁷¹

The REE dispute, for all of the parties involved, stemmed from access: complainants demand greater access to China’s REE supply of processed minerals, and China sought to restrict access to its supply and production of processed REEs because its environmental interests take priority over complainants’ collective economic interest(s). China accounts for approximately 97 percent of world output of REEs.⁷²

What is it, then, about REEs that make them so invaluable to all the parties involved in the dispute? REEs are comprised of minerals with magnetic and conductive properties used in a multitude of industries—from missile technology to smart phones.⁷³ They contain 17 chemical elements in the periodic table: the 15 lanthanides (lanthanum, cerium, praseodymium, neodymium, promethium, samarium, europium,

70. MARGARET P. KARNS & KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE 4 (2004).

71. Gu Bin & Xu Chengjin, *What If WTO Appellate Body Makes Mistakes: A Critique of Raw Materials and Rare Earths*, 3 CHINA LEGAL SCI. 123, 124 (2015).

72. Marc Humphries, Cong. Res. Serv., R41347, *Rare Earth Elements: The Global Supply Chain* 14 (2013).

73. See Claire L. McLeod & Mark. P. S. Krekeler, *Sources of Extraterrestrial Rare Earth Elements: To the Moon and Beyond*, in CRITICALITY OF THE RARE EARTH ELEMENTS: CURRENT AND FUTURE SOURCES AND RECYCLING 110-37 (Simon M. Jowitt ed., 2018).

gadolinium, terbium, dysprosium, holmium, erbium, thulium, ytterbium, and lutetium) plus the elements scandium and yttrium.⁷⁴ REEs also include tungsten and molybdenum.⁷⁵

Tungsten, for example, is used in electronics, automotive, aerospace and medical technologies. China produces 91% of the world's tungsten. Molybdenum is a metallic element used for filaments in light bulbs. China produces 36% of the world's molybdenum. [These elements] are not actually 'rare,' and can be found in other countries — including the U.S. — but they are [notoriously] difficult to mine [and process] safely. About a third of the world's rare earth deposits are in China but the country controls around 97% of production, in part due to its lower labor costs and less stringent environmental regulations.⁷⁶

The significance of REEs revolves around their vital use in various industries and products deemed crucial for global commerce and national defense—in particular, industries engaged in weapons technology R&D, electronics, and renewable-energy sources. In the realm of and military ordnance, REEs are sought after because “of their unique magnetic and electrochemical properties[.] REEs help DOD [(U.S. Department of Defense)] weapons systems perform with reduced weight and energy consumption; or give them greater efficiency, performance, miniaturization, durability, and thermal stability.”⁷⁷ The Office of the Inspector General for the DOD found that REEs directly affect U.S. national security.⁷⁸

For example, dysprosium and neodymium are used in the targeting capabilities of the Joint Direct Attack Munition. The Joint Direct Attack Munition is a low-cost guidance kit that converts existing unguided “dumb” bombs into accurately guided, near-precision, “smart” weapons. The munition's tail fin assembly control motor actuators contain neodymium-iron-boron magnets that direct the bomb precisely to its target.

74. *EU Challenges China's Export Restrictions on Rare Earths*, EUROPA (Mar. 13, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/182&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Nov. 5, 2018); see also Peter Lloyd, *The WTO, China and Rare Earths: Where to From Here?*, THE CONVERSATION (Mar. 28, 2012), available at <http://theconversation.edu.au/the-wto-china-and-rare-earths-where-to-from-here-5921> (last visited Nov. 5, 2018).

75. See generally MOLYBDENUM AND TUNGSTEN ENZYMES: BIOCHEMISTRY (Russ Hille, Carola Schulzke, & Martin L Kirk, eds., 2017).

76. Irene Chapple, *Why Minerals Dispute Threatens Electronics Industry*, CNN (Mar. 14, 2012), available at <https://www.cnn.com/2012/03/13/business/rare-earths-china-u-s-/index.html> (last visited Nov. 5, 2018).

77. PROCEDURES TO ENSURE SUFFICIENT RARE EARTH ELEMENTS, *supra* note 2, at 1.

78. See *id.* at 2.

Dysprosium is added to enhance the ability of the magnets to maintain their magnetic properties at high temperatures.⁷⁹

Additionally,

[REEs] feature unique magnetic, heat-resistance and phosphorescence properties. They are used to directly produce highly efficient magnets, metal alloys, phosphors, optical material, battery material, ceramics, [and] special abrasive powders . . . While rare earths often constitute a small share of the finished product, most of the time they are non-substitutable (and even if so, with consequences in the form of redesigned and/or more costly final product). Their non-availability can lead to the disruption of whole value chains.⁸⁰

A multitude of mass-produced products crucial for commerce employ REEs, including computers, smart phones, tablets, disk drives, solar panels, hybrid car batteries, energy-efficient lighting, LCD screens, cars and engines, petroleum, medical equipment, jet engines, and wind turbines.⁸¹

In a formal complaint filed with the WTO in March 2012, the United States, EU, and Japan accused China of violating WTO trade rules by improperly manipulating the rare earths market to distort global market prices of REEs.⁸² The joint complaint embodied an unprecedented concerted cooperative action based on shared interests articulated and implemented via a formal legal mechanism (the WTO).⁸³ China, however,

79. *Id.*

80. Mamta Badkar, *China's Rare Earth Export Restrictions Might Be Violating International Trade Rules*, BUS. INSIDER (Mar. 14, 2012), available at <http://www.businessinsider.com/china-rare-earth-exports-wto-complaint-2012-3> (last visited Nov. 5, 2018).

81. Doug Palmer & Sebastian Moffett, *U.S., EU, Japan Take on China at WTO Over Rare Earths*, REUTERS (Mar. 13, 2012), available at http://www.reuters.com/article/2012/03/13/us-china-trade-eu-idUSBRE8_2C0JU20120313 (last visited Nov. 5, 2018); see also Request for Consultations by the United States, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431/1 (Mar. 15, 2012); Elisa Baroncini, *The China-Rare Earths WTO Dispute: A Precious Chance to Revise the China-Raw Materials Conclusions on the Applicability of GATT Article XX to China's WTO Accession Protocol*, 4 CUADERNOS DERECHO TRANSNACIONAL 49, 51 (2012).

82. See generally Request for Consultations by the United States, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431/1_G/L/982 (Mar. 15, 2012); Request for Consultations by Japan, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS433/1_G/L/984 (Mar. 15, 2012); Request for Consultations by the European Union, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS432/1_G/L/983 (Mar. 15 2012).

83. See generally Request for Consultations by the United States, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *supra* note 82; Request for Consultations by Japan, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *supra* note 82; R Request

defended its restrictive REE production regime and trade practices on the sovereign and security basis of preventing harm to its people and domestic environmental degradation; such claims, if found valid, would have fallen under the General Exceptions of General Agreement on Tariffs and Trade (“GATT”) Article XX. The Exceptions can be viewed as a legal mechanism to preserve the sovereign power of the State to exercise its police powers independently of oversight from other States in an international law context. The complainants alleged that: (1) China’s restrictive export controls on REEs purposefully benefited its domestic manufacturers, negatively impacting WTO trade partners; (2) the measures distorted and hindered competitive free trade; (3) China exercised an unfair trade advantage; and (4) the measures served to exert pressure on international firms to move their operations to China through export curbs violating WTO trade rules.⁸⁴

The REE dispute raised several questions pertaining to the interpretation of sovereignty and security in China’s decision to implement restrictive measures based on its sovereign authority. China’s response to the complaint found its basis in Article XX, which provides a legal policy space for articulating arguments for a sovereign right to regulate a State’s internal affairs of an economic, environmental, security, and strategic nature. By interpreting the LSSN from a System of States perspective, China felt it had the discretion to implement environmental protection measures by restricting international trade in REEs to, among other concerns, “promote the conservation of environmental resources harmed by production of those goods.”⁸⁵

China appeared to have a *prima facie* Article XX defense.⁸⁶ However, considering prior rulings in similar cases, the overarching trade interests of WTO member States served to displace the sovereign right to address environmental concerns, thus negating a successful Article XX defense. In short, sovereignty was not found to be at the apex of ordering principles and concepts. The trade priorities of WTO Member States

for Consultations by the European Union, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *supra* note 82.

84. Palmer & Moffett, *supra* note 81.

85. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 741 (2001).

86. See generally Danielle Spiegel Feld & Stephanie Switzer, *Whither Article XX? Regulatory Autonomy Under Non-Gatt Agreements After China-Raw Materials*, 38 YALE J. INTL. L. ONLINE 16 (2012), available at <https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2017/01/o-38-feld-switzer-whither-article-xx-2lbtpe9.pdf> (last visited Nov. 4, 2018).

superseded the sovereign rights and interests of China. In its final report, the WTO Panel (equivalent to a trial court), in light of GATT Art. XI (quantitative restrictions) and GATT Art. XX(g) (general exceptions—exhaustible natural resources), found that:

China's export quotas on rare earths, tungsten, and molybdenum were inconsistent with GATT Art. XI. The Panel also concluded that the export quotas were not justified under the exception in GATT Art. XX(g), which allows WTO Members to implement GATT-inconsistent measures 'relating to the conservation of exhaustible natural resources.'⁸⁷

The Appellate Body (equivalent to a court of appeals) upheld the Panel's findings, stating,

[the] panel rightly considered that it should focus on the measures' design and structure rather than on their effects in the marketplace, although it was not required to consider market effects [and] further concluded that the burden of conservation did not have to be evenly distributed, for example, between foreign consumers, on the one hand, and domestic producers or consumers, on the other hand.⁸⁸

China asserted its sovereign right to environmental regulation and national production quotas as being unassailable.⁸⁹ However, the Panel found China's trade measures inconsistent with WTO rules.⁹⁰ As interpreted and implemented in the REE dispute, WTO rules, as a form of international law and regulation, an expression of soft power, and reflective of collective interests, are exemplary of a changing international landscape. Such changes are directly impacting traditional interpretations of the LSSN. The REE dispute represents a case study that highlights how soft power manifests in CCNs, and the role it assumes in complicating traditional notions of international order and relations where sovereignty once reigned supreme.

The complainants alleged that China "hoarded" REEs, which illegally increased the global prices of REE while lowering prices domestically, essentially creating massive and unfair trade advantages in China's favor that violate the legal obligations imposed by the GATT on China.⁹¹ By filing the complaint, the complainants attempted to exert pressure on China to abolish its restrictive export limits on REE production (mining

87. Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WTO Doc. WT/DS431 (adopted Dec. 3, 2015).

88. *Id.*

89. Charles Kilby, *China's Rare Earth Trade: Health and the Environment*, 218 CHINA Q. 540, 540 (2014).

90. *Id.*

91. Chapple, *supra* note 76.

and refining of REE products destined for the global market).⁹² China, however, claimed exemption from WTO regulations because the restrictions primarily consisted of, or rather were based on, domestic environmental and security concerns. China therefore invoked GATT Article XX's Exceptions Clause. The complainants, on the other hand, framed the issue as strictly trade-based (protectionist), whereas China framed the issue through the lens of a sovereign as an environmental protection concern.

With respect to REEs (as well as tungsten and molybdenum), the complainants alleged that China violated the following WTO trade provisions: the imposition of export duties; the imposition of export quotas and other quantitative restrictions; the imposition of other restrictions such as the right to export based on licenses, prior export experience, minimum capital requirements, and "other conditions that appear to treat foreign invested entities differently from domestic entities"; the maintenance of minimum export prices, through the examination and approval of contracts and offered prices, and through the administration and collection of the export duties, "in a manner that is not uniform, impartial, reasonable, or transparent"; and the imposition and administration of restrictions through unpublished measures.⁹³

China's restrictive REE export regime allegedly violated the following under the GATT: (1) GATT Article VII: "Valuation for Customs Purposes"; (2) GATT Article VIII: "Fees and Formalities connected with Importation and Exportation"; (3) GATT Article X: "Publication and Administration of Trade Regulations"; (4) GATT Article XI: "General Elimination of Quantitative Restrictions"; (5) various commitments within the Protocol on the Accession of the People's Republic of China (specifically Paragraph 11.3); and (6) various commitments within the Report of the Working Party on the Accession of China.⁹⁴

The complainants alleged unfair treatment under GATT because non-Chinese entities (i.e., WTO member States) suffered undue economic detriment due to illegal "export restrictions, discriminatory commercial operating rules within China, the setting of unofficial minimum

92. See Mayuko Yatsu, *Revisiting Rare Earths: The Ongoing Efforts to Challenge China's Monopoly*, THE DIPLOMAT (Aug. 29, 2017), available at <https://the-diplomat.com/2017/08/revisiting-rare-earths-the-ongoing-efforts-to-challenge-chinas-monopoly/> (last visited Nov. 4, 2018).

93. Gareth Hatch, *The WTO Rare Earths Trade Dispute: An Initial Analysis*, TECH. METALS RES. (Mar. 28, 2012), available at <http://www.techmetalsresearch.com/the-wto-rare-earths-trade-dispute-an-initial-analysis/> (last visited Nov. 4, 2018).

94. *Id.*

export prices (what some might call price fixing) and an overall lack of transparency concerning the implementation of the measures in question.”⁹⁵ According to then-U.S. Trade Representative Ron Kirk, China made “export restraints more restrictive, resulting in massive distortions and harmful disruptions in supply chains for these materials throughout the global marketplace.”⁹⁶ Furthermore, Mr. Kirk alleged that “[b]ecause China is a top global producer for these key inputs [(REEs)] its harmful policies artificially increase prices for the inputs outside of China while lowering prices in China.”⁹⁷ Because some REEs “can be purchased inside China at about 10 percent of global market prices, the United States, EU, and Japan are claiming that China is giving preferential treatment to domestic companies,” and China’s steep export tax (up to 25 percent) and quotas placed on REEs exports are very “problematic” if free and fair trade transpires between China and its WTO trading partners.⁹⁸

The EU alleged in 2012 that China’s REE quota announcements: are further tightening [restrictions,] and are a clear signal in the wrong direction’ . . . Foreign companies pay up to twice as much as Chinese firms for rare earth metals . . . The EU directly imports 350 million Euros worth of rare earths from China each year, and also brings in products of far greater value containing rare earths from Japan and elsewhere. The damage done to European manufacturing runs into billions of Euros . . . because it was [and remains] nearly impossible to diversify away from Chinese supply.⁹⁹

According to the EU and other sources, in 2012 China produced 97 percent of all rare earths for the global market.¹⁰⁰ This figure, for the most part, was accepted by the community-at-large (i.e., member States and the REE industry) as an accurate estimate of China’s global production

95. *Id.*

96. Palmer & Moffett, *supra* note 81.

97. *EU, US, Japan Take ‘Rare Earth’ Dispute With China to WTO*, NEWS AU (Mar. 14, 2012), available at <http://www.news.com.au/technology/eu-us-japan-take-rare-earth-dispute-with-china-to-wto/news-story/1a7fb7e54d256caf207c760d0cc57a94> (last visited Nov. 5, 2018).

98. *Rare Earths Dispute Now Before WTO*, JAPAN TIMES (Mar. 27, 2012), available at <https://www.japantimes.co.jp/opinion/2012/03/27/editorials/rare-earths-dispute-now-before-wto/#.WwcPf9PwZL4> (last visited Nov. 5, 2018); see also Tom Miles & Doug Palmer, *Analysis: Grow By the Rules, Rare Earth Rivals Tell China*, REUTERS UK (Mar. 19, 2012), available at <https://uk.reuters.com/article/us-trade-rareearths/analysis-grow-by-the-rules-rare-earth-rivals-tell-china-idUKBRE82I0B020120319> (last visited Nov. 5, 2018).

99. Palmer & Moffett, *supra* note 81.

100. *US, EU, Japan Challenge China on Rare Earths*, INT’L CTR. FOR TRADE & DEV. (Mar. 15, 2012), available at <https://www.ictsd.org/bridges-news/biores/news/us-cu-japan-challenge-china-on-rare-earth> (last visited Nov. 5, 2018).

output. This state of affairs was viewed as problematic from a fair-trade perspective because China had a virtual monopoly on producing REE, and it could engage in “price fixing” if it wanted to protect its domestic industry from free and fair trade to the detriment of China’s global trading partners.

Most of the time, rare earths cannot be substituted without resulting in a redesigned and more costly product . . . ‘Their non-availability can lead to the disruption of whole value chains.’ China has gradually tightened export restrictions on the materials through raising export taxes and ‘drastically reducing the export quota’ . . . In 2010, China reduced the quota by 32% for domestic companies and 54% for foreign-invested companies.¹⁰¹

In light of the virtual Chinese monopoly,

[Japan also] expressed a sense of urgency to secure new non-Chinese supplies of REEs since [a] September 2010 maritime incident with China and the claim of a Chinese supply embargo of REEs and other materials. Japan’s primary end-use application of REEs includes polishing (20%), metal alloys (18%), magnets (14%), and catalysts (12%) — much different than that of the United States. Japan receives 82% of its REEs from China. Forty percent of China’s REE exports go to Japan and 18% to the United States.¹⁰²

Japan’s concerns were reasonable because REEs are virtually indispensable to Japan’s manufacturing industry, and China made no visible effort to increase Japan’s access to REEs at what Japan considered fair market prices. Additionally,

[i]n 2010, China slashed rare earths exports by 40 percent. It also temporarily suspended such exports to Japan after bilateral relations deteriorated following a September 2010 incident in which a Chinese trawler rammed into two Japan Coast Guard patrol ships inside Japanese territorial waters near the Senkaku Islands in the East China Sea.¹⁰³

In sum, Japan felt vulnerable because of China’s near-monopoly on REE production and joined the United States and EU in demanding the dismantlement of China’s restrictive export regime.

101. *Obama Announces WTO Case Against China Over Rare Earths*, CNN (Mar. 13, 2012), available at <http://www.cnn.com/2012/03/13/world/asia/china-rare-earth-cases/index.html> (last visited Nov. 5, 2018).

102. Humphries, *supra* note 72, at 19; see also *Rare Earths Dispute Now Before WTO*, *supra* note 98.

103. *Rare Earths Dispute Now Before WTO*, *supra* note 98; see also Roland Buerk, *Japan Seeks New Options on Rare Earths*, BBC (Nov. 10, 2010), available at <http://www.bbc.co.uk/news/world-asia-pacific-11677802> (last visited Nov. 5, 2018); Cecilia Jamasmie, *U.S., Japan and the E.U. Dispute China’s Decision on Rare Earths at the WTO*, MINING (Mar. 13, 2012), available at <http://www.mining.com/u-s-japan-and-the-e-u-dispute-chinas-decision-on-rare-earth-at-the-wto/> (last visited Nov. 5, 2018).

V. The WTO & GATT ARTICLE XX—RECONFIGURING THE LSSN (?)

The REE dispute highlights the deep complexity of the LSSN in international relations by documenting the role of the WTO in negotiating the complex interactions between collective trade interests, members' sovereignty, and members' security priorities as they relate to environment and population—and the indelible effects that trade and development practices have and will continue to have on the environment and States' interpretation of sovereign power.¹⁰⁴ Prior to the WTO, the GATT's founding purpose consisted of facilitating free trade on a global scale; the two remain viable legal regimes that States employ to ameliorate the effects of anarchy on the conduct of global trade.

Driven by the philosophy of a market economy, [GATT's] main objective was economic growth, to be achieved by providing trade rules and a framework for trade liberalization. GATT also provides for environmental exceptions in Article XX . . . [although] GATT was negotiated [primarily] to combat protectionist trade barriers . . . Obligatory upon member states, GATT essentially forbids any country to discriminate between like products of other countries.¹⁰⁵

The GATT, at the most basic level, is comprised of three foundational principles: (1) most favored nation status (Article I); (2) the national treatment obligation (Article III); and (3) the obligation of States elimination of quantitative restrictions on trade (Article XI).¹⁰⁶ The incorporation of Article XX's environmental exceptions, however, creates a potential viable policy space and legal instrument to prevent trade from riding roughshod over a State's sovereign power to designate environmental issues and concerns as security issues. Article XX can be viewed as a collective acknowledgment that trade does not occur in a vacuum. Indeed, the Preamble of the WTO "recognizes that trade is not an end in itself, but rather that sustained economic growth must be pursued in the broader context

104. For a discussion on networks, international organizations, and law, see generally Kal Raustiala, *The Architecture of International Cooperation: Trans-governmental Networks & the Future of International Law*, 43 V.A. J. OF INT'L L. 1 (2002).

105. Shawkat Alam, *Trade-Environment Nexus in GATT Jurisprudence: Pressing Issues for Developing Countries*, 17 BOND L. REV. 1, 1-2 (2005); see generally THE WTO & GLOBAL GOVERNANCE: FUTURE DIRECTIONS (Gary P. Sampson ed., 2008).

106. Alam, *supra* note 105, at 6-8.

of sustainable development and protection of the environment.”¹⁰⁷ Moreover,

[t]he WTO has formally established the Committee on Trade and Environment to identify the relationship between trade and environmental measures and to make recommendations for modifications of the rules of the multilateral trading system . . . [the] WTO acknowledges that trade liberalization has implications for the environment and recognizes the need to preserve the environment, something the old GATT did not.¹⁰⁸

So what exceptions does Article XX provide? Article XX states, in pertinent part, that,

[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same countries prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) *necessary to protect human, animal or plant life or health*; . . . [or] (g) *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption* (emphasis added).¹⁰⁹

It is important to note that Article XX’s exceptions are just that—exceptions, not positive rules whereby States can opt out of legal obligations imposed by the GATT. When considering exceptions, one must keep in mind that the WTO/GATT, when analyzing disputes, focuses on *how a product is produced*, or the mode of production. Mode of production is key to any exceptions analysis.

How the product was made is usually *not* relevant. In GATT jurisprudence . . . lumber is lumber, whether or not it was made from trees harvested in an environmentally sound manner; and a strawberry is a strawberry, whether or not it was grown in fields treated with methyl bromide. *In contrast, the production process is very important from an environmental protection point of view. Thus, proper treatment of PPMs [Processes or Production Methods] under GATT is one of the core issues in the trade and environment debate* (emphasis added).¹¹⁰

The terms “environment” or “environmental” are not explicitly stated in Article XX. However, environmental concerns and issues—as a basis for exemption from WTO regulatory measures—can be

107. Bruce Neuling, *The Shrimp-Turtle Case: Implications for Article XX of GATT and the Trade and Environment Debate*, 22 LOY. L.A. INT’L & COMP. L. REV. 1, 1 (1999).

108. Alam, *supra* note 105, at 3.

109. *Article XX: General Exceptions*, WTO (2012), available at https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf (last visited Nov. 4, 2018).

110. Neuling, *supra* note 107, at 7-8.

extrapolated from the protection of flora and fauna and preservation of exhaustible natural resources. Security interests are certainly implicated in the exercise of a State's sovereign power to protect its environment, broadly construed, to preserve its integrity, borders, and effectuate public safety.¹¹¹ Does the fact that Article XX fails to explicitly incorporate "environment" attenuate its effectiveness? Generally speaking, the drafting and legislative history of Article XX suggest that Article XX purpose for enactment did not include providing a safe haven for (securitized) environmental issues/concerns.¹¹² "Despite the current recognition, the original GATT agreement . . . did not consider the environmental effects of its trade rules on the production of goods. Rather, environmental protectionism was treated as a non-tariff trade barrier."¹¹³ The intent of the initial drafters was thus meant to construe Article XX narrowly, limiting it to protecting member States from unsanitary products (tainted food-stuffs), and allowing States to preserve exhaustible natural "stock" resources (oil).¹¹⁴ Thus, Article XX was not "intended to shield environmental measures from basic GATT disciplines."¹¹⁵

Article XX's negotiation and legislative history, however, does not control its modern interpretation. More specifically, under Article 31(1) of the Vienna Convention, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹¹⁶ The language of Article XX, while not written with broad environmental protection purposes, contains some degree of flexibility; for example, one may query what exactly constitutes "necessary" measures, what are "exhaustible" resources exactly, and what does the term "natural resources" encompass?¹¹⁷ However, the WTO has interpreted Article XX beyond the legislative and negotiating history. The WTO stated,

the phrase 'exhaustible natural resources' under Article XX(g) has been interpreted [by various Panels and the Appellate Body] broadly to include not only 'mineral' or 'non-living' resources but also living species which may be susceptible to depletion, such as sea turtles. To support this interpretation, the Appellate Body noted, in the *US — Shrimp* case,

111. See Michael Ming Du, *The Rise of National Regulatory Autonomy in the GATT/WTO Regime*, 14 J. INT'L ECON. L. 639, 639 (2011).

112. Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 38-47 (1991).

113. Alam, *supra* note 105, at 2.

114. Charnovitz, *supra* note 112, at 44-46.

115. Neuling, *supra* note 107, at 15.

116. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, U.N.T.S. 1155.

117. See Neuling, *supra* note 107, at 16-18.

that modern international conventions and declarations made frequent references to natural resources as embracing both living and non-living resources . . . [T]o demonstrate the exhaustible character of sea turtles, the Appellate Body noted that sea turtles were included in Appendix I on species threatened with extinction of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.¹¹⁸

A. WTO Case Law: Interpretation of Article XX's Exceptions Vis-À-Vis Environmental Security Concerns

According to the WTO, the Appellate Body's (hereinafter "AB") and Panels' jurisprudence vis-à-vis Article XX embodies a recognition by the WTO of the necessity for States to maintain a balance between the right of a member State to invoke an environmental exception and the trade rights of other member States under the GATT.¹¹⁹ "The Appellate Body's GATT Article XX jurisprudence has done much to reassure members that, at least with respect to measures falling within the scope of the GATT, there is sufficient regulatory space at the domestic level for states to enact measures that, though trade-restrictive, serve pressing public policy goals."¹²⁰ According to the WTO,

members' autonomy to determine their own environmental objectives has been reaffirmed on a number of occasions (e.g. in *US — Gasoline, Brazil — Retreaded Tires*). The Appellate Body also noted, in the *US — Shrimp* case, that conditioning market access on whether exporting members comply with a policy unilaterally prescribed by the importing member [—under certain limited conditions discussed below—] was a common aspect of measures falling within the scope of one or other of the exceptions of Article XX. In past cases, a number of policies have been found to fall within the realm of these two exceptions: policies aimed at reducing the consumption of cigarettes, protecting dolphins, reducing risks to human health posed by asbestos, reducing risks to human, animal and plant life and health arising from the accumulation of waste tires (under Article XX(b)); and policies aimed at the conservation of tuna, salmon, herring, dolphins, turtles, clean air (under Article XX(g)).¹²¹

The AB "established early on in its jurisprudence that two prerequisites must be satisfied for an Article XX defense to succeed[:]" (1) the

118. *WTO Rules and Environmental Policies: GATT Exceptions*, WTO, available at http://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Nov. 5, 2018).

119. *Id.* For a discussion on the negative effects of attenuating WTO regulatory power in favor of State autonomy, see generally Joost Pauwelyn, *Squaring Free Trade in Cultural Goods and Services with Chinese Censorship: The WTO Appellate Body Report on China—Audiovisuals*, 11 MELB. J. INT'L L. 119 (2008).

120. Spiegel Feld & Switzer, *supra* note 86, at 18.

121. *Id.*

measure in question must fall under a sub-paragraph of Article XX; and (2) must also “satisfy the chapeau of Article XX. To pass that bar, a measure must not result in ‘arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or be a ‘disguised restriction on international trade.’”¹²² In the case of *U.S.—Standards for Reformulated and Conventional Gasoline*, the AB found that in “order [for] the justifying protection of Article XX [to] be extended . . . the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.”¹²³ Furthermore, in the case of *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products*, the AB found that Article XX’s Preamble provides an effective check for measures that are, or may be, provisionally permissible under the Article XX’s subparagraphs.¹²⁴

While not common, member States that unilaterally “impose export restrictions while tackling the uncontrolled exploitation of natural resources may [legally] violate their GATT obligations under Article XI.”¹²⁵ The WTO’s rulings in:

the Tuna-Dolphin case, the Thai Cigarettes case, the Canadian Fisheries case, the Danish Beer Bottle case and the Reformulated Gasoline case have all indicated that discriminatory trade practices will not be tolerated under GATT, even if there is some justification for them on environmental, health or conservation grounds. The non-discrimination principle, with its narrow scope, [generally] does not permit parties to impose import or export restrictions for the sake of environmental protection (emphasis added.)¹²⁶

122. *Id.* at 16.

123. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 22, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

124. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 118-19, WTO Doc. WT/DS58/AB/R (adopted Nov. 21, 2001).

125. Alam, *supra* note 105, at 8; see also Panel Report, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 5, WTO Doc. L/6268 - 35S/98 (adopted Mar. 22, 1988) (noting that under the 1976 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring and salmon. The U.S. claimed that the measures were inconsistent with GATT Article XI. Canada responded that the measures were part of a system of fishery resource management aimed at preserving fish stocks, and that the end goals or motivators of enacting the measures fell under the environmental exception of Article XX(g). The Panel Report found that the measures were not covered by Article XX(g).).

126. Alam, *supra* note 105, at 11-12; see also Panel Report, *United States—Restrictions on Imports of Tuna*, WTO Doc. WT/DS29/R (adopted June 16, 1994); Panel Report, *United States—Restrictions on Imports of Tuna*, ¶ 5.15, WTO Doc.

Such rulings are in line with privileging the collective economic interests of WTO Members over the sovereign and security interests of a single State. Environment logically falls under the umbrella of security because it constitutes a State's geophysical sovereign territory. Environmental degradation at the expense of collective economic interests in the free flow of trade is indicative of how CCNs, such as the WTO, have impacted traditional notions of sovereignty and security. CCNs directly affect the LSSN in present global politics and international relations. In the case of the WTO, the balance between facilitation of trade, a collective interest, and preservation of State regulatory autonomy over economic-related security concerns is tilted in favor of the former.

Under the GATT, six dispute proceedings addressing environmental measures or human health-related measures vis-à-vis Article XX took place: *U.S.–Canadian Tuna*, *Canada–Salmon and Herring*, *Thailand–Cigarettes*, *U.S.–Tuna (Mexico)*, *U.S.–Tuna (EC)* and *U.S.–Automobiles*. “Out of the six reports, three remained un-adopted (*U.S.–Tuna (Mexico)*, *U.S.–Tuna (EEC)* and *U.S.–Automobiles*). So far, under the WTO, three disputes led to the adoption of panel and Appellate Body reports (*U.S.–Gasoline*, *U.S.–Shrimp* and *EC–Asbestos*).”¹²⁷ The three major cases

WT/DS21/R-39S/155 (adopted Sept. 3, 1991); Panel Report, *Thailand–Restriction on Importation of and Internal Taxes on Cigarettes*, WTO Doc. WT/DS10/R-37S/200 (adopted Oct. 5, 1990); Panel Report, *United States–Prohibition of Imports of Tuna and Tuna Products from Canada*, WTO Doc. WT/L/5198-29S/91 (adopted Dec. 22, 1981); Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted Aug. 26, 1997); Case C-47/88, *Comm'n v. Kingdom of Den.*, 1990 E.C.R. I-04509.

127. WTO Comm. on Trade and Env't, *Note by the Secretariat: GATT/WTO Dispute Settlement Practice Relating To GATT Article XX, Paragraphs (b), (d) AND (g), ¶ 3*, WTO Doc. WT/CTE/W/203 (adopted Mar. 8, 2002) [hereinafter *Note by the Secretariat*]; see also Panel Report, *Prohibition of Imports of Tuna Fish and Tuna Products from Canada*, WTO Doc. WT/L/5198-29S/91 (adopted Dec. 22, 1981); Panel Report, *Canada–Measures Affecting Exports of Unprocessed Herring and Salmon*, *supra* note 125; Panel Report, *Thailand–Restrictions on Importation of and Internal Taxes on Cigarettes*, WTO Doc. WT/DS10/R-37S/200 (adopted Oct. 5, 1990); Panel Report, *United States–Restrictions on Imports of Tuna*, WTO Doc. WT/DS29/R (adopted June 16, 1994); Panel Report, *United States–Taxes on Automobiles*, WTO Doc. WT/DS31/R (adopted Oct. 11, 1994); Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Panel Report, *United States–Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996); Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/23 (adopted Nov. 26, 2001); Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/23 (adopted Nov. 26, 2001); Appellate Body Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001); Panel Report,

decided (discussed below) by the AB interpreting Article XX exceptions pertaining to environment are: *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*; *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products* (Shrimp-Turtle case); and *United States—Standards for Reformulated and Conventional Gasoline*.¹²⁸

It is important to reiterate that Article XX has not been interpreted as providing positive legal rules, but rather limited legal exceptions. This distinction is important, as it affects, or rather limits, the ability of States to issue legally valid unilateral measures based on environmental protection measures rooted in security concerns. In the case of *U.S.—Wool Shirts and Blouses*, the AB stated that Article XX contains, “limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves.”¹²⁹ Defenses are limited to a narrow range of exceptions. According to the WTO, when examining the relationship between an environmental measure that restricts trade and Article XX defenses,

[t]o determine whether a measure is “necessary” to protect human, animal or plant life or health under Article XX(b), a process of weighing and balancing a series of factors has been used . . . including the contribution made by the environmental measure to the policy objective, the importance of the common interests or values protected by the measure and the impact of the measure on international trade. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.¹³⁰

For instance, in the *Brazil—Retreaded Tyres* case, the AB found that environmental protection remained the actual motive behind Brazil’s import ban on retreaded tires.¹³¹ The AB found that although the import ban

European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001).

128. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (adopted Mar. 12, 2001); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/9 (adopted May 20, 1996).

129. Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WTO Doc. WT/DS33/AB/R (adopted Apr. 25, 1997); see also *Note by the Secretariat*, *supra* note 127, ¶ 7.

130. *WTO Rules and Environmental Policies: GATT Exceptions*, *supra* note 118.

131. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 151, WTO Doc. WT/DS332/AB/R (adopted Dec. 3, 2007).

measure enacted affected trade obligations, it nonetheless “apt[ed] to produce a material contribution to the achievement of its objective,” or rather to obtain an appreciable reduction in the volume of waste tires in Brazil.¹³² The AB found that the measure in question directly addressed Brazil’s overarching policy to protect the environment by reducing tire waste, and proposed remedial alternatives did not constitute genuine alternatives to Brazil’s import ban because they failed to contribute to reducing the accumulation of waste tires in Brazil.¹³³ The AB also noted and emphasized that:

certain complex environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. The [AB] pointed out that the results obtained from certain actions—for instance, measures adopted in order to address global warming and climate change—can only be evaluated with the benefit of time.¹³⁴

In the *EC–Asbestos* case, the AB found that no reasonably available alternative existed to the trade prohibition in question.¹³⁵ The measure, according to the AB, clearly constituted a design to maintain and protect health and wellbeing as defined by the EC. The AB regarded the measure to be “both vital and important in the highest degree” vis-à-vis protection of health, and it “made the point that the more vital or important the common interests or values pursued, the easier it was to accept as necessary measures designed to achieve those ends.”¹³⁶ The AB also expounded upon when a trade measure relates to the protection of natural resources: it relates when a “substantial relationship between the measure and the conservation of exhaustible natural resources” has been established.¹³⁷ A member State must establish that the measure enacted “reasonably relates” to Article XX(b) and/or (g). Additionally, to show justification under Article XX(g), a measure affecting imports must be applied “in conjunction with restrictions on domestic production or consumption.”¹³⁸

In the *U.S.–Gasoline* case, the United States enacted a measure to regulate the composition and emission effects of gasoline with the

132. *Id.*

133. *WTO Rules and Environmental Policies: GATT Exceptions*, *supra* note 118.

134. *Id.*; see generally Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 9 AM. J. INT’L L. 268 (1997).

135. *WTO Rules and Environmental Policies: GATT Exceptions*, *supra* note 118.

136. *Id.*

137. *Id.*

138. *Id.*

express purpose of reducing its domestic air pollution.¹³⁹ The AB held that a defending party:

must demonstrate that the measure (i) falls under at least one of the ten exceptions—paragraphs (a) to (j)—listed under Article XX, and (ii) satisfies the requirements of the preamble, i.e. is not applied in a manner which would constitute ‘a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,’ and is not ‘a disguised restriction on international trade.’ These are cumulative requirements.¹⁴⁰

The AB found that the measure in place was “primarily aimed at” the policy goal of conservation of clean air “and thus fell within the scope of paragraph (g) of Article XX. As far as the second requirement of paragraph (g) is concerned, the AB ruled that the measure met the ‘even-handedness’ requirement, as it affected both imported and domestic products.”¹⁴¹ This case is particularly relevant for analyzing Article XX defenses because the AB set forth a two-tier test for interpreting when an Article XX defense can be successfully invoked. The AB found that to justify an Article XX defense:

the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX.¹⁴²

In short, the AB acknowledged the viability of Article XX and its invocation as a justification for granting an environmental exception based on the integrity of geophysical territory of a Member State. The AB found that Article XX:

139. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* 20-21, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

140. *Note by the Secretariat, supra* note 127, ¶¶ 9. The Panel Report in *U.S.—Gasoline* ¶ 6.20, states that under Article XX(b):

(1) [T]hat the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health; (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective; and (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX.

Id. at ¶ 13.

141. *WTO Rules and Environmental Policies: GATT Exceptions, supra* note 118; *see also*, Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline, supra* note 139.

142. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline, supra* note 139.

contains provisions designed to permit important state interests— including the protection of human health, as well as the conservation of exhaustible natural resources—to find expression . . . Indeed, in the preamble to the WTO Agreement and in the Decision on Trade and Environment . . . there is specific acknowledgement to be found about the importance of coordinating policies on trade and the environment. WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.¹⁴³

The AB:

held that the baseline establishment rules contained in the Gasoline Rule fell within the terms of Article XX(g), but failed to meet the requirements of the chapeau of Article XX. It noted that the chapeau addressed not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. Accordingly, the chapeau is animated by the principle that while Members have a *legal right* to invoke the exceptions of Article XX, they should not be so *applied* as to lead to an abuse or misuse.¹⁴⁴

In the *U.S.–Shrimp* case, the AB considered the trade-restrictive measure in question “fairly narrowly focused” and did not consist of a blanket prohibition of:

[the] importation of shrimp imposed without regard to the consequences to sea turtles; thus, the Appellate Body concluded that the regulation in question was a measure ‘relating to’ the conservation of an exhaustible natural resource within the meaning of Article XX(g). The Appellate Body also found that the measure in question had been made effective in conjunction with the restrictions on domestic harvesting of shrimp, as required by Article XX(g).¹⁴⁵

The AB followed a three-step analysis in interpreting Article XX(g): (1) “a measure concerned with the conservation of ‘exhaustible natural resources’ within the meaning of Article XX(g)”; (2) “Article XX(g) requires that the measure sought to be justified be one which ‘relat[es] to’ the conservation of exhaustible natural resources”; and (3) “a measure made effective in conjunction with restrictions on domestic production or consumption.”¹⁴⁶

143. *Id.* at 30.

144. *Note by the Secretariat, supra* note 127, ¶ 40.

145. *WTO Rules and Environmental Policies: GATT Exceptions, supra* note 118, at 3.

146. *Note by the Secretariat, supra* note 127 (citing Appellate Body Report, *US–Shrimp*, ¶¶ 127, 135, & 143-45).

When interpreting Article XX, the AB determined that an exception qualifies as discrimination:

not only when countries in which the same conditions prevail were treated differently, but also when the application of the measure at issue [does] not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in the exporting countries. [The AB also found that in interpreting Article XX exceptions] *the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before unilaterally enforcing the import prohibition against the shrimp exports of those Members, was also taken into account* (emphasis added).¹⁴⁷

The AB concluded that measures enacted by member states that treat WTO members “differently”—in the *Shrimp* case (initially), by the United States adopting a cooperative approach vis-à-vis protection of sea turtles with some member States but not with others—render such measures applied in an unjustifiable discriminatory manner.¹⁴⁸ Serious, or rather actual, multi/bilateral negotiation in the common undertaking of these terms between member States is thus considered to be requisite for a measure to qualify under Article XX.¹⁴⁹ In the context of the REE dispute, it is questionable whether China’s unilateral action was conducted with any degree of serious multi/bilateral negotiations with the United States and other aggrieved Members, or that its measures were the only viable means of protecting China’s security interests regarding environmental degradation. China chose to ignore the complexity of inter-State relations under a networked cooperative framework, seeking traditional ordering precepts to insulate itself from its (cooperative) treaty obligations.

VI. CHINA’S RESPONSE: SOVEREIGNTY & SECURITY

China’s response to the WTO complaint framed the issue of restrictive exports in terms of environmental protection and resource conservation measures that are (or should be) exempt from WTO regulatory

147. *Note by the Secretariat, supra note 127, ¶ 49.*

148. *See Jayati Srivastava & Rajeev Ahuja, Working Paper No. 78—Mainstreaming Environment Through Jurisprudence: Implications of the Shrimp-Turtle Decision in the WTO for India and Other Developing Countries*, INDIAN COUNCIL FOR RES. ON INTL. ECON. REL. (April 2002), available at <http://icrier.org/pdf/jaya-rajeev.pdf> (last visited Nov. 8, 2018).

149. *Id.*

oversight.¹⁵⁰ China countered the complaint, stating that export curbs were necessary to control the very serious environmental damage stemming from REE mining and production, as well as the need to conserve supplies of an exhaustible natural resource.¹⁵¹ The basis of each of these concerns rests on sovereign and security interests of the State as traditionally understood. According to Foreign Ministry spokesman Liu Weimin, “based on environmental protection and in order to achieve sustainable development, China carries out management policies over the export of rare earths.”¹⁵² China contended that, under Article XX, it should be allowed to maintain its restrictive export regime.¹⁵³ China claims that since its deposits of REE account for approximately 36 percent of global deposits, the demand of producing 90+ percent of global supply is simply not sustainable, and it is not in China’s best interests, from a security and resource-conservation perspective, to provide unrestricted access to its REE supply.¹⁵⁴ According to Su Bo, a Chinese Industry Vice Minister, “Beijing is looking to further tighten its policies for the sector. ‘China will continue to clean up the rare-earth industry, expand rare earth environmental controls, strengthen environmental checks, and implement stricter rare earth environmental policies.’”¹⁵⁵ In sum, Article XX (b) and (g) should apply because China seeks to curb exports based on direct and immediate threats to its environment, and seeks to preserve its supply of an exhaustible natural resource while protecting its people from the mischievous effects of REE mining and refining. These claims are in line with a sovereignty-based perception of international order. Although the WTO has a place in the conduct of States’ affairs, it nonetheless should not and cannot supersede the basal ordering principles of the Westphalia-inspired modern System of States.

150. See generally China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum—Notification of Another Appeal by China, WTO Doc. WT/DS431/10 (Apr. 24, 2014); Romi Jain, *China: Enmeshed in or Escaping the WTO?*, 21 AM. J. OF CHINESE STUD. 185 (2014).

151. See generally Brigid Gavin, *China’s Growing Conflict with the WTO: The Case of Export Restrictions on Rare Earth Resources*, 48 INTERECONOMICS REV. OF EUR. ECON. POL’Y 254 (2013).

152. *EU, US, Japan Take ‘Rare Earth’ Dispute With China to WTO*, *supra* note 97.

153. See generally Mitsuo Matsushita, *Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources*, 3 TRADE, L. & DEV. 267 (2011).

154. *Rare Earths Dispute Now Before WTO*, *supra* note 98; see also *China Sets Up Rare Earth Body to Streamline the Sector*, BBC UK (Apr. 8, 2012), available at <http://www.bbc.co.uk/news/business-17655146> (last visited Nov. 3, 2018).

155. *China Sets Up Rare Earth Body to Streamline the Sector*, *supra* note 154.

China claimed that Article XX (b) and (g) applied to the REE dispute because of the severe damage REE mining and refining imposes on the environment—damage so severe that it raises security concerns regarding public safety and geophysical integrity of territory.¹⁵⁶ Traditionally, these concerns are left to the sole discretion of a State exercising its sovereign right to decide for itself its best interests. In the REE dispute, it can be observed how the WTO's legal ruling directly impacted the traditional principles that have undergirded States' reasoning and behavior because it has provided a mechanism by which to effectuate "global administrative law" and governance over certain State conduct.¹⁵⁷

The associated radioactive elements of light rare-earth minerals [and] ores pose major problems for the environment. Most of China's light rare-earth deposits ores can be . . . mined for large-scale industrial exploitation, but as thorium (Th) and other radioactive elements are difficult to treat, . . . more attention [] should be paid to its impact on people's health and the ecology [in terms of mining, smelting, and separating out REE from the earth].¹⁵⁸

The processes of extricating and refining REEs have deleterious environmental consequences; for example, REEs "are absorbed in the soil in the form of ions."¹⁵⁹ According to an official report issued by the Chinese government, the REE industry, while undergoing rapid and profitable development, nonetheless resulted in very serious environmental damage due to the excessive exploitation of REE that, in turn, resulted in profound damage to China's ecological environment.¹⁶⁰ Such massive environmental damage is part of a macroscopic problem facing China in other sectors of its energy development and economy.¹⁶¹

China declared in 2012 that, after 50+ years of excessive exploitation of REEs, its reserves rapidly declined. As a result, China's

156. Matsushita, *supra* note 153, at 276-82.

157. See generally Andrew D. Mitchell & Elizabeth Sheargold, *Global Governance: The World Trade Organization's Contribution*, 46 ALTA. L. REV. 1061 (2008-2009).

158. INFO. OFF. OF THE ST. COUNCIL, PEOPLES REPUBLIC OF CHINA, SITUATION AND POLICIES OF CHINA'S RARE EARTH INDUSTRY 4 (2012), available at <http://www.rareearthassociation.org/Official%20China%20MIIT%20White%20Paper%20on%20Rare%20Earths%20-%20English.pdf> (last visited Nov. 7, 2018).

159. *Id.*

160. See Wayne M. Morrison & Rachel Tang, Cong. Resarch Serv., R42510, *China's Rare Earth Industry and Export Regime: Economic and Trade Implications for the United States* 11 (2012).

161. See Eleanor Albert & Beina Xu, *China's Environmental Crisis*, COUNCIL ON FOR. REL. (Jan. 18, 2016), available at <https://www.cfr.org/backgrounder/chinas-environmental-crisis> (last visited Nov. 4, 2018).

exhaustible REE supply became unfairly depleted.¹⁶² “In Baotou, only one-third of the original volume of rare-earth resources is available in the main mining areas, and the reserve-extraction ratio of ion-absorption-rare-earth mines in China’s southern provinces has declined from 50 two decades ago to the present 15.”¹⁶³ Baotou (located in Inner Mongolia), one of the largest reserves of REEs,

[is] essential to advanced technology, from smartphones to GPS receivers, but also to wind farms and, above all, electric cars. The minerals are mined at Bayan Obo, 120km farther north, then brought to Baotou for processing. The concentration of rare earths in the ore is very low, so they must be separated and purified, using hydro-metallurgical techniques and acid baths. China accounts for 97% of global output of these precious substances, with two-thirds produced in Baotou. The foul waters of the tailings pond contain all sorts of toxic chemicals, but also radioactive elements such as thorium which, if ingested, cause cancers of the pancreas and lungs, and leukemia.¹⁶⁴

Furthermore,

[a] study by the [Chinese] municipal environmental protection agency showed that rare-earth minerals . . . themselves caused pollution, but [so too did] the dozens of new factories that had sprung up around the processing facilities and a fossil-fuel power station feeding Baotou’s new industrial fabric. Residents of what was now known as the ‘rare-earth capital of the world’ were inhaling solvent vapor, particularly sulphuric acid, as well as coal dust, clearly visible in the air between houses.¹⁶⁵

Additionally, China contends with illegal mining,

[which] has severely depleted local resources, and mines rich in reserves and easy to exploit [] were favored over the others . . . the recovery rate of the rare-earth resources is relatively low. Less [than] 50 percent of such resources are recovered in ion-absorption-rare-earth mines in Southern China, and only ten percent of the Baotou reserves are dressed ore is selected and utilized-for use.¹⁶⁶

China contended that under Article XX (subparagraph (g) in particular), current levels of mining and refining production process related to

162. See generally Morrison & Tang, *supra* note 160, at 7.

163. INFO. OFF. OF THE ST. COUNCIL, PEOPLES REPUBLIC OF CHINA, *supra* note 158, at 3.

164. Cécile Bontron, *Rare Earth Mining in China Comes at a Heavy Cost for Local Villages*, THE GUARDIAN (Aug. 7, 2012), available at <http://m.guardiannews.com/environment/2012/aug/07/china-rare-earth-village-pollution> (last visited Nov. 5, 2018).

165. *Id.*

166. INFO. OFF. OF THE ST. COUNCIL, PEOPLES REPUBLIC OF CHINA, *supra* note 158, at 3.

its REE industry resulted in severe and irreparable damage to the ecological environment that merited an exception to its trade obligations.¹⁶⁷

Outdated production processes and techniques in the mining, selecting dressing, [sic] smelting and separating of rare-earth ores have severely damaged surface vegetation, caused water loss, soil erosion, pollution, and acidification, and reduced or even eliminated food crop output. In the past, the outmoded tank leaching and heap leaching techniques were employed at ion-absorption middle and heavy rare-earth mines, creating 2,000 tons of tailings for the production of every ton of REO (rare earth oxide). Although the more advanced in-situ leaching method has been widely adopted, large quantities of ammonium nitrogen, heavy metal and other pollutants are being produced, resulting in the destruction of vegetation and severe pollution of surface water, ground water and farmland. Light-rare-earth mines usually contain many associated metals, and large quantities of toxic and hazardous gases, wastewater with high concentration of ammonium nitrogen and radioactive residues are generated during the processes of smelting and separating.¹⁶⁸

China argued that Article XX (b) and (g) should apply because the excessive exploitation of REE concomitantly resulted in severe environmental degradation, accelerated exhaustion of non-renewable resources, and immediate and long-term danger to the health and overall wellbeing of the Chinese State and People. In other words, the severe environmental damage resulting from unfettered REE production—especially unchecked foreign access to China's REEs—posed a direct threat to the State's and People's wellbeing,¹⁶⁹ and the restrictive export regime should fall under Article XX (b) and (g). The “excessive rare earth mining exploitation of rare earth ores has resulted in landslides, clogged rivers, environmental pollution emergencies, and even major accidents and disasters, causing great damage to people's safety and health, and the ecological environment.”¹⁷⁰

Interestingly, the legal basis for an Article XX defense involves more than the letter of the law, so to speak. The legal argument also contains the implication that, because environmental issues play such a profound role in a State's overall security, a balance must be sought between trade, open markets, and environmental health and sustainability. “In May 2011, the [Chinese] State Council issued Guidelines on

167. *See generally id.* at 3-9.

168. *Id.*

169. *See generally* Jonathan Kaiman, *Rare Earth Mining in China: The Bleak Social and Environmental Costs*, THE GUARDIAN (Mar. 20, 2014), available at <https://www.theguardian.com/sustainable-business/rare-earth-mining-china-social-environmental-costs> (last visited Nov. 9, 2018).

170. INFO. OFF. OF THE ST. COUNCIL, PEOPLES REPUBLIC OF CHINA, *supra* note 158, at 3.

Promoting the Sustainable and Healthy Development of the Rare-Earth Metals Industry . . . attaching more importance to the protection of resources and the environment, and the realization of sustainable development” than unrestrained development to bolster trade and commercial weal.¹⁷¹ A fundamental principle guiding China’s approach to REEs includes, “adhering to environmental protection and resource conservation. The State will implement stricter standards for ecological protection and protective exploitation policies concerning rare-earth resources, improve relevant laws and regulations on the industry’s administration, and crack down on all violations of laws and regulations according to law.”¹⁷²

Although China’s environmental argument may encompass geo-political, national security, and strategic considerations, this does not in and of itself dilute the validity and efficacy of the environmental dimension of the Chinese effort to avoid WTO regulatory oversight over its REE mining and processing. It is a fact that REEs are non-renewable resources and that the extraction and processing of REEs have deleterious environmental effects. China officially declared that REEs “as a non-renewable natural resources [sic], need to be effectively protected and rationally utilized. As part of its drive to ensure the sustainable use of resources, China has been practicing protective exploitation of its [REEs].”¹⁷³ China also stated that, “out of the need . . . to better protect[] the environment . . . the state has adopted a series of . . . measures to better coordinate [REE] development and utilization with environmental protection. China will never develop the [REE] industry at the expense of its environment.”¹⁷⁴

In view of the needs of protecting the environment and resources and developing in a sustainable way, and after giving overall considerations to the domestic and international markets, the carrying capacity of resources and environments, as well as domestic production conditions, China strictly controls the total volumes of rare-earth mining and production, and takes restrictive measures on the mining, production, consumption and export of rare-earth products metals simultaneously.¹⁷⁵

171. *Id.*

172. *Policies of China’s Rare Earth Industry*, CHINA DAILY (June 20, 2012), available at http://usa.chinadaily.com.cn/china/2012-06/20/content_15515783_3.htm (last visited Nov. 8, 2018).

173. INFO. OFF. OF THE ST. COUNCIL, PEOPLES REPUBLIC OF CHINA, *supra* note 158, at 1.

174. *Id.*

175. Jason Miks, *China’s Rare Earth Warning*, THE DIPLOMAT (June 20, 2012), available at <https://thediplomat.com/2012/06/chinas-rare-earth-warning/> (last visited Nov 5, 2018).

The WTO allows for exceptions to its regulatory oversight, which are based on the Article XX General Exceptions.¹⁷⁶ Yet, in the present LSSN, trade reigns as a preeminent value that undergirds the WTO/GATT.

VII. THE LSSN, TRADE, ENVIRONMENT, & ARTICLE XX

The GATT exemplifies a legal product of statecraft that embodies and propagates a free market economic system of trade. Law and economy find powerful expression in the WTO. The GATT recognizes the value that the environment holds for States, providing an exemption from WTO regulatory oversight if a particular trade practice threatens environmental degradation. Yet, this recognition does not privilege a State's security concerns with environmental degradation.

Driven by the philosophy of a market economy, [with] its main objective [being] economic growth . . . GATT was [specifically] negotiated to combat protectionist trade barriers which were believed to have contributed to the economic crises of the 1920s and 1930s. Obligatory upon member states, GATT essentially forbids any country to discriminate between like products of other countries.¹⁷⁷

According to some commentators, the basis of China's response(s) rested on allowable exceptions within the GATT that allow WTO members to put restrictive measures in place to control certain types of exports.¹⁷⁸ As discussed above, China seemed to have recourse to support its export regime within GATT Article XX (b) and (g), in the sense that:

[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures.¹⁷⁹

China stated that it specifically designed restrictive export controls to address environmental pollution and degradation.¹⁸⁰ A plausible case stands for upholding the export control measures based on Article XX

176. See, e.g., Hal S. Shapiro, *The Rules That Swallowed The Exceptions: The WTO SPS Agreement And Its Relationship To GATT Articles XX And XXI—The Threat of the EU-GMO Dispute*, 24 *Az. J. INT. & COMP. L.* 199 (2007).

177. Alam, *supra* note 105, at 1-2.

178. Hatch, *supra* note 93.

179. *Id.*; see also General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 55 U.N.T.S. 188.

180. Jim Zarroli, *U.S., WTO Pressure China on Rare Earth Minerals*, NPR (Mar. 13, 2012), available at <http://www.npr.org/2012/03/13/148536622/u-s-wto-pressure-china-on-rare-earth-minerals> (last visited Nov. 5, 2018).

(b)'s allowance for protecting the environment and mitigating noxious pollution to protect "human, animal or plant life or health." Sources—Chinese and non-Chinese—cited severe and extensive environmental damage and toxic by-products that result from rare earth mining and processing as possible "reason[s] for restricting the export of rare earths. There is certainly significant evidence to suggest that rare earth operations have previously caused widespread pollution and damage to local ecosystems, have contaminated water sources and have caused health problems in local populations, livestock and plant life."¹⁸¹ Studies conducted in China demonstrate that:

thorium radiation emitted during the refining process and by plant waste can cause cancer, leukemia, birth defects and chronic lung diseases. The government says the whole sector has been producing more than 20 million metric tonnes (22.05 million tons) of poisonous waste water a year, and in the major Chinese production regions of Inner Mongolia in the northeast and Jiangxi in the east, mining has created bubbling streams of toxic tailings that contaminate water supplies and render farmland worthless for decades.¹⁸²

Other commentators contend, however,

[that given the fact that] approximately 65-70% of demand for rare earths comes from end users within China [itself, a] more persuasive argument could be made if overall production levels of rare earths were reduced, as a means of reducing the environmental impact of rare-earth mining, instead of restricting their export. However, overall production levels of rare-earth ores have remained steady or have actually increased in recent years.¹⁸³

Thus, China had a difficult time justifying an Article XX exception because it was not applying restrictions on mining and processing to its domestic industries. Yet, "China may . . . be able to . . . successfully justify the export quotas and licensing processes, even if non-domestic customers are disadvantaged by them, if they can demonstrate that such actions are not a 'disguised restriction on international trade,' as stated in the preamble for Article XX."¹⁸⁴ A problem China faced in putting forth an

181. Hatch, *supra* note 93; see also Justin Paul & Gwenette Campbell, *Investigating Rare Earth Element Mine Development in EPA Region 8 and Potential Environmental Impacts*, U.S. ENVTL. PROT. AGENCY (Aug. 15, 2011), available at <https://nepis.epa.gov/Exec/ZipPDF.cgi/P100FHSY.PDF?Dockey=P100FHSY.PDF> (last visited Nov. 5, 2018).

182. David Stanway & James Regan, *Pollution the Big Barrier to Freer Trade in Rare Earths*, REUTERS (Mar. 19, 2012), available at <http://www.reuters.com/article/2012/03/19/us-china-rareearth-idUSBRE82I08I20120319> (last visited Nov. 5, 2018).

183. Hatch, *supra* note 93.

184. *Id.*

Article XX defense was that the measures it took were construed by the WTO as a “disguised restriction on international trade” because of the immense windfall China’s domestic industry would receive if the import measures were to be upheld under Article XX.¹⁸⁵

Another justification for an exception that China may invoke from Article XX falls under subparagraph “(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁸⁶ China stated that it cannot and should not be asked to sustain 90+ percent of the proportion of global REE production when it only has 30+ percent of actual rare earth resources within its territory.¹⁸⁷ China’s position—that WTO Members, in attempting to bypass Article XX protections designed to preserve a State’s sovereign right to posit environmental security regulations were being unreasonable—refused to meet exorbitant global demand for REE out of proportion with its resources, which are finite in nature.¹⁸⁸ Perhaps the most problematic issue with a subparagraph (g) defense is:

the explicit expectation that any measures taken with respect to foreign consumers, will only be deemed valid if those measures are also applied to domestic consumers as well . . . this [may be] the single biggest flaw in any attempt by the Chinese authorities to use the ‘conservation of exhaustible natural resources’ argument to justify export restrictions, since by their very definition, they apply only to foreign consumers. It may smack of a technicality, but it’s a pretty significant one, and frankly [may] undermine any attempt by China to use clause (g).¹⁸⁹

China’s mining and refining of REE, however, do in fact implicate the exhaustion of natural resources that are finite in nature. The pollution resulting from REE mining and refining may possibly fall under Article XX(b), along with depletion of China’s REE supply, given its disproportionate role in providing REE for the global market. This does seem to

185. Sanford Gaines, *The WTO’s Reading of the Gatt Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L L. 739, 740 (2001); see generally JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW: SOVEREIGNTY MODERN, THE LAW AND THE ECONOMICS (Leila Choukroune ed., 2016) [hereinafter JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW].

186. See generally JUDGING THE STATE IN INTERNATIONAL TRADE AND INVESTMENT LAW, *supra* note 185.

187. See Joseph A. Giacalone, *Can China’s Monopoly of the Rare Earth Minerals Market Be Broken?*, 19 PROCEEDINGS OF ASBBS, 385, 385 (2012).

188. For a discussion of the various problems with this argument, see Hatch, *supra* note 93.

189. *Id.*

provide a legitimate basis for an Article XX (g) defense, although the WTO rejected China's argument.

Instead of stripping the earth bare to supply raw materials to the world, Beijing wants to move up the value chain and dominate downstream sectors. By letting domestic manufacturers buy rare earths at a significant discount, it is seeking to attract foreign firms to relocate to China and help China move up the value chain. 'There have been plenty of instances where companies reliant on Chinese rare earths have had to send their manufacturing business into China, which, from a Chinese economic perspective, is a strong result' . . . Beijing uses export controls and its monopolistic position as producer . . . as the basis of a strategy to build world-class companies that create jobs' . . . Chinese officials insist the country's dominance is no longer anything to celebrate. Despite having only a third of global reserves, it has damaged its environment in order to supply the bulk of the world's rare earth needs . . . [Chinese officials] have said they are happy for other countries to 'share the burden' of production, and Beijing's supply restrictions have already encouraged other sources to emerge.¹⁹⁰

A. Article XX: Trade v. Environmental Security—Analyzing China's Environmental Defense

Critics of Chinese REE export policies in place before the AB's final ruling dismissed China's environmental claims and contended that China's strategy, quite explicitly, "aimed at driving up global prices of the metals and forcing foreign firms to relocate to the country to access them. [Critics reject China's claims that] the restrictions are necessary to conserve the highly sought-after natural resource, limit harm to the environment from excessive mining and meet domestic demand."¹⁹¹ These complainants—with the United States in particular—accused China of purposefully and illegally harming:

[non-Chinese] workers and manufacturers . . . in both established and budding industrial sectors by [its] policies. China continues to make its export restraints more restrictive, resulting in massive distortions and harmful disruptions in supply chains [in] the global marketplace . . . The launch of this case against China[,] along with [U.S.] President [Obama's] creation of the Interagency Trade Enforcement Center, reflects the [U.S.'s] commitment to make all . . . trading partners play by the rules. [The U.S.] will continue fighting for a level playing field for

190. *Id.*; see also Reinhard Bütikofer, *China and Raw Materials: Conflict or Co-Operation?*, EUR. VOICE (Mar. 29, 2012), available at <http://www.european-voice.com/article/imported/china-and-raw-materials-conflict-or-co-operation-74015.aspx> (last visited Nov. 4, 2018); Stanway & Regan, *supra* note 182.

191. *EU, US, Japan Take 'Rare Earth' Dispute With China to WTO*, *supra* note 97.

American workers and manufacturers in order to grow our economy, and ensure open markets for products made in America.¹⁹²

China's Minister of Industry and Information Technology, Miao Wei, stated that he regrets the "decision to complain to the WTO" . . . 'In the meantime, we are actively preparing to defend ourselves.' China's export quotas [are] not trade protectionism and did not target any specific country."¹⁹³ According to Liu Weimin, a spokesman for the Chinese Ministry of Foreign Affairs,

'China has worked out its own policy on managing rare earths, which is in line with WTO regulations' . . . 'Our policies tackle not only the export of rare earth but also its production and exploration.' The United States accuses China of hoarding the valuable minerals for its own use. But . . . restrictions are motivated by environmental concerns.¹⁹⁴

Zhang Anwen, Deputy Secretary for the Chinese Society of Rare Earths, said WTO members' requests for unrestricted access to the Chinese supply of rare earths were "unreasonable," and that rare earth commodities' increasing prices do in fact reflect market conditions, in that global prices must eventually consider the possibility and costs of environmental degradation.¹⁹⁵

An economic-environment perspective counters the economic-protectionist argument put forth by the complainants that appears on its face to be in line with Article XX (b) and (g) because China's restrictive measures, to some degree, do attempt to preserve health, flora, and fauna from an economic-environmental perspective. After all, the WTO itself:

disavows any competence on environmental policy. In their 1994 Decision on Trade and Environment, the world's trade ministers officially reiterated the common observation that the 'competence of the multilateral trading system . . . is limited to trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members.' It is impossible to develop an integrated and

192. Press Release, Office of the U.S. Trade Representative, United States Challenges China's Export Restraints on Rare Earths (Mar. 2012), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/march/united-states-challenges-china%E2%80%99s-export-restraints-r> (last visited Nov. 4, 2018).

193. Palmer & Moffett, *supra* note 81.

194. *Obama Announces WTO Case Against China Over Rare Earths*, *supra* note 101.

195. Tuo Yannan, *China Disputes Claims in WTO Rare-Earth Investigation*, CHINA DAILY (Apr. 26, 2012), available at http://europe.chinadaily.com.cn/business/2012-04/26/content_15145340.htm (last visited Nov. 4, 2018).

mutually supportive trade-environment policy by considering only the trade dimension.¹⁹⁶

Liao Jinjiu, an economist at the Jiangxi University of Finance and Economics and a deputy to the National People's Congress, said that the profoundly negative and significant environmental costs that attach to rare earth mining and processing have not been included in the pricing of rare earth commodities in past years.¹⁹⁷ “‘The exploitation of rare earths should be further integrated, and a rare earth industry chain must be forged to ease the environmental pressure created by excessive extraction,’ Liao said.”¹⁹⁸

China's regulations, which include production caps, export quotas and stricter emission standards, were adopted after a full consideration was made regarding ‘the ability of the environment to ensure effective supplies of rare-earth metals.’ According to the Ministry of Industry and Information Technology, processing one metric ton of rare earths produces about seven tons of strong acid. ‘The recovery rate for rare earths is less than 50 percent . . . In some illegal mines, the rate is as low as 20 percent. So if [China] can't control and manage [processing] activities, there will be significant damage to plant life and underground water supplies.’¹⁹⁹

China contended that:

[the] disorderly mining of rare earths has long been blamed for the environmental damage in [rare-earths-rich] regions across the country. And experts say it will be costly to repair ecosystems that have been ruined as a result of rare earth mining. Xunwu County in east China's Jiangxi Province is a major production base for ionic rare earths. Lavish exploitation of the metals since the 1970s has not only impeded local economic development, but also posed a threat to drinking water safety in neighboring Guangdong province, said Liao Liping, the county's deputy magistrate . . . ‘It would cost about 1 billion yuan (\$158.7 million) to restore the ecosystems of those obsolete rare earth mines . . .’²⁰⁰

The mining of heavy rare earths, largely unregulated until recently, caused considerable environmental damage, with organized crime playing a role in operations that dump waste in the form of acid into local waterways. The Chinese government took steps in 2010 to try to “limit

196. Sanford Gaines, *The WTO's Reading of the Gatt Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L L. 739, 856 (2001), quoting GATT Secretariat, *A Decision on Trade and Environment*, MTN.TNC/MIN (94)/1/Rev. 1 (Apr. 14, 1994).

197. *China Responds to Rare Earth WTO Complaint*, BEIJING REV. (Mar. 14, 2012), available at http://www.bjreview.com/se/txt/2012-03/14/content_439604.htm (last visited Nov. 4, 2018).

198. *Id.*

199. Yunnan, *supra* note 195.

200. *Id.*

production, close illegal mines and consolidate the industry under the control of state-owned enterprises.”²⁰¹ The Chinese government faces serious challenges to regulating rare earths mining and processing. “China’s rare earth industry is so large it is challenging to monitor illegal mining. Smuggling accounts for one-third of the total amount of rare earths leaving China. Illegal exports keep prices low and deplete strategic resources.”²⁰²

Under the WTO’s interpretation of Article XX (g), the fact that China provides 97 percent of the global supply of rare earths and yet has only 35 percent of rare earths deposits, the exceptions for health and environment do not take into account that Member States are compelling China to exhaust its resources *and* absorb the bulk of environmental damage due to REE processing.²⁰³ Article XX’s exceptions are thus more formal and less substantive in practice, and actually undermine rather than preserve the sovereignty of Member States. One could view the AB’s final ruling on the REE dispute as employing law to attain a collective economic interest at the expense of a Member State.

Most nations with rare earth deposits, including the United States, closed their own mines decades ago and [now demand] cheap supplies from China. Rare-earth mining and processing is notoriously devastating to the environment, making it politically difficult for those countries to reopen the mines, which means China is still expected to contribute tremendously to rare earth supplies. However, those undeniable truths are overlooked as tunnel vision [that] only sees unfair trading practices [at work].²⁰⁴

201. PEACE AND STABILITY IN ASIA-PACIFIC REGION: ASSESSMENT OF THE SECURITY ARCHITECTURE 139-40 (Y.K. Gera ed., 2012); *see also* Keith Bradsher, *China Tries to Clean Up Toxic Legacy of Its Rare Earth Riches*, N.Y. TIMES (Oct. 22, 2013), *available at* https://www.nytimes.com/2013/10/23/business/international/china-tries-to-clean-up-toxic-legacy-of-its-rare-earth-riches.html?rref=collection%2Ftimestopic%2FRare%20Earths&action=click&contentCollection=timetopics®ion=stream&module=stream_unit&version=latest&contentPlacement=9&pgtype=collection (last visited Dec. 4, 2018).

202. Lee Levkowitz & Nathan Beauchamp-Mustafaga, *China’s Rare Earths Industry and Its Role in the International Market*, U.S.-CHINA ECON. & SEC. REV. COMM’N STAFF BACKGROUNDER (Nov. 3, 2010), *available at* <https://www.uscc.gov/sites/default/files/Research/RareEarthsBackgrounderFINAL.pdf> (last visited Nov. 4, 2018).

203. *See Environmental Protection in China*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE U.N. OFF. AT GENEVA AND OTHER INTL. ORGS. IN SWITZ. (June 1996), *available at* <http://www.china-un.ch/eng/bjzl/t176940.htm> (last visited Nov 5, 2018).

204. *West’s Rare Earth Accusations Against China Unfair*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE REPUBLIC OF MALTA (Mar. 18, 2012), *available at* <http://mt.chineseembassy.org/eng/zyxwdt/t914981.htm> (last visited Nov. 8,

According to a U.S. E.P.A. report released last year,

every ton of rare earth elements produced generates [noxious pollutants, viz.,] approximately 8.5 kilograms of fluorine and 13 kilograms of flue dust. Additionally, sulfuric acid refining techniques used to produce one ton of rare earth elements generates 9,600 to 12,000 cubic meters of [poisonous] gas laden with flue dust concentrate, hydrofluoric acid, sulfur dioxide, and sulfuric acid. Not only are large quantities of harmful gas produced, alarming amounts of liquid and solid waste also resulted from Chinese refining processes.²⁰⁵

Deleterious environmental damage combined with exhaustion of natural resources suggests that China's restrictive export regime may indeed qualify for Article XX exceptions. China estimates that:

at the completion of refining one ton of rare earth elements, approximately 75 cubic meters of acidic waste water and about one ton of radioactive waste residue are produced . . . China produced over 130,000 metric tons of rare earth elements in 2008 alone . . . Extrapolation of the waste generation estimates over total production yields extreme amounts of waste. With little environmental regulation, stories of environmental pollution and human sickness remain frequent in areas near Chinese rare earth element production facilities.²⁰⁶

Critics of China's policy point out that the exhaustion of resources contention does not qualify for an Article XX (g) exception; the term "REE" is actually a misnomer because REEs "amount to some 100 million tonnes of rare earth oxides (REO). Based on its present annual consumption (75,000 tonnes REO), the proven reserves of rare earth minerals can serve the world for over 1,000 years."²⁰⁷

In the REE dispute before the WTO, the environmental security concerns of a single Member State were at odds with the collective trade and security interests of other Member States.²⁰⁸ Despite the AB's final ruling in the dispute, it is important to ask the question: does the GATT provide sufficient policy space for States to unilaterally impose restrictive import/export regimes based on environmental security measures? When considering trade and environmental security concerns, one must not lose

2018); *see also* *Malaysian Protest Over Rare Earths Refinery Plan*, BBC UK (Feb. 26, 2012), available at <http://www.bbc.co.uk/news/world-asia-17169601> (last visited Nov. 8, 2018).

205. Paul & Campbell, *supra* note 181, at 14.

206. *Id.*

207. ACAD. OF SCI. MALAY. & NAT'L PROF. COUNCIL, RARE EARTH INDUSTRIES: MOVING MALAYSIA'S GREEN ECONOMY FORWARD 15 (2011).

208. For a discussion of Security interests and membership in IGOs, *see* Christina L. Davis & Tyler Pratt, *The Forces of Attraction: How Security Interests Shape Membership in Economic Institutions*, HARV. SCHOLAR (July 31, 2018), available at https://scholar.harvard.edu/files/cldavis/files/davispratt_forces_july2018.pdf (last visited Nov. 8, 2018).

sight of the fact that, despite rhetoric that claims environmental concerns play a profound role in GATT/WTO jurisprudence and the limited exceptions in Article XX, the GATT/WTO are fundamentally legal instruments that place trade at the apex of inter-State relations. This is the case even though REEs have strategic importance for Member States, as the justification for WTO rulings are premised on trade, not security. In the case of the REE dispute, economically, export restrictions created significant disadvantages for foreign consumers/producers by artificially raising China's export prices, thereby driving global market prices up.

[S]uch restrictions artificially lower China's domestic prices for the raw materials due to significant increases in domestic supply. This gives China's domestic downstream industry significant competitive advantages and puts pressure on foreign producers to move their operations and technologies to China, which in turn results in losses of employment and production capacities[, e.g., in the case of] the EU, [where] Chinese restrictions [have resulted in] losses of employment and production capacities in Europe. These policies stand at odds with the non-discriminatory trade framework that WTO members, including China, have signed up to.²⁰⁹

According to the United States,

Chinese export restraints have a devastating impact on production and jobs [in the U.S.] by limiting or raising the cost of . . . materials to [U.S.] companies which use them to make products . . . Many firms faced with restricted access to these key raw materials have either begun to contract with producers in China or have moved their own operations there. China has used export restraints as a development strategy to advantage their companies and undermine their competitors.²¹⁰

When considering the economic dimensions of the REE dispute, perhaps an overarching concern that underpinned the objections leveled by the complainants includes:

the issue of competitiveness in world markets. China's exports have been increasing in volume at a rate much faster than that of the exports of the other dominant world suppliers. China has also been running huge annual surpluses in its balance of trade with these countries. China is naturally competitive in a wide range of manufactured goods because of its low labor costs and the scale of its industries.²¹¹

The United States, EU, and Japan contended that this advantage had been:

[artificially and significantly] augmented by a number of measures, some of which are subject to WTO discipline and appeals, such as subsidies and dumping, while others are not . . . Whether or not China will have

209. *EU Challenges China's Export Restrictions on Rare Earths*, *supra* note 74.

210. Gerard, *supra* note 11.

211. Lloyd, *supra* note 74.

total freedom to continue to restrict its exports of minerals remains to be seen. But there is no doubt that with today's volatile markets and the need for nation-states to increase competitiveness in the global economy, the large trading partners will continue to jostle for market share for the foreseeable future.²¹²

Similar issues pertaining to the relationship between trade and environmental security measures were addressed in the case of *China—Measures Related to the Exportation of Various Raw Materials*.²¹³ In this case, the United States filed a complaint with similar issues involved in the REE dispute.²¹⁴ The Panel found (and the AB upheld the Panel's findings) that Chinese export restrictions on (non-critical) minerals such as bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc,²¹⁵ of which China leads the world as a producer, stood incompatible with China's trade obligations.

The Panel found that the wording of China's Protocol of Accession did not allow China to use the general exceptions in Article XX of the GATT 1994 to justify its WTO-inconsistent export duties. The Panel also considered that even if China were able to rely on certain exceptions available in the WTO rules to justify its export duties, it had not complied with the requirements of those exceptions.²¹⁶

Furthermore, the Panel found (and the AB upheld the Panel's finding) that China could not avail itself of Article XX defenses because it could not prove (to the satisfaction of the Panel) that application of its measures, both foreign and domestic production, would be administered in an even-handed manner and that the desired environmental protection would be effectuated.²¹⁷ In light of Article XX (b) and (g),

China argued that some of its export duties and quotas were justified because they related to the conservation of exhaustible natural resources for some of the raw materials. But China was not able to demonstrate that it imposed these restrictions in conjunction with restrictions on domestic production or consumption of the raw materials so as to conserve the raw materials . . . As for other of the raw materials, China had claimed that its export quotas and duties were necessary for the protection of the health of its citizens. China was unable to demonstrate that its export duties and quotas would lead to a reduction of pollution in the

212. *Id.*

213. Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/R/Add.1 (adopted July 5, 2011).

214. *Id.*; see also Baroncini, *supra* note 81.

215. Baroncini, *supra* note 81.

216. *Id.*

217. *Id.*

short—or long—term and therefore contribute towards improving the health of its people.²¹⁸

After the ruling, U.S. Trade Representative Ron Kirk stated that it “was so ‘unequivocal’ that he hoped China would back down on rare earths and take steps to resolve both cases before the rare earths suit comes before a WTO dispute panel.”²¹⁹ But the January judgment may have left China enough room to restrict exports in other ways. For example, China may argue that “its efforts to clean up the environment are to blame for its dwindling rare earths exports and not any sinister motives to manipulate prices.”²²⁰ Although the AB ruled against China,

[it may take a few years to] put an end to the offending trade practice. So even if China loses, rare earths could remain scarce for a while, giving China more time to capitalize on its position as the dominant supplier. And dominance in rare earths may just be a route to building companies that lead the most advanced industries. That would suit Chinese politicians who want China to earn a bigger cut from the goods it makes.²²¹

China has been able to:

use its export controls and its monopolistic position as producer of 96 percent of all rare earth minerals as the basis of a strategy to build world-class companies that create jobs . . . In a sense, Beijing is modeling domestic firms after companies like Hitachi, once a mining company but now a massive electronics and infrastructure conglomerate.²²²

While this may attenuate the power of law to effectuate full and immediate compliance, the WTO exists as a forum wherein States seek to settle grievances in an anarchic world. This points to the evolving role and impact of law on inter-State relations, notions of sovereignty, and security. International law levies a substantial and targeted effect (trade) on how States interact and conduct themselves, resulting in a significant development in the history of international relations, whereas the sovereignty of the State was viewed as the singular basis for inter-State relations.

China actively regulated its rare earths resource reserves since 2008, introducing various measures such as high export taxes and, in the case of some products, even prohibiting trade.²²³

218. Miles & Palmer, *supra* note 98.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. See generally Roland Howanietz, *Changes to the Regulatory Framework of the Chinese Rare Earth Industry After the Global Financial Crisis*, 35 COPENHAGEN J. OF ASIAN STUD. ONLINE 32 (2017), available at

Earlier in 2007, China withdrew the 16 per cent refund of value-added tax on exports of unimproved rare earths. The effect of this decision, combined with the export-tax regime, is that non-Chinese rare earth processors such as producers of cerium polishing powder and rare earth magnets, pay 31 per cent more for rare earth raw materials than their Chinese counterparts.²²⁴

Export restrictions imposed by China on REEs, as well as on tungsten and molybdenum, appear mainly in the form of quotas, export duties, a minimum export price system, and additional requirements and procedures that prove quite burdensome for various foreign entities seeking access to Chinese rare earths.²²⁵

Prior to the AB's final ruling, China had continued to tighten its export restrictions on rare earths by substantially raising export taxes and considerably reducing the export quota.²²⁶ In June 2010,

China implemented a drastic reduction of the quota by 32% for domestic companies and 54% for foreign-invested companies. It also caused the supply to the rest of the world to fall behind demand (30.000t of quota destined for export vs. 50-60.000t of demand). Quota figures for 1st semester 2011, showing a further decrease of 35% in allowed exports amounts, compared to the same semester of 2010 (with a slightly deeper cut for foreign invested players than for Chinese exporters). Those restrictions undoubtedly affected the prices. Sharp price increase[s] started for many elements in mid-2010 (first tightening of the quota). This follow[ed] an absolute price peak for all elements in first half of 2011: most prices went up by 500%-1000%.²²⁷

In mid-2011,

[market prices on rare earths] corrected downwards because of obstructed demand. Although . . . prices continue to remain significantly higher than in 2009. China[s] export prices are up to 100% higher compared to domestic prices . . . Due to the restrictions and price hikes the EU . . . had to drop manufacturing of some of their products, various businesses had to relocate to China, consumer prices of many [rare

<https://rauli.cbs.dk/index.php/cjas/article/viewFile/5398/5961> (last visited Nov. 8, 2018).

224. Nabeel A. Mancheri, *China Faces WTO Again Over Rare Earth Metals*, E. ASIA F. (May 16, 2012), available at <http://www.easiaforum.org/2012/05/16/china-faces-wto-again-over-rare-earth-metals/> (last visited Nov. 8, 2018); see generally Michael G. Pecht et al., RARE EARTH MATERIALS: INSIGHTS AND CONCERNS (Davinder K. Anand et al. eds., 2012).

225. Badkar, *supra* note 80.

226. See generally Han-Wei Liu & John Maughan, *China's Rare Earths Export Quotas: Out of The China-Raw Materials Gate, But Past The WTO's Finish Line?*, 15 J. OF INTL. ECON. L. 971 (2012).

227. *EU Challenges China's Export Restrictions on Rare Earths*, *supra* note 74.

earth]-based goods went up, and uncertainty in downstream sectors on cuts of the supplies [left] the industry unstable.²²⁸

Despite the AB's final ruling, some analysts contend that any "shortage" of REEs is in fact temporary; rising prices are predicted to have the effect of encouraging governments and private industry to enter the market, thus leading to an increased supply of REEs as well as encouraging innovation for establishing alternative mineral supply chains.²²⁹

The U.S., for example, has 13 per cent of the world's known rare-earth reserves and could re-enter the production and refining business. China's efforts to exert price leverage are unintentionally driving a revival of global rare earth production and, over time, China will likely be just one of many global suppliers. China's efforts to monopolize the sector [may] backfire because such high-handed measures have prompted the rest of the world to formulate alternate strategies.²³⁰

For example, in Japan, a major Tokyo-based trading company, Sojitz Corporation:

signed a \$250 million procurement deal with an Australian mining company . . . Th[is] deal is the latest effort by Japan to diversify its sources of the minerals, known as rare earths, which are vital to the production of a wide range of high-technology products. Sojitz, . . . forged a deal with the Australian mining company Lynas to start shipping 3,000 tons a year of the minerals from a new mine, Mount Weld, beginning late next year. Sojitz and Lynas, based in Sydney, aim to increase shipments to more than 9,000 tons a year by early 2013.²³¹

Businesses as well as policy makers were "concerned about the increasingly restrictive and unpredictable environment of international trade in industrial raw materials. Multilateral disciplines governing export restrictions are ambiguous, which creates uncertainty for industries that require these materials and raises the risk for investment in both mining and processing facilities worldwide."²³² Such concerns also served to encourage the development of alternate supply chains and/or rare earths replacements, thereby further reducing reliance on Chinese supplies and productive capacity.

228. *Id.*

229. Mancheri, *supra* note 224.

230. *Id.*

231. Hiroko Tabuchi, *Japanese Firm in Rare Earths Deal with Australian Miner*, N.Y. TIMES (Nov. 24, 2010), available at <https://www.nytimes.com/2010/11/25/business/global/25rare.html> (last visited Nov. 5, 2018).

232. Mancheri, *supra* note 224; see also *EU, US, Japan Launch Rare Earth WTO Case Against China*, REUTERS (Mar. 13, 2012), available at <https://www.reuters.com/article/china-trade-eu/eu-us-japan-launch-rare-earth-wto-case-against-china-idUSB5E8DS01T20120313> (last visited Nov. 5, 2018).

The negative economic impact of restrictive exports carried over to the shipment, as well as mining and processing, of REEs.²³³ Even when rare earths were slated for export, foreign buyers face another serious obstacle to free and fair trade prices.

China has repeatedly reduced its export quotas for rare earths over the last five years so that they are now well below world demand. [. . .] World demand for Chinese rare earths approaches 50,000 tons a year, according to industry estimates. [. . .] The value of the remaining quotas soared to the point that the right to export a single ton of rare earths from China sold for about \$40,000, including special Chinese taxes.²³⁴

For instance, in March of 2012 neodymium sold for approximately \$40,000 a metric ton in China, and almost \$80,000 outside of the country because of the export restrictions.²³⁵ “Cerium oxide used as a catalyst and in glass manufacturing, cost \$3,100 a ton in 2009. It now costs as much as \$110,000 per ton outside of China—four times its price in China.”²³⁶ Another example is lanthanum, a rare earth that is vital for the manufacture of catalytic converters that cleans tailpipe emissions of conventional gasoline-powered cars. “Lanthanum, mostly produced here in Baotou . . . sells for less than \$4,500 a ton in China and up to 10 times outside of China because of the export restrictions. [This has] created a big incentive for companies to move factories to China, and many already have.”²³⁷ For example,

General Electric has closed its last U.S. light bulb factory and is opening a new factory in China making Compact Fluorescent Lights, which require rare earths. [. . .] [D]espite receiving more than \$58 million in grants, loans and tax incentives in 2007 from the state [of Massachusetts] (in addition to federal support), Evergreen Solar decided to close its solar panel plant in Massachusetts and start a joint venture in China. A U.S. specialty lighting manufacturer, Intematix, and Japanese manufacturers Showa Denko and Santoku, have also opened factories in China, specifically to secure access to affordable rare earths.²³⁸

From an international political economy perspective,

233. See *Critical Materials Strategy*, U.S. DEPT. OF ENERGY (Dec. 2010), available at <https://www.osti.gov/servlets/purl/1000846> (last visited Nov. 5, 2018).

234. Keith Bradsher, *China Said to Resume Rare Mineral Shipments*, N.Y. TIMES (Oct. 28, 2010), available at <https://www.nytimes.com/2010/10/29/business/energy-environment/29rare.html> (last visited Nov. 5, 2018).

235. *Id.*

236. H. Sterling Burnett, *Will Green Energy Make the United States Less Secure?*, NAT'L CTR. FOR POL'Y ANALYSIS (Nov. 1, 2011), available at <http://www.ncpathinktank.org/pub/ib103> (last visited Nov. 5, 2018).

237. Bradsher, *supra* note 234.

238. Burnett, *supra* note 236.

[the REE dispute raises] the more general matter of restrictions on national sovereignty and the ability of a WTO member nation to choose trade measures [specifically] to pursue domestic policy objectives. It is certainly true that these choices are restricted in relation to international trade in goods. But it is in the nature of a binding multilateral agreement that all signatories agree to be bound by stated rules on a mutual basis. Moreover, these cases relate to an article of the GATT that has applied since its founding in 1947. There is nothing new about these restraints on national sovereignty.²³⁹

Yet, the role of international law in directly impacting States' interests, inter-State ordering principles, and State conduct indeed remains a significant development in international relations.

CONCLUSION

Sustainable development of the REE industry, as well as the value of preserving and protecting the environment, seems to have been relegated to the sidelines in the case of the REE dispute. Additionally, the sovereignty and environmental security interests of Member States in the WTO, according to the REE dispute reasoning and ruling, will not automatically take precedence in WTO interpretation of trade rules. Complainant's argument to force China to dismantle its restrictive export regime was thoroughly steeped in the preeminent value underlying the GATT/WTO (elimination of all barriers to free and fair trade). China premised its argument on the principle that environmental interests weigh as heavily, if not more, than free trade interests in a State's security calculus. In other words, the environment inextricably links with trade, and therefore, a State's sovereign integrity and security interests—as defined by the sovereign—should take precedence over trade. Irrespective of the actual or multiple reasons for arguing an Article XX exception to its restrictive REE measures, China's argument suggests that legal interpretations of treaties pertaining to trade must take the environment into account beyond paying lip service to the importance of the environment in the conduct of global trade. How, if at all, are the norms and perceptions governing the relationship of trade and environment, vis-à-vis the REE debate, impacted by the WTO and the GATT's General Exceptions? There is an argument that addressing miasmatic environmental effects that result from REE mining and processing takes precedence over ensuring unrestricted free trade. "Tackling pollution, not freeing up trade, is regarded as the solution to a global shortage of rare earths, the metals that are the building blocks of the 21st century."²⁴⁰

239. Lloyd, *supra* note 74.

240. Stanway & Regan, *supra* note 182.

In the end, it seems that in considering previous WTO cases China (and other Member States) will have a difficult time availing itself of Article XX's (b) and (g) exceptions. Due partially to the fact that China had failed to engage in what the WTO considered serious multilateral or bilateral negotiations to resolve the dispute, it may be instructive for Member States to evaluate how they can meet these formal requirements in order to better effectuate measures designed to protect their domestic environments over trade obligations. China struggled to prove that its measures were both (a) not benefitting its domestic industry at the expense of Member States, and (b) that the REE export regime effectively addressed the depletion of exhaustible resources. In the case of even-handedness between domestic and foreign industry,

Chinese explanations seem to heavily focus on the environmental and sustainable resource development points which are generally protected under WTO rules. Yes, China's dominance of the global rare earth supply has come at a great cost, with serious environmental issues. But many consumer countries feel that China will have to provide a much more satisfactory answer as to why the export quota has been declining while the production quota has been increasing. Also, it's one thing to have the overall level of export quotas unchanged, but it would be quite another to allow exports—in a sufficient amount—of the types of rare earth materials that consumers want.²⁴¹

Trade in the LSSN trumped environment. Despite a seemingly valid *prima facie* case that REE mining and production produce miasmatic effects on the environment, China's unilateral action of imposing a restrictive export regime goes against its international obligations under the WTO. China finds itself renegotiating and compromising its sovereignty and security interests because of its trade obligations. As mentioned above, Article XX provides exceptions, not positive rules, whereby States can exempt themselves from WTO regulatory oversight. Trade and environmental security are inextricably transected in the REE dispute. It will be interesting to see how the WTO continues to manage the tension in the LSSN, and what precedent, if any, the REE decision will set for employing Article XX to preserve and protect the environment.

241. Clara Gillispie & Stephanie Pfeiffer, *The Debate Over Rare Earths: Recent Developments in Industry and the WTO Case: An Interview with Yufan Hao and Jane Nakano*, NAT'L BUREAU OF ASIAN RES. (July 11, 2012), available at <http://www.nbr.org/research/activity.aspx?id=261> (last visited Nov. 5, 2018).

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

Frederick V. Perry*

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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 Allies '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).

**THE RISING DRAGON AND THE DYING BEAR:
REFLECTIONS ON THE ABSENCE OF A UNIFIED AMERICA
FROM THE WORLD STAGE AND THE RESURGENCE OF
STATE-BASED THREATS TO U.S. NATIONAL SECURITY**

Michael R. Sinclair*

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I. Introduction

“On January 19, 2018, Secretary of Defense Mattis released the unclassified summary of the Department of Defense (DOD)’s first congressionally mandated National Defense Strategy (NDS).”¹ In it, Secretary Mattis notes that the United States is facing “increased global disorder, characterized by decline in the long-standing rules-based international order” and that “[i]nterstate strategic competition, *not terrorism*, is now the primary concern in U.S. national security.”² This pivot away from international terrorism and towards the prospect of “great power conflict”³ is

1. Kathleen J. McInnis, *The 2018 National Defense Strategy*, FED’N OF AM. SCIENTISTS (Feb. 5, 2018), available at <https://fas.org/sgp/crs/natsec/IN10855.pdf> (last visited Oct. 28, 2018); see generally JIM MATTIS, U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), available at <https://www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> (last visited Oct. 28, 2018) [hereinafter 2018 NDS SUMMARY].

2. 2018 NDS SUMMARY, *supra* note 1, at 1 (emphasis added).

3. See, e.g., *The Growing Danger of Great-Power Conflict*, THE ECONOMIST (Jan. 25, 2018), available at <https://www.economist.com/news/leaders/21735586-how-shifts-technology-and-geopolitics-are-renewing-threat-growing-danger> (last visited Oct. 28, 2018) (reporting on the global dynamics that likely helped shape the 2018 NDS).

a significant departure from U.S. foreign policy goals over the last seventeen years,⁴ implemented following the tragic terror attacks in New York, Washington D.C., and the skies over Pennsylvania on September 11, 2001.⁵

The 2018 NDS places special emphasis on both China and Russia as potential adversaries of the United States.⁶ Indeed recently, relations between Russia and China have reached “a new age of diplomacy between

4. See Adam Taylor, *The Pentagon Says China and Russia Are Bigger Problems For U.S. Than Terrorists; American Voters May Not Agree*, WASH. POST (Jan. 20, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/20/the-pentagon-says-china-and-russia-are-bigger-problems-for-u-s-than-terrorists-american-voters-may-not-agree/?utm_term=.5ccf549745e6 (last visited Oct. 28, 2018) (reporting that “[a]fter almost two decades of a ‘war on terror’ that came at huge expense, but often had few tangible benefits, such a strategy shift would mark a noteworthy change in the way the United States conducts its foreign policy”). Compare WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <https://www.state.gov/documents/organization/63562.pdf> (last visited Oct. 28, 2018); CENT. INTELLIGENCE AGENCY, NATIONAL STRATEGY FOR COMBATING TERRORISM (2003), available at https://www.cia.gov/news-information/cia-the-war-on-terrorism/Counter_Terrorism_Strategy.pdf (last visited Oct. 28, 2018); U.S. DEP’T. OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2004), available at <http://archive.defense.gov/news/Mar2005/d20050318nms.pdf> (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), available at <http://nssarchive.us/NSSR/2006.pdf> (last visited Oct. 28, 2018); U.S. DEP’T. OF DEF., NATIONAL DEFENSE STRATEGY (2008), available at <https://archive.defense.gov/pubs/2008NationalDefenseStrategy.pdf> (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY (May 2010), available at <http://nssarchive.us/NSSR/2010.pdf> (last visited Oct. 28, 2018); U.S. DEPT. OF DEF., THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2011), available at https://www.army.mil/e2/rv5_downloads/info/references/NMS_Feb2011.pdf (last visited Oct. 28, 2018); WHITE HOUSE, NATIONAL SECURITY STRATEGY (2015), available at <http://nssarchive.us/wp-content/uploads/2015/02/2015.pdf> (last visited Oct. 28, 2018), and U.S. DEPT. OF DEF., NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2015), available at http://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf (last visited Oct. 28, 2018), with WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2017), available at <http://nssarchive.us/wp-content/uploads/2017/12/2017.pdf> (last visited Oct. 28, 2018); U.S. DEPT. OF DEF., NUCLEAR POSTURE REVIEW EXECUTIVE SUMMARY (2018), available at <https://media.defense.gov/2018/Feb/02/2001872877/-1/-1/1/EXECUTIVE-SUMMARY.PDF> (last visited Oct. 28, 2018); 2018 NDS SUMMARY, *supra* note 1.

5. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <https://govinfo.library.unt.edu/911/report/911Report.pdf> (last visited Oct. 29, 2018) [hereinafter 9/11 REPORT].

6. See 2018 NDS SUMMARY, *supra* note 1, at 1-2.

the two countries”⁷ in response to their perceived common international rival, the United States.⁸ Both nations are apparently exploring “the viability of an alternate world order, one which is separate to and stands up to America.”⁹

The 2018 NDS lists China as a “strategic competitor” who is “leveraging military modernization, influence [sic] operations, and predatory economics to coerce neighboring countries to reorder the Indo-Pacific region to their advantage” with the end goal of establishing a “regional hegemony in the near term and displacement of the United States” at the top of the world order in the long-run.¹⁰ “Three decades of unprecedented economic growth provided China with the wealth to transform its armed forces, giving its leaders the sense that their moment has come.”¹¹

With regard to Russia, the 2018 NDS paints a picture of a spoiler nation with a history of violating the borders and sovereignty of its neighbors, leveraging “emerging technologies to discredit and subvert democratic processes,” all the while seeking to undermine the “North Atlantic Treaty Organization and change European and Middle East security and economic structures to its favor.”¹² Russia is a nation in decline,¹³ with a

7. Ben Westcott, *China Says Relations With Russia at “Best Level in History,”* CNN (Apr. 6, 2018), available at <https://www.cnn.com/2018/04/06/asia/russia-china-relations-us-intl/?no-st=1523377706> (last visited Oct. 29, 2018).

8. *See id.*

9. *Id.* (quoting Richard McGregor, senior fellow at the Lowy Institute in Sydney).

10. *See* 2018 NDS SUMMARY, *supra* note 1, at 1-2; *see also* Steven L. Myers, *With Ships and Missiles, China Is Ready to Challenge U.S. Navy in Pacific*, N.Y. TIMES (Aug. 29, 2018), available at <https://www.nytimes.com/2018/08/29/world/asia/china-navy-aircraft-carrier-pacific.html> (last visited Oct. 29, 2018).

11. *The Growing Danger of Great-Power Conflict*, *supra* note 3.

12. 2018 NDS SUMMARY, *supra* note 1, at 2; *see also* Olga Oliker, *Will Russia Continue to Play the Role of Spoiler*, CSIS (Dec. 15, 2016), available at <https://www.csis.org/analysis/will-russia-continue-play-role-spoiler> (last visited Oct. 28, 2018); *see generally* Syria Strikes Lock U.S. and Russia Into New Era of Animosity, BLOOMBERG (Apr. 16, 2018), available at <https://www.bloomberg.com/news/articles/2018-04-16/syria-strikes-lock-u-s-and-russia-into-a-new-era-of-animosity> (last visited Oct. 28, 2018) (reporting that competition between Russia and the West has significantly increased over the last few months).

13. *See* Jacob Sharpe, *Putin Is Looking Vulnerable in a Crumbling Russia*, NEWSWEEK (Apr. 14, 2017), available at <http://www.newsweek.com/putin-looking-vulnerable-crumbling-russia-583593> (last visited Oct. 29, 2018); *see also* Paul D. Shinkman, *The Inevitable Decline of Putin’s Russia*, U.S. NEWS (May 18, 2016), available at <https://www.usnews.com/news/articles/2016-05-18/the-inevitable-decline-of-putins-russia> (last visited Sept. 20, 2018); *see generally* S. Enders Wimbush & Elizabeth M. Portale, *Russia in Decline*, JAMESTOWN FOUND. (Mar. 2017),

smaller population than the United States, a weaker military, and an economy that “doesn’t produce anything that anybody wants to buy, except oil and gas and arms.”¹⁴ Thus, it may feel pressure to assert itself into world affairs now, while it still can and “[i]ts leaders have spent heavily to restore Russia’s hard power”¹⁵ and asymmetric capabilities, specifically in the cyber-realm to ensure that they can maintain their own sovereignty (and very likely the role of Vladimir Putin at the head of government)¹⁶ and continue to exert regional, if not international, influence.¹⁷

Furthermore, the 2018 NDS identifies “a resilient, but weakening, post-WWII international order” as a contributor, motivator, and exploitable environment for China’s and Russia’s posture of rivalry toward the United States.¹⁸ The NDS’ position that “China and Russia are now undermining the international order from within the system by exploiting its benefits while simultaneously undercutting its principles”¹⁹ rings a bit hollow, however, considering the United States’ own contributions to undermining the international order that it worked so very hard to create from the ashes of the last great power conflict.²⁰

available at <https://jamestown.org/wp-content/uploads/2017/08/Russia-in-Divide-Full-Text.pdf> (last visited Oct. 29, 2018) (noting that Russia is in significant decline across nearly every metric of national prestige—population, economic, militarily).

14. Greg Miller, Ellen Nakashima, & Adam Entous, *Obama’s Secret Struggle to Punish Russia for Putin’s Election Assault*, WASH. POST (June 23, 2017), available at https://www.washingtonpost.com/graphics/2017/world/national-security/obama-putin-election-hacking/?utm_term=.6f1649a2d0b7 (last visited Oct. 28, 2018) (quoting President Obama).

15. *The Growing Danger of Great-Power Conflict*, *supra* note 3.

16. See FIONA HILL & CLIFFORD G. GADDY, MR. PUTIN: OPERATIVE IN THE KREMLIN 388-93 (2013) (“[Putin’s] larger strategic goal is ensuring the defense of Russia’s interests—which are tightly fused with and now largely inseparable from, his own and his system’s interests.”).

17. See *id.* at 378-80; see also AGLAYA SNETKOV, RUSSIA’S SECURITY POLICY UNDER PUTIN: A CRITICAL PERSPECTIVE 193-94 (2015).

18. See 2018 NDS SUMMARY, *supra* note 1, at 2.

19. *Id.*

20. See Peter S. Goodman, *The Post-World War II Order Is Under Assault From the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), available at <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> (last visited Oct. 29, 2018) (noting that:

[i]n the aftermath of World War II, the victorious Western countries forged institutions—NATO, the European Union, and the World Trade Organization—that aimed to keep the peace through collective military might and shared prosperity. They promoted democratic ideals and international trade while investing in the notion that coalitions were the antidote to destructive nationalism . . . But now the model that has dominated geopolitical affairs for more than 70 years appears increasingly fragile. Its tenets are being challenged by a surge of nationalism and its institutions under assault from some of the very powers that constructed them—not least, the United States . . .);

This paper will examine America's steady withdrawal from international fora and regimes, and how a rising China and a declining Russia have taken advantage of both a divided America and the oft-conscious absence of American international leadership in a manner that increasingly threatens the United States and raises the potential for future great power conflict. Further, both China and Russia are proficiently employing gray zone²¹ tactics to achieve their strategic goals, but do so in slightly different fashions because of their relative positions in the existing world order.

Part II starts by challenging a fundamental assumption in the 2018 NDS, specifically that the threat posed by international terrorism has diminished to such an extent that America can afford to refocus its efforts towards countering state rivals. This is an important issue because the pivot that General Mattis suggests will require significant resources.²²

see also U.S. DEF. INTELLIGENCE AGENCY, *RUSSIA MILITARY POWER, BUILDING A MILITARY TO SUPPORT GREAT POWER ASPIRATIONS* iv (2017), *available at* <http://www.dia.mil/Portals/27/Documents/News/Military%20Power%20Publications/Russia%20Military%20Power%20Report%202017.pdf> (last visited Oct. 29, 2018) (noting that post WWII international order that developed through the Cold War was “underwritten primarily [through] the strength of the United States) [hereinafter *RUSSIA MILITARY POWER*]; *John McCain Reminds Us How Important—And How Tenuous—American Leadership Is*, *L.A. TIMES* (Oct. 18, 2017), *available at* <http://www.latimes.com/opinion/editorials/la-ed-mccain-trump-nationalism-20171018-story.html> (last visited Oct. 29, 2018) (quoting Senator John McCain, that:

[t]he international order we helped build from the ashes of world war, and that we defend to this day, has liberated more people from tyranny and poverty than ever before in history . . . To fear the world we have organized and led for three-quarters of a century, to abandon the ideals we have advanced around the globe, to refuse the obligations of international leadership and our duty to remain the last best hope of Earth for the sake of some half-baked, spurious nationalism cooked up by people who would rather find scapegoats than solve problems is as unpatriotic as an attachment to any other tired dogma of the past that Americans consigned to the ash heap of history . . . We have a moral obligation to continue in our just cause, and we would bring more than shame on ourselves if we don't, [for] [w]e will not thrive in a world where our leadership and ideals are absent. We wouldn't deserve to.)

21. *See* Hal Brands, *Paradoxes of the Gray Zone*, *FOR. POL'Y RES. INST.* (Feb. 5, 2016), *available at* <https://www.fpri.org/article/2016/02/paradoxes-gray-zone/> (last visited Oct. 29, 2018); *see also* MICHAEL J. MAZARR, *Thinking about Gray Zone Conflict* 5 (on file with the author) [hereinafter *MAZARR*]; MICHAEL J. MAZARR, *MASTERING THE GRAY ZONE: UNDERSTANDING A CHANGING ERA IN CONFLICT* 79-101 (2015) [hereinafter *MAZARR, MASTERING THE GRAY ZONE*]; Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 *YALE J. INT'L L. ONLINE* 1, 1-21 (2017) (analyzing the 2016 Russian hack into the DNC through the lens of gray zone conflict).

22. *See* Richard Sisk, *Here's What the Military Gets in \$1.3 Trillion Omnibus Spending Bill*, *MILITARY* (Mar. 22, 2018), *available at*

American military resources, while substantial, are not infinite, and as such may not be available to support this renewed focus on state rivals if they are required to remain fully engaged in ongoing counter-terror operations at the same time. Part II continues by noting that since approximately 1980, America has steadily pulled back from the international order it helped create after WWII, with itself at the center, and provides examples of this withdrawal to highlight the point. Part II concludes by examining the general concept of the gray zone of international rivalry and conflict.

Part III, the crux of this paper, first analyzes China's activities in the South China Sea as within the burgeoning understanding of gray zone actions and then reviews Russia's interference in the 2016 American elections as another threatening gray zone tactic. Part IV concludes the paper by recommending certain specific actions to address these two Chinese and Russian gray zone threats.

II. Background

A. Is It Truly the End of the "War on Terror?"

The status of ongoing U.S. actions in both Syria and Afghanistan indicate that the NDS' dismissal of the threat posed by terror may be incorrect. The terror attacks launched by Al Qaeda against the United States on September 11, 2001²³ ushered in an era of deployed expeditionary U.S. military forces waging a "war on terror" that continues through today, with American armed forces conducting operations and fighting in Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen,²⁴ and increasingly throughout large parts of Africa.²⁵

<https://www.military.com/daily-news/2018/03/22/heres-what-military-gets-13-trillion-omnibus-spending-bill.html> (last visited Oct. 29, 2018) (describing the nearly \$700 billion in new equipment, projects, and gear for the DoD included within the recent \$1.3 trillion omnibus spending bill). Much, but not all, of the defense spending is geared towards major weapons systems like capital ships and fighter jets more suited to address great power rivalry, rather than counter-terror operations. *Id.*

23. See 9/11 REPORT, *supra* note 5.

24. See WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 6-10 (2016), available at https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf (last visited Oct. 28, 2018) (providing the domestic and international legal support for continued U.S. military and counter-terror operations in certain locations overseas).

25. See Dan Lamonthe, *Pentagon Adds Niger, Mali and Parts of Cameroon to Areas Where U.S. Troops Receive Imminent Danger Pay*, WASH. POST (Mar. 8, 2018), available at <https://www.washingtonpost.com/news/check-point/wp/2018/03/08/pentagon-adds-niger-mali-and-parts-of-cameroon-to-areas->

In a recent speech, however, at Johns Hopkins University, which marked the release of the 2018 NDS, Secretary of Defense James Mattis stated, “[w]e will continue to prosecute the campaign against terrorists, but great-power competition—not terrorism—is now the primary focus on U.S. national security.”²⁶ The United States has not been the victim of an organized terror operation near the same extent as the 9/11 attacks.²⁷ But does such a pivot away from terrorism make sense given the state of the world today? In addressing this question, it is reasonable to examine the state of international terror in general, and America’s “War on Terror” in two specific theatres—Syria and Afghanistan.

To start, “[t]he number of people dying in terrorist attacks is dropping.”²⁸ “In 2017, militants conducted 22,487 attacks worldwide, down 7.1 percent from 24,202 in 2016.”²⁹ Most striking was a 45 percent

where-u-s-troops-receive-imminent-danger-pay/?utm_term=.6f58ca6ba6c6 (last visited Oct. 28, 2018) (noting that U.S. military personnel are now receiving hazardous duty pay to assist West African allies in dealing with “militants who have rebranded themselves as Islamic State-West Africa” joining “Al-Qaeda in the Islamic Maghreb (AQIM),” which itself recently rebranded); see also Dionne Searcey & Eric Schmitt, *In Niger, Where U.S. Troops Died, A Lawless and Shifting Landscape*, N.Y. TIMES (Oct. 29, 2017), available at <https://www.nytimes.com/2017/10/29/world/africa/niger-ambush-isis.html> (last visited Oct. 28, 2018) (reporting on a battle involving U.S. special forces that resulted in the deaths of four U.S. Army members and noting that there were 800 U.S. service members in Niger and approximately 6,000 spread throughout the African continent).

26. Dan Lamonthe, *Mattis Unveils New Strategy Focused on Russia and China, Takes Congress to Task for Budget Impasse*, WASH. POST (Jan. 19, 2018), available at https://www.washingtonpost.com/news/checkpoint/wp/2018/01/19/mattis-calls-for-urgent-change-to-counter-russia-and-china-in-new-pentagon-strategy/?utm_term=.22c922a3d3ff (last visited Oct. 28, 2018).

27. See Ashley Halsey III, *As Terrorists Turn to “Lone Wolf” Attacks, TSA Adjusts Its Tactics*, WASH. POST (Mar. 7, 2018), available at https://www.washingtonpost.com/local/trafficandcommuting/as-terrorists-turn-to-lone-wolf-attacks-tsa-adjusts-its-tactics/2018/03/06/555f74bc-213c-11e8-94da-ebf9d112159c_story.html?utm_term=.f2b03ea4c180 (last visited Oct. 28, 2018). “The face of terrorism has evolved from the coordinated, carefully plotted events of 9/11 to a helter-skelter approach where lone wolves use low-tech means to attack soft targets.” *Id.*

28. Amanda Erickson & Laris Karklis, *Every 2017 Terrorist Attack, Mapped*, WASH. POST (Jan. 18, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/18/every-2017-terrorist-attack-mapped/?utm_term=.a44fe435f41 (last visited Oct. 28, 2018); see also Adam Taylor, *Terrorist Attacks Are Quietly Declining Around the World*, WASH. POST (Aug. 15, 2018), available at https://www.washingtonpost.com/world/2018/08/15/terrorist-attacks-are-quietly-declining-around-world/?utm_term=.2081ee3e9c59 (last visited Oct. 28, 2018).

29. Matthew Henman, *Global Militant Attacks Caused Fewer Fatalities*, IHS MARKIT (Jan. 18, 2018), available at

decrease in the average annual rate of non-militant fatalities over the past five years.³⁰ The ongoing, confused, and multi-lateral conflict in Syria accounted for a large portion of attacks, representing “more than one-third of all attacks worldwide—almost surpassing the five next most violent countries in total attacks.”³¹ But, of particular note to the United States, where a citizen is more likely to perish in a lawnmower accident incident than an Islamist terror attack,³² attacks in Iraq “fell by more than one-third and fatalities by almost two-thirds.”³³

Despite gains in Iraq, the conflict in neighboring Syria shows no signs of slowing anytime soon. The Islamic State, despite being stripped of major territorial holdings, will in the next few years attempt to “re-group . . . and maintain its operational threat through a combination of low-level insurgent operations and periodic asymmetric mass-casualty attacks . . . [while] continu[ing] to export its supporters worldwide to continue to launch attacks in their home countries.”³⁴ As a result, “Syria now looks like the latest chapter in [an American] war on terror, that has lasted nearly 17 years—starting in Afghanistan and spreading to Iraq, Pakistan, and many other countries—and that shows no signs of stopping.”³⁵ An

analysis/global-militant-attacks-caused-fewer-fatalities-in-2017.html (last visited Oct. 28, 2018) (reporting on Jane’s Terrorism and Insurgency Centre’s Global Attack Index report of 2017, which “uses open source data to build a global database of politically—and ideologically—motivated violence by non-state armed groups and individuals, archived to 1997”).

30. *Id.*

31. *Id.*

32. Taylor, *supra* note 4.

33. Henman, *supra* note 29; see also Susannah George & Qassim Abudul-Zhara, *With ISIS in Iraq Defeated, the US Military Is Beginning to Draw Down From Baghdad*, BUS. INSIDER (Feb. 5, 2018), available at <https://www.businessinsider.com/with-isis-in-iraq-defeated-the-us-military-is-beginning-to-draw-down-from-baghdad-2018-2> (last visited Oct. 28, 2018) (noting that U.S. forces are shifting out of Iraq, because due to their efforts in cooperation with Iraqi security forces, the Islamic State’s “self-styled caliphate stretching across Iraq and Syria has crumbled . . . [with] militants no longer hold[ing] a contiguous stretch of territory”).

34. Henman, *supra* note 29.

35. Adam Taylor, *Quicksand: American’s Forever War Is Expanding, Again*, WASH. POST (Jan. 19, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/01/19/americas-forever-war-is-expanding-again/?utm_term=.4a2495aa3b92 (last visited Oct. 28, 2018). Compare Karen DeYoung & Shane Harris, *Trump Instructs Military to Begin Planning for Withdrawal From Syria*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/trump-instructs-military-to-begin-planning-for-withdrawal-from-syria/2018/04/04/1039f420-3811-11e8-8fd2-49fe3c675a89_story.html?utm_term=.6d08b2ea54e8 (last visited Oct. 28, 2018) (“President Trump has instructed military leaders to withdraw U.S. troops from Syria as soon as possible.”), with Karen DeYoung & Missy Ryan, *As Trump Talks*

in depth discussion of the ins and outs of the conflict in Syria exceeds the scope of this paper and merits its own independent academic discussion. In sum, though, many believe that while “[t]he war against the Islamic State in Syria and Iraq has actually been one of the brighter spots . . . [through use of] [f]requent coalition airstrikes . . . [that] helped dismantle [ISIS’] self-proclaimed caliphate . . . it [remains] unclear whether the Islamic State can be conclusively defeated any more than the Taliban can.”³⁶

As for the Taliban, the Trump administration certainly seems willing to try to hand them defeat, and as such announced its intention to increase the American military footprint in Afghanistan in late 2017.³⁷ “Part of the plan is to deploy more American troops to Afghanistan to continue to train Afghan forces there, with the goal of convincing the Taliban—which has . . . gained substantial ground . . . that they could not win on the battlefield.”³⁸ “In practical terms, it means the American military mission [in Afghanistan] will [likely] continue for many more years, despite its unpopularity with the American public.”³⁹ “The Trump administration says [its Afghanistan strategy is focused on] escalating pressure on the Taliban to advance a negotiated solution to the fighting.”⁴⁰ This renewed focus on active fighting in Afghanistan is, however, hardly consistent with a renewed focus on traditional rivals such as China and Russia, as eluded to by General Mattis.

So, even with the trend away from complex, organized September 11, 2001-type attacks and despite the general drop in terror fatalities and

of Leaving Syria, His Top Commander in the Middle East Emphasizes the Need to Stay, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/as-trump-talks-of-leaving-syria-his-top-commander-in-the-middle-east-emphasizes-the-need-to-stay/2018/04/03/2ccdcff8-3753-11e8-8fd2-49fe3c675a89_story.html?utm_term=.509699bcfedb (last visited Oct. 28, 2018).

36. Taylor, *supra* note 35.

37. See Julie H. Davis & Mark Landler, *Trump Outlines New Afghanistan War Strategy with Few Details*, N.Y. TIMES (Aug. 21, 2017), available at <https://www.nytimes.com/2017/08/21/world/asia/afghanistan-troops-trump.html> (last visited Oct. 28, 2018).

38. *Id.*

39. Rob Nordland, *U.S. Expands Kabul Security Zone, Digging in for Next Decade*, N.Y. TIMES (Sept. 16, 2017), available at <https://www.nytimes.com/2017/09/16/world/asia/kabul-green-zone-afghanistan.html?action=click&contentCollection=Asia%20Pacific&module=RelatedCoverage®ion=EndOfArticle&pgtype=article> (last visited Oct. 28, 2018).

40. Matthew Pennington, *US, Afghan Leaders Agree on Peace Push, Taliban Don't*, AP NEWS (Mar. 4, 2018), available at <https://www.apnews.com/1eeb3ce17028472aa92b95e1af73e70a> (last visited Dec. 23, 2018).

attacks over the last year,⁴¹ given the highly dynamic and seemingly ever-changing battlefield and political considerations, it certainly appears unlikely that America will be able to choose to suspend its current heavily militarily-dependent, counter-terror operations in any real or meaningful way, anytime soon.

Syria, still a hotbed of terror activity,⁴² remains a tangled, Gordian knot⁴³ where the existing regime, supported by both Iran and Russia,⁴⁴

41. See Erickson & Karklis, *supra* note 28; see also Henman, *supra* note 29.

42. See Henman, *supra* note 29.

43. See Max Fisher, *Straightforward Answers to Basic Questions About Syria's War*, N.Y. TIMES (Sept. 18, 2016), available at <https://www.nytimes.com/2016/09/19/world/middleeast/syria-civil-war-bashar-al-assad-refugees-islamic-state.html?mtref=www.google.com> (last visited Oct. 28, 2018) (tracing the history of the ongoing Syria conflict); see also Kathy Gilsinan, *The Confused Person's Guide to the Syrian Civil War*, THE ATLANTIC (Oct. 29, 2015), available at <https://www.theatlantic.com/international/archive/2015/10/syrian-civil-war-guide-isis/410746/> (last visited Oct. 28, 2018); Andrew Tabler, *How Syria Came to This*, THE ATLANTIC (Apr. 15, 2018), available at <https://www.theatlantic.com/international/archive/2018/04/syria-chemical-weapons/558065/> (last visited Oct. 28, 2018).

44. See Tabler, *supra* note 43; see also Thomas Gibbons-Neff, Jeremy White, & David Botti, *The U.S. Has Troops in Syria; So Do the Russians and Iranians—Here's Where*, N.Y. TIMES (Apr. 11, 2018), available at <https://www.nytimes.com/interactive/2018/04/11/world/middleeast/syria-military-us-russia-iran.html> (last visited Oct. 29, 2018) (providing a detailed explanation of the Syrian battle lines and territory “controlled” by each faction fighting in Syria); see also Ivan Nechepurenko, Neil MacFarquhar, & Thomas Gibbons-Neff, *Dozens of Russians Are Believed Killed in U.S.-Backed Syria Attack*, N.Y. TIMES (Feb. 13, 2018), available at <https://www.nytimes.com/2018/02/13/world/europe/russia-syria-dead.html> (last visited Oct. 29, 2018); David Brennan, *New Russian SU-57 Stealth Jets Deployed to Syria Despite Putin Promise of Drawdown*, NEWSWEEK (Feb. 23, 2018), available at <http://www.newsweek.com/new-russian-su-57-stealth-jets-deployed-syria-despite-putin-promise-drawdown-817573> (last visited Oct. 29, 2018).

has committed,⁴⁵ and continues to commit,⁴⁶ atrocious human rights violations against its population, while at the same time is either “unwilling or unable” to prevent cross-border terror attacks launched by ISIS into Iraq.⁴⁷ At the request of Iraq, the United States provided ground advisors,⁴⁸ and continues to provide critical air support,⁴⁹ in operations

45. See, e.g., Sarah Almukhtar, *Most Chemical Attacks in Syria Get Little Attention; Here are 34 Confirmed Cases*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/interactive/2018/04/13/world/middleeast/syria-chemical-attacks-maps-history.html> (last visited Oct. 29, 2018) (stating that “[t]he Independent International Commission of Inquiry on the Syrian Arab Republic says it has confirmed at least 34 chemical attacks since 2013, many of which it said used chlorine or sarin, a nerve agent, and were conducted by the Syrian government.”); see also Rick Gladstone, *U.S. Says Syria Has Used Chemical Weapons at Least 50 Times During War*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/2018/04/13/world/middleeast/un-syria-haley-chemical-weapons.html> (last visited Oct. 29, 2018) (providing the history of the Assad regime’s use of chemical weapons during the current conflict in Syria, stating:

[I]t’s be clear: Assad’s most recent use of poison gas against the people of Douma was not his first, second, or third, or even 49th use of chemical weapons . . . The United States estimates that Assad has used chemical weapons in the Syrian war at least 50 times. Public estimates are as high as 200.);

see generally Derek Chollet, *Obama’s Red Line, Revisited*, POLITICO (July 19, 2016), available at <https://www.politico.com/magazine/story/2016/07/obama-syria-foreign-policy-red-line-revisited-214059> (last visited Oct. 29, 2018) (stating that “[i]n August 2013, the Syrian military] attacked rebel-controlled areas of the Damascus suburbs with chemical weapons, killing nearly 1,500 civilians, including more than 400 children.”).

46. See Daniel Brown, *A Compelling Theory Explains the Latest Chemical Attack in Syria—And It Looks Like Assad Got What He Wanted*, BUS. INSIDER (Apr. 9, 2018), available at <http://www.businessinsider.com/why-assad-probably-used-chemical-weapons-syria-2018-4> (last visited Oct. 29, 2018) (explaining how Assad regime used chemical weapons against Jaysh al-Islam rebels in response to this rebel group resisting a Russian brokered cease-fire); see also Ben Hubbard, *Dozens Suffocate in Syria as Government Is Accused of Chemical Attack*, N.Y. TIMES (Apr. 8, 2018), available at <https://www.nytimes.com/2018/04/08/world/middleeast/syria-chemical-attack-ghouta.html> (last visited Oct. 29, 2018).

47. See Benjamin Wittes, *State Department Legal Adviser Egan’s Speech at ASIL*, LAWFARE, (Apr. 8, 2016), available at <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil> (last visited Oct. 29, 2018) (providing legal analysis of U.S. activity in Syria); see also Letter from Charles Faulkner, Bureau of Legis. Aff., U.S. Dep’t of St., to Bob Corker, Chairman of the Senate Comm. on For. Rel. (Aug. 2, 2017) available at <https://www.politico.com/f/?id=0000015d-a3bf-d43a-a3dd-b3bf14170000> (last visited Oct. 29, 2018).

48. See Nechepurenko, MacFarquhar, & Gibbons-Neff, *supra* note 44.

49. See *id.*; see also Madeline Conway, *Timeline: U.S. Approach to the Syrian Civil War*, POLITICO (Apr. 7, 2017), available at <https://www.politico.com/story/2017/04/timeline-united-states-response-syria-civil-war-237011> (last visited Oct. 29, 2018).

intended to destroy ISIS' abilities to fight its way into Iraq, deny ISIS its desired territorial holdings, and defend U.S. and coalition forces.⁵⁰ While in theatre, U.S. forces also provide support to anti-Assad forces, or at least "certain rebels, providing [them with] arms and training,"⁵¹ which brings with it the risk of expanding the conflict into an international armed conflict between the United States and Syria.⁵² Such a change in the character of the conflict could have grave consequences considering the close relationship between the Assad regime and Russia.⁵³

50. See Tim Lister, *What Does ISIS Really Want?*, CNN (Dec. 11, 2015), available at <https://www.cnn.com/2015/12/11/middleeast/isis-syria-iraq-caliphate/index.html> (last visited Oct. 29, 2018); see also Gibbons-Neff, White, & Botti, *supra* note 44.

51. Gilsinan, *supra* note 43.

52. See, e.g., Liz Sly & Erin Cunningham, *Regional Tensions Soar in Syria as Trump Threatens to Strike and Iranians Die in an Attack*, WASH. POST (Apr. 10, 2018), available at https://www.washingtonpost.com/world/middle_east/syria-says-strike-on-military-base-carried-out-by-israeli-war-planes/2018/04/09/4179f3a2-2864-46ec-9b35-fef7c4eaf247_story.html?utm_term=.20b446ea0b49 (last visited Oct. 29, 2018); see generally Tess Bridgeman, *About That "Deconfliction Zone in Syria: Is the United States on Firm Domestic and International Legal Footing?*, JUST SEC. (June 15, 2017), available at <https://www.justsecurity.org/42183/deconfliction-zone-syria-united-states-firm-domestic-international-legal-footing/> (last visited Oct. 29, 2018) (noting that:

[t]he more the ongoing conflicts in Syria overlap in geography, in the actors participating, and importantly, in the territorial or other strategic aims of those actors, the harder it will be for the U.S. military to maintain the line operationally between participating in one [conflict] (against ISIL) while generally avoiding the other (against Assad and his allies [in particular, Russia]).

53. See, e.g., Zachery Cohen & Kevin Liptak, *US, UK and France Launch Syria Strikes Targeting Assad's Chemical Weapons*, CNN (Apr. 14, 2018), available at <https://www.cnn.com/2018/04/13/politics/trump-us-syria/index.html> (last visited Oct. 29, 2018) (providing an overview of the recent joint missile strike by the United States, United Kingdom, and France against the Assad regime's chemical weapons territory in response to a chemical weapon attack attributed to the regime earlier in the week); see also Ray Sanchez & Laura Smith-Spark, *After Syrian Airstrikes Comes Finger-Pointing and Condemnation*, CNN (Apr. 14, 2018), available at <https://www.cnn.com/2018/04/14/politics/syria-strikes-russia-us-response-intl/index.html> (last visited Oct. 29, 2018); Missy Ryan & Paul Sonne, *Broad Attack on Syria Would Face Risk From Air Defenses, Escalation With Russia*, WASH. POST (Apr. 12, 2018), available at https://www.washingtonpost.com/world/national-security/broad-attack-on-syria-would-face-risk-from-air-defenses-escalation-with-russia/2018/04/11/f14e9a96-3db2-11e8-974f-aacd97698cef_story.html?utm_term=.1736e9b918ad (last visited Oct. 29, 2018) (reporting on the increasing tensions between the United States and Russian-backed Syria, as President Trump decides how to respond to the Assad regime's most recent use of chemical weapons against Syrian rebel forces); Anton Troianovski, *Kremlin Backers Warn of Threat of War With U.S. as Syria Tensions Rise*, WASH. POST (Apr.

In Afghanistan, America's "longest war," despite routing Al Qaeda, the Taliban remains a viable adversary to the Afghan government, apparently with the capacity of mounting attacks, even in the country's most secure areas.⁵⁴ In February 2018, the Taliban issued a letter "to the American people" looking "to solve the Afghan issue through peaceful dialogue" and talks with Washington.⁵⁵ Yet, this contradicts the longstanding American position, which pushes any discussion of peace talks towards the Afghan government for resolution.⁵⁶ "U.S. officials . . .

10, 2018), available at https://www.washingtonpost.com/world/russia-backers-warn-of-threat-of-war-with-us-as-syria-tensions-rise/2018/04/10/3a5fb4ec-3cbc-11e8-912d-16c9e9b37800_story.html?utm_term=.12c0cd3d36ed (last visited Oct. 29, 2018); Alex Lockie, *Russia Says the US Is About to Strike Syria—And That It Will Strike Back*, BUS. INSIDER (Mar. 13, 2018), available at <http://www.businessinsider.com/russia-us-syria-attack-2018-3> (last visited Oct. 29, 2018); Tom O'Connor, *Russia Says It Will Attack U.S. Military If Trump Strikes Syria Again*, NEWSWEEK (Mar. 3, 2018), available at <http://www.newsweek.com/russia-threatens-attack-us-forces-if-trump-strikes-syria-again-843128> (last visited Oct. 29, 2018). *But see* Anton Troianovski, *Russia Responds to Airstrikes in Syria With Harsh Words but No Fire*, WASH. POST (Apr. 14, 2018), available at https://www.washingtonpost.com/world/russia-responds-to-airstrike-with-harsh-words-but-no-fire/2018/04/14/a02ce438-3f97-11e8-955b-7d2e19b79966_story.html?utm_term=.197ff124e31e (last visited Oct. 29, 2018) (reporting that the Russian response to the most recent instance of America's, with the assistance of Great Britain and France, retributive strike against the Assad regime's use of chemical weapons in Syria has been limited to rhetoric).

54. See Dan Lamonthe, *Inside the Marines' New Mission in Afghanistan: Tackling Back Territory Previously Won*, WASH. POST (Apr. 16, 2018), available at https://www.washingtonpost.com/world/asia_pacific/inside-the-marines-new-mission-in-afghanistan-taking-back-territory-previously-won/2018/04/15/a91d4668-382c-11e8-af3c-2123715f78df_story.html?utm_term=.6601e4bed048 (last visited Oct. 29, 2018) [hereinafter Lamonthe, *Inside the Marines' New Mission in Afghanistan*]; see also Dan Lamonthe, "The Taliban is in the City:" *Secretive Raids With U.S. Forces Launched to Stop Kabul Attacks*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/news/checkpoint/wp/2018/03/14/the-taliban-is-in-the-city-secretive-raids-by-u-s-forces-among-the-options-used-to-stop-attacks-in-kabul/?utm_term=.08dd90fd998c (last visited Oct. 29, 2018) (reporting that the Taliban is active in Kabul and that the United States is assisting Afghan security forces in dealing with them); Amir Shah, *An Explosion in Afghanistan's Capital Has Killed a Young Girl and Wounded Six Others*, TIME (Mar. 2, 2018), available at <http://time.com/5182429/kabul-explosion-kills-one/> (last visited Oct. 29, 2018) (stating that "Kabul has recently seen a spate of large-scale militant attacks by the Taliban and also the Islamic State group, whose affiliate in Afghanistan has grown stronger since it emerged in 2014.").

55. *Taliban Addresses "the American People" in Rambling Letter*, CBS NEWS (Feb. 14, 2018), available at <https://www.cbsnews.com/news/rambling-taliban-letter-addresses-the-american-people/> (last visited Dec. 23, 2018).

56. See Lamonthe, *Inside the Marines' New Mission in Afghanistan*, *supra* note 54 ("U.S. commanders say that the most likely path to declaring victory is reaching

conveyed messages to Taliban political representatives in Qatar, urging the group to join talks with the Afghan government,” who later extended a peace offer in late February and early March of 2018.⁵⁷ Despite their own February letter, however, the Taliban have since rebuffed this offer from the Afghan government.⁵⁸

Thus, if Syria and Afghanistan remain active fronts on America’s war on terror—and leaving aside for the moment less active locations of deployed American troops in advisory roles—⁵⁹ it seems as if a major policy shift away from non-state actor focused, counter-terror operations and towards addressing state rivals may be a bit premature. This is due to the fact that American forces are still very much fully engaged in the fight against terror in both Syria and Afghanistan. Therefore, where should the United States look to make up the difference between the hard power it has and the hard power it needs to simultaneously fight the war on terror and pivot to address the great power threats of Russia and China?

B. America’s Retreat From International Leadership

Next, if the 2018 NDS includes global instability as a justification for change in national focus towards countering great power rivalries, it is important to consider the status of America’s own posture in the international community over the course of the last several decades to get a better sense of how China and Russia became resurgent state rivals.⁶⁰ Indeed, attempting to actually apply international legal structures to

a political settlement with the Taliban.”); see also *Taliban Addresses “the American People” in Rambling Letter*, *supra* note 55.

57. See Pennington, *supra* note 40.

58. *Id.*

59. See Searcey & Schmitt, *supra* note 25.

60. Cf. 2018 NDS SUMMARY, *supra* note 1 at 2; Karl Vick, *Donald Trump Is Turning Davos Into a Globalist Throwdown*, TIME (Jan. 25, 2018), available at <http://time.com/5118046/donald-trump-davos/> (last visited Oct. 29, 2018). See generally Roger Cohen, *Trump’s World and the Retreat of Shame*, N.Y. TIMES (Mar. 9, 2018), available at <https://www.nytimes.com/2018/03/09/opinion/trump-despots-human-rights.html?ref=collection%2Fcolumn%2FRoger%20Cohen&action=click&contentCollection=Opinion&module=Collection®ion=Marginalia&src=me&version=column&pgtype=article> (last visited Oct. 29, 2018) (stating that:

France and Britain convene an emergency meeting of the Security Council and press for enforcement of last month’s Resolution 2401, calling for an immediate cessation of hostilities [in Eastern Ghouta, a suburb of Damascus, the last rebel-held enclave close to the Syrian capital]. In this effort, the United States is nowhere, silent, AWOL, as President Vladimir Putin and his Syrian sidekick do their worst. The message to Moscow is clear: . . . America does not care about Syria, or war crimes, or human rights. Russian cynicism and American absence produce disaster.).

American activities these days is admittedly often a subject with little practical effect outside the realm of academia.⁶¹ There are many reasons for this, including:⁶² (1) that as a general proposition, international legal paradigms often lack enforcement mechanisms;⁶³ (2) the United States' general trend away from being strictly bound by international law and treaties, and its habit of attaching Reservations, Understandings, and Declarations (RUDs) in part ostensibly to account for the nuances of the American governmental system;⁶⁴ (3) the tendency of American courts to read international legal obligations narrowly;⁶⁵ (4) America's reluctance to be subject to international institutions;⁶⁶ (5) general Federalism concerns;⁶⁷ and (6) an apparently persistent belief in American exceptionalism both with regard to America's place in the world order⁶⁸ and in

61. See, e.g., John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 15 (2000) (arguing that international law is not really "law").

62. See, e.g., Sean D. Murphy, *The United States and The International Court of Justice: Coping With Antinomies*, 291 *U.S. & INT'L CTS. & TRIBUNALS*, 1, 1-3 (2008) (describing the inevitable tensions of American interaction within the international sphere, specifically the United States' relationship with the ICJ).

63. But see Frederic L. Kirgis, *Enforcing International Law*, 1 *AM. SOC'Y OF INT'L L.* (1996), available at <https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law> (last visited Oct. 29, 2018).

64. See Willem van Genugten, *The United States' Reservations to the ICCPR: International Law Versus God's Own Constitution*, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY* 35-46 (Monique Castermans-Holleman et al. eds., 1998) (describing the history of the United States' reservations to the International Convention on Civil and Political Rights (ICCPR)); see also M.S., *Why the Sheriff Should Follow the Law*, *THE ECONOMIST* (May 23, 2017), available at <https://www.economist.com/blogs/democracyinamerica/2014/05/america-and-international-law> (last visited Oct. 29, 2018).

65. E.g., *Sale v. Haitian Ctr. Council Inc.*, 509 U.S. 155, 182 (1993).

66. See Ben Cardin, *The South China Sea Is the Reason the United States Must Ratify UNCLOS*, *FOR. POL'Y* (July 13, 2016), available at <http://foreignpolicy.com/2016/07/13/the-south-china-sea-is-the-reason-the-united-states-must-ratify-unclos/> (last visited Oct. 29, 2018); see also Harold Hongju Koh et al., *Trump's So-Called Withdrawal From Paris: Far From Over*, *JUST SEC.* (June 2, 2017), available at <https://www.justsecurity.org/41612/trumps-so-called-withdrawal-paris/> (last visited Oct. 29, 2018) (describing President Bush's act of "unsigned" the Rome Statute compared to President Trump's attempt to withdraw from the Paris climate accords).

67. See generally *Medellin v. Texas*, 552 U.S. 491 (2008) (holding that only self-executing treaties or treaties that are implemented via statute are enforceable as the law of the land in the United States).

68. See generally Harold H. Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003).

matters that pertain to the application of constitutional law in American affairs.⁶⁹

This current state of affairs, which can fairly be described as an American withdrawal from the international world order,⁷⁰ is likely a far different outcome than what that world order's architects had in mind. After the end of World War II until around 1980, U.S. presidents of both parties "midwived international institutions that gave every nation a stake in keeping peaceful and stable a world that had America at its center."⁷¹ So, what changed?

In answering this question, it is helpful to look at American international relationships by examining two actions: (1) America's refusal to ratify the United Nations Convention on the Law of the Sea ("UNCLOS"),⁷² and (2) the American Reservations, Understandings, and Declarations attached to the International Convention on Civil and Political Rights ("ICCPR"). This is not to say that there are no other ways to examine this issue but, strategically, the U.S. treatment of UNCLOS and the ICCPR, in particular, signals to the international community that the United States is less interested than it should be in international leadership; thus, creating a vacuum for others to fill. Tactically, the United States' stance on these two international instruments weakens its position in trying to counter both the rising dragon of China and the dying bear of Russia.

1. America's Persistent Refusal to Sign and Ratify UNCLOS

"The United Nations Convention on the Law of the Sea [UNCLOS] is a comprehensive attempt to deal with a wide variety of issues concerning the high seas and territorial and coastal areas including ownership,

69. See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1 (2010) (denying petition for rehearing en banc to determine the role of international law-of-war principles in interpreting AUMF). "The idea that international norms hang over domestic law as a corrective force to be implemented by courts is not only alien to our case law, but an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers." *Id.* at 4 (Brown, J., concurring). "[I]nternational norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts . . ." *Id.* at 6.

70. See Stewart M. Patrick, *China and Trump May Bury the Liberal International Order*, DEF. ONE (Mar. 25, 2018), available at <http://www.defense-one.com/ideas/2018/03/china-and-trump-threaten-bury-liberal-international-order/146937/?oref=acemail> (last visited Oct. 31, 2018) (noting that "[t]he United States, for its part, is a weary titan, no longer willing to bear the burdens of global leadership, either economically or geopolitically.").

71. Vick, *supra* note 60.

72. See generally U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

resource exploitation, and passage rights.”⁷³ “After more than a decade of detailed and intense international discussions, UNCLOS codified the existing rules of the sea and adopted them on December 12, 1982.”⁷⁴ The convention entered into force in 1994 and, as of this writing, 168 nations, including both Russia and China, ratified or acceded to its terms.⁷⁵

“Today, [UNCLOS] is the globally recognized regime dealing with all matters relating to the law of the sea.”⁷⁶ It includes provisions that codify, articulate, or clarify the international law on territorial limitations, navigational rights, establishment of exclusive economic zones, provisions on extracting resources from the continental shelf, and governs the protection of marine life, amongst many other subjects.⁷⁷ Furthermore, it includes a powerful dispute resolution provision at article 286.⁷⁸ UNCLOS’ requirement that “its parties consent to arbitration or [the peaceful] adjudication of all disputes concerning the interpretation of application of the Convention” is an extraordinary provision which counters the default international norm of requiring state consent to arbitration.⁷⁹ The provision’s champions, led by an American, intended this “compulsory and binding” dispute resolution mechanism as a means of “promoting stability and discouraging unilateralism.”⁸⁰ Importantly though, this binding arbitration provision allows States to exempt their militaries from its reach.⁸¹

73. Jay M. Zitter, Annotation, *Construction and Application of United Nations Convention on the Law of the Sea—Global Cases*, 21 A.L.R. Fed. 2d 109 (2007).

74. Sean Patrick Mahard, *Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea*, 47 VAND. J. TRANSNAT’L L. 331, 343 (2014).

75. See *United Nations Convention on the Law of the Sea of 10 December 1982: Overview and Full Text*, U.N.: OCEANS & L. OF THE SEA (Mar. 28, 2018), available at http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (last visited Nov. 1, 2018) (providing a “table of ratifications/accessions, etc. (pdf format)” which shows how many States have ratified or acceded to the Treaty’s terms).

76. *Id.*

77. Maggie Goodlander, *Is the United States Ready to Approve the Law of the Sea Treaty?*, COUNCIL ON FOR. REL. (July 19, 2007), available at <https://www.cfr.org/background/united-states-ready-approve-law-sea-treaty> (last visited Nov. 1, 2018).

78. See B.H. Oxman, *United States of America*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AT 30: REFLECTIONS 129 (2013).

79. *Id.*

80. *Id.*

81. Stewart M. Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC (June 10, 2012), available at <https://www.theatlantic.com/international/archive/2012/06/-almost-everyone->

Despite significant efforts by U.S. delegations in drafting the entire convention and several near misses at ratification,⁸² the United States neither signed⁸³ nor ratified UNCLOS⁸⁴ primarily because “[t]he United States, along with several other industrialized states, took issue with aspects of the treaty (Part XI) which dealt with deep seabed resources beyond national jurisdiction.”⁸⁵ The U.S. objection to the creation of the International Seabed Authority (“ISA”), which contained the potential to redistribute sea bed mining royalties, was addressed by a follow-up negotiation, again led by America, which resulted in a parallel agreement, the Agreement to the Implementation of Part XI,⁸⁶ that established a permanent U.S. seat on the ISA.⁸⁷ This seat has always been and still remains vacant. However, despite this follow up negotiation in which the United States essentially lobbied for and built in an ISA veto, the United States cannot claim its seat until it becomes a party to UNCLOS.⁸⁸ Traditional complaints that U.S. accession to UNCLOS would negatively impact U.S. sovereignty and security seemingly also prevented signature and ratification, despite both broad and deep bipartisan support from the Executive Branch and U.S. military over the last 30 years.⁸⁹

Today, the United States relies on President Reagan’s Oceans Policy Statement⁹⁰ and his National Security Decision Directive 83 as support

agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/ (last visited Nov. 1, 2018).

82. *See id.* (writing that the “United States was the principal force behind the negotiation of UNCLOS”).

83. *See Multilateral Treaties Deposited with the Secretary-General*, Ch. XXI: Law of the Sea, § 6, at 4 (2009), available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXI/XXI-6.en.pdf> (last visited Oct. 29, 2018) (showing that the United States has not signed UNCLOS).

84. Roncevert G. Almond, *U.S. Ratification of the Law of the Sea Convention*, THE DIPLOMAT (May 24, 2017), available at <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/> (last visited Nov. 1, 2018).

85. *Id.*

86. *See Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, U.N., available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last visited Nov. 1, 2018).

87. Patrick, *supra* note 81. *Cf.* Almond, *supra* note 84.

88. *See* Cardin, *supra* note 66; *see also* Goodlander, *supra* note 77.

89. *See* Glenn M. Sulmasey & Chris Tribolet, *The United Nations Convention on The Law of the Sea*, in NATIONAL SECURITY LAW IN THE NEWS: A GUIDE FOR JOURNALISTS, SCHOLARS AND POLICYMAKERS 145, 155-56 (Paul Rosenzweig et al. eds., 2012).

90. *See generally* *Statement on United States Oceans Policy*, AM. PRESIDENCY PROJECT, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=41036> (last visited Nov. 2, 2018) (providing President Reagan’s Oceans Policy Statement).

for the idea that, while not a party to UNCLOS, the United States considers the Treaty as reflective of the current state of customary international law as it relates to the law of the sea.⁹¹ “But custom and practice are far more malleable and subject to interpretation” than an actual treaty.⁹² Without U.S. accession to UNCLOS, and most importantly its direct participation in its deliberative bodies like the International Tribunal for the Law of the Sea (“ITLOS”), Commission on the Limits of the Continental Shelf, and the ISA,⁹³ “[o]ther states may soon push the Law of the Sea into new, antithetical directions” in spite of U.S. interests.⁹⁴

2. *Eviscerating the ICCPR Through Reservations, Understandings, and Declarations (“RUDs”)*

“The ICCPR is an early United Nations treaty which ‘guarantees a broad spectrum of civil and political rights.’”⁹⁵ “While many Americans are aware of endogenous civil and political rights stemming from the Bill of Rights and the Anglo-American legal tradition, many citizens may not realize that the United States is a party to the [ICCPR].”⁹⁶

The ICCPR grew out of the United Nations Commission on Human Rights, and “[o]n December 16, 1966, the United Nations General Assembly unanimously adopted the ICCPR.”⁹⁷ It entered into force on March 23, 1976 and enjoys broad acceptance, with 74 signatories and 168 parties.⁹⁸

President Carter signed the ICCPR on behalf of the United States in 1977 and the U.S. Senate ratified the ICCPR in 1992 to further two goals articulated by the Senate Committee on Foreign Relations: (1) a demonstrated commitment to protecting human rights; and (2) participation in the Human Rights Committee, so as to monitor global human rights

91. See Nat'l Sec. Decision Directive No. 83, *United States Oceans Policy: Law of the Sea and Exclusive Economic Zone (C)*, WHITE HOUSE (Mar. 10, 1983), available at <https://fas.org/irp/offdocs/nsdd/nsdd-83.pdf> (last visited Nov. 2, 2018).

92. Patrick, *supra* note 81.

93. See Almond, *supra* note 84.

94. Patrick, *supra* note 81.

95. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1, 1 (2005).

96. Timothy G. Joseph, *A Brief History of the International Covenant on Civil and Political Rights*, PENN STATE J. OF INT'L AFF. (Dec. 3, 2015), available at <http://sites.psu.edu/jlia/a-brief-history-of-the-international-covenant-on-civil-and-political-rights/> (last visited Oct. 28, 2018).

97. *Id.*

98. See *id.*

compliance.⁹⁹ In its ratification, the Senate attached “five reservations, five understandings, four declarations, and one proviso,” which essentially “rendered the treaty powerless under domestic law.”¹⁰⁰

The ICCPR in its natural state is broad and far reaching in scope.¹⁰¹ Among its enumerated rights are self-determination,¹⁰² right to life,¹⁰³ right to liberty and security of person,¹⁰⁴ right to compensation for unlawful detention,¹⁰⁵ freedom of thought, conscience, and religion,¹⁰⁶ freedom of opinion,¹⁰⁷ right to peacefully assemble,¹⁰⁸ right to freedom of association,¹⁰⁹ rights of the family,¹¹⁰ right to participate in the public process,¹¹¹ and equal protection under the law.^{112, 113}

The United States’ RUDs are categorized in four primary ways: (1) the preservation of distinctive Constitutional rights that exceed the protections of the ICCPR; (2) disagreements over defined terms, which may be discussed in existing U.S. statutes or the Constitution; (3) the idea that America sometimes supports the general concepts behind certain rights, but does not wish to be held to international standards pertaining to those rights; and (4) a double standard centered on American exceptionalism which results in the perception that different rules should apply for Americans as compared to those of the rest of the world.¹¹⁴

Of the four categories, it is most helpful for this paper to focus on the last two, both in the context of human rights treaties, like the ICCPR, and as general maxims that pertain to international relations. In reality, the two are closely related and can be simplified to one classification: the

99. Ash, *supra* note 95, at 1, 2.

100. *Id.* at 3, 11.

101. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited Oct. 23, 2018) [hereinafter ICCPR].

102. *Id.* art. 1.

103. *Id.* art. 6.

104. *Id.* arts. 9-11.

105. *Id.*

106. ICCPR, *supra* note 101, art. 18.

107. *Id.* art. 19.

108. *Id.* art. 21.

109. *Id.* art. 22.

110. *Id.* arts. 23-24.

111. ICCPR, *supra* note 101, art. 25.

112. *Id.* art. 26.

113. Ash, *supra* note 95, at 5.

114. *Id.* at 9-14.

American exceptionalism-driven double standard of international norm application and compliance.

“[T]he perception that the United States applies one standard to the world and another to itself sharply weakens America’s claim to lead globally through moral authority.”¹¹⁵ This is critically important as America is currently a global hegemon, whose “commitment to its allies . . . [as] a leader of a phalanx of nations all of which are committed to democracy and the rule of law . . . is key to [maintaining] its global hegemony” in the face of those revisionist nations, like Russia and China, who would challenge it.¹¹⁶ As discussed in a bit more detail below, America keeps this “phalanx” together largely through the administration of “soft power,” and as such, this double standard diminishes the United States’ ability to wield this key component of diplomacy.¹¹⁷ Further, “by opposing global rules, the United States can end up undermining the legitimacy of the rules themselves . . . at precisely the moment when it needs those rules to serve its own national purposes.”¹¹⁸

C. *Welcome to the Gray Zone*

Both China and Russia are masters of operating in the “gray zone” of statesmanship, and it is a combination of this mastery and the United States’ recognition of the effectiveness of these tactics that increased the visibility of the threat China and Russia pose to the United States.¹¹⁹

“Gray zone conflict is best understood as activity that is coercive and aggressive in nature, but that is deliberately designed to remain below the threshold of conventional military conflict and open interstate war.”¹²⁰ The state employing gray zone tactics often does so gradually by asymmetrically leveraging the full spectrum of tools of statecraft—military, economic, diplomatic, and informational.¹²¹ This purposefully gradual approach results in a series of relatively small gains that, while troublesome to the target state or perhaps the world, do not rise to such a sufficient level to either warrant or legally justify international or

115. Koh, *supra* note 68, at 1487.

116. Eric Engle, *Trump’s Foreign Policy: Realist Economic Nationalism*, 14 LOY. U. CHI. INT’L L. REV. 91, 117-18 (2016).

117. See Koh, *supra* note 68, at 1487.

118. *Id.*

119. See generally Brands, *supra* note 21; MAZARR, *supra* note 21; MAZARR, MASTERING THE GRAY ZONE, *supra* note 21; Schmitt, *supra* note 21.

120. Brands, *supra* note 21.

121. See MAZARR, *supra* note 21.

unilateral armed response.¹²² In short, States that employ gray zone tactics “eat away at the status quo one nibble at a time.”¹²³

Scholar Michael Mazarr suggests several characteristics of gray zone conflict, in that they are activities conducted by so-called revisionist states¹²⁴ challenging the existing world order through actions that: (1) pursue political objectives through cohesive integrated campaigns; (2) employ mostly nonmilitary or kinetic tools; (3) strive to remain under key escalatory or red line thresholds to avoid outright conventional conflict; and (4) move gradually toward its objectives rather than seeking conclusive results in a specific period of time.¹²⁵

“By acting in . . . grey [sic] zones [States] make it difficult for other States to definitively name and shame the [acting State] as having committed an internationally wrongful act.”¹²⁶ This problem is compounded in non-authoritarian Western, liberal democracies, who both tend to strongly adhere to the rule of law and have socio-political environments with characteristics like rival political parties that participate in fair elections, free speech often supercharged with far-reaching internet access, and relatively open borders that make asymmetric gray zone operations very tempting to employ for a revisionist state, looking to challenge the existing international order.¹²⁷

III. The Rising Dragon and the Dying Bear

A. *The Rising Dragon: Chinese Gray Zone Activities in the South China Sea*

1. *Factual Background*

“The complexity of maritime and territorial disputes in the South China Sea is nothing short of mind-numbing . . . [in that] [t]hey involve six countries—Brunei, China, Malaysia, the Philippines, Taiwan, and Vietnam—hundreds of tiny land features, and a body of international law

122. See Corri Zoli, *The Changing Role of Law in Security Governance: Post 9/11 “Gray Zones” and Strategic Impacts*, 67 SYRACUSE U. L. REV. 613, 622 (2017) (“[G]ray zone approaches achieve political gains without triggering formal response processes—or even recognition of the nature of such actions—and succeed in shielding conflict actors from the risks or costs that such escalation would usually bring.”).

123. Brands, *supra* note 21.

124. See *id.* (noting that revisionist States are “those actors that seek to modify some aspect of the existing international environment”).

125. MAZARR, *supra* note 21.

126. See Schmitt, *supra* note 21, at 2.

127. *Id.* at 3.

that is both contested and complicated to interpret.”¹²⁸ A fully detailed discussion exceeds the scope of this paper, as literally not just books, but volumes of books have been written on the subject.¹²⁹ For purposes here though, a brief factual synopsis, coupled with an overview of the relevant UNCLOS provisions, should suffice to tease out the issues at play.

As a threshold matter, “China, a party to UNCLOS, rejects U.S. interpretations of the treaty’s freedom of navigation provisions, and continues to assert outlandish claims to control over virtually the entire South China Sea.”¹³⁰ At its most basic, the thrust of the issue in the South China Sea revolves around Chinese maritime claims, which are no doubt grounded on a combination of factors, including that nation’s perception of historical claims,¹³¹ its need for access to potential living marine¹³² and natural resources,¹³³ and its desire to address regional security concerns.¹³⁴

In short, “[t]he Chinese have reached into their ancient past to justify the conversion of maritime frontiers, over which they had little control, into maritime borders over which they would [seek to] be able to exercise

128. Gregory B. Poling, *The South China Sea in Focus: Clarifying the Limits of Maritime Dispute*, CSIS (July 2013), available at https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/130717_Poling_South-ChinaSea_Web.pdf (last visited Oct. 30, 2018).

129. See *id.*; see generally THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES (Leszek Buszynski & Christopher B. Roberts, eds., 2015); NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA (2012); THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION OR CONFLICT-MAKING SOVEREIGNTY CLAIMS? (C.J. Jenner & Tran Truong Thuy, eds., 2016); NALANDRA ROY, THE SOUTH CHINA SEA DISPUTES: PAST, PRESENT, AND FUTURE (2016); MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES (Yann-juai Song & Keyuan Zou, eds., 2014); POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA (Tran Truong Thuy & Le Thuy Trang, eds., 2015); ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA (Shicun Wu & Keyuan Zou, eds., 2016).

130. Patrick, *supra* note 81; see also Emily Rauhala, *China to U.S.: It's Your Fault We Are in the South China Sea*, WASH. POST (Jan. 22, 2018), available at https://www.washingtonpost.com/world/china-to-us-its-your-fault-we-are-in-the-south-china-sea/2018/01/22/1bc25b72-ff3e-11e7-93f5-53a3a47824e8_story.html?utm_term=.f01958baf33b (last visited Oct. 29, 2018); Christina Zhao, *China Says “Reckless” U.S. to Blame for Military Buildup in South China Sea*, NEWSWEEK (Jan. 22, 2018), available at <http://www.newsweek.com/china-blasts-us-recklessly-making-trouble-and-threatens-more-military-build-786457> (last visited Oct. 29, 2018).

131. See HONG, *supra* note 129, at 62-71.

132. *Id.* at 71-74.

133. *Id.* at 74-78.

134. *Id.* at 78-82.

full sovereignty and control.”¹³⁵ Yet, “China’s attempt to cite ancient records as a basis for sovereignty over all the South China Sea finds little support in international law.”¹³⁶

Specifically, “[o]ne of the most difficult issues impacting upon sovereignty claims and disputes in the [South China Sea] is the ‘dotted’ or the ‘nine dotted line’ found on Chinese maps dating back to 1947.”¹³⁷ “[A]lso known as the ‘U-Shaped line’ . . . China[, at times], claims ownership and historic rights to islands, reefs, shoals, banks, and waters within the nine-dotted line.”¹³⁸ If China prevails in capitalizing on its assertion of the nine-dotted line marking the edge of its empire it would “extend its jurisdiction some one thousand nautical miles from its mainland, so as to command the virtual Mediterranean or maritime heart of Southeast Asia, with far-reaching consequences for the strategic environment.”¹³⁹

Interestingly, there are at least four ways to interpret this “line.”¹⁴⁰ First, everything between the line and mainland China is “indisputably” Chinese territory.¹⁴¹ Next, the line establishes the Chinese reach of its Exclusive Economic Zone and continental shelf.¹⁴² Third, the line may represent a claim on all of the land features within the boundaries of the line.¹⁴³ And fourth, the line could represent the outer limit to historic fishing and seabed claims.¹⁴⁴ The Chinese never explained the line, and in true embrace of the “gray zone” tend to simply pick a post-hoc justification and use the ambiguity to justify whatever action they are challenged on at the time.¹⁴⁵

135. THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES, *supra* note 129, at 2.

136. *Id.* at 6.

137. ROY, *supra* note 129, at 12.

138. *Id.* at 13.

139. CHINESE ECONOMIC REFORM: THE IMPACT ON SECURITY 142 (Gerald Segal & Richard Y. Hang eds., 1996).

140. Gregory Poling, *US Interests in the South China Sea*, in POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA 67 (Tran Truong Thuy & Le Thuy Trang eds., 2015).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See Pham Lan Dung & Nguyen Ngoc Lan, *Some Legal Aspects of the Philippines-China Arbitration Under Annex VII of the United Nations Convention on the Law of the Sea*, in POWER, LAW, AND MARITIME ORDER IN THE SOUTH CHINA SEA, *supra* note 140 (noting that “[n]o official explanation has been provided to date on the legal basis or the claim that China is seeking with the line. China’s claim

In addition to the challenges posed by the Chinese assertion of the existence of the nine-dotted line as some sort of significant maritime border, China also took to building out installations, and essentially creating land in the middle of the ocean, ostensibly as a mean of buttressing its claims of sovereignty over rocks and reefs.¹⁴⁶ “The U.S. estimates China has added 3,200 acres of land on seven features . . . over the past three years.”¹⁴⁷ China has constructed installations on the Spratly Islands, some 500 miles from the coast of China and Fiery Cross reef, nearly 750 miles away from the mainland.¹⁴⁸ “The new islands allow China to harness a portion of the Sea for its own use that has been relatively out of reach until now”¹⁴⁹ and extends their ability to project military force into the heavily disputed region.¹⁵⁰

The United States’ interests in the region generally do not intervene with territorial disputes between the six affected nations mentioned above.¹⁵¹ “[O]wnership over individual [natural] features has little impact on US security concerns or strategic thinking.”¹⁵² Nor is the United States particularly interested in the region’s disputed resources.¹⁵³ The United States, however, is firmly committed to protecting its long-term regional allies in the South China Sea and in preserving the post-WWII

based on [it] is still largely undefined and unformulated.”); *see also* HONG, *supra* note 129, at 68.

146. *See* Eleanor Ross, *How and Why China Is Building Islands in the South China Sea*, NEWSWEEK (Mar. 29, 2017), *available at* <http://www.newsweek.com/china-south-china-sea-islands-build-military-territory-expand-575161> (last visited Oct. 31, 2018); *see also* Emily Rauhala & Olivier Laurent, *Stunning New Pictures Show the Scope of Chinese Building in the South China Sea*, WASH. POST (Feb. 7, 2018), *available at* https://www.washingtonpost.com/news/worldviews/wp/2018/02/07/stunning-new-pictures-show-the-scope-of-chinese-building-in-the-south-china-sea/?utm_term=.e7f8f0263fcf (last visited Oct. 31, 2018).

147. *Id.*

148. *Id.*

149. Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Oct. 27, 2015), *available at* <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html> (last visited Oct. 30, 2018).

150. *See* Tom O’Connor, *China Reveals Its New Russian Jets Flying Over Secret Military Bases in Pacific*, NEWSWEEK (Feb. 8, 2018), *available at* <http://www.newsweek.com/china-reveals-new-russian-jets-flying-over-secret-military-bases-pacific-801709> (last visited Oct. 30, 2018).

151. *See* POLING, *supra* note 140, at 61-62.

152. *Id.*

153. *Id.* at 62-63 (writing that “any oil discovered in the South China Sea would presumably enter the global spot market just like any other petroleum drilled for export around the world”).

international norm favoring the peaceful settlement of disputes.¹⁵⁴ The United States is also keenly interested in allowing its military full freedom of navigation on the high seas within the region, a concept that is codified in UNCLOS,¹⁵⁵ but repeatedly challenged by China, often without legal basis.¹⁵⁶ Finally, and despite not being a party to UNCLOS, the United States is ostensibly interested in making sure that Chinese maritime claims are in accord with recognized international legal standards.¹⁵⁷

Yet, the United States let the Chinese proceed with their excessive maritime claims and island construction efforts without resorting to much beyond political statements, and what the U.S. Navy refers to as Freedom of Navigation Operations (“FNOP”).¹⁵⁸ Recently, CNN reported on the U.S. destroyer, *USS Mustin*’s operations nearby, within 12 nautical miles, to Mischief Reef, a disputed land form claimed by both China and the Philippines, but home to a Chinese-built outpost.¹⁵⁹

154. *Id.* at 63-64.

155. *See* UNCLOS, *supra* note 72, art. 87.

156. *See* Christina Zhao, *China Warns Trump Administration Will “Suffer Complete Humiliation” If Washington Continues to Provoke Beijing*, NEWSWEEK (Jan. 23, 2018), available at <https://www.newsweek.com/china-warns-trump-administration-will-suffer-complete-humiliation-if-788149> (last visited Oct. 28, 2018).

157. *See* POLING, *supra* note 140, at 66-74.

158. *See* Cid Standifer, *A Brief History of U.S. Freedom of Navigation Operations in the South China Sea*, USNI NEWS (July 2, 2017), available at <https://news.usni.org/2017/05/29/brief-history-us-freedom-navigation-operations-south-china-sea> (last visited Oct. 28, 2018); *see also* Justin Wright, Bryan Bender, & Philip Ewing, *Obama Team, Military at Odds Over South China Sea*, POLITICO (July 31, 2015), available at <https://www.politico.com/story/2015/07/barack-obama-administration-navy-pentagon-odds-south-china-sea-120865> (last visited Oct. 28, 2018); Emily Rauhala, *The South China Sea Fell Off Trump’s Radar Last Year; He May Have to Pay Attention in 2018*, WASH. POST (Jan. 1, 2018), available at https://www.washingtonpost.com/world/asia_pacific/the-south-china-sea-fell-off-trumps-radar-this-year-he-may-have-to-pay-attention-in-2018/2018/01/01/b7c9a27a-eb1e-11e7-956e-baea358f9725_story.html?utm_term=.68e23ce16181 (last visited Oct. 28, 2018); Hannah Beech, *U.S. Aircraft Carrier Arrives in Vietnam, With a Message for China*, N.Y. TIMES (Mar. 4, 2018), available at <https://www.ny-times.com/2018/03/04/world/asia/carl-vinson-vietnam.html> (last visited Oct. 28, 2018); Ben Brimelow, *The US Is Considering Sending Heavily Armed Marines to Asia to Counter China*, BUS. INSIDER (Feb. 9, 2018), available at <http://www.businessinsider.com/us-considering-marine-expeditionary-units-asia-china-2018-2> (last visited Oct. 28, 2018); Damien Sharkov, *The U.S. Is Sending 1,587 U.S. Marines to Australia in a Direct Threat to China*, NEWSWEEK (Mar. 23, 2018), available at <http://www.newsweek.com/us-marines-launch-historic-drill-risks-angering-china-858101> (last visited Oct. 28, 2018).

159. *See* Ryan Browne, Sereitie Wang, & Ben Westcott, *US Destroyer Sails Close to Contested Island in South China Sea*, CNN (Mar. 23, 2018), available at

Many scholars believe that “[t]he United States’ call on all parties concerned in the South China Sea to handle their territorial and maritime disputes in accordance with [UNCLOS] has been weakened by its own failure to become a party to the treaty.”¹⁶⁰ It is simply “more difficult for the United States to protect its interests given that it is not yet a party to the treaty” and accession will no doubt “greatly enhance the role and credibility of the United States in the South China Sea.”¹⁶¹

The United States could certainly use a stronger position in addressing Chinese claims in the South China Sea, especially because China continues to build out installations to support its “indisputable sovereignty” over a huge swath of the South China Sea despite a ruling by the Permanent Court of Arbitration in The Hague in 2016 adverse to Chinese interests.¹⁶²

2. Relevant Legal Issues and UNCLOS

UNCLOS is truly a comprehensive treaty regime stating that:

[t]he disputes and conflicts contained in the [South China Sea] cover almost every aspect of UNCLOS, e.g., maritime delimitation, historic title, territorial sovereignty, use of force, military activities, fishing marine scientific research, freedom of navigation, marine environment protection, and deep seabed mining.¹⁶³

That said, there are several key UNCLOS provisions that, given the factual summary above, will aid in understanding the current state of the law as it relates to Chinese activities—specifically, maritime claims in the South China Sea. First, as a general proposition, coastal states can exert varying degrees of control over bordering waters. Distance is determined via the creation of “baselines” and extended seaward.¹⁶⁴ Twelve nautical miles mark the limit of territorial seas. Coastal states retain extensive power to regulate and jurisdiction to prescribe within their

<https://www.cnn.com/2018/03/23/asia/south-china-sea-us-drills-intl/index.html> (last visited Oct. 28, 2018).

160. Yann-huei Song, *Possibility of US Accession to the LOS Convention and its Potential Impact on State Practices and Maritime Claims in the South China Sea*, in MAJOR LAW AND POLICY ISSUES IN THE SOUTH CHINA SEA: EUROPEAN AND AMERICAN PERSPECTIVES, *supra* note 129, at 77.

161. *Id.* at 78.

162. See Simon Denyer & Emily Rauhala, *Beijing’s Claims to South China Sea Rejected By International Tribunal*, WASH. POST (July 12, 2016), available at https://www.washingtonpost.com/world/beijing-remains-angry-defiant-and-defensive-as-key-south-china-sea-tribunal-ruling-looms/2016/07/12/11100f48-4771-11e6-8dac-0c6e4acce5b1_story.html?utm_term=.4e421c38d525 (last visited Oct. 28, 2018).

163. HONG, *supra* note 129, at 3.

164. See UNCLOS, *supra* note 72, arts. 5, 7, 14.

territorial sea, which for most intents and purposes is treated as an extension of terrestrial sovereignty.¹⁶⁵ The contiguous zone and coastal states' ability to regulate becomes a bit more limited between 12 and 24 miles—confined to matters of the customs, immigration, and sanitation.¹⁶⁶

UNCLOS also establishes the concept of an exclusive economic zone (EEZ),¹⁶⁷ where a coastal state retains exclusive rights to the resources on and under the sea within that zone. The EEZ can extend out as far as 200 nautical miles from the baseline.¹⁶⁸ This includes both living marine resources and energy resources located on or in the sea bed of the EEZ.¹⁶⁹ It also establishes a continental shelf, which can extend out to 350 nautical miles from baseline¹⁷⁰ and gives the coastal state exclusive right to explore and exploit non-living natural resources or authorize the exploration or exploitation of such resources.¹⁷¹

Archipelagic States get their own set of rules for establishing baselines¹⁷² and islands. In general, these specific rules for Archipelagic States can serve to establish extended sovereign reach. UNCLOS' island regime is codified at Part VIII, which consists exclusively of Article 121. It reads:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf* (emphasis added).¹⁷³

UNCLOS also includes a provision for artificially constructed islands.¹⁷⁴ It reads in relevant part, “[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial

165. *Id.* arts. 2-4.

166. *Id.* art. 33.

167. *Id.* Part V.

168. *Id.* art. 57.

169. UNCLOS, *supra* note 72, art. 56.

170. *Id.* art. 76.

171. *Id.* art. 77.

172. *Id.* Part IV.

173. *Id.* art. 121.

174. UNCLOS, *supra* note 72, art. 60(8).

sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”¹⁷⁵

Finally, UNCLOS exempts warships from the jurisdiction of a coastal state that is not the flag state of the warship.¹⁷⁶ It establishes a right of innocent passage for warships through the territorial seas of a coastal state, which essentially allows the warship to navigate, but does not allow it to conduct defense operations.¹⁷⁷ Seaward of the territorial sea is known as the high seas, and there warships are free to engage in whatever operations they would like as a matter of international law.¹⁷⁸

Given these rules and the geography of the South China Sea, it is easy to see how regional tensions can be elevated. First, there are overlapping claims to resources within established EEZs. Disputed claims over islands can serve to extend one state’s EEZ into another’s. Further, China has repeatedly challenged U.S. warships and aircraft to identify themselves within claimed or disputed Chinese territorial claims outside of the normal 12-mile territorial sea. This violates the general concept of freedom of the seas, and depending upon the location of the challenges, the specific UNCLOS provisions pertaining to warship immunity¹⁷⁹ and coastal state rights and duties within the EEZ.¹⁸⁰ Finally, despite the language of UNCLOS as it pertains to artificially constructed islands, the Chinese island construction efforts seem largely intended to establish the land forms in question as being able to sustain human habitation or economic life as a bald means of establishing new baselines and corresponding territorial seas, contiguous zones, EEZs, and continental shelves.

All the while, these activities are slowly developing or if such activities are aggressive, they may not be so aggressive as to justify the use of force in response.¹⁸¹ They are also multi-tiered. Along with the island

175. *Id.* Part I, ¶. 8.

176. *Id.* arts. 29-32.

177. *Id.* arts. 17-19, 21.

178. *See id.* Part VII.

179. *See* UNCLOS, *supra* note 72, art. 95.

180. *Id.* art. 58 (providing that:

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms . . . of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.).

181. Brad Lendon, *Photos Show How Close Chinese Warship Came to Colliding With US Destroyer*, CNN (Oct. 4, 2018), available at <https://www.cnn.com/2018/10/02/politics/us-china-destroyers-confrontation-south-china-sea-intl/index.html> (last visited Oct. 29, 2018).

building and excessive territorial claims, the Chinese also employ strategic uncertainty vis-à-vis the nine-dashed line and non-traditional State resources, such as fishing fleets and “coast guards,”¹⁸² to establish or exercise their claims in the South China Sea. All classic “gray zone” tactics are consistent with a Chinese military doctrine that focuses on a multi-disciplinary approach to achieve national ends.¹⁸³

B. The Dying Bear: Russian Election Interference in the 2016 U.S. Presidential Election as a Gray Zone Activity

Russia is not China. In comparing the two, Russia is certainly a more potent nuclear power,¹⁸⁴ but is arguably a conventional military peer to China.¹⁸⁵ Compared to China, Russia’s economy is significantly weaker¹⁸⁶ and its population is smaller by an order of magnitude than that of China.¹⁸⁷ Furthermore, neither the trend lines of Russia’s economy nor its population seem to be changing soon. Russia’s ongoing economic troubles are especially likely concerning to Putin’s regime, as Putin draws

182. See Simon Denyer, *How China’s Fishermen Are Fighting a Covert War in the South China Sea*, WASH. POST (Apr. 12, 2016), available at https://www.washingtonpost.com/world/asia_pacific/fishing-fleet-puts-china-on-collision-course-with-neighbors-in-south-china-sea/2016/04/12/8a6a9e3c-fff3-11e5-8bb1-f124a43f84dc_story.html?utm_term=.7d42867a5f11 (last visited Oct. 30, 2018).

183. See MAZARR, *supra* note 21, at 5 (“[W]ar had evolved to using all means, including armed force or non-armed force, military and non-military, and lethal and non-lethal means to compel the enemy to accept one’s interests.” (quoting Chinese Colonels Qiao Liang and Wang Xiangsui)).

184. *Trump’s Nuclear Arsenal*, N.Y. TIMES (Oct. 26, 2017), available at <https://www.nytimes.com/interactive/2017/10/26/opinion/trump-nuclear-arsenal.html> (last visited Oct. 30, 2018) (reporting that Russia has 4,300 nuclear warheads as compared to China’s 270).

185. See *Comparison Results of World Military Strengths*, GLOB. FIREPOWER, available at <https://www.globalfirepower.com/countries-comparison-detail.asp?form=form&country1=china&country2=russia&Submit=COMPARE> (last visited Oct. 30, 2018).

186. *Compare Russia, The World Fact Book*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/rs.html> (projecting a GDP of \$4 trillion in 2017 with a projected growth of 1.8% following a .2% decline in 2016) *with China, The World Fact Book*, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (projecting a \$23.12 trillion GDP in 2017 with projected growth of 6.8%).

187. *Compare Russia, The World Fact Book*, *supra* note 186 (reporting a population of 142+ million with a decline of .08% over the last year and a median age of 39.6 years) *with China, The World Fact Book*, *supra* note 186 (reporting a population of 1.39 billion with a .41% population growth and a median age of 37.4 years.).

a significant amount of his support from Russia's oligarchy.¹⁸⁸ Of course, "[Putin] has [also] been advertising his desire to restore Russia's lost glory since he became president in 2000,"¹⁸⁹ despite the metrics.

While Russia can certainly be aggressive regionally, as it demonstrated in Estonia in 2007, Georgia in 2008, and Crimea in 2014,¹⁹⁰ it simply does not have the resources to undertake a direct challenge to U.S. interests. This, however, does not mean Russia is completely without options to challenge the United States and its place in the international order.¹⁹¹

188. See HILL & GADDY, *supra* note 16, at 213-5; see also LILIA SHEVTSOVA, PUTIN'S RUSSIA 370 (Antonina W. Bouis trans., 2005); David Ignatius, *America Ignores Russia at Its Peril*, WASH. POST (Mar. 6, 2018), available at https://www.washingtonpost.com/opinions/global-opinions/america-ignores-russia-at-its-peril/2018/03/06/0fad7f52-218e-11e8-94da-ebf9d112159c_story.html?utm_term=.79fd56ee698b (last visited Oct. 30, 2018); see generally Gardiner Harris, *Trump Administration Imposes New Sanctions on Putin Cronies*, N.Y. TIMES (Apr. 6, 2018), available at <https://www.nytimes.com/2018/04/06/us/politics/trump-sanctions-russia-putin-oligarchs.html> (last visited Oct. 29, 2018) (providing that:

[t]he Trump administration imposed new sanctions on seven of Russia's richest men and 17 top government officials on Friday in the latest effort to punish President Vladimir V. Putin's inner circle for interference in the 2016 election and other Russian aggressions. The sanctions are designed to penalize some of Russia's richest industrialists, who are seen in the West as enriching themselves from Mr. Putin's increasingly authoritarian administration.);

John Hudson, Josh Dawsey, & Shane Harris, *Trump Administration to Impose Fresh Sanctions Against Russia*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-to-impose-fresh-sanctions-against-russia/2018/04/04/bc09e0b8-3851-11e8-b57c-9445cc4dfa5e_story.html?utm_term=.6a2834015c5 (last visited Oct. 30, 2018).

189. See Ignatius, *supra* note 188.

190. See e.g., HILL & GADDY, *supra* note 16, at 367 (Estonia), 395-7 (Georgia and Crimea); see also Linda Kinstler, *How to Survive a Russian Hack*, THE ATLANTIC (Feb. 2, 2017), available at <https://www.theatlantic.com/international/archive/2017/02/russia-disinformation-baltics/515301/> (last visited Oct. 30, 2018) (describing Russia's information operations in Estonia in 2007 in response to the government's intention to relocate the "Bronze Soldier of Tallinn." The article continues that "[i]n the years that followed, Russia refined its disruptive techniques in the invasions of Georgia in 2008, and Ukraine in 2014, in an effort to distance both countries from NATO and reassert Russian political control.").

191. See Andrew Higgins, *Pushing Further Into Africa, Russia Signs a New Military Accord*, N.Y. TIMES (Aug. 21, 2018), available at <https://www.nytimes.com/2018/08/21/world/europe/russia-central-african-republic-military-accord.html> (last visited Oct. 30, 2018) (describing Russian efforts to establish strategic partnerships on the African continent); see also HILL & GADDY, *supra* note 16, at 395; Mark Galeotti, *Putin Finally Went Too Far*, DEFENSE ONE (Mar. 27, 2018), available at <http://www.defenseone.com/ideas/2018/03/putin-finally-went-too-far/146990/?oref=acemail> (last visited Oct. 30, 2018) (reporting that "[f]or years

Indeed, President Putin often speaks about how technological advancement contains world changing potential and how it is a national imperative that Russia fully leverage new technological capabilities to meet its ends. In a recent speech, he said:

The speed of technological progress is accelerating sharply. It is rising dramatically. Those who manage to ride this technological wave will surge far ahead. Those who fail to do this will be submerged and drown in this wave.

Technological lag and dependence translate into reduced security and economic opportunities of the country and, ultimately, the loss of its sovereignty. This is the way things stand now.¹⁹²

Therefore, it should be no great surprise that,

Russian efforts to influence the 2016 US presidential elections represent the most recent expression of Moscow's longstanding desire to undermine the US-led liberal democratic order . . . undermined public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.¹⁹³

1. Factual Background: What We Know Today About Russia's "Gray Zone" U.S. Election Interference Operations

a. The Context

The USA prefers to follow the rule of the strongest and not by the international law. They are convinced that they have been chosen and they are exceptional, that they are allowed to shape the destiny of the world, that it is only them that can be right. They act as they please. Here and there they use force against sovereign states, set up coalitions in accordance with the principle: who is not with us is against us. *Vladimir Putin's*

now, Putin's calculation has been that the West is strong but lacking in unity and will, allowing a scrappy Russia willing to bend and break the rules of the international order to assert its place as a global player"); *see generally*, Edith M. Lederer, *UN Rejects Russian Attempt to Condemn US Aggression in Syria*, WASH. POST (Apr. 14, 2018), available at https://www.washingtonpost.com/world/europe/un-rejects-russian-attempt-to-condemn-us-aggression-in-syria/2018/04/14/5260e08a-4012-11e8-955b-7d2e19b79966_story.html?utm_term=.73ac29bf1dee (last visited Oct. 30, 2018) (reporting on the failed attempts by the Russian ambassador to the UN to condemn the U.S./U.K./French air strike against Syrian chemical weapons infrastructure, in response to yet another Syrian use of chemical weapons).

192. *Presidential Address to the Federal Assembly* (Mar. 1, 2018), available at <http://en.kremlin.ru/events/president/news/56957> (last visited Oct. 30, 2018); *see generally*, David D. Kirkpatrick & Ron Nixon, *U.S.-U.K. Warning on Cyberattacks Includes Private Homes*, N.Y. TIMES (Apr. 16, 2018), available at <https://www.nytimes.com/2018/04/16/world/europe/us-uk-russia-cybersecurity-threat.html> (last visited Oct. 30, 2018) (reporting on the latest cyber threat from Russia).

193. *Assessing Russian Activities and Intentions in Recent US Elections*, OFF. OF THE DIR. OF NAT'L INTELLIGENCE: NAT'L INTELLIGENCE COUNCIL (Jan. 6, 2017), available at https://www.dni.gov/files/documents/ICA_2017_01.pdf (last visited Nov. 5, 2018) [hereinafter ICA Report].

*Address to the Russian Assembly following the referendum on the annexation of Crimea, 18 March, 2014*¹⁹⁴

The above statement from Vladimir Putin sets the stage for Russia's activities regarding the 2016 U.S. presidential election and is a far cry from his "Americans, we are with you!" response to the terror attacks on September 11, 2001.¹⁹⁵ Indeed, "Putin was the first foreign leader to call President George W. Bush [after the attacks], hoping to impress on him that the [United States and Russia] were now allies in the struggle against [Islamic] terrorism," of which Russia was quite familiar due to its actions in Chechnya.¹⁹⁶

In 2003, however, the United States once again undercut an international institution (that it itself had championed the creation of) by circumventing the United Nations Security Council, and a likely Russian veto, in undertaking the invasion of Iraq.¹⁹⁷ This both humiliated Putin, reminding him that to the West, "Russian objections carried no weight," and highlighted to him that "[u]nder the guise of promoting democracy and human rights . . . [e]ven the open use of military force was now fair game."¹⁹⁸

Most importantly, it brought into focus the new, post-Soviet world order, where one superpower reigned, which Putin described in 2007 as both "unacceptable" and "ineffective," and that as a result, it was time to

194. Preface, RUSSIA MILITARY POWER, *supra* note 20; *see generally* James Kitfield, *The "Day-After" Problem: What's Next After the Iran Deal*, YAHOO (Apr. 6, 2018), *available at* <https://www.yahoo.com/news/day-problem-whats-next-trump-tears-iran-deal-163416302.html> (last visited Oct. 30, 2018) (postulating on the likely impact of a unilateral withdrawal of the Iranian nuclear agreement by the United States) (quoting Kori Schake, the deputy director-general of the International Institute for Strategic Studies in London, that:

[If the United States leaves] the agreement, the Europeans are likely to work with the Iranians, Russians, and Chinese to try to preserve it. 'And their perception will be that it is not just Iran, but increasingly the United States that is destabilizing the international order and needs to be contained.')

195. SHEVTSOVA, *supra* note 188, at 205.

196. Julia Ioffe, *What Putin Really Wants*, THE ATLANTIC (Jan/Feb 2018), *available at* <https://www.theatlantic.com/magazine/archive/2018/01/putins-game/546548/> (last visited Oct. 30, 2018).

197. *See, e.g.*, Hikaru Yamashita, *The Iraq War, the United Nations Security Council, and the Legitimacy of the Use of Force*, 6 NIDS SEC. REPORTS 38, 73, 77-92 (2005), *available at* http://www.nids.mod.go.jp/english/publication/kiyo/pdf/bulletin_e2005_2.pdf (last visited Oct. 29, 2018) (providing an excellent run down of the international effort in the lead up to the U.S. invasion of Iraq in March 2003).

198. Ioffe, *supra* note 196.

“rethink the entire architecture of global security.”¹⁹⁹ Putin’s Russia now strived to ensure that the “United States can never again unilaterally maneuver without encountering friction—and, most importantly, that it can never, ever depose him.”²⁰⁰

It was this latter factor that likely contributed to the motivation behind the Russian interference into the 2016 American presidential elections. America’s continued preference for unilateral international action provided an excuse for his own. Putin could not help but pay heed to U.S. attempts to democratize nations within the traditional sphere of Russian influence via European and U.S. funded Russian non-governmental organizations such as the Organization for Security and Cooperation in Europe and National Endowment for Democracy.²⁰¹ Some of these NGOs were closely associated with the so-called color revolutions, “[t]he Rose Revolution in Georgia, the Orange Revolution in Ukraine, the Tulip Revolution in Kyrgyzstan.”²⁰² So, it should be of no surprise that Putin believed them to be “vulgar instrument[s] of the foreign policy of interests of one country[, the United States],” and that Moscow and his own rule was likely in the cross hairs.²⁰³ As a result, he ordered the expulsion of USAID from Russia in 2012 and banned the National Endowment for Democracy in 2015.²⁰⁴ He also likely ordered covert cyber action, specifically targeting the American electoral process in the 2016 Presidential election, which continues to reverberate through the American body politic to this day.²⁰⁵

199. *Id.*; see also Thom Shanker & Mark Landler, *Putin Says U.S. Is Undermining Global Stability*, N.Y. TIMES (Feb. 11, 2007), available at <http://www.nytimes.com/2007/02/11/world/europe/11munich.html> (last visited Oct. 27, 2018); Andrew Higgins, *It’s No Cold War, But Relations With Russia Turn Volatile*, N.Y. TIMES (Mar. 26, 2018), available at <https://www.nytimes.com/2018/03/26/world/europe/russia-expulsions-cold-war.html> (last visited Oct. 27, 2018) (“[F]rom the Kremlin’s perspective, it is the United States that first upended previous [international] norms . . . [and] Russia . . . does not like the rules of the American-dominated order that have prevailed since then, and wants to change them.”) (internal quotes removed).

200. Ioffe, *supra* note 196.

201. *See id.*

202. *Id.*; see also HILL & GADDY, *supra* note 16, at 305-07.

203. Shanker & Landler, *supra* note 199.

204. Ioffe, *supra* note 196.

205. *But see* Madison Park, *Putin: Maybe Jews or Minorities Behind US Election Interference*, CNN (Mar. 12, 2018), available at <https://www.cnn.com/2018/03/12/politics/putin-comment-jews-russian-minorities/index.html> (last visited Oct. 28, 2018) (essentially denying responsibility for ordering the widespread and pervasive cyber activities targeting the 2016 American presidential election).

b. The Interference

America's intelligence community believes with relatively high confidence that Russia took affirmative action to influence the 2016 American Presidential election and likely, Russian President Vladimir Putin order this himself.²⁰⁶ We also know special counsel Robert Mueller uncovered enough information to support the Department of Justice's indictments covering several Russians and three businesses.²⁰⁷ Thus, a brief synopsis of the timeline is helpful in understanding the legal issues as they relate to Russian gray zone activities targeting the United States' presidential electoral process.²⁰⁸

For Russia, the story begins all the way back in July of 2013 when the "Internet Research Agency LLC" registered as a corporation with the Russian government.²⁰⁹ Later on in April 2014, the Agency formed a "department known as the 'translator project' to focus on operations via social media."²¹⁰ By May, Moscow apparently "developed a strategy with the goal of interfering in the 2016 [Presidential] election" and sow general discontent in the United States.²¹¹

In the United States, the story generally (and publicly) begins in May 2016, when the Director of National Intelligence, James Clapper, announced at a House Intelligence Committee hearing that there were growing cyber threats against U.S. presidential campaigns.²¹² On June 14,

206. Miller, Nakashima, & Entous, *supra* note 14; *see also* ICA Report, *supra* note 193.

207. Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), available at <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html> (last visited Oct. 27, 2018); *see also* Mark Mazzetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (July 13, 2018), available at <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html?smid=nytcore-ios-share> (last visited Oct. 27, 2018); Kara Scannell, David Shortell, & Veronica Stracqualursi, *Mueller Indicts 13 Russian Nationals Over 2016 Election Interference*, CNN (Feb. 17, 2018), available at <https://www.cnn.com/2018/02/16/politics/mueller-russia-indictments-election-interference/index.html> (last visited Oct. 27, 2018).

208. *See* Matthew Nussbaum, *The Definitive Trump-Russia Timeline of Events*, POLITICO (Mar. 3, 2017), available at <https://www.politico.com/trump-russia-ties-scandal-guide/timeline-of-events> (last visited Oct. 28, 2018); *see also* Schmitt, *supra* note 21.

209. Nussbaum, *supra* note 208.

210. *Id.*

211. *Id.*

212. *Id.* *See also* Darren Goode, *Clapper: Cyber Threats Against Presidential Campaigns Are Growing*, POLITICO (May 18, 2016), available at

2016, the Democratic National Committee (“DNC”) announced that it had been compromised by what it believed were Russian computer hackers.²¹³ On July 22, 2016, WikiLeaks published nearly 20,000 e-mails from the DNC.²¹⁴ U.S. intelligence services believe WikiLeaks has long been linked with the Russian government.²¹⁵ On July 25, 2016, the FBI waded in and announced its investigation of the hack,²¹⁶ as a growing consensus formed amongst U.S. intelligence agencies that Russia was behind the DNC breach.²¹⁷ In August 2016, widely followed Russian-controlled Twitter accounts posted false allegations of voter fraud in North Carolina, a key electoral battleground state. At the same time, Russian operatives, using a fake U.S. alias, “pa[id] a U.S. person to wear a costume of Secretary Clinton in a prison uniform at a Florida rally,” and posed as activists to hold a number of rallies supporting candidate Trump.²¹⁸ The Russian organization behind these activities was operating as early as April 2016, by purchasing politically charged advertisements in opposition to candidate Secretary Clinton,²¹⁹ and we would later learn that the Russian “fake news” machine extended beyond Twitter to both Facebook and Tumblr.²²⁰

<https://www.politico.com/story/2016/05/james-clapper-presidential-cyber-threats-223321> (last visited Oct. 29, 2018).

213. See Nussbaum, *supra* note 208.

214. *Id.*

215. Kathryn Watson, *How Did WikiLeaks Become Associated With Russia?* CBS NEWS (Nov. 15, 2017), available at <https://www.cbsnews.com/news/how-did-wikileaks-become-associated-with-russia/> (last visited Oct. 29, 2018); see also Kevin Poulsen & Spencer Ackerman, *Exclusive: ‘Lone DNS Hacker’ Guccifer 2.0 Slipped Up and Revealed He Was a Russian Intelligence Officer*, THE DAILY BEAST (Mar. 22, 2018), available at <https://www.thedailybeast.com/exclusive-lone-dnc-hacker-guccifer-20-slipped-up-and-revealed-he-was-a-russian-intelligence-officer> (last visited Oct. 29, 2018) (“Guccifer 2.0, the “lone hacker” who took credit for providing WikiLeaks with stolen emails from the Democratic National Committee, was in fact an officer of Russia’s military intelligence directorate (GRU).”).

216. See Watson, *supra* note 215.

217. See David E. Sanger & Eric Schmitt, *Spy Agency Consensus Grows That Russia Hacked D.N.C.*, N.Y. TIMES (July 26, 2016), available at https://www.nytimes.com/2016/07/27/us/politics/spy-agency-consensus-grows-that-russia-hacked-dnc.html?_r=0 (last visited Oct. 28, 2018).

218. Philip Bump, *Timeline: How Russian Trolls Allegedly Tried to Throw the 2016 Election to Trump*, WASH. POST (Feb. 16, 2018), available at https://www.washingtonpost.com/news/politics/wp/2018/02/16/timeline-how-russian-trolls-allegedly-tried-to-throw-the-2016-election-to-trump/?utm_term=.3e01e9946f03 (last visited Oct. 24, 2018).

219. Nussbaum, *supra* note 208.

220. See Rob LeFebvre, *Tumblr Confirms 84 Russian Accounts Were Used to Spread Disinformation*, ENGADGET (Mar. 23, 2018), available at

The *Washington Post* then broke a story on September 5, 2016 noting that “U.S. intelligence and law enforcement agencies are investigating . . . a broad covert Russian operation in the United States to sow public distrust in the upcoming presidential election and in U.S. political institutions.”²²¹ That same day, President Obama met with President Putin at the G-20 conference in China, and reportedly told the Russian president “to cut it out, [or] there were going to be serious consequences if he did not.”²²² In the months that followed, Russian organizations became extremely active on social media, both through posts or by purchasing thousands upon thousands of advertisements on various social media spaces.²²³ In November 2016, the American people elected Donald Trump as President.²²⁴

“Despite the dire warnings [of high level Presidential advisors], there were no meltdowns in the United States’ voting infrastructure on Nov. 8, no evidence of hacking related fraud, crashing of electronic ballots, or manipulation of vote counts.”²²⁵ Regardless, the United States expelled over 30 Russian diplomats in response to their interference in the 2016 U.S. Presidential election.²²⁶ On February 16, 2018, the United States Justice Department also issued indictments against 13 Russians who “stole the identities of American citizens, posed as political activists

<https://www.engadget.com/2018/03/23/tumblr-confirms-84-russian-accounts-disinformation/> (last visited Oct. 24, 2018).

221. Dana Pries, Ellen Nakashima, & Tom Hamburger, *U.S. Investigating Potential Covert Russian Plan to Disrupt November Elections*, WASH. POST (Sept. 5, 2016), available at https://www.washingtonpost.com/world/national-security/intelligence-community-investigating-covert-russian-influence-operations-in-the-united-states/2016/09/04/aec27fa0-7156-11e6-8533-6b0b0ded0253_story.html?utm_term=.590ff639c307 (last visited Oct. 24, 2018).

222. Mark Landler & David E. Sanger, *Obama Says He Told Putin: “Cut It Out” on Hacking*, N.Y. TIMES (Dec. 16, 2016), available at <https://www.nytimes.com/2016/12/16/us/politics/obama-putin-hacking-news-conference.html> (last visited Oct. 24, 2018).

223. See Nussbaum, *supra* note 208; see also *The Social Media Ads Russia Wanted Americans to See*, POLITICO (Nov. 1, 2017), available at <https://www.politico.com/story/2017/11/01/social-media-ads-russia-wanted-americans-to-see-244423> (last visited Oct. 24, 2018).

224. See, e.g., Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), available at <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> (last visited Oct. 24, 2018).

225. Miller, Nakashima, & Entous, *supra* note 14.

226. See Rhonda Schaffler, *U.S. Expels 35 Russian Diplomats for Interference in Presidential Election*, THE STREET (Dec. 29, 2016), available at <https://www.thestreet.com/video/13938814/u-s-expels-35-russian-diplomats-over-interference-in-presidential-election-says-official.html> (last visited Oct. 25, 2018).

and used the flash points of immigration, religion and race to manipulate a campaign in which those issues were already particularly divisive.”²²⁷ As a result of the indictments, we know today that Russia favored a clear candidate,²²⁸ hacked the DNC and released tens of thousands of potentially damaging E-mails through WikiLeaks, and engaged in a large scale and relentless social engineering operation via social media and advertisements, all done together with the ostensible intention to place a proverbial thumb on the scales of history.²²⁹

Scholar Michael Schmitt believes that the hack of the DNC “epitomized” gray zone strategy,²³⁰ the likes of which have apparently been Russia’s preference for international engagement for quite some time.²³¹

Since the denial-of-service attacks on Estonia in 2007 and the invasion of Georgia in 2008, Russia has used old and new forms of aggression to undermine our open societies and the foundations of international peace and stability. Estonia, Latvia, and Lithuania have all been targeted by Russia’s so-called hybrid warfare, a pernicious form of aggression that combines political, economic, informational, and cyber assaults against sovereign nations. Russia employs sophisticated strategies deliberately designed to achieve objectives while falling below the target state’s threshold for a military response. Tactics include infiltrating social media, spreading propaganda, weaponizing information, and using other forms of subversion and espionage.²³²

By all measures, the Russian use of cyber tools to exert influence over the 2016 Presidential election was a cohesive integrated campaign in furtherance of the Russian political objective of both denying the presidency to Secretary Clinton and sowing dissent and confusion amongst

227. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

228. See Karoun Demirjian, *Intel Panel Republicans Seem to Back Away From Finding That Russia Was Not Trying to Help Trump*, WASH. POST (Mar. 13, 2018), available at https://www.washingtonpost.com/powerpost/intel-panel-republicans-seem-to-back-away-from-finding-that-russia-was-not-trying-to-help-trump/2018/03/13/7b4c9594-2716-11e8-874b-d517e912f125_story.html?utm_term=.810b27160d35 (last visited Oct. 25, 2018) (quoting Representative Michael Conway (R-Tex) that, “[i]t’s clear [Russian] officials were trying to hurt Hillary [Clinton] by interfering in the 2016 election.”).

229. See *id.*; see also Jens David Ohlin, *Did Russian Cyber-Interference in the 2016 Election Violate International Law?*, 95 TEX. L. REV. 1579, 1581-82 (2017).

230. Schmitt, *supra* note 21, at 2.

231. See General H. R. McMaster, National Security Advisor, Keynote Address at the Atlantic Council: 100 Years of U.S.-Baltic Partnership: Reflecting on the Past and Looking to the Future (Apr. 3, 2018), available at <http://www.atlantic-council.org/news/transcripts/us-national-security-advisor-lt-gen-h-r-mcmaster-russian-aggression-is-strengthening-our-resolve> (last visited Oct. 29, 2018).

232. *Id.*

the American electorate.²³³ Russia undertook this action without resort to kinetic tools, and by choosing not to actually tamper with voting roles, remained relatively limited, below the so-called “red line thresholds” which could have led to conventional conflict.²³⁴ It was gradual and indeed remains relatively sustained in its execution, as compared to a one-time event.²³⁵ It was also what many would consider as a covert action.²³⁶

2. Covert Action, Espionage, and the Relevance of Coercion

Understanding what a covert action is will help illuminate the threat posed by Russian election interference. With a few exceptions for traditional diplomatic, military and law enforcement actions, the United States generally defines “covert action” as “an activity or activities of the United States Government to *influence* political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”²³⁷ The United States defined covert action as a means to ensure appropriate notice and oversight to Congress, but in doing so, opened the door for scholars to debate what factually is or is not covered by the definition, seemingly *ad nauseum*.²³⁸

There is no parallel widely accepted international legal definition of covert action. One writer suggested as a broadly applied definition, “a spectrum of coordinated coercive measures, short of direct military assault, secretly exercised by one state in order to influence the sovereign

233. Cf. Apuzzo & LaFranier, *supra* note 207; Scannell, Shortell, & Stracqualursi, *supra* note 207; MAZARR, *supra* note 21.

234. Cf. Apuzzo & LaFranier, *supra* note 207; Scannell, Shortell, & Stracqualursi, *supra* note 207; MAZARR, *supra* note 21.

235. See Elizabeth Dwoskin, Craig Timberg, & Tony Romm, *Facebook's Russia Problem Won't Go Away. Hundreds More Accounts Purged on the Social Network*, WASH. POST (Apr. 3, 2018), available at https://www.washingtonpost.com/business/economy/facebook-says-there-were-more-russian-accounts-than-previously-acknowledged/2018/04/03/f26462f5-5715-4769-b887-29f80817f236_story.html?utm_term=.5de40caa306c (last visited Oct. 29, 2018) (reporting that as late as April 3, 2018 Facebook “removed more than 200 Facebook pages and Instagram accounts controlled by the Russian organization that had meddled in the U.S. 2016 presidential election . . . a sign that manipulation on Facebook continued months after [an earlier] purge.”); see also Eli Meixler, *Facebook Has Removed Hundreds of Accounts Linked to a Russia Troll Farm*, TIME (Apr. 4, 2018), available at <http://time.com/5227225/facebook-russia-troll-accounts/> (last visited Oct. 29, 2018).

236. See, e.g., Robert Chesney, *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SEC. L. & POL'Y 539, 592-602 (2012) (tracing the history of definition of “covert action”).

237. 50 U.S.C. § 3093(e) (2017) (emphasis added).

238. See Chesney, *supra* note 236.

affairs of another.”²³⁹ Yet others would take issue with the idea that covert action, per se, rises to the level of “coercion,” as “an act is only coercive when it is intended to compel another state to behave in a manner other than how it normally would, or to refrain from taking an action it would otherwise take.”²⁴⁰ Importantly, “persuasion or propaganda does not qualify [as coercion], nor do actions that merely affect another state’s decision making processes.”²⁴¹

The existence of coercion becomes an important issue because of several international legal norms. International law is a law of custom²⁴² and one of the primary overarching norms is that actions which are not prohibited are allowed, *nullum crimen sine lege*.²⁴³ This so-called *Lotus* principle²⁴⁴ is somewhat controversial but remains widely accepted.²⁴⁵

Next, there is the idea that state sovereignty is sacrosanct and should be respected by other members of the international community.²⁴⁶ This norm is enshrined in the context of the U.N.’s reach in Article 2 of the United Nations Charter which states:

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. . . . Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter [except for those measures of enforcement as ordered by the Security Council under Chapter VII of the Charter].²⁴⁷

239. See generally *Legality of Covert Action under Contemporary International Law*, 1 BERKLEY LA RAZA L. J. 139 (2015).

240. Michael N. Schmitt & Andru Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT’L SEC. J. 349, 354 (2014).

241. *Id.*

242. See John P. Carlin, *Detect, Disrupt, Deter: A Whole-Of-Government Approach to National Security Cyber Threats*, 7 HARV. NAT’L SEC. J. 391, 421 (2016).

243. See *Nulleum Crimen Sine Lege*, CORNELL: LEGAL INFO. INST., available at https://www.law.cornell.edu/wex/nullum_crimen_sine_lege (last visited Oct. 29, 2018).

244. See generally *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

245. See generally Craig Forcese, *Pragmatism and Principle: Intelligence Agencies and International Law*, 102 VA. L. REV. ONLINE 67 (2016), available at <http://www.virginialawreview.org/volumes/content/pragmatism-and-principle-intelligence-agencies-and-international-law> (last visited Oct. 29, 2018).

246. See generally Ohlin, *supra* note 229, at 1587-94.

247. U.N. Charter art. 2; see also Schmitt & Wall, *supra* note 240, at 353-54.

Further, the principle of non-intervention also applies directly to States.²⁴⁸ Indeed, “[s]temming from the principle of sovereignty, this prohibition [against using coercive means to intervene in the internal or external affairs of other states] has been recognized by the International Court of Justice (ICJ) as a fundamental norm of customary international law.”²⁴⁹

When you combine these two international norms, you end up with a clear prohibition on the threat or use of force or coercive means against the sovereignty of another state, but leave the door open for a host of activities short of the application or threat of force.²⁵⁰

This is largely a line drawing exercise, but it is why the coercive extent of an activity is such an important piece of the analysis—because of the direct relationship between the level of coerciveness in relation to what reasonably can be construed as a use of force.²⁵¹ Hence, the previously discussed “gray zone” which describes activities that are purposefully intended to be below the threshold of harm most States would consider force. This, in turn, limits the options available to those States with a strong belief in the adherence of the rule of law, to non-force responses.²⁵²

It is also why no international treaty explicitly prohibits espionage, an act that seemingly by definition requires the violation of state sovereignty, but uses means widely considered as short of reaching the threshold necessary to establish force.²⁵³ Covert action, of course, differs from espionage in that the former seeks to affirmatively influence, while the latter generally relates to more passive intelligence and information acquisition.²⁵⁴ Regardless, international law is silent “on countless low-visibility national security activities, including forms of intelligence collection, clandestine activities, [and] covert action” and as such, these

248. See Schmitt & Wall, *supra* note 240, at 353.

249. *Id.* at 353-54.

250. See Michael Jefferson Adams, *Jus Extra Bellum: Reconstructing the Ordinary, Realistic Conditions of Peace*, 5 HARV. NAT'L SEC. J. 377, 398-408 (2014).

251. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, para. 205, 251 (June 27) [hereinafter *Nicaragua*].

252. See U.N. Charter, art. 51 (noting “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” Armed attack remains undefined in international law). *But see Nicaragua, supra* note 251 (discussing activities which may count as an armed attack).

253. See, e.g., Schmitt & Wall, *supra* note 240, at 362 (noting “[i]t is well accepted that espionage is not, in itself, a breach of international law.”).

254. See Forcese, *supra* note 245.

activities are not prohibited as a matter of international law, at least by those who abide by the *Lotus* principle.²⁵⁵

Both the principle of non-intervention and a variation on the *Lotus* principle have also been adopted in the cyber context, through the *Tallinn Manual 2.0*, a collection of burgeoning international norms aiming to provide some guidance and clarity in the highly dynamic cyber domain.²⁵⁶ The *Tallinn Manual 2.0* notes that the principle of state sovereignty applies in cyber space,²⁵⁷ that a State enjoys sovereign authority with regard to the cyberinfrastructure, persons, and cyber activities located within its territory,²⁵⁸ that it is likewise free to conduct cyber activities in its international relations, subject to any contrary rule of international law binding it,²⁵⁹ and that specifically, a State must not conduct cyber operations that violate the sovereignty of another state.²⁶⁰

This last proposed norm in the *Tallinn Manual 2.0* includes important explanatory details in its supporting comments. For instance, the panel of experts that generated the manual were split as to whether cyber espionage ran afoul of the proposed norm prohibiting the violation of sovereignty.²⁶¹ The experts also concluded that “when one State’s cyber operation interferes with or usurps the inherently governmental functions of another State” there is a violation of sovereignty,²⁶² but that propaganda operations would generally not be found to violate another State’s sovereignty, although they may violate other existing international norms.²⁶³

3. Does Election Interference Violate International Law?

As is the case with many legal questions, the answer here is that it depends because the facts matter. As a general proposition, though,

255. Adams, *supra* note 250, at 402-03.

256. Cf. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 1, 11-86 (Michael Schmitt & Liis Vihul, eds., 2nd ed. 2017) [hereinafter TALLINN MANUAL 2.0].

257. *Id.* at 11-13 (Rule 1).

258. *Id.* at 13-16 (Rule 2).

259. *Id.* at 16-17 (Rule 3).

260. *Id.* at 17-27 (Rule 4).

261. TALLINN MANUAL 2.0, *supra* note 256, at 17-27 (Rule 4). Specifically, comment 7 notes that “[t]he majority took the position that [cyber espionage] violates the rule,” and comment 8 notes that “[a] few of the Experts were of the view that the extensive State practice of conducting espionage on the target State’s territory has created an exception to the generally accepted premise that non-consensual acidity attributable to a State while physically present on another’s territory violate[s] sovereignty.” *Id.*

262. *See id.* (specifically, comments 15-18).

263. *Id.* (specifically, comment 29).

“[p]artisan electoral interventions are a common phenomenon in world affairs.”²⁶⁴ Indeed, influencing and in some cases interfering with elections is a time-honored tool of American statecraft.²⁶⁵ “The [United States] has a long history of attempting to influence presidential elections in other countries—it’s done so 81 times [in 45 countries] between 1946 and 2000.”²⁶⁶

Proponents of American activities relating to foreign elections quickly point out that there is a marked difference between actions intended to make sure that elections are fair and that the will of the people is heard²⁶⁷ and activities purposely intended to confuse and sow discord, often through the employment of deception and “fake news.”²⁶⁸ In short, there is a difference between *influence* and *interference* and that difference lies in part on both the coercive nature of the activity in question²⁶⁹ and the motives of the actor engaged in the election activity.

Jens David Ohlin analyzes and describes several ways the Russian activities in the 2016 American Presidential could have violated international law, specifically international human rights law (“IHRL”)²⁷⁰ and the doctrine of state responsibility/non-interference. First, Ohlin frames the issue as “spying” and analyzes espionage through the lens of both the Law of Armed Conflict and the Right to Privacy, as articulated in the

264. Don H. Levin, *Sure the U.S. and Russia Often Meddle in Foreign Elections. Does It Matter?*, WASH. POST (Sept. 7, 2016), available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/07/sure-the-u-s-and-russia-often-meddle-in-foreign-elections-does-it-matter/?utm_term=.d8951fe90d13 (last visited Nov. 5, 2018).

265. See Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, WASH. POST (Oct. 13, 2016), available at https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/?utm_term=.2450bf9e5249 (last visited Nov. 5, 2018).

266. Nina Agrawal, *The U.S. Is No Stranger to Interfering in the Elections of Other Countries*, L.A. TIMES (Dec. 21, 2016), available at <http://www.latimes.com/nation/la-na-us-intervention-foreign-elections-20161213-story.html> (last visited Nov. 5, 2018); see also Katrina vanden Heuvel, *On Russia, We Need More Reason and Less Frenzy*, WASH. POST (Feb. 27, 2018), available at https://www.washingtonpost.com/opinions/on-russia-we-need-more-reason-and-less-frenzy/2018/02/27/47003f60-1b14-11e8-9de1-147dd2df3829_story.html?utm_term=.a7073b03deac (last visited Nov. 5, 2018).

267. See Chad Vickery, Address in *The Global Law Scholars Symposium: Foreign Electoral Interference and International Law*, VIMEO (Mar. 7, 2018), available at <https://vimeo.com/282318416> (last visited Nov. 5, 2018).

268. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

269. See, e.g., Ohlin, *supra* note 229, at 1588-93 (analyzing coercion).

270. *Id.*

ICCPR, as a manifestation of International Human Rights Law.²⁷¹ Of the two, and assuming for now the accuracy of Ohlin's espionage categorization of the Russian election interference activities, only the IHRL analysis pertaining to the ICCPR bears on this paper.²⁷²

Ohlin starts his ICCPR IHRL analysis by challenging the idea that espionage is truly not prohibited by international law.²⁷³ He buttresses his argument with Article 17 of the ICCPR, which says, "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attack on his honour [sic] and reputation."²⁷⁴ Thus, he argues that the ICCPR may have supplanted the customary international norm "allowing" espionage, because by its nature, espionage violates this right to privacy.²⁷⁵ Indeed, "[d]espite the fact that spying is a widespread or even universal tool of statecraft, the adoption of the ICCPR . . . may have outlawed the practice."²⁷⁶ He points out, however, "it is unclear whether the Article 17 right to privacy was meant to cover such transnational conduct" as the Russians engaged in with the 2016 American Presidential elections, and notes that there is also an issue with traditional and longstanding U.S. interpretation of the Treaty, which seeks to limit its extraterritorial application.²⁷⁷ Yet one more instance of the American retreat from international fora and regimes coming back to bite.

Ohlin then conducts a traditional state responsibility/sovereignty-based analysis with a long discussion on coercion.²⁷⁸ He ultimately concludes "[w]hile the Russian hacking was certainly corrosive to the proper functioning of a democracy, it is genuinely unclear whether it should count as coercive."²⁷⁹ Ohlin wraps up his sovereignty-based analysis by examining the Tallinn concept of illegal usurpation of a government function.²⁸⁰ Here he notes that, "[e]veryone agrees that had the Russian government tampered with the ballot boxes, or with electronic voting this would count as a violation of international law, because the *counting of votes* during an election is a paradigmatically 'governmental function'

271. *See id.* at 1582-86.

272. *Id.*

273. *Id.*

274. ICCPR, *supra* note 101, art. 17.

275. Ohlin, *supra* note 229, at 1583-85.

276. *Id.* at 1583.

277. *Id.* at 1584-86.

278. *Id.* at 1587-93.

279. *Id.* at 1593.

280. Ohlin, *supra* note 229, at 1593-94.

which in that case would be usurped by Russia.”²⁸¹ But, here the facts do not support such vote tampering.

Ohlin concludes his piece by suggesting that the Russian election activities may constitute a violation of the concept of self-determination.²⁸² “In political terms, the Russian hacking interfered with a key element of sovereignty, insofar as sovereignty is understood as a relational concept that connects the government with the will of the people.”²⁸³ This view requires a bit of uncoupling of traditional conceptions of both sovereignty and self-determination but generally stands scrutiny. After all, “[t]he election process is the ultimate expression of a people’s sovereign will . . . By illicit interference, the Russians influenced the election to produce the sovereign will of the Russian . . . government, . . . rather than the sovereign will of the American people” thereby violating “the right of the American people to self-determination.”²⁸⁴ He ends by admitting that there are some holes in his self-determination-based analysis in that it is difficult to actually ascertain the sovereign will of a people *ex ante* and that as previously noted, America itself can be said to have violated this norm through its own international election activities over the years.²⁸⁵ He neatly resolves the latter by noting that “it is important to distinguish between political interference in dictatorships and other illiberal systems versus interference in genuinely democratic elections. The former violates the principle of self-determination while the latter does not.”²⁸⁶

4. If Indeed Russian Election Interference Violated International Law, What are the Remedies?

If we extend Ohlin’s position and assume that Russia violated international law with its election interference, what could the United States do in response? One of the reasons that a gray zone tactic such as election interference is so effective is that it involves activities which generally do not rise to the level in which a hard power response would be internationally legal. The UN Charter fundamentally changed the international order by essentially making the resort to use of force illegal, but for situations authorized by the Security Council²⁸⁷ or in individual or collective

281. *Id.* at 1594.

282. *See* U.N. Charter art. 1, ¶ 2.

283. Ohlin, *supra* note 229, at 1594-95.

284. *Id.* at 1595-96.

285. *Id.* at 1596-97.

286. *Id.*

287. *See* U.N. Charter, art. 2.

self-defense to an armed attack.²⁸⁸ Even if Russia tampered with actual votes in the United States, it is unlikely that such action would justify the use of force in response.²⁸⁹ This also says nothing of the political risks of employing force against a nuclear power, with a relatively capable conventional military capability.²⁹⁰ After all, presuming that I am correct and that Russia is indeed rapidly declining in power, it is far from dead. So, the political calculus of employing armed force against them in response to election interference cannot be ignored.²⁹¹

Just because the resort to the use of force is not a realistic option, however, does not mean that a nation subject to a gray zone tactic like election interference is without options. International law has long recognized the concept of “countermeasures.”²⁹² Countermeasures are activities which would normally be banned by international law, but that which States may employ to check or counter another state or actor’s own targeted international law violation against them.²⁹³ There is also a requirement that countermeasures may only be used in response to an ongoing event and may not be legally employed retributively.²⁹⁴

Countermeasures are especially helpful tools in the cyber context,²⁹⁵ although there are some challenges applying the doctrine to cyber, not the least of which is the inherent difficulty in attributing action in that domain.²⁹⁶ Here, given the nature and scope of the 2016 election

288. *Id.* art. 51.

289. *Compare id.* with Nicaragua, *supra* note 251.

290. *See Comparison Results of World Military Strengths, supra* note 185; *see generally* RUSSIA MILITARY POWER, *supra* note 20; *A Colder War With Russia?*, N.Y. TIMES (Mar. 30, 2018), available at <https://www.nytimes.com/2018/03/30/opinion/a-colder-war-with-russia.html> (last visited Nov. 5, 2018) (highlighting that there is a large difference between the United States’ current relationship with Russia in that there is an absence of policy, procedural, and actual infrastructure in place to de-escalate potential conflict).

291. *See Comparison Results of World Military Strengths, supra* note 185; *see generally* RUSSIA MILITARY POWER, *supra* note 20; *A Colder War With Russia?*, *supra* note 290.

292. *See* Michael N. Schmitt, “*Below the Threshold*” *Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT’L L. 697, 700 (2014).

293. *Id.*

294. *Id.* at 701-04.

295. *See* Gary Corn, *Tallinn Manual 2.0—Advancing the Conversation*, JUST SEC. (Feb. 15, 2017), available at <https://www.justsecurity.org/37812/tallinn-manual-2-0-advancing-conversation/> (last visited Oct. 29, 2018).

296. *Id.* There are several aspects of the traditional rule of countermeasures (the successor to the non-forceful component of what used to be known as the law of reprisals) that do not accord easily with the dynamic environment of cyberspace. Among these are the strict notice requirement, the absence of anticipatory

interference, no such attribution difficulty exists in that it was quite clearly attributable to the Russian state and its security apparatus, if not ordered by Russian President Putin personally.²⁹⁷ It is unclear whether the United States employed countermeasures during the 2016 election cycle, but it is unlikely.²⁹⁸ The United States did, however, undertake several diplomatic remedies as discussed further below.²⁹⁹ Yet, Russian social engineering and cyber activities persist,³⁰⁰ so the United States may be conducting ongoing cyber operations today targeting Russia as a countermeasure to Russia's own ongoing activity. To date though, none have been publicly reported on.

"Naming and shaming" is another potential response to a gray zone tactic like election interference. In the context of cyber espionage, the

countermeasures, and the absence of a collective remedy as in the case of collective self-defense. For purposes of the present example, a key limitation on the availability of this self-help remedy is that, also unlike self-defense, countermeasures cannot be invoked as a justification for actions taken against non-state actors. *Id.*

297. See ICA Report, *supra* note 193, at ii.

298. See, e.g., Miller, Nakashima, & Entous, *supra* note 14 (providing detailed reporting on the Obama administrations attempt to counter the Russian election interference).

299. *But see id.* (reporting that "Obama also approved a previously undisclosed covert measure that authorized planting cyber weapons in Russia's infrastructure, the digital equivalent of bombs that could be detonated if the United States found itself in an escalating exchange with Russia").

300. Erin Griffith, *Pro-Gun Russian Bots Flood Twitter After Parkland Shooting*, WIRED (Feb. 15, 2018), available at <https://www.wired.com/story/pro-gun-russian-bots-flood-twitter-after-parkland-shooting/> (last visited Nov. 5, 2018); see also Catherine Garcia, *Russian Bots on Twitter Are Really Trying to Make #SchumerShutdown Happen*, THE WEEK (Jan. 21, 2018), available at <http://theweek.com/speedreads/749973>

[/russian-bots-twitter-are-really-trying-make-schumersshutdown-happen](http://russian-bots-twitter-are-really-trying-make-schumersshutdown-happen) (last visited Nov. 5, 2018) (reporting on Russian "bots" pushing an agenda during the early January 2018 government shutdown debates); Max de Haldevang, *Russian Twitterbots Blaming the Shutdown on Democrats*, QUARTZ (Jan. 22, 2018), available at <https://qz.com/1185452/government-shutdown-russian-bots-are-helping-republicans-blame-democrats-with-schumersshutdown/> (last visited Nov. 5, 2018); Jessica Rosenworcel, *Russians Hacking Our Public-Commenting System Too*, WASH. POST (Mar. 6, 2018), available at https://www.washingtonpost.com/opinions/russians-are-hacking-our-public-commenting-system-too/2018/03/06/fdfe3dae-1d6a-11e8-b2d9-08e748f892c0_story.html?utm_term=.9e55cf9d7d42 (last visited Nov. 5, 2018) (reporting on about 500,000 comments on the pending U.S. net neutrality rule making originating from Russia). Cf. Geoff Brumfiel, *As An American Tragedy Unfolds, Russian Agents Sow Discord Online*, NPR (Feb. 16, 2018), available at <https://www.npr.org/sections/thetwo-way/2018/02/16/586361956/as-an-american-tragedy-unfolds-russian-agents-sow-discord-online> (last visited Nov. 5, 2018) (describing the influence of Russian "bots" in shaping American political discourse in the wake of the tragic school shooting in Parkland, FL).

United States continues to do this³⁰¹ and has done so in the past³⁰² via indictment. The Mueller indictments of 13 Russian nationals in response to their activities in support of the Russian election interference indicates that the United States is equally comfortable doing so in this context.³⁰³ “Naming and shaming” via indictment of foreign nationals quite unlikely to ever see the inside of an American court room has its detractors,³⁰⁴ but it does have the advantage of throwing a potentially deterring light on a nation’s attempted covert activity, can help shape domestic and international public opinion, and serves as an important signaling mechanism indicating that the targeted nation has enough information to attribute the sovereignty breaching activities of another.

Finally, diplomatic reprisals and unilateral economic sanctions are also available. For instance, the United States expelled 35 Russian diplomats and leveraged narrowly targeted, largely symbolic, economic

301. See Tal Kopan, *US Disrupts ‘Massive and Brazen’ Iranian Hacking Scheme, DOJ Says*, CNN (Mar. 23, 2018), available at <https://www.cnn.com/2018/03/23/politics/iranian-hackers-indicted-universities-government/> (last visited Nov. 5, 2018) (reporting on an “indictment unveiled by the Justice Department [on March 23, 2018 that] directly links the individuals charged with the hacks to the Iranian government, saying the perpetrators were working for Iran’s Islamic Revolutionary Guard Corps and other government clients”); see also Ellen Nakashima & Karen DeYoung, *Trump Administration Hits Iranian Hacker Network With Sanctions, Indictments in Vast Global Campaign*, WASH. POST (Mar. 23, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-hits-iranian-hacker-network-with-sanctions-indictments-in-vast-global-campaign/2018/03/23/4481721c-2e16-11e8-8688-e053ba58f1e4_story.html?utm_term=.4f780c3c9b2f (last visited Nov. 5, 2018) (noting that:

[t]he Trump administration on Friday announced sanctions and criminal indictments against an Iranian hacker network it said was involved in ‘one of the largest state-sponsored hacking campaigns’ ever prosecuted by the United States, targeting hundreds of U.S. and foreign universities, as well as dozens of U.S. companies and government agencies, and the United Nations.).

302. See Press Release, U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage (May 19, 2014), available at <https://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor> (last visited Nov. 5, 2018); see also Kristen Eichensehr, *Deterrence by Indictment*, JUST SEC. (Mar. 24, 2016), available at <https://www.justsecurity.org/30205/deterrence-indictment/> (last visited at Nov. 5, 2018) (describing the indictment of Iranian nationals for cyber activities against the United States).

303. See Apuzzo & LaFraniere, *supra* note 207; see also Scannell, Shortell, & Stracqualursi, *supra* note 207.

304. See Jack Goldsmith, *The DNC Hack and (the Lack of) Deterrence*, LAWFARE (Oct. 9, 2016), available at <https://www.lawfareblog.com/dnc-hack-and-lack-deterrence> (last visited Nov. 5, 2018).

sanctions in response to the Russian election interference.³⁰⁵ The United States leveled a fresh set of economic sanctions targeting 19 people and five organizations in Russia on March 15, 2018,³⁰⁶ and the President reportedly considered an additional set in the first week of April, 2018.³⁰⁷ “Those targeted by the new sanctions may not travel into the United States . . . all their assets under U.S. jurisdiction are frozen . . . [and] U.S. individuals are barred from engaging in transactions with them.”³⁰⁸ The problem with reprisals, however, is that they can rapidly result in escalation, as was the case with Russia, who responded to the initial expulsion of their diplomats by ordering over 700 American diplomats and staff out of Russia.³⁰⁹

In short, while countermeasures present a potential, if not imperfect, avenue to respond to gray zone activities like election interference, they ultimately do a poor job preventing these activities in the first place.

IV. Recommendations

Young Clark Kent: “The world is too big, mom.”

Martha Kent: “Then make it small.”³¹⁰

This poignant dialogue from the recent Superman film, *Man of Steel*, brings into stark relief a key theme necessary to counter a rising China and a declining Russia’s challenges to America. America, a united America, must reverse recent trends away from globalism³¹¹ and look for ways

305. See Miller, Nakashima, & Entous, *supra* note 14.

306. Ellen Nakashima, *Trump Administration Hits Russian Spies, Trolls With Sanctions Over U.S. Election Interference, Cyberattacks*, WASH. POST (Mar. 15, 2018), available at https://www.washingtonpost.com/world/national-security/trump-administration-sanctions-russian-spies-trolls-over-us-election-interference-cyber-attacks/2018/03/15/3eaae186-284c-11e8-b79d-f3d931db7f68_story.html?utm_term=.db7b2a4ede52 (last visited Nov. 5, 2018).

307. See Hudson, Dawsey, & Harri, *supra* note 188.

308. Nakashima, *supra* note 306.

309. See Camila Domonoske, *Putin to Expel 755 U.S. Diplomats and Staff From Russia in Response to New Sanctions*, NPR (July 30, 2017), available at <https://www.npr.org/sections/thetwo-way/2017/07/30/540432397/putin-expels-755-u-s-diplomats-from-russia-in-response-to-new-sanctions-bill> (last visited Nov. 5, 2018); see also UK Official: *Russia Conduct ‘Hybrid Warfare’*, ASSOC. PRESS (Mar. 29, 2018) available at <https://www.wcjb.com/content/news/UN-chief-warns-of-new-Cold-War-approaching-478313663.html> (last visited Nov. 5, 2018) (providing a running update on the U.S., U.K., and Russian actions and reactions, fairly characterized as proportional countermeasures which commenced with the poisoning via nerve agent of a Russian ex-spy in Britain).

310. MAN OF STEEL (Warner Bros. 2013).

311. Compare Max Boot, *Three Cheers for Globalism!*, FOR. POL’Y (Oct. 6, 2017), available at <http://foreignpolicy.com/2017/10/06/three-cheers-for->

to make the world small.³¹² We can no longer afford to take for granted our place in the international order. The United States is “the nation that liberated death camps, rebuilt our enemies, inspires dissidents, welcomes refugees, secures the peace on every contested frontier and seizes the ‘burden and glory of freedom.’”³¹³ Today, as has long been the case, challenges are everywhere and the best way to address them is through unity of purpose and cooperation. International institutions and treaty regimes, like UNCLOS and the ICCPR, are the embodiment of both. Embracing them does not make the “[United States] a nation of ‘globalists;’ it makes [it] America.”³¹⁴ Likewise, America ignores them, challenges them, weakens them, and a great many of the 44 other Treaties and international agreements that are languishing in the Senate for advice and consent since 1945,³¹⁵ at its peril.

A. General

1. “America first does not mean America alone.”³¹⁶

The United States needs to remember how to be a leader in the international community once again. “Rather than seeking to impose ‘a

globalism/ (last visited Nov. 5, 2018) (touting the benefits to America of globalism and internationalism) with Peter Savodnik, *Putin Already Has Trump in a Soviet Sleeper Hold*, VANITY FAIR (Mar. 13, 2018), available at <https://www.vanityfair.com/news/2018/03/putin-already-has-trump-in-a-soviet-sleeper-hold> (last visited Oct. 29, 2018) (stating that:

[there are those in America who] think the old configurations are corrupt and un-American. They crave a battle royale with anyone they believe to be on the inside: the globalists and profiteers who have apparently made zillions off the backs of Real Americans—anyone who feels angry, Lilliputian, put upon. They think that what polite company refers to as the ‘liberal democratic order’ is a sham, and if the president is undermining it, that’s good because shams are bad.).

312. See Michael Gerson, *We Are Not Globalists; We’re Americans*, WASH. POST (Mar. 19, 2018), available at https://www.washingtonpost.com/opinions/we-are-not-globalists-were-americans/2018/03/19/2a117e26-2bb0-11e8-8ad6-fbc50284fce8_story.html?utm_term=.fbae1efedf73 (last visited Nov. 5, 2018) (“[T]he postwar preeminence of the United States has been sustainable, not only because of our military power but also because the global order we shaped is not a zero-sum game”).

313. *Id.* (quoting President John F. Kennedy).

314. *Id.*

315. See Almond, *supra* note 84.

316. Adem Edleman, *Trump to Davos: “America First Does Not Mean America Alone,”* NBC NEWS (Jan. 26, 2018), available at <https://www.nbcnews.com/politics/donald-trump/trump-tells-davos-crowd-america-first-does-not-mean-america-n841306> (last visited Nov. 5, 2018). But see Peter Beinart, *The Rise of Right-Wing Foreign Policy in America*, THE ATLANTIC (Mar. 15, 2018), available at <https://www.theatlantic.com/international/archive/2018/03/trumps-foreign-policy-gop/555644/> (last visited Nov. 5, 2018) (reporting that outgoing Secretary of State

new American century' on the basis of . . . cynical unilateral violence, we must call for partnerships among nations based on mutual respect, tolerance, and the rule of law.”³¹⁷ And, if we are indeed facing a return of great power rivalry, international institutions are intended as an important piece of the international system designed to prevent great power conflict. These international institutions serve as a pressure relief mechanism that can keep States from engaging in gray zone activities in the first place and may, in fact, keep those gray zone activities from becoming actual armed conflicts.³¹⁸ Further, acting unilaterally only spurs and incentivizes further unilateral action from other States—a dangerous trend when both China and Russia demonstrate a proclivity towards unilateral gray zone operations.³¹⁹ Finally, our consistent withdrawal from the fora and institutions that we worked so hard to create have, as a result, weakened those institutions to the point of general ineffectiveness which makes them unavailable to us should we need them to check aggression from elsewhere.³²⁰

With specific regard to China, the U.S. Senate's refusal to ratify UNCLOS puts the United States in a much weaker position to challenge both excessive Chinese maritime claims in general and viewed in a light least favorable to their activities and U.S. interests, a transparent attempt to convert the whole of the South China Sea into “internal waters” through the creation of an artificial series of archipelagic islands with

Rex Tillerson is likely the last gasp of “Hamiltonian” American foreign policy leaders, that favored diplomacy, containment of state rivals, and international institutions).

317. Engle, *supra* note 116, at 131-33.

318. See, e.g., Emilie M. Hafner-Burton & Alexander Montgomery, *Power Positions*, 50 J. OF CONFLICT RESOL. 3, 5 (2006) (writing that a great many scholars concur that international institutions reduce conflict).

319. MAZARR, *MASTERING THE GRAY ZONE*, *supra* note 21, at 79-96; see also Max Boot, *Russia's Been Waging War on the West for Years; We Just Haven't Noticed*, WASH. POST (Mar. 15, 2018), available at https://www.washingtonpost.com/opinions/russias-been-waging-war-on-the-west-for-at-least-a-decade-we-just-havent-noticed/2018/03/15/83926c78-2875-11e8-bc72-077aa4dab9ef_story.html?utm_term=.0148886e0386 (last visited Nov. 5, 2018) (noting that:

Russia has been waging war on the West for at least 10 years, and the West hasn't bothered to notice. This is not, to be sure, a conventional war, with Russian tanks invading Poland or Russian missiles hitting Pittsburgh. Moscow's kind of war is more subtle and yet all the more effective—precisely because it does not compel an overwhelming response.).

320. Ash, *supra* note 95, at 41 (writing that “because of the [United States'] unique position of power, excepting itself to international rules actually weakens the rules, which prevent[s] the [United States] from using them against other countries in the future”); see also Koh, *supra* note 68, at 1487.

which to reset their external baselines.³²¹ As for Russia, who remains not above good old-fashioned sabre rattling,³²² the occasional assassination,³²³ or combination thereof,³²⁴ the American evisceration of the ICCPR, through a record number of RUDs cuts off an avenue of relief³²⁵ from what is turning into persistent, if not constant, social engineering and influence operations targeting American political institutions.³²⁶

Leveraging all available tools of statecraft is a key component of gray zone activities.³²⁷ Certainly there is room to build or adjust conventional forces or hard power to counter gray zone attacks.³²⁸ But, it makes

321. See Cardin, *supra* note 66 (“[O]ur failure to ratify the treaty also undermines our ability to with our allies and partners in the South China Sea region [because] . . . it is difficult for the United States to rely on the treaty to determine” the issues in play in the region”).

322. See James Cameron, *Putin Just Bragged About Russia’s Nuclear Weapons; Here’s the Real Story*, WASH. POST (Mar. 5, 2018), available at https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/05/putin-claims-russia-has-invincible-nuclear-weapons-heres-the-story-behind-this/?utm_term=.1d2bdcdb79ec (last visited Nov. 5, 2018) (reporting on Russia’s most recent round of public statements trumpeting advanced hard power capabilities it may or may not have).

323. Cf. William Booth & Matthew Bodner, *Britain to Expel 23 Russian Diplomats After Ex-Spy Poisoning*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/world/europe/britains-theresa-may-prepares-response-to-russian-spy-poisoning/2018/03/14/0a232d2c-26f5-11e8-a227-fd2b009466bc_story.html?utm_term=.19c56483ac0d (last visited Nov. 5, 2018); Williams Booth, *Theresa May: ‘Highly Likely’ Russia Responsible for Spy’s Poisoning By Nerve Agent*, WASH. POST (Mar. 12, 2018), available at https://www.washingtonpost.com/world/theresa-may-says-highly-likely-russia-is-responsible-for-spys-poisoning/2018/03/12/7baa6d22-25f4-11e8-a227-fd2b009466bc_story.html?utm_term=.7ff600129dbf (last visited Nov. 5, 2018); Adam Taylor, *Britain’s Expulsion of 23 Russian Diplomats Marks a Return to Cold War Ejections*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/news/worldviews/wp/2018/03/14/britains-expulsion-of-23-russian-diplomats-marks-a-return-to-cold-war-ejections/?utm_term=.47c914df017f (last visited Nov. 5, 2018).

324. See Alex Lockie, *Russia Responds With Veiled Nuclear, Death Threats to UK Nerve Agent Attack*, BUS. INSIDER (Mar. 14, 2018), available at <http://www.businessinsider.com/russia-uk-responds-nuclear-death-threats-nerve-agent-attack-2018-3> (last visited Nov. 5, 2018).

325. See Ohlin, *supra* note 229, at 1583-87.

326. See Miller, Nakashima, & Entous, *supra* note 14.

327. See MAZARR, *MASTERING THE GRAY ZONE*, *supra* note 21, at 43-52; see generally, HILL & GADDY, *supra* note 16, at 336-39 (describing Russian’s focus on leveraging all aspects of state power to meet its goals).

328. See generally Max Boot, *The United States Is Preparing for the Wrong War*, WASH. POST (Mar. 29, 2018), available at <https://www.washingtonpost.com/opinions/the-united-states-is-preparing-for-the-wrong-war/2018/03/29/0c0553ae-336b-11e8-8bdd->

no sense not to try to counter those initiatives with all available tools, especially, as I discuss below, diplomatic capacity,³²⁹ as well as full participation in applicable international treaty regimes and relevant international fora. If one thing is clear, it is that “the rules-based international order [created in large part by America] . . . has helped to keep the peace for over 60 years” and with care will continue to do so into the future.³³⁰ But it will take work and a present, not absent, America, if for no other reasons than adopting an internationalist posture helps shed light on state actions with questionable international legal justification, eases coalition building as a means to counter such activity, and can serve to isolate bad actors as international pariahs.³³¹ Simply put,

America must not retreat from global engagement . . . engagement is not an end in itself. It is a strategic tool to protect [the United States]. Without an engaged diplomatic component of national power, [the United States] weaken[s] our alliances, lose[s] credibility in the eyes of both our partners and our adversaries, and increase the likelihood of unnecessary and costly wars.³³²

cdb33a5eef83_story.html?utm_term=.257d17207bb9 (last visited Oct. 29, 2018) (summarizing both Russia’s gray zone activities and the U.S. military’s failure to develop the capacity and capabilities to effectively counter them).

329. See William J. Burns, *Putin Has Overplayed His Hand*, N.Y. TIMES (Mar. 31, 2018), available at <https://www.nytimes.com/2018/03/31/opinion/sunday/putin-trump-overplayed.html> (last visited Oct. 29, 2018) (arguing that the United States “should lead with diplomacy and demonstrate its enduring power and purpose. If [it does not] . . . [the United States will] perpetuate illusions about partnerships with [Russia] and the irrelevance of diplomacy—and waste” America’s advantages of strong international alliances and partnerships); see also Eric Levitz, *Tillerson’s Firing Brings America Closer to War With North Korea*, N.Y. MAG (Mar. 13, 2018), available at <http://nymag.com/daily/intelligencer/2018/03/tillersons-firing-brings-us-closer-to-war-with-north-korea.html> (last visited Oct. 29, 2018) (reporting on the impact of Secretary Tillerson’s removal and noting that “[h]e leaves the State Department demoralized and understaffed, in a moment when the United States is in dire need of diplomatic expertise”); Carol Morello, *More Than 200 Former Diplomats Are Alarmed at the State of American Diplomacy*, WASH. POST (Mar. 28, 2018), available at https://www.washingtonpost.com/world/national-security/nearly-200-former-diplomats-are-alarmed-at-the-state-of-american-diplomacy/2018/03/28/3f4ac510-32ac-11e8-8bdd-cdb33a5eef83_story.html?utm_term=.fc1b0cc41ec0 (last visited Oct. 29, 2018).

330. See MAZARR, MASTERING THE GRAY ZONE, *supra* note 21, at 127.

331. See *generally id.* at 126-138 (arguing five strategies to checking Gray Zone activity favored by both China and Russia: “(1) Set the Long-Term Trajectory: Make Sure Time is on Your Side, (2) Strengthen Institutions and Norms to Control Revisionist [Gray Zone] Tactics, (3) Decide Where Accommodation is Possible, (4) Build Forces, System, Technologies, Concepts, and Doctrine for a Gradualist Environment, (5) Punish Selected Revisionist Acts and Broadcast True Red Lines”).

332. Letter from Ambassador Frank Almaguer et al. to Senator Bob Corker, Chairman Senate For. Rel. Comm. and Robert Menendez, Ranking Member, Senate

2. “We must, indeed, all hang together, or most assuredly we shall all hang separately.”³³³

“America first” should also mean America before party.³³⁴ Domestic hyper-partisanship creates a national security issue because it fosters an environment hospitable for asymmetric, covert actions targeting democratic institutions³³⁵ and prevents the nation from acting in a cohesive, unified manner to address threats which require a unified response. “Indeed, gray zone techniques can properly be thought of [as] tools to take advantage of pre-existing political, social, or economic vulnerabilities rather than as efforts capable of achieving decisive results on their own.”³³⁶

Americans seemingly grow more politically divided by the day.³³⁷ “Public opinion remains more divided along partisan lines than along the lines of race, religion, age, gender, and educational background.”³³⁸ Most concerning, “[t]he vast majority of Republicans and Democrats, at 81 percent for both parties, say they have an unfavorable view of the other

For. Rel. Comm. (Mar. 21, 2018), available at <https://defenddiplomacy.org/sign-the-petition/> (last visited Oct. 29, 2018) [hereinafter Diplomacy Letter].

333. *Franklin’s Contributions to the American Revolution as a Diplomat in France*, U.S. HISTORY, available at <http://www.ushistory.org/valleyforge/history/franklin.html> (last visited Oct. 29, 2018) (quoting Benjamin Franklin).

334. See generally Jeremy W. Peters, *In a Divided Era, One Thing Seems to Unite: Political Anger*, N.Y. TIMES (Aug. 17, 2018), available at <https://www.nytimes.com/2018/08/17/us/politics/political-fights.html> (last visited Oct. 29, 2018); Michael D’Antonio, *Trump is Bringing Everyone Down to His Level*, CNN (Feb. 7, 2018), available at <http://www.cnn.com/2018/02/06/opinions/treasonous-cadet-bone-spurs-opinion-dantonio/index.html> (last visited Oct. 29, 2018).

335. See Christopher Paul & Miriam Matthews, *The Russian “Firehose of Falsehood” Propaganda Model*, RAND CORP. (2016), available at <https://www.rand.org/pubs/perspectives/PE198.html> (last visited Oct. 29, 2018) (noting that Russia has taken advantage when “high numbers of channels and messages and a shameless willingness to disseminate partial truths or outright fictions” are used to spread propaganda); see also Ben Guarino, *Fake News Spreads “Farther, Faster, Deeper” Than Truth, Study Finds*, WASH. POST (Mar. 8, 2018), available at https://www.washingtonpost.com/news/speaking-of-science/wp/2018/03/08/fake-news-spreads-farther-faster-deeper-than-truth-study-finds/?utm_term=.9c9f68acfe96 (last visited Oct. 29, 2018) (“By almost all metrics, false [social media] cascades outpaced true ones.”).

336. MAZARR, MASTERING THE GRAY ZONE, *supra* note 21, at 118.

337. See Clare Foran, *America’s Political Divide Intensified During Trump’s First Year as President*, THE ATLANTIC (Oct. 5, 2017), available at <https://www.theatlantic.com/politics/archive/2017/10/trump-partisan-divide-republicans-democrats/541917/> (last visited Oct. 29, 2018); see also Emma Green, *One Country, Two Radically Different Narratives*, THE ATLANTIC (July 17, 2018), available at <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-republican-democratic-voter/565328/> (last visited Oct. 29, 2018).

338. Foran, *supra* note 337.

side.”³³⁹ Even the mere concept of compromise seems an impossible task.³⁴⁰

The basic political norms of mutual toleration and restraint served American democracy for the better part of the last century.³⁴¹ Yet, these norms today appear to be weakening, creating extreme partisan polarization.³⁴² As a starting point, this polarization seems to be growing because of an apparent trust deficit—amongst ourselves³⁴³ and recently, our institutions.³⁴⁴ Trust is important because “[t]he lifeblood of democracy is a common understanding of the facts and information that we can use as a basis for negotiation and compromise When that goes away, the whole foundation of democracy gets shaken.”³⁴⁵ The absence of objective facts and rational discourse allows for foreign actors like Russia bent on sowing further discourse to drive dividing wedges into a nation’s populace.³⁴⁶

Further, hyper-partisanship makes the nation vulnerable to crisis when party politics makes it impossible to move with national purpose. China apparently has a long-term plan and its actions in the South China Sea are but one piece of that plan. In addition to its excessive South China Seas maritime claims, China is in the midst of undertaking an impressive

339. *Id.*

340. See generally Charles Lane, *Americans Used to Compromise All the Time*, WASH. POST (Mar. 14, 2018), available at https://www.washingtonpost.com/opinions/national-unity-might-be-impossible-we-could-try-compromise-instead/2018/03/14/b8c0632c-279f-11e8-b79d-f3d931db7f68_story.html?utm_term=.99f5b9c7043b (last visited Oct. 29, 2018).

341. See generally Steven Levitisky & Daniel Ziblatt, *This Is How Democracies Die*, THE GUARDIAN (Jan. 21, 2017), available at <https://www.theguardian.com/us-news/commentisfree/2018/jan/21/this-is-how-democracies-die> (last visited Oct. 29, 2018).

342. *Id.*

343. See Nicholas Kristof, *You’re Wrong! I’m Right!*, N.Y. TIMES (Feb. 17, 2018), available at <https://www.nytimes.com/2018/02/17/opinion/sunday/liberal-conservative-divide.html> (last visited Oct. 29, 2018) (reporting that about the only thing Americans in 2018 agree on is the rending of our social fabric and arguing that today there are two Americas. “In each . . . people who inhabit the other are often perceived as not just obtuse but also dangerous. Half of Democrats and Republicans alike say in polls that they are literally afraid of the other political party.”).

344. See Uri Friedman, *Trust Is Collapsing in America*, THE ATLANTIC (Jan. 21, 2018), available at <https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/> (last visited Oct. 29, 2018).

345. *Id.* (quoting researcher David Bersoff).

346. See generally Paul & Matthews, *supra* note 335.

effort to create or improve infrastructure in Asia,³⁴⁷ Africa,³⁴⁸ and really throughout the world,³⁴⁹ that allows it to spread its influence³⁵⁰ while opening markets to its goods.³⁵¹ China is also in the process of

347. See Ismail Dilawar, *China's Flagship Port in Pakistan Shackled by Heavy Security*, BLOOMBERG (Feb. 26, 2018), available at <https://www.bloomberg.com/amp/news/articles/2018-02-26/china-s-flagship-port-in-pakistan-shackled-by-heavy-security> (last visited Oct. 29, 2018) (describing China's \$50 billion in infrastructure projects in Pakistan); see also Max Fisher & Audrey Carlsen, *How China Is Challenging American Dominance in Asia*, N.Y. TIMES (Mar. 9, 2018), available at <https://www.nytimes.com/interactive/2018/03/09/world/asia/china-us-asia-rivalry.html> (last visited Oct. 29, 2018).

348. See Laura Koran, *Why China's Footprint in Africa Worries the US*, CNN (Mar. 10, 2018), available at <https://www.cnn.com/2018/03/10/politics/china-africa-footprint-tillerson/> (last visited Oct. 29, 2018) ("Since the early 2000s, China has been investing heavily across Africa" in an attempt to further increase its world influence); see also Josh Rogin, *Can the Trump Administration Stop China From Taking Over a Key African Port?*, WASH. POST (Mar. 7, 2018), available at https://www.washingtonpost.com/news/josh-rogin/wp/2018/03/07/can-the-trump-administration-stop-china-from-taking-over-a-key-african-port/?utm_term=.9ac464ff95c8 (last visited Oct. 29, 2018) (reporting on a Chinese state controlled firm's efforts to take over the Doraleh Container terminal in Djibouti, which serves as a major import location for U.S. counter-terror operations on the whole of the African continent).

349. See Parag Khana, *Get Over Yourself, America*, POLITICO (Jan. 19, 2018), available at <https://www.politico.com/magazine/story/2018/01/19/get-over-yourself-america-216478?cid=apn> (last visited Oct. 24, 2018) (writing that "American officials speak about accommodating China's rise as if it were still up to them"); see also Alfonso Serrano, *China Fills Trump's Empty Seat at Latin America Summit*, N.Y. TIMES (Apr. 13, 2018), available at <https://www.nytimes.com/2018/04/13/opinion/china-trump-pence-summit-lima-latin-america.html> (last visited Oct. 24, 2018) (reporting on China's efforts to expand its influence into South America); Ting Shi, *China Infrastructure Push Reaches Arctic, Leaving Out U.S.*, BLOOMBERG (Jan. 28, 2018), available at https://www.bloomberg.com/news/articles/2018-01-28/china-infrastructure-push-reaches-arctic-further-isolating-u-s?utm_campaign=pol&utm_medium=bd&utm_source=applenews (last visited Oct. 24, 2018) (linking China's efforts at world-wide infrastructure improvement or creation as "the latest illustration of [China's] desire to play a greater global role as the U.S. turns more inward-looking").

350. See Kerry Brown, *The Security Implications of China's Belt and Road*, THE DIPLOMAT (Nov. 27, 2015), available at <https://thediplomat.com/2015/11/the-security-implications-of-chinas-belt-and-road/> (last visited Oct. 24, 2018); see also Shivshankar Menon, *The Unprecedented Promises—and Threats—of the Belt and Road Initiative*, THE WIRE (Apr. 24, 2017), available at <https://thewire.in/127579/the-unprecedented-promises-and-threats-of-the-belt-and-road-initiative/> (last visited Oct. 24, 2018).

351. See, e.g., Peng-fu Neo, *Foreword* to LIM TAI WI ET AL., CHINA'S ONE BELT ONE ROAD INITIATIVE ix (2016) (describing the historical basis and future plans of the Chinese initiative to open trade and influence routes throughout the globe).

developing true strategic military assets that will allow it to project force all over the globe,³⁵² but especially regionally,³⁵³ and positioned itself in both the Arctic³⁵⁴ and the Antarctic³⁵⁵ to take full advantage of new access

352. See Eric Baculinao, *These Chinese Military Innovations Threaten U.S. Superiority, Experts Say*, NBC NEWS (Feb. 17, 2018), available at <https://www.nbcnews.com/news/world/these-chinese-military-innovations-threaten-u-s-superiority-experts-say-n848596> (last visited Oct. 24, 2018); see also *China's Next Aircraft Carrier Will Be a Massive Leap Forward*, POPULAR MECHANICS (Jan. 19, 2018), available at <https://www.popularmechanics.com/military/navy-ships/a15392390/chinas-next-aircraft-carrier-002/> (last visited Oct. 24, 2018); Jeffrey Lin & P. W. Singer, *A Chinese Shipbuilder Accidentally Revealed Its Major Navy Plans*, POPULAR SCI. (Mar. 15, 2018), available at <https://www.popsci.com/china-nuclear-submarine-aircraft-carrier-leak> (last visited Oct. 24, 2018); Kyle Mizokami, *China's Second Aircraft Carrier Is Its Most Crucial Yet*, POPULAR MECHANICS (Dec. 11, 2017), available at <https://www.popularmechanics.com/military/navy-ships/a14408704/chinas-second-aircraft-carrier-is-its-most-crucial-yet/> (last visited Oct. 24, 2018); Scott Neuman, *China's Newest Aircraft Carrier, 'Type 001A,' Reportedly Begins Sea Trials*, NPR, (Aug. 28, 2018), available at <https://www.npr.org/2018/08/28/642493101/chinas-newest-aircraft-carrier-type-001a-reportedly-begins-sea-trials> (last visited Oct. 29, 2018); Brian Wang, *China's Next Aircraft Carrier Will Make Its Navy Distant Second Behind the USA*, NEXT BIG FUTURE (Jan. 21, 2018), available at <https://www.nextbigfuture.com/2018/01/chinas-next-aircraft-carrier-will-make-its-navy-distant-second-behind-the-usa.html> (last visited Oct. 24, 2018) (describing China's indigenous Type 001A air craft carrier).

353. See Myers, *supra* note 10; see also James Pearson & Greg Torode, *Exclusive: Satellite Images Reveal Show of Force by Chinese Navy in South China Sea*, REUTERS (Mar. 27, 2017), available at https://www.reuters.com/article/us-china-defence/exclusive-satellite-images-reveal-show-of-force-by-chinese-navy-in-south-china-sea-idUSKBN1H3135?utm_source=applenews (last visited Oct. 29, 2018); Jacqueline Williams, *Australia Shudders Amid Talk of a Chinese Military Base in Its Backyard*, N.Y. TIMES (Apr. 11, 2018), available at <https://www.nytimes.com/2018/04/11/world/australia/vanuatu-chinese-military-base.html> (last visited Oct. 29, 2018) (reporting on China's attempt to partner with the Vanuatu government to build an expeditionary Chinese military base well into the South Pacific off the east coast of Australia). "The prospect of a Chinese military base close to Australia in the South Pacific could provide a significant boost in Beijing's ability to project its power, and could also undermine the strategic dominance of Western powers in an area they have long effectively controlled." *Id.*

354. See Mia Bennett, *What Does China's Arctic Policy Actually Say*, MAR. EXECUTIVE (Jan. 28, 2018), available at <https://www.maritime-executive.com/editorials/what-does-china-s-arctic-policy-actually-say#gs.qWBcDAc> (last visited Oct. 29, 2018) (reporting that China, as a self-proclaimed "near-arctic nation" plans to "understand, protect, develop, and participate in the governance of the Arctic"); see also Charlotte Gao, *China Issues Its Arctic Policy*, THE DIPLOMAT (Jan. 26, 2018), available at <https://thediplomat.com/2018/01/china-issues-its-arctic-policy/> (last visited Oct. 29, 2018).

355. Compare Nengye Liu, *Demystifying China in Antarctica*, THE DIPLOMAT (Jun. 9, 2017), available at <https://thediplomat.com/2017/06/demystifying-china-in-antarctica/>

to resources caused by global climate change and the pending sunset of the relevant existing international treaty regime, respectively. China is also apparently quite happy to engage in regional trade agreements without the United States, so as to not have to account for U.S. interests and equities.³⁵⁶ Equally concerning, China's President Xi recently announced an end to his term limits, tilting the burgeoning super power more closely towards authoritarianism than it has been in recent years.³⁵⁷

"National unity may be beyond our reach, [but] national cohesion [should] not" be.³⁵⁸ If it is, we will likely reap what we sow.³⁵⁹ Russia is constantly pressing and China is playing the long game and their supposed counter-balance, the United States, cannot manage enough

antarctica/ (last visited Oct. 29, 2018) (reporting that China's ambitions in Antarctica should not cause concern) with Dan Southerland, *Does China Want to Explore Antarctica, or Exploit Its Resources*, RADIO FREE ASIA (Nov. 30, 2017), available at <https://www.rfa.org/english/commentaries/china-antarctica-11302017154333.html> (last visited Oct. 29, 2018) (reporting that some believe that China "has conducted undeclared military activities in Antarctica [in violation of the Antarctic treaty regime of which China is a party] is building a case for a territorial claim, and is engaging in military exploration there"). See also Nick Whigham, *Should We Be Concerned About a Challenge to Australia's Territorial Claim in Antarctica*, NEWS AU (Oct. 15, 2017), available at <https://www.news.com.au/technology/environment/conservation/should-we-be-concerned-about-a-challenge-to-australias-territorial-claim-in-antarctica/news-story/ad27325554ff70b7b0a0e7c5e1312c3a> (last visited Oct. 29, 2018) (reporting that Chinese aspirations in Antarctica are clear, as it has established its fifth installation on the continent and "is seen as a resource hungry nation in need of fossil fuels and minerals to feed its growing economy").

356. See Fisher & Carlsen, *supra* note 347 (noting that in the absence of America, traditional allies like Australia and Japan are "forging ahead without American leadership" in their interactions with China); see also Steven Mufson, *As Trump Imposes Tariffs, Allies Sign on to Free-Trade Pact—Without U.S.*, WASH. POST (Mar. 8, 2018), available at https://www.washingtonpost.com/business/economy/as-trump-imposes-tariffs-allies-sign-on-to-free-trade-pact—without-us/2018/03/08/bb068820-2301-11e8-badd-7c9f29a55815_story.html?utm_term=.35816f15c859 (last visited Oct. 29, 2018) ("The rest of the world is moving ahead without us." (quoting Michael Froman, U.S. negotiator of the Trans-Pacific Partnership, a massive trade agreement "that covers nearly 500 million people and more than 13 percent of global trade"))).

357. See Chris Buckley & Adam Wu, *Ending Term Limits for China's [President] Xi Is a Big Deal; Here's Why*, N.Y. TIMES (Mar. 10, 2018), available at <https://www.nytimes.com/2018/03/10/world/asia/china-xi-jinping-term-limit-explainer.html> (last visited Oct. 29, 2018).

358. Lane, *supra* note 340.

359. See 2 *Corinthians* 9:6 ("Whoever sows sparingly will also reap sparingly, and whoever sows generously will also reap generously.").

bipartisan support to stave off the specter of regular government shut downs³⁶⁰ or pass an annual budget.³⁶¹ This must change, or we may one day awake in a world where Russia manages to do real damage to our institutions and China, through a combination of gray zone tactics similar to those they are employing in the South China Sea, overt influence operations such as its “One Belt/One Road”³⁶² initiative, and ever-growing economic capacity and hard power capabilities drives that nation to supplant the United States as the world’s leader.

B. Specific

1. South China Sea: Reinvigorate America’s Soft Power

As a starting matter, the United States should ratify UNCLOS to maximize its international credibility, engage China from a position of international leadership, and fully leverage the Convention’s powerful dispute resolution provisions to address Chinese aggression in the South China Sea.³⁶³

Furthermore, the United States is still very much engaged in the global war on terror. This becomes critically important as America pivots to address the threat posed by great power conflict. While the U.S. military is largely unrivaled in the world today, it simply cannot be in all places at all times. We need like-minded partners to provide capacity and capabilities that we ourselves lack.³⁶⁴ This dynamic is compounded in the Pacific, where military forces must contend with the tyranny of distance.³⁶⁵ Thus, the United States will likely need to recognize that it must choose between the global war on terror and the threat of great power

360. See Shery Gay Stolberg & Thomas Kaplan, *Government Shutdown Ends After 3 Days of Recriminations*, N.Y. TIMES (Jan. 22, 2018), available at <https://www.nytimes.com/2018/01/22/us/politics/congress-votes-to-end-government-shutdown.html> (last visited Oct. 30, 2018).

361. See Press Release, U.S. House of Representatives Comm. on Appropriations, House Approves Budget and Emergency Supplemental Agreement (Feb. 9, 2018), available at <https://appropriations.house.gov/news/document-single.aspx?DocumentID=395097> (last visited Oct. 30, 2018) (describing the details of a continuing resolution and noting that the committee chair “look[ed] forward to working with our Senate counterparts to quickly negotiate and complete all [still pending] 12 full-year Appropriations bills”).

362. See generally LIM TAI WI ET AL, *supra* note 351.

363. See OXMAN, *supra* note 78.

364. See Julian Ku, *The British Are Coming to the South China Sea, and It’s About Time*, LAWFARE (Feb. 28, 2018), available at <https://www.lawfare-blog.com/british-are-coming-south-china-sea-and-its-about-time> (last visited Oct. 30, 2018) (reporting on the presence of the British Navy in the South China Sea to aid U.S. efforts in countering excessive Chinese maritime claims).

365. *Id.*

conflict, and as such, “curb current counterterrorism operations to support a longer-term strategy in Asia . . . [and correspondingly] free up necessary resources to increase U.S. military presence” and improve the capacity of U.S. regional partners, by “limiting—not expanding . . . U.S. military campaigns in [Syria,] Afghanistan and parts of Africa.”³⁶⁶

Most importantly, this hard power pivot needs to be supported by the force multiplying effects of American soft power, which the current administration has either ignored completely³⁶⁷ or actively sought to diminish.³⁶⁸ As of this writing, “[d]ozens of . . . key diplomatic jobs remain unfilled, including ambassadors to key U.S. allies such as Germany, Australia, and Saudi Arabia. More than two dozen ambassador posts are waiting for nominations to be put forward; nominees for more than a dozen others are waiting for confirmation.”³⁶⁹ The not-completely unexpected but comparatively sudden departure of the U.S. Secretary of State earlier this year further complicated the diplomatic vacuum at the State Department.³⁷⁰

366. Oriana Skylar Mastro & Ely Ratner, *China Is Gaining on the United States; What Are We Doing About It?*, POLITICO (Feb. 9, 2018), available at <https://www.politico.com/magazine/story/2018/02/09/china-united-states-donald-trump-216955?cid=apn> (last visited Oct. 30, 2018). *But see* Ryan Browne, *US Military Reveals New Firefight in Niger*, CNN (Mar. 15, 2018), available at <https://www.cnn.com/2018/03/15/politics/niger-firefight-december/index.html> (last visited Oct. 30, 2018) (reporting on the US military’s most recent African counterterrorism operation).

367. *See* Bill Faries & Mira Rojanasakul, *At Tillerson’s State Department, Seven of Nine Top Jobs Are Empty*, BLOOMBERG (Feb. 2, 2018), available at <https://www.bloomberg.com/graphics/2018-state-department-vacancies/> (last visited Oct. 30, 2018); *see also* John W. Schoen, *The State Department Is Riddled With Key Vacancies as Trump Seeks Nuclear Talks With North Korea*, CNBC (Mar. 13, 2018), available at <https://www.cnbc.com/2018/03/13/the-state-department-is-riddled-with-key-vacancies.html> (last visited Oct. 30, 2018).

368. *See* Benjamin Hart, *Trump on Unfilled State Department Jobs: “I Am the Only One That Matters,”* N.Y. MAG. (Nov. 3, 2017), available at <http://nymag.com/daily/intelligencer/2017/11/trump-on-unfilled-jobs-i-am-the-only-one-who-matters.html> (last visited Oct. 30, 2018) (quoting President Trump saying,

I’m a businessman, and I tell my people, ‘When you don’t need to fill slots, don’t fill them.’ But we have some people that I’m not happy with [at the State Department]. Lemme [sic] tell you, the one that matters is me. I’m the only one that matters, because when it comes to it, that’s what the policy is going to be.)

369. Schoen, *supra* note 367.

370. *See* Jeremy Diamond, *Inside Rex Tillerson’s Final Days as Secretary of State*, CNN (Mar. 13, 2018), available at <https://www.cnn.com/2018/03/13/politics/rex-tillerson-final-days/> (last visited Oct. 30, 2018); *see also* Ashley Parker et al., *Trump Ousts Tillerson, Will Replace Him as Secretary of State with CIA Chief Pompeo*, WASH. POST (Mar. 13, 2018), available at

The president signaled early on that military might, not diplomatic deftness, was his thing. Soft power was for the birds. This world view . . . has been expressed in a proposed cut of about 30 percent in the State Department budget as military spending soars; a push to eliminate some 2,300 jobs, the vacancy of many senior posts, including 20 of the 22 assistant secretary positions requiring Senate confirmation; unfilled ambassadorships—roughly 30 percent of the total—from Paris to New Delhi; and the brushoff of the department's input in interagency debate and in pivotal decisions.³⁷¹

This move away from diplomatic capacity is folly, for it is only through leveraging diplomacy *and* hard power that America can counter both gray zone tactics in general and China's aspirations of a new world order with itself at the fore.³⁷² "There is a lot that the military can do, but it is extraordinarily important that our diplomats, our Department of State, our other development agencies, and others are involved in this process as well," because if the United States does not integrate military objectives with soft-power capabilities, "we risk creating space for our adversaries to achieve their strategic aims."³⁷³

China is too big, its economy too strong, its influence too ascendant, and its growing military too capable for the United States to try and counter by itself. America needs allies to counter China and diplomatic soft power is the way to win them.

2. Russian Election Interference: It is Time to Begin Considering a New International Norm Against Election "Interference"

The mix of the last 50 years of globalism and technological advancement created a perfect storm that makes Western liberal democracies especially vulnerable to foreign interference in democratic processes. This is compounded through cyber capabilities that capitalize on the inherent

https://www.washingtonpost.com/politics/trump-ousts-tillerson-will-replace-him-as-secretary-of-state-with-cia-chief-pompeo/2018/03/13/30f34eea-26ba-11e8-b79d-f3d931db7f68_story.html?utm_term=.de42cc055071 (last visited Oct 30, 2018). *But see* Zack Beauchamp, *Rex Tillerson Has Been Fired; Experts Say He Did Damage That Could Last "a Generation,"* VOX (Mar. 13, 2018), available at <https://www.vox.com/world/2018/3/13/16029526/rex-tillerson-fired-state-department> (arguing that many experts believe that outgoing Secretary of State Tillerson was essentially the worst thing to happen to the State Department, ever).

371. Roger Cohen, *The Desperation of Our Diplomats*, N.Y. TIMES (July 28, 2018), available at <https://www.nytimes.com/2017/07/28/opinion/sunday/trump-tillerson-state-department-diplomats.html> (last visited Oct. 29, 2018).

372. *See, e.g.*, Diplomacy Letter, *supra* note 332; *see also* Morello, *supra* note 329; Phil Klay, *Two Decades of War Have Eroded the Morale of America's Troops*, THE ATLANTIC (May 2018), available at <https://www.theatlantic.com/magazine/archive/2018/05/left-behind/556844/> (last visited Oct. 29, 2018).

373. Klay, *supra* note 372 (quoting General Joseph L. Votel, current CENTCOM Commander).

technological interconnectedness of the 21st century that give States a relatively cheap³⁷⁴ and hard-to-detect means with which to penetrate sovereign borders and spread propaganda and disinformation to huge numbers of people.³⁷⁵ For example, in the context of “fake news,” a tool employed by Russia against the United States in the 2016 Presidential election,

[b]y liking, sharing, and searching for information, social bots (automated accounts impersonating humans) can magnify the spread of fake news by orders of magnitude. By one recent estimate—that classified accounts based on observable features such as sharing behavior, number of ties, and linguistic features—between 9 and 15% of active Twitter accounts are bots Facebook estimated that as many as 60 million bots may be infesting its platform. They were responsible for a substantial portion of political content posted during the 2016 U.S. campaign, and some of the same bots were later used to attempt to influence the 2017 French election.³⁷⁶

This is a far cry from the days of print media and even radio broadcasts, where similar activities were comparatively limited in scope. Yet, international law recognized the threat posed to sovereign nations and a people’s right of self-determination, for example, by placing certain limits on radio broadcasts.³⁷⁷ People today, especially in comparatively economically well-off Western nations that tend to be democracies, carry around powerful computers with them in their pockets.³⁷⁸ They use these computers to interact with the world, and most importantly in this

374. See McMaster, *supra* note 231 (claiming that “Russia brazenly and implausibly denies its actions, and *we have failed to impose sufficient costs*”) (emphasis added); see generally *On His Way Out, McMaster Tells the Truth*, WASH. POST (Apr. 4, 2018), available at https://www.washingtonpost.com/opinions/on-his-way-out-mcmaster-tells-the-truth-trump-should-listen/2018/04/04/7319ff08-3826-11e8-9c0a-85d477d9a226_story.html?utm_term=.26506cb1839c (last visited Oct. 29, 2018).

375. See David M. J. Lazer et al., *The Science of Fake News*, 359 SCI. 1094, 1095 (2018) (providing an excellent analysis on “[t]he rise of fake news” and its impact on “erosion of long-standing institutional bulwarks of information in the internet age”); see also Tania Lombrozo, *The Psychology of Fake News*, NPR (Mar. 27, 2018), available at <https://www.npr.org/sections/12.7/2018/03/27/597263367/the-psychology-of-fake-news> (last visited Oct. 28, 2018).

376. Lazer et al, *supra* note 375.

377. See generally UNCLLOS, *supra* note 72, art. 109 (prohibiting unauthorized broadcasting from the high seas); Horace B. Robertson Jr., *The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities Outside National Territory*, 45 DUKE J. L. AND CONTEMP. PROBS. 73, 76-83 (1982).

378. See *Riley v. California*, 134 S.Ct. 2473, 2489-92 (2014) (holding that cell phones, due in part to their ability to hold vast amounts of data, are different in kind than other possessions, and as such, those in the United States have a reasonable expectation of privacy in their contents).

context, get information.³⁷⁹ Further, people are growing more and more dependent on social media as a source of news information,³⁸⁰ which is particularly vulnerable, almost by design, to social engineering and propaganda operations.³⁸¹ The ease with which information flows has always been and remains a powerful tool of democracy. But this tool, at the same time, contains a powerful vulnerability, ripe for exploitation on many fronts.³⁸² Thus, it is of course no surprise that authoritarian States favor a top down, framing of “cyber-security” as the ability to control information within their own sovereign borders, as compared to the western state preference of a multi-lateral, bottom up, data-security focused model, which in turn makes these western States susceptible to gray zone, cyber-based intrusions from their more authoritarian rivals.³⁸³

379. *See id.*

380. *See* Elizabeth Grieco, *More Americans Are Turning to Multiple Social Media Sites for News*, PEW RES. CTR. (Nov. 2, 2017), available at <http://www.pewresearch.org/fact-tank/2017/11/02/more-americans-are-turning-to-multiple-social-media-sites-for-news/> (last visited Oct. 29, 2018).

381. *See* Benedict Carey, *How Fiction Becomes Fact on Social Media*, N.Y. TIMES (Oct. 20, 2017), available at <https://www.nytimes.com/2017/10/20/health/social-media-fake-news.html> (last visited Oct. 29, 2018) (providing that:

Executives from Facebook and Twitter will appear before congressional committees to answer questions about the use of their platforms by Russian hackers and others to spread misinformation and skew elections. During the 2016 presidential campaign, Facebook sold more than \$100,000 worth of ads to a Kremlin-linked company, and Google sold more than \$4,500 worth to accounts thought to be connected to the Russian government.);

see also Cecilia Kang, Nicholas Fandos, & Mike Isaac, *Tech Executives Are Contrite About Election Meddling, but Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), available at <https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html> (last visited Oct. 29, 2018) (reporting that “The most pointed exchanges were aimed at Facebook, which acknowledged . . . that more than 126 million users potentially saw inflammatory political ads bought by a Kremlin-linked company, the Internet Research Agency”); Lazer et al., *supra* note 375; Lombrozo, *supra* note 375.

382. *See generally* *Day Two of Mark Zuckerberg’s Testimony*, N.Y. TIMES (Apr. 12, 2018), available at <https://www.nytimes.com/video/us/politics/100000005844655/watch-live-day-2-of-mark-zuckerbergs-testimony.html> (last visited Oct. 29, 2018) (providing video of Facebook CEO Mark Zuckerberg’s testimony before the U.S. Congress on the exploitation of massive amounts of Facebook user data); Cecilia Kang et al., *Mark Zuckerberg Testimony: Day 2 Brings Tougher Questioning*, N.Y. TIMES (Apr. 12, 2018), available at <https://www.nytimes.com/2018/04/11/us/politics/zuckerberg-facebook-cambridge-analytica.html> (last visited Oct. 29, 2018).

383. *See* Kristen E. Eischensehr, *The Cyber-Law of Nations*, 103 GEO. L. J. 317, 329 (2014) (describing competing visions of the cyber domain); *see also* Statement of Christopher Painter, Coordinator for Cyber Issues, U.S. Dep’t of State, Before the Subcommittee on East Asia, the Pacific, and International Cyber Security,

Traditional international legal remedies like countermeasures, sanctions, and indictments are reactive in nature and therefore, by themselves, insufficient to counter the threat to sovereignty and self-determination posed by far reaching, concerted election interference operations. Hard power also does not provide a credible deterrence, because in all but the most egregious circumstances, election interference would not likely rise to a level justifying the use of force in self-defense.

Thus, I propose that the United States, first through international custom³⁸⁴ and ultimately through the creation of a U.S.-led multi-lateral treaty or series of bi-lateral treaties, establish a new international legal norm against election interference. As a start, election interference should be expressly carved out from the norm that arguably permits espionage³⁸⁵ by requiring all election influence operations to be overt in nature. Second, this norm should distinguish between influence and interference by prohibiting the wide dissemination via any means of patently false or verifiably inaccurate information across sovereign borders.³⁸⁶ To the extent that the United States had engaged in this activity in the past, it should expressly renounce its future use.³⁸⁷ Finally, this norm would also optimally establish certain baseline characteristics of functioning and fair democracies as a means of identifying both especially vulnerable States and potentially repressive regimes, the latter of which, in an admitted deviation from the existing norm of sovereign equality,³⁸⁸ would enjoy less protection from presumptively legitimate democracy fostering activities. This relates to the second norm in that activities intended to limit or minimize access to the democratic process or those that are intended to sow confusion and dissent should be presumptively violative of

Hearing on International Cybersecurity Strategy: Deterring Foreign Threats and Building Global Cyber Norms, 114th CONG. (2016), available at https://www.foreign.senate.gov/imo/media/doc/052516_Painter_Testimony.pdf (last visited Nov. 5, 2018); see generally Michael Schmitt & Liis Viñul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SEC. (June 30, 2017), available at <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/> (last visited Oct. 29, 2018) (taking to task authoritarian regimes like Cuba, Russia, and China for stonewalling the creation of even basic cyber norms).

384. See JEFFREY L. DUNNOFF, STEVEN R. RATNER, & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 78-81 (2nd ed. 2006) (describing the formation of customary international law through state practice and *opinio juris*).

385. See, e.g., Schmitt & Wall, *supra* note 240, at 362 (noting that “[i]t is well accepted that espionage is not, in itself, a breach of international law”).

386. See Lazer et al, *supra* note 375; see also Lombrozo, *supra* note 375.

387. See generally notes 264 & 265, *supra*.

388. See U.N. Charter art. 2 (1).

the norm, whereas those that enhance access to democratic processes would be likewise presumptively legal.³⁸⁹

V. Conclusion

The 2018 NDS remains a pivotal document in that it brought into focus what the Department of Defense considers as the primary threat vector to America—great power rivalry, specifically from China and Russia.³⁹⁰ This shift may in fact be premature considering the continuing nature of America's global war on terror, but it is serious and should not be ignored. This will necessarily force a choice between continuing the fight against terror at its current levels or re-leveraging American hard power and soft power tools to better focus on the threats posed by great power rivalry, specifically from China and Russia. Further, over the last 30 years, the United States may have increased its own vulnerability to great power rivals by moving away from the international institutions, treaties, and fora, many of which were first championed by the United States, and which, in part, were intended to serve as checks against future great power conflict. America's failure to sign and ratify UNCLOS and its unprecedented number of RUDs to the ICCPR are but two examples of this retreat from internationalism. There are many, many more.

America, in both China and Russia, has two revisionist nations who are certainly rivals if not potential adversaries. With China, America meets a rival on the rise and in Russia one in decline.³⁹¹ But, both nations have demonstrated a proclivity and aptitude for operating in the gray zone, as a means of asymmetrically countering America's status as a global hegemon. China's aspirations in the South China Sea threaten American regional influence and are simultaneously an end in of itself and a means as part of a broader strategy in which China can attempt to supplant the United States at the top of the world order. With Russia and its leadership interested in maintaining that nation's international relevance, checking perceived Western encroachment, and defending its own grip on domestic power, America must be vigilant against disruptive, technologically-based threats to its foundational institutions, like election interference operations, that seek to support a Russian zero-sum take on

389. See Vickery, *supra* note 267.

390. See 2018 NDS SUMMARY, *supra* note 1.

391. *C.f. Comparison Results of World Military Strengths*, *supra* note 185, *Russia*, *The World Fact Book*, *supra* note 186, and *China*, *The World Fact Book*, *supra* note 186.

international relations, specifically that a weakened United States/West is in Russia's best interests and vice versa.³⁹²

An America divided amongst itself and in retreat from internationalism only serves to assist both China and Russia in executing their gray zone tactics, and thus, the United States must work to reverse the largely political trends of the last thirty years so that it can effectively counter the rising dragon and dying bear and lead a peaceful and prosperous world in the 21st century.

392. See Rolf Mowatt-Larssen, *The Strategic Balance: A New US-Russian Zero Sum Game*, JUST SEC. (Oct. 17, 2016), available at, <https://www.justsecurity.org/33635/strategic-balance-u-s-russian-sum-game/> (last visited Oct. 29, 2018); see also Oliker, *supra* note 12; see generally HILL & GADDY, *supra* note 16, at 316 (writing that it has become Russia's strategy to "take every opportunity both to undermine American influence and to project Russian influence around the world").

**JAPAN’S PACIFIST CONSTITUTION: IMPOSED ON IT BY
THE UNITED STATES, NOW JAPAN SCRAMBLES TO
ANSWER NORTH KOREA’S THREATS**

Joshua D. Caron, MSgt, USAF, Ret.*

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ABSTRACT

Though Japan has an inherent right to self-defense, Article 9 of its Constitution expressly renounces war as a means to resolve international disputes. Currently, Japanese nationalists and the United States encourage the government of Japan to reconsider Article 9 and to rebuild its military. With recent threats from North Korea, including a ballistic missile launch over the Japanese island of Hokkaido into the Pacific Ocean, is Japan left to defense tactics only? The Treaty of Mutual Cooperation and Security of 1960 obliges the United States to defend the sovereign territories of Japan, but does the United States have a legal or even moral obligation to defend Japan from *threats*? The current treaties between the United States and Japan lack the necessary specificity to assure Japan's domestic and regional interests. I posit the United States has a moral obligation to defend Japan's interest against not only physical attacks, but also from North Korean threats.

I. INTRODUCTION

North Korea has been developing its Inter-Continental Ballistic Missile ("ICBM") and nuclear capability in earnest since Kim Jung Un succeeded his father in 2011 as the preeminent ruler of the reclusive state. This capability, along with Kim's threatening rhetoric, causes concern in the region and beyond. Indeed, North Korea remains the only state in the

world to have tested nuclear weapons in the twenty-first century, performing tests on at least five separate occasions.¹ The North Korean threat combined with Japan's pacifist Constitution poses a significant security risk for Japan.

Part II frames the issues throughout the note and introduces how the underdeveloped state of North Korea can pose a significant threat to Japan, arguably one of the most advanced nations in the world. Part II also explains the legal limitations within which Japan is forced to operate due to its pacifist Constitution.

Part III provides a history of the development of Japan's current Constitution and the United States' involvement in its drafting process. This section also addresses the evolution in interpreting Article 9 of Japan's Constitution to where it stands today. It further depicts why the United States began to lose favor with Article 9 and how that ultimately led to Japan's adoption of a Self-Defense Force ("SDF"). An overview of the SDF's history follows and includes its capabilities—both legally and operationally. Part III concludes with a historical backdrop of Japan and North Korea, which provides the basis for the current tensions between the two countries. Part III assesses the significant legal treaties and guidelines between Japan and the United States and how they expand the SDF's capacity.

Part IV examines the limitations of Japan's Constitution from a legal perspective and why some may consider it to violate international law. This forms the foundation for why the United States has not only a legal obligation to defend Japan against an attack, but also a moral obligation to defend Japan against threats.

In sum, this note critiques the United States' involvement in drafting Japan's Constitution, and concludes that because of this involvement (along with the strategic benefits the United States enjoys from its large military presence in Japan), the United States is responsible to ensure Japan's wellbeing from threats.

1. Jonathan D. Pollack, *The Threat from North Korea*, BROOKINGS (Apr. 24, 2017) available at <https://www.brookings.edu/blog/unpacked/2017/04/24/the-threat-from-north-korea/> (last visited Oct. 20, 2018).

II. ISSUE: A NUCLEAR CAPABLE NORTH KOREA IS PARTICULARLY ALARMING FOR JAPAN

How can a country with one of the weakest economies in the world (197th in 2013),² one that relies heavily on foreign support,³ be a feasible threat to Japan, a country that enjoys the world's third strongest economy?⁴ North Korea, indeed, remains determined to stay closed off from the Western world to avoid exposure "to the contagion" of foreign influence,⁵ yet it depends on foreign aid to feed its own people. Despite its weak economy, North Korea is home to the fourth largest conventional military the world knows.⁶ But it is not a conventional attack that threatens the region; it is North Korea's nuclear and ICBM capabilities that keeps the world concerned.

In the last two years, North Korea conducted approximately 30 ballistic missile tests.⁷ These tests, coupled with the aggressive rhetoric by

2. Rick Newman, *Here's How Lousy Life Is in North Korea*, U.S. NEWS AND WORLD REP. (Apr. 12, 2013), available at <https://www.usnews.com/news/blogs/rick-newman/2013/04/12/heres-how-lousy-life-is-in-north-korea> (last visited Oct. 20, 2018).

3. As recently as January 2017 (shortly before Donald Trump was sworn in as President), U.S. Secretary of State John Kerry awarded \$1 million to UNICEF for North Korea for humanitarian assistance. Baik Sung-won, *US Humanitarian Aid Goes to North Korea Despite Nuclear Tensions*, VOA NEWS (Jan. 25, 2017), available at <https://www.voanews.com/a/united-states-humanitarian-aid-goes-to-north-korea/3692811.html> (last visited Oct. 20, 2018). The U.K. has provided more than £4 million (\$5.2 million) to North Korea in six years. Jack Maidment, *UK 'Gave Millions in Foreign Aid' to North Korean Regime Now Threatening Nuclear War*, THE TELEGRAPH (Apr. 18, 2017), available at <http://www.telegraph.co.uk/news/2017/04/18/uk-gave-4-million-foreign-aid-north-korea-past-six-years/> (last visited Oct. 20, 2018).

4. *Best Countries—Japan*, U.S. NEWS AND WORLD REP., available at <https://www.usnews.com/news/best-countries/japan> (last visited Oct. 20, 2018).

5. *2017 Index of Economic Freedom, North Korea*, HERITAGE, available at <https://www.heritage.org/index/pdf/2017/countries/northkorea.pdf> (last visited Oct. 20, 2018).

6. Eleanor Albert, *North Korea's Military Capabilities*, COUNCIL ON FOR. REL. (June. 6, 2018), available at <https://www.cfr.org/backgrounder/north-koreas-military-capabilities> (last visited Oct. 20, 2018). Even with a weak GDP, North Korea spends approximately a quarter of its GDP on its military. Between 2004 and 2014, it is estimated that North Korea spent approximately \$3.5 billion annually on its military. *Id.*

7. Rosie Perper, *These Striking Photos Capture the Major Missile Launches North Korea Has Conducted in 2017*, BUS. INSIDER, available at <https://www.businessinsider.com/photos-of-north-koreas-major-missile-and-rocket-launches-to-date-2017-11> (last visited Oct. 20, 2018). For a definition of a "ballistic missile," see *Ballistic Missile*, WIKIPEDIA, available at https://en.wikipedia.org/wiki/Ballistic_missile (last visited Oct. 20, 2018) (stating that:

the North Korean dictator,⁸ cause regional tensions to escalate. Despite international warnings, North Korea launched two ballistic missiles into the Sea of Japan in July 2017 and another ballistic missile *over* Japan into the Pacific Ocean in August 2017, thus increasing the reality of the threats.⁹

North Korea's growing weapons capability, coupled with its aggressive testing, is cause for global concern. As of 2015, South Korea represented the eleventh strongest economy in the world,¹⁰ while Japan's economy ranks third.¹¹ China, also a key player, holds the world's second largest economy.¹² Consequently, a military conflict in the region would result in a disastrous outcome for the global economy.

Geographically, The Republic of Korea (South Korea) and Japan are the most susceptible to an attack from North Korea. Perhaps most vulnerable is Japan. Japan's vulnerability lies not only in its geographic proximity, but also within Article 9 of its Constitution. Specifically, Article 9 renounces war and use of force as a means for resolving disputes:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

A ballistic missile is a missile which follows a ballistic trajectory to deliver one or more warheads on a predetermined target. These weapons are only guided during relatively brief periods of flight—most of their trajectory is unpowered, being governed by gravity and air resistance of the atmosphere. Shorter range ballistic missiles stay within the Earth's atmosphere, while longer-ranged intercontinental ballistic missiles (ICBMs), are launched on a sub-orbital flight trajectory and spend most of their flight out of the atmosphere.).

8. For example, "Once an order is issued, you should break the waists of the crazy enemies, totally cut their windpipes and thus clearly show them what a real war is like." Sarah Sicard, *The Most Ridiculous Threats to Come Out of the North Korea in the Last few Years, Ranked*, BUS. INSIDER (Apr. 21, 2017), available at <http://www.businessinsider.com/ridiculous-threats-from-north-korea-ranked-2017-4> (last visited Oct. 20, 2018).

9. Tomoyuki Tachikawa, *U.S.-Japan Ties at "Highest Point" Amid N. Korea Woes: New U.S. Envoy*, KYODO NEWS (Sept. 12, 2017), available at <https://english.kyodonews.net/news/2017/09/df511b512c82-us-japan-ties-at-highest-point-amid-n-korea-woes-new-us-envoy.html> (last visited Oct. 20, 2018).

10. Kim Kyung-rok, *South Korea's Economy 11th Biggest in the World as of 2015*, HANKYOREH (Aug. 17, 2016), available at http://english.hani.co.kr/arti/english_edition/e_business/757139.html (last visited Oct. 20, 2018).

11. Alex Gray, *The World's 10 Biggest Economies in 2017*, WORLD ECON. F. (Mar. 9, 2017), available at <https://www.weforum.org/agenda/2017/03/worlds-biggest-economies-in-2017/> (last visited Oct. 20, 2018).

12. *Id.*

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.¹³

Despite the language of the second paragraph, Japan maintains ground, air, and naval forces.¹⁴ Japan cleverly refers to the military branches as defense forces—the “ground defense force,” the “air defense force,” and the “naval defense force.”¹⁵

Due to its pacifist constitution, Japan lacks the ability to wage war or conduct preemptive military operations, but it does maintain an SDF.¹⁶ The SDF is limited in scope to the defense of Japan and its territories.¹⁷ Thus, short of an overt attack, Japan stands nearly-powerless to respond to North Korean threats. Recent guidelines, however, expand the role of Japan’s SDF. In 2015, Japan and the United States agreed to a new set of defense guidelines, which essentially expanded the capabilities of the SDF.¹⁸ Even with the SDF, since World War II (“WWII”), Japan necessarily relies on the United States for defense.¹⁹ Furthermore, the history involving the region’s major players lies significant to the current situation.

A. North Korea’s Current Military, ICBM, and Nuclear Capability (estimated)

North Korea’s military is not a world power, but it remains a valid threat to regional peace and beyond.²⁰ A ground invasion against Japan

13. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 1-2 (Japan).

14. Brad Lendon, *Resurgent Japan Military ‘Can Stand Toe to Toe with Anybody,’* CNN (Dec. 7, 2016), available at <https://www.cnn.com/2016/12/06/asia/japan-military-pearl-harbor-anniversary/index.html> (last visited Oct 21, 2018).

15. Sayuri Umeda, *Japan: Article 9 of the Constitution* 1, 1, L. LIBR. OF CONG. (2006), available at <https://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf> (last visited Oct. 21, 2018).

16. Kyle Mizokami, *Inside the New U.S.-Japan Defense Guidelines*, USNI NEWS (Apr. 29, 2015), available at <https://news.usni.org/2015/04/29/inside-the-new-u-s-japan-defense-guidelines> (last visited Oct. 21, 2018).

17. *Id.*

18. See generally U.S. DEP’T OF DEF., THE GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION (Apr. 27, 2015), available at http://archive.defense.gov/pubs/20150427_GUIDELINES_FOR_US-JAPAN_DEFENSE_COOPERATION.pdf (last visited Oct. 21, 2018) [hereinafter GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION].

19. Doug Bandow, *It’s Time to End Japan’s Defense Dependence on the United States*, FORBES (Jan. 28, 2013), available at <https://www.forbes.com/sites/dougbandow/2013/01/28/its-time-to-end-japans-defense-dependence-on-the-united-states/#35551b783185> (last visited Oct. 21, 2018).

20. The North Korean Army is sizable (intelligence sources put it around 1.19 million, making it one of the most powerful in the world). Cristina Silva, *What*

is highly unlikely; however, North Korea's ballistic missile threat to Japan is very real. As tensions between the United States, South Korea, Japan, and North Korea rise, Japan will require more than one arrow in its quiver to respond to North Korea.

North Korea's most operative threat is in the form of a nuclear bomb delivered via ballistic missile. North Korea continues to build its nuclear program, which began in the late 1950s.²¹ Initially only able to construct a nuclear research reactor, North Korea progressed to light-water reactors, and eventually to nuclear bombs.²² The United States estimates that North Korea holds somewhere between 30–60 nuclear bombs.²³ In recent years, North Korea conducted six known tests of its nuclear weapons:

North Korea's Military Looks Like Compared to the U.S., NEWSWEEK (Apr. 25, 2017), available at <http://www.newsweek.com/what-north-koreas-military-looks-compared-us-589688> (last visited Oct. 21, 2018). The North Korean Navy (presumably a delivery vehicle option of ground forces) relies on obsolete equipment—simply transporting ground forces to Japan would prove problematic. Oliver Steward, *How Dangerous Is North Korea's Navy?* UK DEFENCE J. (Sep. 27, 2017), available at <https://ukdefencejournal.org.uk/how-dangerous-is-north-koreas-navy/> (last visited Oct. 21, 2018). Furthermore, North Korea's fleet of more than 1,300 aircraft (traditionally another transport option of ground troops) are outdated, primarily Soviet legacy models, and are generally responsible for defending North Korean Airspace. Simply put, they are not capable attack aircraft or capable troop transport aircraft. North Korea possesses only a handful of modern aircraft—the most capable of which are Pyongyang's fleet of 35 or so Mikoyan MiG-29 Fulcrums fighter aircraft. Other relatively modern planes in Pyongyang's inventory include 56 MiG-23 Floggers and 34 Sukhoi Su-25 Frogfoot close air support aircraft. Avinash Bhunjun, *How Powerful Is the North Korean Air Force?* METRO UK (Sept. 26, 2017), available at <http://metro.co.uk/2017/09/26/how-powerful-is-the-north-korean-air-force-6955891/> (last visited Oct. 21, 2018). Furthermore, Japan hosts the largest concentration of U.S. troops outside of the United States. See Julia Zorthian & Heather Jones, *Boots on the Ground*, TIME (OCT. 16, 2015), available at <http://time.com/4075458/afghanistan-drawdown-obama-troops/> (last visited Oct. 21, 2018). Japan's Air Defense force far exceeds the capabilities of North Korea's. Additionally, there is a sizable presence of U.S. Air Force assets stationed in Japan. Yokota Air Base is located just outside Tokyo and is the Headquarters for U.S. Forces Japan. The base also serves as the logistical hub for the region and hosts a squadron of cargo and troop-carrying aircraft. To the north is Misawa Air Base, which hosts two F16 Fighter Squadrons. To the south in Okinawa, Japan sits Kadena Air Base, which is home to two F15 Fighter Squadrons, an Airborne Warning and Control Systems (AWACS) Squadron, a Tanker Squadron (to provide inflight air refueling) a Rescue Squadron, and an Aeromedical Evacuation Squadron.

21. Albert, *supra* note 6. Initially North Korea had some assistance from the Soviets and later from China and Pakistan, but the growth of its nuclear capability has largely been domestic. *Id.*

22. *Id.*

23. *Id.* Other estimates put the number somewhere closer to fifteen to twenty nuclear bombs. *Id.*

October 2006; May 2009; February 2013; January and September 2016; and September 2017.²⁴

It is not definitively confirmed, but U.S. intelligence analysts believe that North Korea developed the ability to miniaturize its nuclear payload to fit in an ICBM warhead.²⁵ This capability would validate that North Korea is a substantial nuclear threat to the region and the United States. Simultaneously, the North Korean government has been increasing its ICBM capability. What good is a nuclear bomb with no means of delivering it?

Currently, North Korea's arsenal of ballistic missiles range from short-range missiles (with a range of 120–170 km, or 75–105 miles) to the ICBM "Hwasong-14" (with a range of 10,400 km, or 6,400 miles).²⁶ Though California and Japan fall well within the range of North Korea's ballistic missiles, it remains uncertain how powerful of a nuclear weapon North Korea can condense to fit into an ICBM warhead.²⁷ North Korea's guidance systems are also questionable. Some analysts assert that North Korea has been relying on outdated Soviet guidance systems, though others speculate they are now beginning to introduce GPS guidance to their ICBM weapons systems.²⁸

24. Albert, *supra* note 6. Each nuclear test has increased in power. The test in 2017 was seventeen times more powerful than its first in 2006. *Id.*

25. Bonnie Berkowitz, Laris Karklis, & Kevin Schaul, *How Four Launches Signaled New Leaps in North Korea's Missile Capabilities*, WASH. POST (Nov. 18, 2017), available at https://www.washingtonpost.com/graphics/2017/world/north-korea-launch/?utm_term=.85f41c5b8b12 (last visited Oct. 21, 2018). This article puts the September 2017 nuclear test at seven times greater than the first atomic bomb dropped on Hiroshima in 1945. *Id.*

26. *Id.* For reference, North Korea is approximately 2,110 miles from Guam, 4,660 miles from Hawaii, and 5,600 miles from California. Chris Baynes, *North Korea Missiles "Now Capable of Hitting Guam"*, THE INDEP. (Sept. 15, 2017), available at <https://www.independent.co.uk/news/world/asia/north-korea-missiles-guam-japan-us-territory-pacific-ocean-island-pyongyang-military-base-donald-a7947741.html> (last visited Oct. 21, 2018); see also Sebastian Kettley, *Could North Korea Bomb Hawaii? How Far Away Is Hawaii From North Korea?*, EXPRESS (Aug. 12, 2017), available at <https://www.express.co.uk/news/world/840060/North-Korea-news-bomb-Hawaii-missile-range-how-far-attack> (last visited Oct. 21, 2018); Mehreen Kasana, *Can North Korea Missiles Reach California? The West Coast Isn't That Far From Pyongyang*, BUSTLE (Aug. 10, 2017), available at <https://www.bustle.com/p/can-north-korea-missiles-reach-california-the-west-coast-isnt-that-far-from-pyongyang-75885> (last visited Oct. 21, 2018).

27. *How Potent Are North Korea's Threats?*, BBC NEWS (Sept. 15, 2015), available at <http://www.bbc.com/news/world-asia-21710644> (last visited Oct. 22, 2018).

28. Albert, *supra* note 6.

Still, 13 out of the last 18 ICBM tests have been deemed “successful.”²⁹ While some experts debate the accuracy, ability to survive re-entry, and true effective range of the ICBMs,³⁰ no one can argue that despite international condemnation North Korea grew its nuclear and ICBM weapons systems to a point beyond what most expected. What is clear, and perhaps most discomfoting, is that the world remains unable to deter North Korea thus far. If the world failed at slowing North Korea's nuclear and ICBM growth, what is Japan, a nation whose very Constitution forbids it to grow a military, capable of doing?

III. BACKGROUND: HOW THE UNITED STATES BECAME OBLIGATED TO DEFEND JAPAN

Japan's current exposure results from its past imperialistic domination over the region. From its victory in the Sino-Japanese war in 1894–95 until the end of WWII, Japan was determined to imperialize the region.³¹ Because of its domineering history, its regional neighbors view Japan more as a necessary economic trading partner rather than a popular ally.

This Part explains how Japan's current Constitution came to completion and outlines the United States' involvement in the drafting process. A summary follows regarding the expansion of the SDF's capabilities, along with the evolution of Article 9's interpretation. Next, a portrayal of why the United States (despite its initial insistence) now disfavors Article 9's war renunciation clause. The United States actually

29. Berkowitz, Karklis, & Schaul, *supra* note 25.

30. In an effort to avoid striking other countries, North Korea launches its ICBM nearly straight into the air allowing the missiles to fall into the Sea of Japan. For this reason, determining the missiles' exact range on a more traditional, flatter trajectory can be difficult. Experts factor in the curvature of the earth, the earth's rotation, the weight of the warhead, and type of fuel used. Still, it is without question that the latest ICBMs tested include the “Hwasong-14” and are capable of striking the continental United States. The Hwasong-14, for example, flew in a nearly straight-up trajectory for 47 minutes, landing 600 miles from the point of launch and reached an altitude of nearly 2,300 miles above earth. For comparison, the international space station orbits at an altitude of about 250 miles above earth. Most experts believe the “Hwasong-14” could potentially reach New York or Boston on a flatter trajectory. *Id.*

31. Susan Townsend, *Japan's Quest for Empire 1931-1945*, BBC (Mar. 30, 2011), available at http://www.bbc.co.uk/history/worldwars/wwtwo/japan_quest_empire_01.shtml (last visited Oct. 22, 2018). Three years later with its victory in the Russo-Japanese war (which stunned the western world), Japan was able to dominate the Korean peninsula. This new confidence, combined with its increased fundamentalist nationalism and demand for natural resources (especially petroleum), only fueled Japan's desire for expansion. *Id.*

pressured Japan to remilitarize. Part III also outlines the military capabilities of North Korea and Japan and explains why North Korea's most valid threat to Japan remains a missile attack. Finally, Part III concludes with an analysis of significant bilateral treaties and Japanese domestic laws. These treaties and domestic laws define the United States' obligations to Japan in the event of an attack, as well as the SDF's operational capabilities and limitations.

A. *The U.S. Military Drafted Japan's Constitution*

Although Japan currently enjoys "universal adult suffrage,"³² its current Constitution was not adopted through a democratic process; rather, Allied advisers in 1947 "dictated" Japan's Constitution.³³ General Douglas MacArthur, the most celebrated general in the war against Japan, later supervised Japan's surrender on the deck of the USS Missouri in Tokyo Bay on September 2, 1945.³⁴ This resulted in his appointment as the Supreme Commander for Allied Powers ("SCAP") in occupied Japan. As such, the Emperor and government of post-war Japan were subject to his authority.

In September 1945, General MacArthur encouraged the Japanese government to amend its then-current Constitution (Meiji Constitution of 1889).³⁵ A month later, Prime Minister Shidehara established a "Constitutional Research Committee" (Matsumoto Committee).³⁶ The Matsumoto Committee drafted two versions of a new Constitution in closed chambers, with the intention for the process to be secret.³⁷ Intentions

32. *Japan: Government and Society*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/place/Japan/Government-and-society> (last visited Oct. 22, 2018).

33. *Occupation and Reconstruction of Japan, 1945-52*, U.S. DEP'T OF ST. OFF. OF THE HISTORIAN, available at <https://history.state.gov/milestones/1945-1952/japan-reconstruction> (last visited Oct. 22, 2018).

34. *Japan Surrenders*, HISTORY, available at <http://www.history.co.uk/this-day-in-history/02-september/japan-surrenders> (last visited Oct. 22, 2018).

35. Umeda, *supra* note 15, at 4. This is also known as the Imperial Constitution. *Id.*

36. *Id.* Dr. JoJi Matsumoto was appointed as chairman of the committee. *Id.*

37. *Birth of the Constitution of Japan, Chronological Table 3, Feb. 1, 1946–Apr. 19, 1946*, NAT'L DIET LIBR., available at <http://www.ndl.go.jp/constitution/e/etc/history03.html> (last visited Oct. 22, 2018) [hereinafter *Chronological Table*]; see also *Outline of the Matsumoto Draft Submitted to SCAP, Gist of the Revision of the Constitution*, NAT'L DIET LIBR., available at http://www.ndl.go.jp/constitution/e/shiryō/03/074a_e/074a_etx.html#t002 (last visited Oct. 22, 2018) [hereinafter *Outline of the Matsumoto Draft Submitted to SCAP*]; *Japan: Interpretations of Article 9 of the Constitution*, LIB. OF CONG., available at <https://www.loc.gov/law/help/japan-constitution/interpretations-article9.php> (last visited Oct. 22, 2018).

aside, in February 1946, a Japanese newspaper gained possession of one of the drafts and made it public.³⁸ Matsumoto's "Revision of the Constitution," submitted to MacArthur on February 8, 1946, notably lacked a war renunciation provision.³⁹ The draft contained limited changes from the original Meiji Constitution and fell short of the standards set out in The Potsdam Declaration (which set the terms for Japan's surrender).⁴⁰

All the while, unbeknownst to the Japanese government, MacArthur (dissatisfied with the leaked Matsumoto draft) ordered his staff to draft the new Japanese Constitution.⁴¹ On February 13, 1946, Brigadier General Courtney Whitney refused the Matsumoto Constitution and personally delivered the draft ordered by MacArthur to the Japanese government.⁴²

The driving force to include Article 9 in Japan's Constitution is unclear. The idea of a war renunciation clause came from either MacArthur or Shidehara—each claim the other introduced it.⁴³ Some facts, however, are not debatable.

For instance, MacArthur was the first to put the idea of a war renunciation clause in writing. In a note from MacArthur to Whitney directing the drafting of the Constitution of Japan, MacArthur outlined the inclusion of three major points, one of which included the renunciation of war.⁴⁴ MacArthur's note regarding war reads:

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese army, navy, or air force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.⁴⁵

38. *Chronological Table*, *supra* note 37.

39. *Id.*; see also *Outline of Matsumoto Draft Submitted to SCAP*, *supra* note 37.

40. See *Outline of Matsumoto Draft Submitted to SCAP*, *supra* note 37; see also *Text of the Constitution and Other Important Documents: Potsdam Declaration*, NAT'L DIET LIBR., available at <http://www.ndl.go.jp/constitution/e/etc/c06.html> (last visited Oct. 21, 2018) [hereinafter *Potsdam Declaration*].

41. Umeda, *supra* note 15, at 4-5.

42. *Chronological Table*, *supra* note 37.

43. Umeda, *supra* note 15, at 7. Because both have since died, the debate lingers. *Id.*

44. *Id.* at 6-7. The other two being to end the feudal system and establishing a new Emperor system. *Id.*

45. *Three Basic Points Stated by Supreme Commander to Be "Musts" in Constitutional Revision*, NAT'L DIET LIBR., available at <http://www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html#t001> (last visited Oct. 21, 2018).

On May 3, 1947, after several drafts, negotiations, and bilingual translations, Japan accepted the new Constitution.⁴⁶ Design of the new Constitution met the objectives set out in The Potsdam Declaration.⁴⁷ One objective required that Japan's new Constitution must remove any "obstacle to democracy and ensure basic freedoms and rights."⁴⁸ The new Constitution contained alterations beyond what would otherwise be deemed as an acceptable amendment under the provisions of the Meiji Constitution of 1889.⁴⁹ Many disfavored MacArthur's version of the Constitution, but his staff rejected any suggested amendments brought by the Japanese committee, forcing Japan to accept the new Constitution without input.⁵⁰ Although unsupported, MacArthur's version of the Constitution became a non-negotiable part of Japan's unconditional surrender.⁵¹ Many speculated that replacement of the SCAP constitution would occur as soon as the occupation of Japan ended, but the constitution remains in place to this day, unchanged.⁵²

Those unfamiliar with Japan's Constitution may assume that it represents little more than a reflection of the United States Constitution at first glance (aside from Article 9's renunciation of war). The preamble of Japan's Constitution resembles the United States Constitution:⁵³

We, the Japanese people, acting through our duly elected representatives . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the

46. *Chronological Table*, *supra* note 37.

47. Lynn Parisi, *Lessons of the Japanese Constitution*, STAN. PROGRAM ON INT'L. AND CROSS-CULTURAL EDUC. (Nov. 2002), available at <https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/const.pdf> (last visited Oct. 21, 2018).

48. *Id.*

49. *Id.*

50. *Id.* Some legal scholars question the legitimacy of the process in the creating of Japan's current constitution. For example, the legislative interference MacArthur's staff imposed on the Japanese government while drafting the constitution violated article 43 of the Laws and Customs of War on Land (Hague IV) and Subitem 12 of the Potsdam Declaration. *Id.*; see also Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277; *Potsdam Declaration*, *supra* note 40.

51. Umeda, *supra* note 15, at 6.

52. Parisi, *supra* note 47.

53. "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

people . . . the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.⁵⁴

The Constitution of Japan is, however, a more progressive document as compared to the U.S. Constitution.⁵⁵ By including the specific language “all of the people,” equal rights were immediately afforded to all genders and races.

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free (emphasis added).⁵⁶

SCAP presented its version of the new *amended* Constitution to Japan with no option but to acquiesce, but MacArthur invited the Japanese government to revise the Constitution between 1948 and 1949.⁵⁷ Japan, however, gave no substantive response.⁵⁸ One may infer Japan declining to revise the constitution to be acceptance of Article 9 and the renunciation of war.

54. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], pmb. (Japan). When compared to the U.S. Constitution, the same ideals are reflected in the preamble of the Japanese Constitution.

55. Japan's constitution significantly surpassed the U.S. Constitution in the arena of women's rights and education. Parisi, *supra* note 47. This is attributed to a 22-year old female aid working on MacArthur's staff at the time who was involved in drafting Japan's constitution as a translator—Beate Sirota Gordon. Born in 1923 in Vienna to Russian Jewish immigrants, Gordon lived in Japan from age five to fifteen. Gordon studied at Mills College in California, and in 1945 became an American citizen. As only one of 65 Caucasians in the United States that could speak Japanese, Gordon was a sought-after commodity and ultimately ended up working on MacArthur's staff. Before the SCAP constitution, Japanese women had no rights at all. Cristine Russell, *The American Woman Who Wrote Equal Rights Into Japan's Constitution*, THE ATLANTIC (Jan. 5, 2013), available at <https://www.theatlantic.com/sexes/archive/2013/01/the-american-woman-who-wrote-equal-rights-into-japans-constitution/266856/> (last visited Oct. 22, 2018).

56. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14, para. 1 (Japan); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 26, para. 1-2. In the United States, a free public education is not a constitutional right; *see generally* U.S. CONST.

57. Parisi, *supra* note 47.

58. *Id.*

***B. The Evolving Interpretation of Japan's War
Renunciation Clause***

Article 9's definition proved to be a moving target in the decades since its inception in 1947, but Japan's Constitution still bars it from any offensive military operations to this day.⁵⁹ The United States was particularly interested in preventing Japan from regaining military power due to its regional dominance and blatant war crimes⁶⁰ in the years leading up to and through World War II. Furthermore, introduction of language similar to Article 9 was far from uncommon for former Axis powers.⁶¹ For instance, the Italian Constitution "rejects war as an instrument of aggression" and German Law prohibits "activities tending and undertaken with the intent to disturb peaceful relations between nations, especially to prepare for aggressive war."⁶² The wording of Article 9, however, goes a step further and presumes to deny the Japanese even the right to utilize a military response as a means of self-defense by eliminating a land, sea, and ground force. It states:

[T]he Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes . . . [L]and, sea, and air forces, as well as other potential, will never be maintained.⁶³

59. Umeda, *supra* note 15.

60. There are many examples, including: The Rape of Nanking (1937), The Bangka Island Massacre (1942), The Bataan Death March (1945), and Conscripting Women into Sexual Slavery (1937-1945). See generally *Nanjing Massacre: Chinese History*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/event/Nanjing-Massacre> (last visited Oct. 22, 2018); Libby-Jane Charleston, *The Horror of the Bangka Massacre*, HUFF. POST (Feb. 16, 2017), available at http://www.huffingtonpost.com/au/2017/02/15/the-horror-of-the-bangka-massacre_a_21714994/ (last visited Oct. 22, 2018); Jason Reblando, *Remembering the Bataan Death March 75 Years Later*, L.A. TIMES (May 12, 2017), available at <http://www.latimes.com/visuals/framework/la-me-fw-bataan-death-march-20170422-htmstory.html> (last visited Oct. 22, 2017); Lévy Christine, *The Japanese Imperial Army's "Comfort Women": Political Implications and the Gender of Memory*, SCIENCESPO, MASS VIOLENCE AND RESISTANCE-RES. NETWORK (July 12, 2012), available at <http://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/japanese-imperial-armys-comfort-women-political-implications-and-gender-memory> (last visited Oct. 22, 2018).

61. Matt Ford, *Japan Curtails Its Pacifist Stance*, THE ATLANTIC (Sept. 19, 2015), available at <https://www.theatlantic.com/international/archive/2015/09/japan-pacifism-article-nine/406318/> (last visited Oct. 22, 2018).

62. *Id.*

63. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

The failure to define Japan's means for national defense left Article 9 open to much debate within the Japanese government, courts, and public since its inception.

It did not take long for the ambiguity of Article 9 to become a topic for discussion in Japanese society and what it meant to the nation's security. Having already received a devastating defeat and now occupied by the United States, many Japanese citizens saw Article 9 as a new source of national pride: it made Japan the first nation in the world to declare war illegal.⁶⁴ Those in the government, however, saw the need for self-defense as an irrevocable right, and therefore, something that should not be prohibited by Article 9.⁶⁵ Despite thinking of self-defense as an irrevocable right, many in the Japanese Diet⁶⁶ still worried that Article 9 would prevent Japan from contributing to international peacekeeping missions, thus barring them from entering the United Nations ("U.N.").⁶⁷ Yet, Article 9 remains and, much like provisions of the United States Constitution, interpretation varies depending on the contemporary needs of the time.

For example, despite the prohibitive language of Article 9, Japan maintains a SDF. Japan's SDF is divided into three sub-parts: "Air Self-Defense Forces," "Ground Self-Defense Forces," and "Maritime Self-Defense Forces." It also contains amphibious assets⁶⁸ which fall under the Maritime Self-Defense Forces. Since Article 9 forbids a national military, the forces are distinguished as "Self-Defense Forces." Some assert the SDF to indeed embody a military and thus, believe it to violate Japan's Constitution.⁶⁹ Interpretation of Article 9 develops and broadens over time, but the Cabinet Legislation Bureau (the office that created the legal theory of the interpretation of Japan's Constitution) always interprets Article 9 to allow for a SDF.⁷⁰

64. Parisi, *supra* note 47.

65. *Id.*

66. "Diet" is a Prussian term. It functions similarly to the English parliament. Gerald L. Curtis, *The Government of Modern Japan: The Japanese Diet*, COLUM. U.: ASIA FOR EDUCATORS, available at http://afe.easia.columbia.edu/at/jp_diet/govtjd01.html (last visited Oct. 22, 2018).

67. Parisi, *supra* note 47. This would therefore be a self-defeating principle. *Id.*

68. Japan's amphibious assets have a similar mission as the U.S. Marine Corps. See generally John Taishu Pitt, *The Meaning of Japan's New Amphibious Rapid Deployment Brigade Launch*, THE DIPLOMAT (Mar. 29, 2018), available at <https://thediplomat.com/2018/03/the-meaning-of-japans-new-amphibious-rapid-deployment-brigade-launch/> (last visited Oct. 22, 2018).

69. Umeda, *supra* note 15, at 1.

70. *Id.* at 3-4.

In 1950, the SDF began as the National Police Reserve, just a few years after the inception of the SCAP Constitution.⁷¹ By 1954, the National Police Reserve evolved into the SDF.⁷² The United States prompted and encouraged Japan's rearmament (looking for a strategic ally in the region post-occupation) in response to the Korean War and the fear of Communist expansion.⁷³ In the wake of a shattering and demoralizing defeat, the Japanese government initially resisted the unpopular idea of rearmament.⁷⁴ Ultimately, the Japanese government began to rebuild a pseudo military. Ironically, a few years after the United States imposed the renunciation of war provisions on the newly established Japanese government, it reversed course and encouraged Japan to rearm.⁷⁵ Many debated whether any rearmament (including the SDF) would be legally amenable with Japan's new constitution.

The first extensive interpretation that broadened the meaning of Article 9 came in 1954, when the legislature of Japan passed a bill to establish the SDF.⁷⁶ Simultaneously, the legislature passed a resolution to ban the SDF from being deployed abroad.⁷⁷ In December 1954, the Cabinet Legislation Bureau issued an official interpretation of the Constitution and, more specifically, Article 9:

[t]he Constitution did not deny the self-defense right; Japan renounced war, but did not renounce the right to struggle in order to defend itself; [e]stablishment of the SDF is not against the Constitution because its mission is self-defense and its ability is limited to necessary and adequate levels of self-defense.⁷⁸

The Cabinet went on to stipulate three requirements to exercise its right to self-defense: (1) there is a present and wrongful danger of invasion to Japan; (2) no other appropriate measures exist to defend Japan; and (3)

71. *Self-Defense Force: Japanese Armed Force*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/topic/Self-Defense-Force> (last visited Oct. 22, 2018).

72. See generally *Japan—Government and Society*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/place/Japan/Government-and-society#ref319259> (last visited Oct. 22, 2018).

73. *Id.*; see also Franz-Stefan Gady, *Toothless Tiger: Japan Self-Defence Forces*, BBC NEWS (Oct. 15, 2015), available at <http://www.bbc.com/news/world-asia-34485966> (last visited Oct. 22, 2018).

74. *Article 9 and the U.S.-Japan Security Treaty*, COLUM. U.: ASIA FOR EDUCATORS, available at http://afe.easia.columbia.edu/special/japan_1950_usjapan.htm (last visited Oct. 22, 2018).

75. Of note, MacArthur was initially opposed to Japan's rearmament. See Umeda, *supra* note 15, at 12.

76. *Id.* at 14-15.

77. *Id.*

78. *Id.* at 15.

the use of force to defend Japan is limited to the minimal force necessary.⁷⁹

Though the Supreme Court of Japan never directly ruled on the constitutionality of the SDF, it noted in *dictum* that the SDF did not violate the Constitution.⁸⁰ In 1973, a District Court in Japan held that the SDF was unconstitutional; however, the Court reversed the decision on other grounds.⁸¹ Other courts avoid the constitutionality issue altogether under the “political question” doctrine.⁸²

Beginning in the early 1990s, the Japanese government began a trend of expanding the role of the SDF. In 1992, Japan's legislature passed the U.N. Peacekeeping Operations Cooperation Bill, which allows deployment of the SDF outside the country's boundaries.⁸³ Subsequently, in the same year the SDF deployed outside of Japan for the first time as part of a U.N. mission in Cambodia.⁸⁴ Since the 1992 Bill, SDF troops have provided non-combat support and humanitarian missions to Iraq, Afghanistan, and Indonesia.⁸⁵ In 2001, the Japanese Maritime Force sank a North Korean spy ship in Chinese waters, which marked the first use of military force by Japan since WWII.⁸⁶ In 2015, Japan's legislature passed a controversial bill to advance the interpretational margins of Article 9 even further.⁸⁷

Though limits still exist on Japan's ability to use military force, the SDF can now aid in the defense of the United States and other allies.⁸⁸ Currently, the Cabinet Legislation Bureau yields the sole authority to interpret Article 9.⁸⁹ The Japanese government believes it can expand its

79. *Id.* The cabinet has consistently maintained this interpretation of Article 9 and the three required stipulations to exercise the self-defense right. *Id.*

80. Umeda, *supra* note 15, at 17.

81. *Id.*

82. *Id.* at 18, 28.

83. *Japan's About-Face*, PBS (July 8, 2008), available at <http://www.pbs.org/wnet/wideangle/uncategorized/japans-about-face-timeline-japanese-military-history/1168/> (last visited Oct. 23, 2018).

84. *Id.*

85. *See id.*

86. *Id.*

87. Ford, *supra* note 61. The Bill does not change the language of Article 9, which would require a constitutional amendment, but only re-interprets the Article. Furthermore, the Bill was highly controversial, but ultimately was passed by the leading party after three days of heavy debate, which included a small tussle between opposing party members trying to physically prevent the vote from taking place. *Id.*

88. *Id.* For example, Japan is now permitted to shoot down a North Korean ICBM fired toward the United States. *Id.*

89. Umeda, *supra* note 15, at 32.

defense ability without restriction, so long as its policy remains defense centric.⁹⁰ Japan's Prime Minister would like to amend the Constitution to specifically define the SDF's role within Article 9, but many still oppose that position.⁹¹

C. The United States Retreats from the War Renunciation Clause It Imposed on Japan

Ironically, when the Allied (U.S.) occupation of Japan slowly ended in 1952, the United States began pressing Japan to rearm.⁹² With the spread of communism in China and the Korean War raging just 600 miles away, the United States feared Japan might fall to communism after it just regained sovereignty.⁹³ The United States viewed Japan as an important pro-West ally. With the Cold War in effect, the United States had no intention of completely withdrawing from Japan. The treaties mentioned below (namely the Security Treaty) ensured the U.S. military would remain in Japan for decades.⁹⁴

Although the United States envisioned a "precipitous rearmament" of Japan after it regained sovereignty, Japan's Prime Minister, aware of the general public's aversion to war, resisted the rearmament agenda.⁹⁵ The National Police Reserve and subsequent SDF became a compromise for Japan as a result of its dependence on the United States as an ally. Indeed, many in Japan (mostly socialist and progressive intellectuals) wanted a neutral nation, fully adopting the concepts of Article 9 and relying on the U.N. for protection.⁹⁶ The primary concern with relying on the United States for defense (at the cost of U.S. military bases in Japan) was that Japan would expose itself to attack mostly concerning the use of atomic weapons against Japan in retaliation for U.S. actions in unrelated

90. *Id.*

91. Kyodo, *Opposition to Abe's Amendment Quest Hits 55%; Support for Article 9 Rewrite Falls: Survey*, JAPAN TIMES (Jan. 14, 2018), available at <https://www.japantimes.co.jp/news/2018/01/14/national/politics-diplomacy/opposition-revising-constitution-grows-55-kyodo-survey/#.WnUGfZM-fUI> (last visited Oct. 23, 2018).

92. *Article 9 and the U.S.-Japan Security Treaty*, *supra* note 74. This pressure led to the compromise of Japan's creation of the "National Police Reserve," which ultimately evolved into the SDF. *Id.*

93. *See id.*

94. *See* Treaty of Mutual Cooperation and Security, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632.

95. Justin Jesty, *Tokyo 1960: Days of Rage & Grief: Hamaya Hiroshi's Photos of the Anti-Security-Treaty Protests*, 13 ASIA-PAC. J. 1,6 (2015), available at <https://apjif.org/-Justin-Jesty/4291/article.pdf> (last visited Oct. 23, 2018).

96. *Id.* at 5-6.

conflicts.⁹⁷ These concerns hold merit. It is well known that if the war between North and South Korea⁹⁸ were to regain hostility, the United States would rely on air bases in Japan to assist in an air campaign.⁹⁹ But where does this leave Japan now?

Still, decades later the United States insists that Japan amend Article 9 and rearm. As recent as 2004, Deputy Secretary of State Richard Armitage “told a Japanese lawmaker that the war renouncing Article 9 of Japan’s Constitution is becoming an obstacle to strengthening the Japan-US alliance.”¹⁰⁰ In the same year, Secretary of State Colin Powell stated that if Japan wanted a permanent seat with the U.N. Security Council it “must consider revising its pacifist constitution[.]”¹⁰¹ In order to keep positive relations with the United States, Japan took a series of steps in order to provide for its own defense, which resulted in the current SDF.

D. The Growth of Japan’s Self-Defense Force

Partly due to Japan’s alliance with the United States, Japan’s SDF is one of the most advanced and well-trained “militaries” in Asia.¹⁰² Despite its aging and shrinking population¹⁰³ and lack of natural resources,¹⁰⁴ Japan possesses a well-equipped military. To be certain,

97. *Id.* at 6.

98. Technically, the war between North and South Korea is still “active.” *The Korean War Armistice*, BBC NEWS (Mar. 5, 2015), available at <http://www.bbc.com/news/10165796> (last visited Oct. 23, 2018).

99. Todd South & Jeff Schogol, *War With North Korea: An Inside Look at How U.S. Troops Would Respond Worldwide*, MIL. TIMES (May 21, 2017), available at <https://www.militarytimes.com/news/your-military/2017/05/21/war-with-north-korea-an-inside-look-at-how-us-troops-would-respond-worldwide/> (last visited Oct. 23, 2018).

100. Umeda, *supra* note 15, at 32.

101. *Id.*

102. See Jeremy Bender, *The 11 Most Powerful Militaries in the World*, BUS. INSIDER AUSTRALIA (Nov. 19, 2015), available at <https://www.businessinsider.com.au/11-most-powerful-militaries-in-the-world-2014-4> (last visited Oct. 23, 2018). Japan comes in at number ten overall on the list behind South Korea at nine. Japan’s defense budget ranked sixth in the world and also boasts the fifth largest Air Force in the world. *Id.*

103. Isabel Reynolds, *Japan’s Shrinking Population*, BLOOMBERG (May 16, 2017), available at <https://www.bloomberg.com/quicktake/japan-s-shrinking-population> (last visited Oct. 23, 2018). Over the next fifty years, Japan’s population is estimated to shrink by one-third. This is primarily due to an ageing population (Japanese citizens have one of the longest life expectancies in the world), coupled with decreased birth rates. *Id.*

104. See *Economy and Trade Fact Sheet: Basic Points About Japan’s Economy and Trading Patterns*, COLUM. U.: ASIA FOR EDUCATORS, available at <http://afe.easia.columbia.edu/japan/japanworkbook/economics/factshe.htm> (last

Japan's SDF enjoyed a resurgence in recent years, in part due to territorial disputes with China¹⁰⁵ and the increasing missile capabilities of North Korea.

The Air Defense Force currently consists of approximately 47,000 airmen and 552 combat aircraft.¹⁰⁶ The Ground Defense Force contains approximately 151,000 soldiers,¹⁰⁷ and the Maritime Defense Forces includes approximately 45,500 sailors and 67 vessels.¹⁰⁸ By comparison, in 2015 the United States Air Force had approximately seven times the number of Active Duty Airmen and nine times the number of aircraft.¹⁰⁹ The United States Army in contrast, is roughly three times larger than Japan's Ground Defense Force.¹¹⁰ Notwithstanding a very capable and

visited Oct. 23, 2018). Japan lacks several of the raw materials necessary for industry and energy such as oil, coal, iron ore, copper, aluminum, and timber. *Id.*

105. Beina Xu, *The U.S.-Japan Security Alliance*, COUNCIL ON FOR. REL. (July 1, 2014), available at <https://www.cfr.org/backgrounder/us-japan-security-alliance> (last visited Oct. 23, 2018). Japan has increased defense spending for the first time in eleven years, and for the first time forty years has established a base on its outer islands. The increase in spending has been attributed in part by increasing tensions with China in regard to territorial disputes involving the Senkaku Islands. The territorial dispute involving the Senkaku islands (a small cluster of uninhabited islands in the East China Sea) grew more relevant when a group of Chinese activists landed on the islands in 2012. In response, Japanese government spent ¥2 billion (\$17.8 million) to purchase two of the islands from a private landowner (against warnings from the State Department). China moved further by creating the East China Sea Air Defense Identification Zone (which requires all non-commercial aircraft entering the East China Sea to include the airspace above the Senkaku Islands to submit flight plans before entering). In 2014, President Obama declared that the U.S.-Japan Mutual Defense Treaty applied to "all territories administered by Japan" to include the disputed Senkaku islands. *Id.*

106. Lendon, *supra* note 14. The Air Defense Force's inventory of aircraft is broken down as follows: 201 fighter jets, 66 transport aircraft, and one Airborne Early Warning and Control aircraft. The Ground Defense Force consists of one tank division, three armored infantry divisions, five light infantry divisions, one airborne brigade, one helicopter brigade, three artillery brigades, one special operations unit, and importantly two air defense brigades. The Maritime Defense Force's fleet is broken down as follows: 47 surface ships, 2 helicopter carriers, 18 submarines, and 166 maritime patrol aircraft. *Id.*

107. *Id.*

108. *Id.*

109. *2015 Index of U.S. Military Strength: U.S. Air Force*, HERITAGE FOUND. 1, 255 (2015), available at https://ims-2015.s3.amazonaws.com/2015_Index_of_US_Military_Strength_FINAL.pdf (last visited Oct. 23, 2018). The U.S. Air Force had approximately 329,500 Active Duty Airmen and 5,000 aircraft. *Id.*

110. See *2017 Index of U.S. Military Strength: U.S. Army*, HERITAGE FOUND., available at <http://index.heritage.org/military/2017/assessments/us-military-power/u-s-army/> (last visited Oct. 23, 2018).

equipped SDF, those forces (aside from the two air defense brigades) are essentially powerless against a nuclear, ballistic missile attack.

In response to recent threats from North Korea, Japan and the United States deployed destroyers equipped with the Aegis ballistic missile defense systems to the Sea of Japan.¹¹¹ Despite having this system in place, many analysts question its ability to defend Japan against a North Korean ICBM attack, with some going as far as to conclude that the Aegis system's effectiveness is "limited, if not improbable" of defeating an inbound offensive missile.¹¹² The Aegis system is designed to intercept ICBMs and mid-range ballistic missiles "in the middle stage of their course."¹¹³ As a secondary precaution, United States and Japanese Patriot missiles are in place throughout Japan to intercept offensive missiles "in their final phase."¹¹⁴ Due to the uncertainty of the effectiveness of the two systems, Japan must consider other defense alternatives and rely on allies aside from the United States for support. However, finding a local ally may prove difficult in light of the history between Japan and neighboring nations.

E. Japan's Annexation of Korea and Alleged War Crimes

In the few decades preceding WWII through its ultimate surrender in 1945, Japan imperialized the region in search of natural resources and human labor. In an effort to do so, Japan occupied the Korean peninsula and a majority of Far East Asia.¹¹⁵ In 1907, Japan disbanded the Korean Army.¹¹⁶ Three years later, Japan officially annexed Korea.¹¹⁷ Japan forced Koreans to learn the Japanese language, culture, and religion, and

111. Julian Ryall, *Japan's Missile Defences 'Not Able to Intercept North Korean ICBMs Fired at Guam'*, THE TELEGRAPH (Aug. 11, 2017), available at <http://www.telegraph.co.uk/news/2017/08/11/japans-missile-defences-not-able-to-intercept-north-korean-icbms/> (last visited Oct. 23, 2018). For the sea-based Aegis system to be effective, the ICBM would have to be on a "low trajectory" and "come within 310 miles of the destroyer," thus providing an extremely limited set of circumstances of even a chance of success. As a result, the sea-based Aegis system is deemed as "not capable of reliably interrupting a North Korean ICBM test." *Id.*

112. *Id.*

113. *Id.*

114. *Id.* A missile on a trajectory toward Guam, however, would be outside the current capability of either system.

115. Yoichi Funabashi, *North Korea's Nuclear Weapons, Japan's Bind*, N.Y. TIMES (Sept. 13, 2017), available at <https://www.nytimes.com/2017/09/13/opinion/north-korea-nuclear-weapons-japan.html> (last visited Oct. 15, 2018).

116. Robert S. Boynton, *North Korea's Abduction Project*, NEW YORKER (Dec. 21, 2015), available at <https://www.newyorker.com/news/news-desk/north-koreas-abduction-project> (last visited Oct. 22, 2018).

117. *Id.*

to take on Japanese names.¹¹⁸ During this assimilation period, Japan subjected Korean women to serve Japanese soldiers as “comfort women.”¹¹⁹ Additionally, Japan forced Koreans to serve in the Japanese Imperial Army and Navy.¹²⁰ By the time Japan surrendered to the Allied Forces in 1945, over 700,000 Japanese military and civilian personnel lived in Korea¹²¹ and roughly two million Koreans lived in Japan.¹²² After WWII, the majority of Koreans living in Japan returned to South Korea; however, six hundred thousand remained.¹²³ During Japan’s occupation of Korea until its surrender in WWII, the Korean peninsula remained unified.

After Japan’s surrender culminating in the ultimate conclusion of WWII, Allied forces divided the Korean peninsula. Russia occupied territory north of the 38th parallel and the United States occupied territory south of the 38th parallel.¹²⁴ This separation created not only a physical divide but also an ideological one. In 1948, the Allied Powers formed two distinct countries: The Republic of Korea (South Korea) and the Democratic People’s Republic of Korea (North Korea).¹²⁵ Two years later, the North attempted to unify the peninsula under Communist rule and sent 135,000 soldiers across the 38th parallel into South Korea.¹²⁶

118. *Id.*

119. *Id.* While Korean women were compelled or forced into sex slavery, Korean men were forced to labor in Japanese mines and factories. *See also* Funabashi, *supra* note 115.

120. Boynton, *supra* note 116. Nearly 213,000 Koreans served in the Japanese military.

121. *Id.*

122. Rachel Blomquist & Daniel Wertz, *An Overview of North Korea-Japan Relations*, NAT’L COMM. ON NORTH KOREA (June 2015), available at <https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/overview-north-korea-japan-relations> (last visited Oct. 15, 2018).

123. *Id.*

124. *Korean War Fast Facts*, CNN LIBR. (Apr. 30, 2018), available at <http://www.cnn.com/2013/06/28/world/asia/korean-war-fast-facts/index.html> (last visited Oct. 15, 2018). The U.S. occupation of South Korea continued until 1948. *Id.*

125. Kallie Szczepanski, *Why Is the Peninsula Split Into North Korea and South Korea?*, THOUGHTCO (Mar. 10, 2017), available at <https://www.thoughtco.com/why-north-korea-and-south-korea-195632> (last visited Oct. 15, 2018).

126. *Korean War Fast Facts*, *supra* note 124.

The U.N. and the United States aided the South¹²⁷ while China fought alongside the North.¹²⁸ Ultimately, hostilities ended with an armistice in 1953 and the two nations remain divided today.¹²⁹

F. The Evolution of the Laws Pertaining to Japan's SDF and the United States

There are several bilateral agreements between the United States and Japan outlined in the 2017 State Department's "Treaties in Force,"—the majority of which fall under the subtitle "DEFENSE."¹³⁰ The United States and Japan established formal diplomatic relations in 1858, four years after Commodore Matthew Perry signed the Treaty of Peace and Amity with Japanese Representatives.¹³¹ Ultimately, diplomatic relations suspended from December 1941 (following Japan's attack on Pearl Harbor) until 1952 (when the postwar Allied occupation of Japan ended).¹³²

In addition to the many treaties between Japan and the United States, the countries also agreed to several "guidelines." Guidelines differ from treaties in that they merely provide guidance—and therefore are not binding under international law.¹³³ Also, unlike treaties, guidelines do not

127. Sebastian Kettley, *North Korea and Japan: A History of Relationships Between the Two Nations*, EXPRESS (Apr. 17, 2017), available at <https://www.express.co.uk/news/world/792890/North-Korea-Japan-timeline-history-relationship-Kim-Jong-Un> (last visited Oct. 20, 2018). China fought on the side of North Korea, while Russia provided military equipment and other supplies to the North. Sixteen countries sent troops to assist South Korea (though ninety percent of the foreign troops were from the United States) and forty-one countries sent military equipment or other aid to the South. Of note, this was the first war in which the U.N. was involved. Blomquist & Wertz, *supra* note 122.

128. *Korean War Fast Facts*, *supra* note 124.

129. *Id.* Because neither side surrendered, technically the two countries remain at war. Also of note, although South Korea recognized and adhered to the provisions laid out in the armistice, it refused to sign it.

130. *Treaties in Force*, U.S. DEPT. OF STATE 1, 228-37 (Jan. 1, 2017), available at <https://www.state.gov/documents/organization/273494.pdf> (last visited Oct. 21, 2018).

131. *Japan*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, available at <https://history.state.gov/countries/japan> (last visited Oct. 20, 2018).

132. *Id.*

133. *New Regime for Security Alliance*, JAPAN TIMES (Apr. 28, 2015) available at <https://www.japantimes.co.jp/opinion/2015/04/28/editorials/new-regime-for-security-alliance/#.WqBDshPwbUI> (last visited Oct. 20, 2018). Of significance, "guidelines" differ from treaties and other international agreements in a few respects. Treaties require the consent of two-thirds of the Senators present to concur and therefore more difficult politically to approve. *Treaties*, U.S. SENATE, available at <https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited Oct. 20, 2018). Because this may prove procedurally difficult, Executive Agreements and Congressional-Executive Agreements have gained more

require the approval of the Japanese Diet,¹³⁴ and thus are generally easier to pass. Another regulating force dictating the capabilities and limitations of the SDF includes Japan's legislation.

Since the end of the Allied occupation, the United States and Japan implemented and revised (as the needs of the region evolved) several treaties and guidelines. As such, the laws in Japan governing the SDF and its operational capabilities evolved as well. Some of the more relevant treaties, guidelines, and Japanese laws which shaped the current relationship between Japan and the United States militarily are highlighted below. The Treaty of Mutual Cooperation and Security remains the most significant treaty between the United States and Japan. Over the years, each subsequent guideline, treaty, and Japanese domestic law expanded the role and capability of the SDF.

1. Treaty of Mutual Cooperation and Security

Initially signed in 1951 and revised in 1960, the ten-year renewable treaty is still in effect today.¹³⁵ In short, the treaty allows the United States to maintain a military presence and bases throughout Japan and the Ryukyu Islands (Okinawa) in exchange for the United States' pledge to defend Japan against attack.¹³⁶ Article VI of the Treaty states specifically, "[f]or the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan."¹³⁷

The treaty allowed the United States to maintain a strategic military presence in the region, proving beneficial to the United States during the Vietnam War, in which the United States launched airstrikes from bases

popularity. *Id.* Executive Agreements are still viewed as binding under international law; however, the subsequent Executive may rescind them with little effort. Defense "guidelines" regarding Japan and the United States are approved by the Security Consultative Committee ("SCC"). Robin "Sak" Sakoda, *The 2015 U.S.-Japan Defense Guidelines: End of a New Beginning*, ASIA MARITIME TRANSPARENCY INITIATIVE (Apr. 30, 2015), available at <https://amti.csis.org/the-2015-u-s-japan-defense-guidelines-end-of-a-new-beginning/> (last visited Oct. 20, 2018). The SCC is comprised of four individuals; the Secretary of State and the Defense Secretary of the United States, and their Japanese counterparts. Emma Chanlett-Avery & Ian E. Rinehart, Cong. Research Serv., RL33740, *The U.S.-Japan Alliance* 13 (2016).

134. Umeda, *supra* note 15, at 21.

135. Treaty of Mutual Cooperation and Security, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632.

136. *Id.*

137. *Id.*

within Japan.¹³⁸ In 1967, to dispel concerns that the presence of nuclear weapons on American bases in Japan could expose the country to attacks, then Japanese Prime Minister Eisaku enacted the “Three Non-Nuclear Principles . . . not possessing, not producing, and not permitting the introduction of nuclear weapons . . .”¹³⁹ Furthermore, a second agreement known as the Status of Forces Agreement, or “SOFA,” governs the details of American base operations in Japan. Still, there are several other defense and security agreements that guide the two nations when it comes to defense.

2. *Peace Keeping Operations and Other Operations (PKO Law)*

Under the initial PKO Law (passed in 1992), the SDF could deploy overseas on humanitarian missions only.¹⁴⁰ The U.N. could not command SDF forces and the SDF could only provide non-combatant support, such as medical care and logistical support.¹⁴¹

3. *Guidelines for U.S.-Japan Defense Cooperation*

Originally created in 1979, the “Guidelines for U.S.-Japan Defense Cooperation” were revised in 1997 and, most recently, again in 2015.¹⁴² The Japan-U.S. Security Consultative Committee approves the Guidelines, but submission to the Japanese Diet is not required because it is not a “treaty.”¹⁴³ The 2015 revision outlines how the two nations intend to cooperate after Japan’s latest reinterpretation of Article 9. Now the SDF can not only defend Japan but also defend of its allies to include the United States and its assets based within Japan.¹⁴⁴ For example, this capability would allow Japan to attempt to intercept a North Korean missile

138. *See id.* There are currently an estimated 39,000 U.S. military personnel stationed within Japan. Kim Kyung-Hoon, *U.S. Military Presence in Asia: Troops Stationed in Japan, South Korea and Beyond*, NEWSWEEK (Apr. 26, 2017), available at <http://www.newsweek.com/us-military-japan-north-korea-asia-590278> (last visited Oct. 21, 2018).

139. *Three Non-Nuclear Principles*, MINISTRY OF FOR. AFF. OF JAPAN, available at <http://www.mofa.go.jp/policy/un/disarmament/nnp/> (last visited Oct. 22, 2018).

140. Kokusai Rengo heiwa iji katsudo to ni taisuru kyoryoku ni kansuru horitsu Law No. 79 of 1992, amended, available at http://www.pko.go.jp/pko_j/data/law/pdf/law_e.pdf (last visited Oct. 22, 2018) [hereinafter PKO Law].

141. *Id.*

142. Yuki Tatsumi, *4 Takeaways From the US-Japan Defense Guidelines*, THE DIPLOMAT (Apr. 29, 2015), available at <https://thediplomat.com/2015/04/4-takeaways-from-the-new-us-japan-defense-guidelines/> (last visited Oct. 22, 2018).

143. Umeda, *supra* note 15, at 11.

144. GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION, *supra* note 18, at 6.

on a trajectory toward Guam. In addition, for the first time the new guidelines set out parameters for bilateral cyberspace cooperation.¹⁴⁵ Lastly, it must be emphasized that these are merely guidelines and therefore are not legally binding on either country.¹⁴⁶

4. Anti-Terrorism Special Measures Law (Law No. 113 of 2001)

Enacted as special legislation after the attacks against the United States on September 11, 2001, the Anti-Terrorism Special Measures Law allowed SDF troops to accompany coalition forces in Afghanistan.¹⁴⁷ The Diet passed the law in a short twenty-four days, and it allows SDF troops to assist coalition forces in non-combatative roles while also allowing them not only the right to defend themselves, but also those “who have come under [SFD] control.”¹⁴⁸ Still, Japan needs consent from the government before deploying SDF troops.¹⁴⁹

5. Law Concerning Ensuring National Independence and Security in a Situation of Armed Attack (Law No. 79 of 2003)

The Armed Attack Laws obliges the Japanese government to implement an action plan if an actual attack occurs or if danger exists of an imminent attack.¹⁵⁰ The law also allows the government to place SDF troops on “standby” if there is an anticipated attack.¹⁵¹ Prior to this legislation, the SDF could not mobilize against an anticipated attack.¹⁵² The SDF are limited, however, to attack the source of the threat only once the attack has started.¹⁵³ Despite this, it has been determined that in the case of a missile attack, the attack has started once the “missiles are readied into position.”¹⁵⁴

145. *Id.* at 22-23.

146. *New Regime for Security Alliance*, *supra* note 133.

147. The Anti-Terrorism Special Measures Law (Tentative English Summary) (Oct. 2001), available at http://japan.kantei.go.jp/policy/2001/anti-terrorism/1029terohougaiyou_e.html (last visited Oct. 22, 2018).

148. Umeda, *supra* note 15, at 11.

149. *Id.*

150. *Id.* at 13.

151. *Id.* at 24.

152. *Id.*

153. Umeda, *supra* note 15, at 24.

154. *Id.* at 25. This was determined by Masahiko Asada. Mr. Asada is a Professor of International Law at Kyoto University Graduate School of Law. He is also a member of: the International Relations Committee of the Atomic Energy Commission, Cabinet Office; the Subcommittee on Security and Trade Control of the Industrial Structure Advisory Council, Ministry of Economy, Trade and Industry (METI); and the Chemical and Biological Committee of the same Advisory Council. In the Japan Atomic Energy Agency (JAEA), he has led the Committee on Nuclear Non-

6. *Iraq Special Measures Law (Law No. 137 of 2003)*

In 2003, the Special Measures Law Concerning Humanitarian Relief Support Activities and Security Maintenance Support Activities in Iraq (“Iraq Special Measures Law”) expanded SDF capabilities.¹⁵⁵ This law enables SDF troops to deploy to occupied countries where fighting continues, so long as they are dispatched to areas free from “acts of hostility.”¹⁵⁶ The law limits the SDF’s scope to humanitarian and reconstruction assistance.¹⁵⁷ Because the use of weapons was still limited to self-defense purposes, Dutch and Australian groups provided security for SDF missions.¹⁵⁸ Seven more war-contingency laws were subsequently passed in 2004.¹⁵⁹

7. *Law Concerning Measures Relating to U.S. Military Actions (Law No. 113 of 2004)*

Of the seven war-contingency laws passed since 2004, one of the more relevant bills pertaining to the U.S.-Japan relationship is the Law Concerning Measures Relating to U.S. Military Actions, or Law No. 113 of 2004.¹⁶⁰ The law intended to compliment and function in accord with the U.S.-Japan Security Agreement if an attack or imminent attack occurred against Japan.¹⁶¹ Prior to this law, the United States and Japan were limited to providing logistical support to one another only during joint military drills or international relief missions.¹⁶² This bill allows for the two nations to share services and equipment and for U.S. military personnel to utilize privately owned Japanese buildings and land in the event of an attack or anticipated attack (with Prime Minister approval).¹⁶³

proliferation Policy Study as its Chairman since 2005. U.N. AUDIOVISUAL LIB. OF INT’L L., *Mr. Masahiko Asada*, available at http://legal.un.org/avl/pdf/ls/Asada_bio.pdf (last visited Nov. 20, 2018).

155. *Iraku ni okeru jindo fukko shien katsudo oyobi anzan kakuho shien katsudo no jisshi ni kansuru tokubetsu sochi ho* [Special Measures Law Concerning Humanitarian Relief Support Activities and Security Maintenance Support Activities in Iraq], Law No. 137 of 2003.

156. Umeda, *supra* note 15, at 25.

157. Mika Hayashi, *The Japanese Law Concerning the Special Measures on Humanitarian and Reconstruction Assistance in Iraq: Translator’s Introduction*, 13 PAC. RIM L. AND POL’Y J. 579, 587 (2004).

158. Umeda, *supra* note 15, at 26.

159. *Id.*

160. *Buryoku kōgeki jitai tō ni okeru amerika gasshūkoku no guntai no kōdō ni tomonai wagakuni ga jisshi suru sochi ni kansuru hōtitsu* [Law Concerning Measures Relating to US Military Actions], Law No. 113 of 2004.

161. Umeda, *supra* note 15, at 27.

162. *Id.*

163. *Id.* at 27-28.

Japan's SDF capabilities expanded and grew considerably since the early 1950s. Often, the expansion occurred as a reluctant acquiescence to pressure from the United States. Recently, the push stems from a proactive, nationalist government with valid concerns stemming from North Korean threats. The United States consistently encouraged and even pressured Japan to provide for its own self-defense throughout.

IV. ANALYSIS: WHAT SOLUTIONS ARE AVAILABLE TO JAPAN AND WHAT ROLE SHOULD THE UNITED STATES PLAY?

Despite a more liberal interpretation of Article 9 and the SDF's expanded capabilities, Japan still undeniably depends on the United States for its defense. Without a doubt, this is attributed to Japan's pacifist Constitution. Furthermore, the United States forced the current Constitution of Japan upon it with little option.

A. Japan's Pacifist Constitution of 1947 is Illegal Under International Law

Many agree that the process by which Japan's Constitution of 1947 came into existence violates both The Laws and Customs of War and Land (Hague IV) of 1907 and the Potsdam Declaration of 1945 (the proclamation defining the terms of Japan's surrender).¹⁶⁴ Article 43 of Hague IV states that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.¹⁶⁵

Here, the United States failed to respect the laws in force in the country. Many described the Post WWII Constitution of 1947 as an "amendment" to the Meiji Constitution of 1889. In fact, the Constitution of 1947 became a completely new constitution, altered beyond what is considered a permissible amendment under the Meiji Constitution. The amendment process in which the new constitution came to be is outside the means set forth in the Meiji Constitution (drafted by MacArthur's SCAP committee within a week).¹⁶⁶ Section 12 of the Potsdam Declaration reads:

The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been

164. *Id.* at 4.

165. Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

166. HISTORY OF LAW IN JAPAN SINCE 1868 VOL. 12, 57-58 (Wilhelm Rohl ed., 2004).

established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.¹⁶⁷

Again, here MacArthur and his staff—not “the freely expressed will of the Japanese people”—designed the government of Japan and its constitution. But, because Japan accepted an unconditional surrender, it was subject to MacArthur's authority. Aside from the procedural issues of birthing Japan's Constitution, substantive issues occurred as well.

Article 98 of Japan's Constitution states that:

This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

The treaties concluded by Japan and established laws of nations shall be faithfully observed.¹⁶⁸

Here, the main legal issue lies within the second provision of this article, which violates international law. Japan is a member of the U.N. (though not a member at the time MacArthur's staff constructed its Constitution),¹⁶⁹ and is therefore obliged by the U.N. Charter and its peacekeeping provisions.¹⁷⁰ Yet, Article 9 limits Japan's involvement to strictly non-combatant, medical, and logistical support roles. Japan is not authorized

167. *Potsdam Declaration*, *supra* note 40.

168. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 98 (Japan).

169. *Member States*, U.N., available at <http://www.un.org/en/member-states/#gotoJ> (last visited Oct. 19, 2018). Japan became a U.N. member in 1956. *Id.* Japan's membership in the U.N. came just over a decade after its bitter war with the United States was viewed as a benefit to the organization. John J. Metzler, *Japan's Road to United Nations Membership, 1956*, ASIA TIMES (Dec. 24, 2016), available at <http://www.atimes.com/japans-road-united-nations-membership-1956/> (last visited Oct. 19, 2018). This was primarily due to the emerging geopolitical landscape and birthing of the cold war. With a communist China and divided Korean peninsula, the U.N. sought a democratic “pro-West” ally in the region. As of 2016, Japan was the U.N.'s second largest financial contributor. *Id.* Also, of note, Japan has been elected as a non-permanent member of the U.N. Security Council more than any other state (eleven times). *Japan Elected for Record 11th Time to U.N. Security Council Nonpermanent Seat*, JAPAN TIMES (Oct. 16, 2015), available at <https://www.japantimes.co.jp/news/2015/10/16/national/politics-diplomacy/japan-elected-record-11th-time-nonpermanent-unsc-member-ukraine-also-gets-seat/#.WmPS4JM-fUI> (last visited Oct. 19, 2018). There are five non-permanent members elected to the U.N. Security Council that serve two-year terms alongside the five permanent members, which consists of the United States, the UK, China, Russia, and France. *Id.*

170. The U.N. Charter provides that one of its purposes is to “maintain international peace and security.” U.N. Charter art. 1, ¶ 1. U.N. peacekeeping operations are employed by mandates from the U.N. Security Council. *Mandates and the Legal Basis for Peacekeeping*, U.N. PEACEKEEPING, available at <https://peacekeeping.un.org/en/mandates-and-legal-basis-peacekeeping> (last visited Oct. 19, 2018).

to fight alongside other U.N. forces, and if deployed in support of U.N. peacekeeping missions, it must remain under the government of Japan's authority.¹⁷¹ Likewise, the SDF cannot participate in any U.N. missions in which the use of force may be expected.¹⁷² If the U.N. has ever been criticized to be "a toothless tiger,"¹⁷³ Japan's membership and seat at the Security Council table does nothing to demonstrate the opposite.

The language in "The Guidelines for U.S.-Japan Defense Cooperation" ("Guidelines") is quite detailed in addressing any direct attack against Japan, but is ambiguous on how the United States shall address regional threats to peace.¹⁷⁴ Even though the Guidelines call for increased cooperation between the two nations,¹⁷⁵ currently disparity exists between their military capabilities.¹⁷⁶ Even though critics in both Japan and the United States wish to amend Article 9 and rearm Japan, Japan still relies on the United States for security against any type of attack.¹⁷⁷

In 2017, during a visit from Japanese Prime Minister Shinzo Abe, President Trump made a unilateral declaration committing the United States "to the security of Japan and all areas under its administrative control" (referring to the Senkaku Islands).¹⁷⁸ But what has the United States done to ensure regional security regarding the mounting threats from North Korea? Providing defense in response to a conventional attack aside, in the event of a nuclear missile attack, threat deterrence perhaps remains the only effective means of prevention.

For instance, Tokyo (population 13.5 million) has approximately ten minutes to react once North Korea launches a missile.¹⁷⁹ The city of

171. Umeda, *supra* note 15, at 20; *see also* PKO Law, *supra* note 140.

172. PKO Law, *supra* note 140.

173. Which, of course, is a common criticism of the organization—a simple internet search for "is the U.N. a toothless tiger?" produces countless articles devoted to the subject.

174. GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION, *supra* note 18, at 1.

175. *Id.*

176. *See* Kyle Mizokami, *Japan and the U.S.: It's Time to Rethink Your Relationship*, THE ATLANTIC (Sept. 27, 2012), available at <https://www.theatlantic.com/international/archive/2012/09/japan-and-the-us-its-time-to-rethink-your-relationship/262916/> (last visited Oct. 21, 2018).

177. *Id.*

178. Steve Holland & Kiyoshi Takenaka, *Trump Says U.S. Committed to Japan Security, in Change From Campaign Rhetoric*, REUTERS (Feb. 10, 2017), available at <https://www.reuters.com/article/us-usa-trump-japan/trump-says-u-s-committed-to-japan-security-in-change-from-campaign-rhetoric-idUSKBN15P17E> (last visited Oct. 21, 2018).

179. David K. Li, *Japan Only Has Minutes to Run for Cover If North Korea Fires Nukes*, N.Y. POST (Apr. 25, 2017), available at

Osaka (population 2.6 million) may have as little as four minutes.¹⁸⁰ Even then, these assumptions are based on the idea that the missile is detected immediately once it is launched, when in fact it may take several minutes to detect.¹⁸¹

In response to North Korea's recent tests, Japan requested fifty-six advanced, medium range, air-to-air missiles from the United States at a cost of about \$113 million.¹⁸² In the meantime, politicians continue to encourage Japan to strengthen its military in order to strike North Korea.¹⁸³ Thus, Japan is looking to acquire the medium-range missiles to be fired from Japanese fighter jets into North Korea "if an attack *appeared* to be imminent."¹⁸⁴ This symbolizes a momentous move from Japan's previous defensive attitude.¹⁸⁵ If this new capability becomes reality, it cannot come soon enough. But is it too little, too late? North Korea's missile capability advanced faster than expected and the previously mentioned land-based Aegis guided missile defense system is not projected to be mission ready until 2023.¹⁸⁶ Will Japan be bringing a knife to a gunfight? Medium range, jet fired missiles pale in comparison to a nuclear capable ICBM. We know the United States is obliged to defend Japan in the event of an attack,¹⁸⁷ but should the United States be doing more to deter the North Korean threat?

A. Proposal—The United States Benefits from its Military Bases in Japan and Should Take an Active Role to Protect Japan's Interest

Without a doubt, the United States benefits greatly from the strategic presence of its military bases in Japan. The proximity of U.S. bases in Japan to North Korea and China allows for accessible intelligence collection. Additionally, as a military ally to South Korea and Taiwan, a large American military presence in Japan promotes regional peace through

<https://nypost.com/2017/04/25/japan-only-has-minutes-to-run-for-cover-if-north-korea-fires-nukes/> (last visited Oct. 16, 2018).

180. *Id.*

181. *Id.*

182. Tom O'Connor, *U.S. Prepares New Missiles for Japan After North Korea Threatens Nuclear War*, NEWSWEEK (Oct. 5, 2017), available at <http://www.newsweek.com/us-military-prepares-war-north-korea-selling-missiles-japan-678830> (last visited Oct. 21, 2018).

183. *Id.*

184. Justin McCurry, *Japan Buys US Missile Defence System to Counter North Korean Threat*, THE GUARDIAN (Dec. 19, 2017), available at <https://www.theguardian.com/world/2017/dec/19/japan-buys-us-missile-defence-system-to-counter-north-korean-threat> (last visited Oct. 21, 2018).

185. *Id.*

186. *Id.*

187. GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION, *supra* note 18.

deterrence and allows for a quick military response to any regional hostilities. At approximately 40,000 troops, more American military personnel are in Japan than in any other foreign country.¹⁸⁸ Because the United States benefits from having such a large military presence in Japan, it should reciprocate the relationship in a quid pro quo fashion and defend Japan's interest from threats as well as attack.

Several options remain available to the United States to deter the North Korean nuclear threat. President Trump himself declares that, "all options are on the table."¹⁸⁹ Some of the options available include a preemptive military strike, diplomacy, or regime change. For the reasons set forth below, the most viable option—despite the negative humanitarian affect—is to strictly enforce the sanctions in place and withhold all humanitarian aid from North Korea. In addition, the United States should apply economic sanctions on any country supplying aid to North Korea—most notably China.

Despite decades of sanctions, humanitarian aid still infuses into North Korea much like a lifesaving medical IV. If an effective deterrence plan existed, North Korea would not launch ICBMs over Japan into the Pacific Ocean or test nuclear weapons. As a world leader (and self-imposed protector of Japan), the obligation fails upon the United States to deter regional threats and protect Japan's domestic and regional interest. To deter these threats, in addition to applying sanctions the United States should attempt to restrict all humanitarian aid going to North Korea and place more pressure on China to abide by existing sanctions. Admittedly, at the time of this writing, China began reducing trade with North Korea to induce it into nuclear compliance,¹⁹⁰ and thus North Korea

188. Jeff Desjardins, *Nearly 200,000 US Troops are Currently Deployed Around the World—Here's Where*, BUS. INSIDER (Mar. 20, 2017), available at <https://www.businessinsider.com/us-military-personnel-deployments-by-country-2017-3> (last visited Oct. 26, 2018).

189. Justin McCurry, *Donald Trump on North Korea: 'All Options Are on the Table'*, THE GUARDIAN (Aug. 29, 2017), available at <https://www.theguardian.com/world/2017/aug/29/donald-trump-on-north-korea-all-options-are-on-the-table> (last visited Oct. 26, 2018).

190. Jeremy Page, Andrew Jeong, & Ian Talley, *China, Finally, Clamps Down on North Korea Trade—and the Impact Is Stinging*, WALL ST. J. (Mar. 2, 2018), available at <https://www.wsj.com/articles/north-korea-finally-feels-the-sting-of-international-sanctions-1519923280?emailTo-ken=48b443e47bfe4c63c5fa9d921b9177c6VJaAZCUFFaHjic%2B1UE4IffQaafgYxnx3P6y1bUicjWi4waJ2HK5gN8VVswsnXP5T4A01kHcmuY8%2BGp6W%2BmF2PSoBWh7r%2B%2BBE1Xkj4lmH6bLb2mNN4wevyUzJfvVrTE7e> (last visited Oct. 26, 2018).

acknowledged interest in denuclearization.¹⁹¹ Notwithstanding these encouraging developments, in the last three decades North Korea failed to make any serious attempts to abide by any of its previous agreements.¹⁹²

Previous U.S. administrations, Allies, and the U.N. have all levied varying levels of sanctions against North Korea over the years.¹⁹³ Nevertheless, despite these sanctions North Korea developed an ICBM and nuclear capability few thought it could, and did so faster than imagined. North Korea also stands accused of money laundering, cyberattacks, and human rights violations.¹⁹⁴ As a result, the United States steadily decreased humanitarian aid to North Korea without any change in North Korea's advancement toward gaining nuclear weaponry.¹⁹⁵ For example, from 1995 to 2008 the United States provided \$1.3 billion in humanitarian assistance to North Korea.¹⁹⁶ Since 2009, nearly all U.S. aid has been withheld.¹⁹⁷ In 2012, the United States agreed to resume providing assistance if North Korea agreed to abstain from testing nuclear weapons.¹⁹⁸ The deal lasted three weeks before North Korea broke its end of the agreement.¹⁹⁹ In 2017, one day before President Obama left office, the United States provided \$1,000,000 of relief aid to North Korea.²⁰⁰

So long as China continues to trade with North Korea, any sanctions against the rogue state will fail to effectuate true change. China accounts for ninety percent of North Korea's trade and otherwise serves "as the lead facilitator of black market" trade with North Korea.²⁰¹ Additionally, China will continue to water down any U.N. sanctions placed against

191. Michael R. Gordon, Michael C. Bender, & Jonathan Cheng, *Trump Administration Praises North Korean Overture, but Remains Wary*, WALL ST. J. (Mar. 7, 2018), available at <https://www.wsj.com/articles/north-korea-willing-to-talk-denuclearization-with-u-s-1520336095> (last visited Oct. 26, 2018).

192. See *id.* North Korea has been known to "link . . . denuclearization with unacceptable demands, such as the withdrawal of American troops from the Korean Peninsula." *Id.*

193. Eleanor Albert, *What to Know About the Sanctions on North Korea*, COUNCIL ON FOR. REL. (Jan. 3, 2018), available at <https://www.cfr.org/background/what-know-about-sanctions-north-korea> (last visited Oct. 26, 2018).

194. *Id.*

195. See Baik Sung-won, *supra* note 3.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. See Baik Sung-won, *supra* note 3.

201. Albert, *supra* note 193.

North Korea.²⁰² What options does this leave the United States and Japan?

Simply accepting North Korea as a nuclear power is unacceptable. This response will only encourage Kim to act more aggressively. To do so would also set a dangerous precedent that the world maintains little option but to submit to future North Korean weapons development. To accept the status quo is not a viable option.

A direct pre-emptive military strike against North Korea by the United States would devastate all sides and the global economy as a whole.²⁰³ A U.S. air strike against North Korea would likely lead to retaliation from North Korea against the South. If North Korea invaded South Korea with ground troops, naturally the United States would come to the defense of South Korea. In doing so, the United States would likely launch air strikes and receive logistical support from its bases in Japan. This, in turn, may invite North Korea to launch ICBMs toward Japan or even the United States. If China were to get involved on any level, even if only to support North Korea logistically, the three largest economies of the world (United States, China, and Japan)²⁰⁴ would be involved in war. The human cost could be unlike anything the world has ever seen.²⁰⁵ The economic impact would be devastating.²⁰⁶ Thus, preemptive military action against North Korea likely becomes the last option.

Perhaps the problem is not that North Korea as a nation maintains a nuclear weapons capability, but the more precise difficulty is the person with his finger on the button. Currently, nine nations possess nuclear

202. *See id.* As a permanent member of the U.N. Security-Council, China maintains power to veto any proposed resolutions. *Id.*

203. Some estimates put the potential death toll at one million. Jonathan Broder, *What Trump's War With North Korea Would Look Like*, NEWSWEEK (Oct. 3, 2017), available at <http://www.newsweek.com/war-trump-north-korea-nuclear-kim-jong-un-china-beijing-pyongyang-japan-south-676372> (last visited Oct. 26, 2018).

204. Gray, *supra* note 11.

205. The Chairman of the Joint Chiefs of Staff, Marine Corps General Joseph Dunford, predicts that a war with North Korea may result in "a loss of life unlike any we have experienced in our lifetimes." John Harwood, *Trump Has Few Options on North Korea as Potential Economic Hazards Come Into Focus*, CNBC (July 31, 2017), available at <https://www.cnbc.com/2017/07/31/potential-economic-hazards-from-north-korea-crisis-come-into-focus.html> (last visited Oct. 26, 2018).

206. *See* Will Martin, *Here's What a War Between North Korea and the US Could Do to the Global Economy*, BUS. INSIDER (Aug. 9, 2017), available at <http://www.businessinsider.com/war-between-north-korea-and-usa-global-economy-impact-2017-8> (last visited Oct. 26, 2018).

weapons²⁰⁷ but only one seems to garner the world's concern and attention. The concern with North Korea is not the nation, but its leader. But in a country like North Korea, the leader defines the nation. The difference between India or Pakistan possessing nuclear weapons compared to North Korea is that Kim Jong Un is not as interested in joining the international community as he is in holding his neighbor nations hostage to his nuclear weapons.²⁰⁸ Is regime change in North Korea possible? Regime change²⁰⁹ may be one of the better alternatives available, yet it was denied as an option by the U.S. Defense Secretary and Secretary of State, who instead promote a diplomatic approach.²¹⁰ With diplomacy and sanctions having a history of failure, and the human and economic cost of a preemptive military strike far too great, what option is the United States left with? When it comes to dealing with Japan's rearmament and constitution, the United States should acknowledge and honor its own historical relevance and continue to support Japan, not just against an imminent attack, but to also deter threats. When it comes to deterring threats from North Korea it comes down to risk evaluation.

207. Skye Gould & Dave Mosher, *14923 Nukes: All the Nations Armed With Nuclear Weapons and How Many They Have*, BUS. INSIDER (Apr. 14, 2017), available at <http://www.businessinsider.com/nuclear-weapons-stockpiles-world-map-2017-4> (last visited Oct. 26, 2018). Currently the United States, the United Kingdom, France, Russia, Israel, Pakistan, India, China, and North Korea all possess nuclear weapons. *Id.*

208. See *North Korea Threatens 'A Sea of Fire' Upon South Korea*, CNN (Nov. 25, 2011), available at <https://www.cnn.com/2011/11/24/world/asia/north-korea-sea-of-fire/index.html> (last visited Oct. 26, 2018). Kim Jong Un has stated "Japan is no longer needed to exist near us" and, referring to islands of the Japanese archipelago, said "[t]he four islands of the archipelago should be sunken into the sea by the nuclear bomb of Juche[.]" Justin McCurry, *We Will Sink Japan and Turn US to 'Ashes and Darkness,' Says North Korea*, THE GUARDIAN (Sep. 14, 2017), available at <https://www.theguardian.com/world/2017/sep/14/north-korea-threat-sink-japan-us-ashes-darkness> (last visited Oct. 26, 2018).

209. Covert regime revolutions are not a new or radical idea. The United States has attempted at least seventy-two regime changes (sixty-six covert and six overt) during the cold war. Notably, most of these efforts failed; however, twenty-six of the sixty-six covert attempts have successfully led to a U.S. backed government being implemented in the target country. Lindsey A. O'Rourke, *The U.S. Tried to Change Other Countries' Governments 72 Times During the Cold War*, WASH. POST (Dec. 23, 2016), available at https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/23/the-cia-says-russia-hacked-the-u-s-election-here-are-6-things-to-learn-from-cold-war-attempts-to-change-regimes/?utm_term=.3ec08025eadf (last visited Oct. 26, 2018).

210. Jim Mattis & Rex Tillerson, *We're Holding Pyongyang to Account*, WALL ST. J. (Aug. 13, 2017), available at <https://www.wsj.com/articles/were-holding-pyongyang-to-account-1502660253> (last visited Oct. 26, 2018).

First, with regards to Japan's rearmament and Article 9, the United States undeniably has a legal obligation—pursuant to bilateral treaties—to defend Japan against an imminent attack.²¹¹ The United States must also acknowledge a moral obligation to defend Japan's regional interest to include threat deterrence. Whether the United States is currently satisfied with Japan's military capability (not only operationally but legally), it must recognize ownership of it. Despite bulldozing a pacifist constitution on Japan, the United States has consistently encouraged Japan to amend Article 9 in favor of rearmament.²¹² The best option for the United States—in regard to Japan's Constitution—is to honor Japan's sovereignty and democratic process. The United States is unquestionably familiar with Japan's Constitution and democratic process; the United States levied it on the defeated nation with little option but to assent.²¹³ If the people of Japan wish to reestablish a traditional military force and amend its constitution, there is an established, democratic process in place to do so (in fact, recent polling reflected 56% favorability for amendment).²¹⁴ The United States should respect the will of the people of Japan and continue to honor its obligation as protector of which it bestowed upon itself. By continuing to ensure Japan's safety, the United States is ensuring a strong global economy, a regional ally, and a strategic military presence.

As to the threat from North Korea, there is no easy solution. Certainly, the North Korean nuclear problem has plagued senior officials in the United States since at least the Clinton era. Of the several possible solutions mentioned above, none stand free from risk for the United States. However, this is not just a U.S. problem, it is a global one. Consequently, there should not be a U.S. solution, but a global solution. Until the nations of the world that provide humanitarian aid to North Korea decide to suspend aid in an effort to pressure Kim into compliance with nuclear terms set out by the U.N., the North Korean nuclear threat will continue.²¹⁵ Conversely, no one wants to see innocent North Korean

211. See GUIDELINES FOR U.S.-JAPAN DEFENSE COOPERATION, *supra* note 18.

212. See Umeda, *supra* note 15, at 23.

213. See generally *id.*

214. Michael MacArthur Bosack, *Japan's Path to Constitutional Amendment*, THE DIPLOMAT (May 26, 2017), available at <https://thediplomat.com/2017/05/japans-path-to-constitutional-amendment/> (last visited Oct. 26, 2018).

215. See Leslie Young, *What Happens to North Korea's Aid Money*, GLOBAL NEWS (Oct. 11, 2017), available at <https://globalnews.ca/news/3797235/north-korea-aid-money/> (last visited Oct. 14, 2018) (noting that Canada provided \$25 million in aid from 2005-2015, and the United States provided \$1.3 billion from 1995-2008); see also Ross Logan, *UN Gives North Korea £4.5M in Aid Despite Slapping Kim With Nuclear Sanctions*, EXPRESS (Aug. 15, 2017), available at

civilians who are separate from the regime suffer. As the new sanctions settle in, truly the ones who suffer are innocent civilians.²¹⁶ However, even while acknowledging the humanitarian concerns, starving North Korea into compliance may be the best option with the least loss of life.

No unassailable scenario exists where everyone wins—either Kim will hold the nations of the region hostage to his growing arsenal, or the innocent people of North Korea will continue to starve under heavy sanctions. Somewhere, a line must be drawn and not everyone can escape this scenario unscathed. Kim, as the leader of North Korea, is responsible for the health and safety of his people. Any effects sanctions have on the innocent civilians of North Korea must lie with Kim alone. The United States and the U.N. must insist on stricter sanctions that include eliminating all humanitarian aid to North Korea. A tough stance on North Korea, however, naturally requires the assistance of China.

With more pressure—especially from China—North Korea can escape decades of isolation and gradually reintegrate into regional affairs. Admittedly, sanctions against North Korea are less effective if North Korea receives assistance from China. The United States must make stronger efforts to encourage China's cooperation in de-nuclearizing North Korea.

In November 2017, the United States designated North Korea as a State Sponsor of Terrorism.²¹⁷ As such, harsher sanctions were imposed on North Korea. This designation “also implicates other sanctions laws that penalize persons and countries engaging in certain trade with state sponsors.”²¹⁸ Sanctions aimed directly at North Korea have a long history of failure; the next approach should be to sanction the nations that continue to aid North Korea.

North Korea's “true lifeline” stems directly from China.²¹⁹ If the United States wants to deter and hopefully eliminate the nuclear threat from North Korea, it must do so with assistance from China. China has

<https://www.express.co.uk/news/world/841630/north-korea-news-drought-united-nations-aid-sanctions-us-weapons> (last visited Oct. 26, 2018) (noting that the U.N. provided \$5.3 million in aid in 2017 alone); Maidment, *supra* note 3 (noting that the UK provided £4 million over the past six years).

216. See Kee B. Park, *Hunger in North Korea Is Devastating and It's Our Fault*, N.Y. TIMES (Dec. 17, 2017), available at <https://www.nytimes.com/2017/12/17/opinion/weapons-north-korea-hunger.html> (last visited Oct. 26, 2018).

217. *State Sponsors of Terrorism*, U.S. DEPT. OF STATE, available at <https://www.state.gov/j/ct/list/c14151.htm> (last visited Oct. 26, 2018).

218. *Id.*

219. See Albert, *supra* note 6.

grown its economy to be the second largest in the world behind only the United States.²²⁰ Unquestionably, China wants to continue its future economic growth. If the United States and its allies can position enough economic pressure against China, perhaps then China will be compelled to rein in Kim. Despite the promise stemming from the U.S.-North Korean summit in Singapore, little ground has been gained since. A recent meeting between the U.S. Secretary of State and North Korean officials was described as going “as badly as it could have gone.”²²¹ In fact, Kim no-showed a scheduled meeting with the Secretary of State.²²² The denuclearization hype from the summit quickly began to lose steam. North Korea accused the United States of making “gangster-like demands,” the United States accused North Korea of “illegally smuggling” refined petroleum products (supplied by China and Russia), and China is already calling for easing sanctions against North Korea.²²³ Thus, without stronger sanctions and the participation of China, the status quo will likely continue. It is time for the United States and its allies to impose unilateral sanctions on China as well.²²⁴

V. CONCLUSION

Japan’s history with the Korean peninsula, coupled with its strong alliance with the United States, makes it a natural target for North Korea. This, along with its pacifist Constitution, readies Japan to be susceptible to attack by North Korea. Because the United States enjoys the strategic benefits of a large military presence in Japan, a moral obligation arises to defend Japan against North Korean threats. Finally, the United States must ultimately recognize its own significance in birthing Japan’s Constitution and acknowledge the procedural difficulty inherent to amend it. To pressure Japan to amend Article 9 constitutes an invasion of Japan’s sovereignty and disrespects the same democratic process we put in place.

220. Gray, *supra* note 11.

221. Zachary Cohen & Elise Labott, *North Korea Puts Off Meeting with US on Returning Soldier Remains*, CNN POL. (July 12, 2018), available at <https://www.cnn.com/2018/07/12/politics/north-korea-us-soldier-remains/index.html> (last visited Oct. 26, 2018).

222. *Id.*

223. Edith M. Lederer, *US Presses China and Russia to Enforce Sanctions on NKorea*, AP NEWS (July 20, 2018), available at <https://www.ap-news.com/a93fd168c6ad45cdb507a6432c6d788b> (last visited Oct. 26, 2018).

224. *Voting System and Records*, U.N. SEC. COUNCIL, available at <http://www.un.org/en/sc/meetings/voting.shtml> (last visited Oct. 26, 2018) (noting that substantial U.N. sanctions against China are an impossibility as China and Russia both have veto power as permanent members of the U.N. Security Council).

The United States must afford the people of Japan the opportunity to govern themselves.

As to North Korea, the United States must insist on a global response that eliminates all aid (including humanitarian aid) to the country. Doing so will naturally require the cooperation of China. Such cooperation will not come voluntarily. Thus, the economic sanctions currently in place against North Korea must be transferred to China. Because an armed response is out of question, an economic solution remains the best option. With China's cooperation, the world could denuclearize North Korea and reintegrate it into regional affairs.

UBER'S INTERNATIONAL TAX SCHEME: INNOVATIVE TAX AVOIDANCE OR SIMPLE TAX EVASION?

Brittany V. Dierken*

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INTRODUCTION

The city of Edinburgh lays in a deep blue shadow, not yet awoken by the sun. However, a young man is already scurrying about his apartment, dragging his luggage down the wooden steps as his phone rings. He clasps the gold door knob, swinging the door open to see his Uber car waiting to take him to the airport. The Uber driver rushes out of the heated car, grabs the man's luggage, tosses it in the trunk, and within minutes both are off to the airport.

Raindrops coalesce and then separate, streaming down a large window reflecting a hunched-over barrister with his fingers dancing across the keyboard. With one click of the mouse, he rushes to the printer and snatches the freshly-printed documents. He clasps on his leather briefcase "click" and he storms out of his London office as his phone jingles inside his suit pocket. He pushes his umbrella open and darts to his identified Uber—he is already late for a meeting.

Foam sloshes and oozes down the pints of Guinness as the glasses "clink" together. A group of freshly-graduated university students celebrate the last stop on their Belfast bar crawl. A young man grabs his worn jean pocket as his phone vibrates frantically. "Uber's here!" The belligerent graduates saunter down the cobblestone walkway to the car. A hand

clutches the door handle and jerks the car door open. The young man bends over and projectile vomits onto the interior of the car—that's a fine.

Customarily, individuals would obtain a traditional taxi by phone, by hailing one on the street, or at a cab stand. Today, those methods are “out-of-date” as the debut of e-hailing services expands into the international domain. Uber is a technology powerhouse that developed digitally convenient e-hailing taxi services from its headquarters in San Francisco, California to the United Kingdom, and beyond. Whether an individual needs a ride to the airport, a ride home, or a ride to another city, he or she uses Uber to order and pay for a taxi on-demand. Uber is now an international 70-billion-dollar technology company known for its unique services and business model, which has fundamentally transformed the market for “point-to-point” transportation.¹ Despite the positives, Uber's innovative business model disrupts the traditional value-added tax (“VAT”) regulatory framework in the European Union (“EU”), specifically in the United Kingdom (“UK”).

This Note explores both the European Union Council Directive (“EU VAT Directive”) and the UK's Value Added Tax Act 1994 (“UK VAT Act”), and their regulatory application to Uber. First, the Background will examine the evolution of VAT legislation in the EU, the history of Uber and the sharing economy in the 21st century, and Uber's international business and tax structure. Second, the Analysis breaks apart the UK VAT Act and its applicability to Uber's business structure. Finally, this Note will articulate how Uber commits tax evasion in the UK and will explore the Digital Single Market Strategy for Europe (“Digital Single Market”), which will go into full effect in 2021, aiming to simplify the VAT registration process and prevent tax evasion.

I. BACKGROUND

A. History of VAT Legislation in the UK

In 1970, the Chancellor of the Exchequer of the UK (the head of Her Majesty's Treasury) enacted the VAT to replace the Purchase Tax.² As part of the UK's reform of the tax system, the UK introduced VAT that applies to both goods and services without distorting the consumer's

1. Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 4 (2017).

2. Chancellor of the Exchequer, *Value-Added Tax*, CAB\129\153 NAT'L ARCHIVES 1, 1 (Oct. 30, 1970), available at <http://filestore.nationalarchives.gov.uk/pdfs/small/cab-129-153-cp-70-99.pdf> (last visited Nov. 22, 2018).

expenditures.³ Today, the EU VAT Directive requires all Member States to adopt VAT legislation that conforms to EU standards, specifying that each Member State applies its own VAT rate of at least 15 percent.⁴ Currently, the UK VAT Act is the controlling legislation regulating VAT throughout the UK (comprised of England, Wales, Scotland, and Northern Ireland).⁵ According to Section 4(1) of the UK VAT Act, “VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.”⁶

1. VAT Calculation

VAT acts as a type of consumption tax, meaning the supplier charges the tax against the consumer on the purchase of the good or service.⁷ The UK charges VAT on goods and services when value is added at each stage along the production chain, starting from raw materials and extending to the final sale.⁸ At each stage, an individual or business that purchases goods or services for business use may be reimbursed for the VAT it paid or claim the reverse charge (specifically for business-to-business transactions), discussed below in Section III(C)(1). In short, the end consumer who buys a good or service pays the supplier the sale price plus the 20 percent VAT amount, and the supplier pays the VAT amount to Her Majesty’s Revenue and Customs (“HMRC”), the UK’s government department responsible for collecting taxes.

Since the United States does not use this type of taxation system, an example follows to illustrate how the UK applies the VAT in commerce. A farmer produces wheat and sells one pound to a baker for 20 pence.⁹

3. *Id.*

4. Walter Hellerstein & Timothy H. Gillis, *The VAT in the European Union*, 127 TAX NOTES 461, 462-64 (2010). “Each Member State has its own national VAT controlled by its own rules and ‘derogations’ from the EU standard.” *Id.*

5. *United Kingdom, THE COMMONWEALTH*, available at <http://thecommonwealth.org/our-member-countries/united-kingdom> (last visited Nov. 21, 2018); see generally Value Added Tax Act 1994, c. 23 (UK).

6. Value Added Tax Act 1994, c. 23, § 4(1) (UK).

7. *What Is Value-Added Tax (VAT) and Who Pays It?*, INVESTOPEDIA (May 2018), available at <https://www.investopedia.com/ask/answers/011915/what-value-added-tax-vat-and-who-pays-it.asp> (last visited Nov. 22, 2018).

8. Charles C. Engel II, *Revisiting the Value Added Tax: A Clear Solution to the Murky United States Corporate Tax Structure*, 22 IND. INT’L & COMP. L. REV. 347, 350 (2012).

9. Derek Thompson, *How Does a ‘Value Added Tax’ Work, Anyway?*, THE ATLANTIC (Mar. 1, 2010), available at <https://www.theatlantic.com/business/archive/2010/03/how-does-a-value-added-tax-work-anyway/36834/> (last visited Nov. 22, 2018).

At a 20 percent VAT rate, the VAT is four pence.¹⁰ The baker pays the farmer 24 pence.¹¹ The farmer pays HMRC four pence in VAT.¹²

The baker makes a loaf of bread out of the wheat and sells it to a store for 60 pence.¹³ At a 20 percent VAT rate, the VAT is 12 pence.¹⁴ The store pays the baker 72 pence.¹⁵ The baker pays HMRC eight pence in VAT—he pays 12 pence in VAT but receives a four pence credit from the government.¹⁶

The store sells the loaf of bread to an individual for £1.¹⁷ At a 20 percent VAT rate, the VAT is 20 pence.¹⁸ The individual pays £1.20 to the store for the loaf of bread.¹⁹ The store pays HMRC eight pence in VAT—the store pays 20 pence in VAT but receives a 12 pence paid credit from the government.²⁰

In total, the HMRC receives four pence from the farmer, eight pence from the baker, and eight pence from the store.²¹ The government collected its 20 percent VAT of 20 pence on the £1 final sale.²²

2. Who Can Reclaim VAT

The general rule is that an individual or business can reclaim VAT paid on goods and services purchased for the use of its business.²³ If the purchase is both for business and personal or private use, then the individual or business (“Buyer”) can only reclaim the business portion of the VAT.²⁴ The Buyer must file a VAT return with HMRC to reclaim the VAT.²⁵ The Buyer must record all transactions of goods and services purchased for business purposes and a total VAT amount to be refunded

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *See* Thompson, *supra* note 9.

15. *Id.*

16. *Id.* This is an example of how the baker used the goods (wheat) for business purposes and reclaimed the VAT it paid.

17. *Id.*

18. *Id.*

19. *See* Thompson, *supra* note 9.

20. *Id.* This is an example of how the store used the goods (bread) for business purposes and reclaimed the VAT it paid.

21. *Id.*

22. *Id.*

23. *Reclaiming VAT*, Gov.UK, available at <https://www.gov.uk/reclaim-vat> (last visited Nov. 22, 2018).

24. *Id.*

25. *Id.*

on the VAT return.²⁶ The Buyer calculates the VAT amount from VAT invoices issued by the suppliers to the Buyer.²⁷ After the Buyer files the VAT return, HMRC refunds the Buyer the VAT amount indicated on the return, assuming the return contains correct information.²⁸

On the other side of the transaction, suppliers need to be cognizant as to whether the transaction is a business-to-consumer transaction (“B2C Transaction”) or a business-to-business transaction (“B2B Transaction”) to issue valid VAT invoices. B2C Transactions are transactions between a business (the supplier) and a consumer (the buyer), who is usually a natural person not registered for VAT.²⁹ B2B Transactions are transactions between two businesses who are both VAT registered.³⁰ In B2B Transactions, the “reverse charge” will most likely apply (as discussed further in Section III(C)(1)). However, a natural person may register for VAT and, in that case, is regarded as a VAT taxable person.³¹ All sales between the VAT-registered business and individual are now treated as B2B Transactions.³² It is important that suppliers always issue a VAT invoice because, at first glance, it is not clear as to whether an individual is registered for VAT.

B. History of Uber: Accelerating from San Francisco to the UK

Unable to hail a cab on the streets of Paris, two friends attending an annual tech conference mulled over the idea of a limo service that they could order via an application (“app”) on a smartphone and, as a result, Uber was born.³³ Uber, a mobile-compatible app, connects riders with drivers utilizing a smartphone’s GPS capabilities.³⁴ Founded in May 2010,³⁵ Uber Technologies Inc. (“Uber Technologies”) began as a start-up tech company in San Francisco and has quickly conquered the taxicab industry with an international presence by operating in 858 cities in 84

26. *Id.*

27. *VAT Record Keeping*, GOV.UK, available at <https://www.gov.uk/vat-record-keeping> (last visited Nov. 22, 2018); see also *Reclaiming VAT*, *supra* note 23.

28. *Reclaiming VAT*, *supra* note 23.

29. PwC, *Who Are B2C Clients for VAT Purposes?*, PwC (Oct. 9, 2012), available at <http://ebiz.pwc.com/2012/10/who-are-b2c-clients-for-vat-purposes/> (last visited Nov. 22, 2018).

30. *Id.*

31. *Id.*

32. *Id.*

33. Dan Blystone, *The Story of Uber*, INVESTOPEDIA (Aug. 9, 2018), available at <https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp> (last visited Nov. 22, 2018).

34. *Id.*

35. *Id.*

countries.³⁶ Uber entered the EU transportation market in late-2011, making its debut in Paris.³⁷

To operate the Uber app, a user must first download and open the app.³⁸ Next, the rider must enter his or her name, credit card information, address, and submit a request for pickup.³⁹ The app will alert the rider to the cost of the ride (the fare) prior to submitting the ride request, which is determined by the rider's car and service preference.⁴⁰ Uber calculates the fare by recording the driving time, subject to discounts or multiplied by a "surge-charge" based on high demand.⁴¹ After the rider makes the ride request, the app notifies a nearby Uber driver who can accept or reject the ride request.⁴² If accepted, the app provides the driver with the rider's name, location, and rating; in turn, the rider receives the driver's name, location, picture of driver's vehicle, and license plate number.⁴³ The driver arrives at the designated pick-up location and the rider hops in the vehicle and enjoys the ride.⁴⁴ At the end of the journey, the rider exits the vehicle and the app takes care of payment, asks the rider to rate the driver, and prompts the rider to leave feedback on the ride.

C. Taxing the Sharing Economy

Technological innovation paves the way for startups—from Uber to companies such as Airbnb—to create a new model of production and consumption of goods and services, known as the sharing economy. The sharing economy enables individuals to obtain rides, rent

36. *Uber Cities*, UBER ESTIMATOR, available at <https://uberestimator.com/cities> (last visited Dec. 2, 2018) (quoting an estimate as of Dec. 2, 2018).

37. Blystone, *supra* note 33.

38. "An app is computer software, or a program, most commonly a small, specific one used for mobile devices." *Definition—What Does App Mean?*, TECHOPEDIA, available at <https://www.techopedia.com/definition/28104/app> (last visited Dec. 2, 2018).

39. Rebecca Elaine Elliott, *Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc.*, 41 IOWA J. CORP. L. 727, 734 (2016).

40. Passengers may select an "UberX" (sedan), "UberXL" (van or SUV), or "Select" (high-end cars). *Always the Ride You Want*, UBER, available at <https://www.uber.com/us/en/ride/> (last visited Nov. 20, 2018). Also, passengers may select to ride in the car by themselves or use "UberPool," which matches passengers with one another who are traveling in the same direction. UberPool operates like a carpool function. *uberPOOL: Together, We Save*, UBER, available at <https://www.uber.com/ride/uberpool/> (last visited Nov. 20, 2018).

41. See Elliott, *supra* note 39, at 735 & 742.

42. See *id.* at 734.

43. *Id.*

44. See *id.*

accommodations, or hire services from peers via their electronic devices (a computer or mobile app) in exchange for payment.⁴⁵

Within the sharing economy, consumers and suppliers conduct transactions electronically, falling into the broad category of electronic commerce (“e-commerce”).⁴⁶ E-commerce is the purchase and sale of tangibles, intangibles, and services through electronic means (Internet or app).⁴⁷ This new business concept of collaborative consumption has significantly impacted traditional industries and challenges the international tax regime.⁴⁸ Lawmakers and professionals argue that the tax laws for brick and mortar locations do not strictly apply to transactions conducted via electronic devices, namely e-commerce.⁴⁹ Additionally, the EU’s imposition of VAT on these goods and services purchased electronically face numerous challenges, such as whether the “thing” being purchased qualifies as a good or service, who constitutes a “taxable person,” distinguishing the “place of supply” of the supplier, and which VAT rate applies to the electronic transaction.⁵⁰

D. Uber’s Tax Scheme

Uber is headquartered in San Francisco and used in 858 cities in 84 countries.⁵¹ In 2013, Uber negotiated new venture capital financing to multiply its worth ten-fold, from \$330 million to \$3.5 billion.⁵² Uber created a complex business and tax structure to limit its tax liabilities by using a well-known arrangement called the “Double Dutch” tax model.⁵³ Uber formed multiple Dutch subsidiaries (Uber International C.V., Uber

45. Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989, 989 (2016).

46. See Rifat Azam, *Global Taxation of Cross Border E-Commerce Income*, 31 VA. TAX REV. 639, 647 (2012).

47. See *id.*

48. See *id.* at 652.

49. See *id.*; see also Subhajit Basu, *International Taxation of E-Commerce: Persistent Problems and Possible Developments*, J. INFO. L. TECH. 1, 7 (2008), available at https://warwick.ac.uk/fac/soc/law/elj/jilt/2008_1/basu/basu.pdf (last visited Nov. 25, 2018).

50. See Basu, *supra* note 49.

51. *Uber Cities*, *supra* note 36.

52. Brian O’Keefe & Marty Jones, *How Uber Plays the Tax Shell Game*, FORTUNE (Oct. 22, 2015), available at <http://fortune.com/2015/10/22/uber-tax-shell/> (last visited Nov. 22, 2018).

53. *Id.*; see also Nino Sichinava, *How to Lose Friends and Alienate People. Five Lessons from Uber*, POL. CRITIQUE (Sept. 21, 2017), available at <http://politicalcritique.org/world/2017/how-to-lose-friends-and-alienate-people-five-lessons-from-uber/> (last visited Nov. 22, 2018).

B.V., and other local subsidiaries)⁵⁴ to effectively shield all its ride-share income outside the United States from domestic and foreign taxes.⁵⁵

Beginning at the starting line stands Uber Technologies, the parent company of Uber and headquartered in San Francisco, CA.⁵⁶ Uber Technologies established its presence in Europe as Uber International C.V. ("Uber C.V."), incorporated in the Netherlands but headquartered in Bermuda as a law firm with no employees.⁵⁷ Uber Technologies and Uber C.V. negotiated a cost-sharing deal to split the profits from Uber Technologies' intellectual property.⁵⁸ This cost-sharing deal states that Uber C.V. retains the right to use Uber Technologies' intellectual property outside of the United States for a one-time fee of approximately \$1 million, and in turn Uber Technologies receives a royalty of 1.45 percent of future net revenue.⁵⁹

Next in line is Uber B.V. and the other local Uber subsidiaries. Uber B.V. is a private limited liability company located in the Netherlands that hires employees to process the transactions conducted in Europe.⁶⁰ Additionally, Uber has strategically placed local subsidiaries, such as Uber London Limited (incorporated in the UK), in Member States in which it operates.⁶¹

Uber B.V. processes 100 percent of passengers' payments for the Uber rides they take outside of the United States.⁶² Off the top, Uber B.V. keeps 20 percent of the fare price.⁶³ Uber C.V. and Uber B.V. contracted in such a way that Uber B.V. retains one percent of the 20 percent cut of each transaction as income and pays the rest of the profits (the other 19 percent) to Uber C.V. as a royalty fee for the use of Uber Technologies' intellectual property.⁶⁴ Then, Uber C.V. pays its 1.45 percent of royalties to Uber Technologies.⁶⁵

54. O'Keefe & Jones, *supra* note 52; *see also* Sichinava, *supra* note 53.

55. O'Keefe & Jones, *supra* note 52.

56. *See id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Sichinava, *supra* note 53; *see also* O'Keefe & Jones, *supra* note 52.

61. *See* O'Keefe & Jones, *supra* note 52; *see also* *Legal: Terms and Conditions (UK)*, UBER (Mar. 14, 2018), *available at* <https://www.uber.com/legal/terms/gb/> (last visited Nov. 22, 2018).

62. *See* O'Keefe & Jones, *supra* note 52.

63. *See id.*; *see also* Sichinava, *supra* note 53.

64. O'Keefe & Jones, *supra* note 52.

65. *See id.*

In the end, Uber (through a third subsidiary called Rasier Operations B.V.) sends back 80 percent of the initial fee to the individual Uber driver who charged the fare.⁶⁶ Therefore, Uber C.V., Uber B.V., and its other international subsidiaries maintain links to Uber Technologies in San Francisco, CA through the slew of contracts. The international subsidiaries, such as Uber C.V. and Uber B.V., represent the nuts and bolts to Uber's international business and tax infrastructure in Europe.

II. ANALYSIS

The sharing economy created an efficient, expedient, and collaborative business model to fulfill life's demands without the need to own property outright. Uber leads the ride-sharing business with increasing popularity, as individuals can use the Uber app for on-demand rides. Nonetheless, Uber received harsh criticism over the last five years, domestically and internationally, that transpired into tremendous international opposition and litigation. Recently, the controversy concerns Uber's refusal to pay VAT in the UK. Uber argues that it is not required to charge VAT because it is not providing a good or service, its place of supply is not in the UK, and the Uber drivers are taxable persons as independent contractors.⁶⁷ I strongly disagree with Uber's stance, and a court would most likely disagree as well.

To determine whether Uber must charge VAT in the UK, a court must establish the following elements: (1) Uber supplies a good or service;⁶⁸ (2) its place of supply is in the UK;⁶⁹ and (3) Uber represents a taxable person with a total VAT taxable revenue over £85,000.⁷⁰ This Section discusses how Uber satisfies each of these elements, and, therefore, must charge VAT in the UK.

A. *Uber Supplies a Transportation Service*

First, a court must determine whether Uber supplies a good or service. Uber contends that it represents a "technology platform" and not a

66. Sichinava, *supra* note 53.

67. *See* Uber B.V. v. Aslam (2017) Appeal No. UKEAT/0056/17/DA (appeal taken from ET) (UK); *see generally* Case C-434/15, Asociación Profesional Elite Taxi v. Uber Systems Spain SL, 2017 EUR-Lex CELEX LEXIS 981 (Dec. 20, 2017).

68. Value Added Tax Act 1994, c. 23, § 1 (UK).

69. *Id.* § 7A.

70. *Id.* § 3; *see also* Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018, Gov.UK (Nov. 22, 2017), available at <https://www.gov.uk/government/publications/vat-maintain-thresholds-for-2-years-from-1-april-2018/vat-maintain-thresholds-for-2-years-from-1-april-2018> (last visited Nov. 22, 2018).

service, which only acts as an intermediary to connect drivers with riders through its smartphone app.⁷¹ Recently, the Court of Justice of the European Union (“CJEU”), Europe’s highest court, rejected Uber’s technology platform claim and ruled that Uber is a “transportation service” because it inherently links itself to a transport service.⁷²

The CJEU highlights two essential arguments: (1) Uber’s app is imperative for both the drivers and riders; and (2) Uber exercises authority over its drivers.⁷³ First, Uber acts as more than an intermediary, due to the importance of the Uber app for both the drivers and riders.⁷⁴ The app remains an “integral part of an overall service whose main component is a transport service.”⁷⁵ Second, Uber exercises authority over the conditions under which its drivers provide the service, such as quality of vehicles, fare rate through the app, and receiving revenue before paying the drivers.⁷⁶ The CJEU ruling confirmed precedent that a transportation service includes any service inherently linked to the physical act of transporting persons from one place to another.⁷⁷ Therefore, the Uber app acts as a transportation service because the Uber app is a necessity to connect drivers and riders, Uber exerts control over its drivers, and the Uber app links directly to the physical act of transporting individuals.⁷⁸ Since the CJEU ruled that the Uber app is a transportation service under EU law, Uber faces heightened pressure to charge VAT.

B. Uber Supplies a Transportation Service in the UK

Second, a court must determine whether Uber supplies a transportation service in the UK.⁷⁹ Uber argues it is not obligated to charge VAT because its place of supply is located in the Netherlands; thus, Uber abides by the Dutch VAT rate of zero percent (since its Dutch subsidiaries—Uber C.V. and Uber B.V.—process its UK revenue).⁸⁰ According

71. See Erin Mitchell, Comment, *Uber’s Loophole in the Regulatory System*, 6 HOUS. L. REV. 75 (2015).

72. *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, 2017 EUR-Lex CELEX LEXIS 981.

73. *Id.*; see also Court of Justice of the European Union Press Release No. 136/17, *The Service Provided by Uber Connecting Individuals With Non-Professional Drivers Is Covered by Services in the Field of Transport* (Dec. 20, 2017).

74. *Asociación Profesional Élite Taxi*, 2017 EUR-Lex CELEX LEXIS 981.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. Value Added Tax Act 1994, c. 23, § 7A (UK).

80. Oscar Williams-Grut, *EXCLUSIVE: Uber’s Rival Says It Uses ‘Tax Avoidance on an Industrial Scale,’ and Wants Europe to Investigate*, BUS. INSIDER (July

to Section 7A of the UK VAT Act, “[a] supply of services is to be treated as made: in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and, otherwise, in the country in which the supplier belongs.”⁸¹ Section 7A is subject to Schedule 4A.⁸² According to Schedule 4A, “[a] supply of services consisting of the transportation of passengers . . . is to be treated as made in the country in which the transportation takes place . . .”⁸³ The place of supply is the “country in which the recipient belongs” (Section 7A),⁸⁴ which is “the country in which the transportation takes place” (Schedule 4A).⁸⁵ To determine Uber’s place of supply, a court must ask: In what country does the transportation take place?

1. Uber’s “Place of Supply” is the UK

Generally, the location where the transport physically takes place represents the place of supply for passenger transport services.⁸⁶ If the transport services are conducted physically inside the UK, then the supply of those services are within the scope of the UK VAT.⁸⁷ Uber hires drivers throughout the UK to transport individuals (recipients) throughout the UK. Accordingly, the transport physically takes place in the countries that comprise the UK; therefore, Uber’s place of supply is the UK. As a result, the services Uber provides fall within the scope of the UK VAT and are subject to the UK VAT rate of 20 percent.⁸⁸

C. Uber is a “Taxable Person”

Lastly, a court must determine whether Uber is a “taxable person [entity].”⁸⁹ Uber asserts that its drivers are the taxable persons (i.e. independent contractors) and required to charge VAT on the bookings (thereby transferring Uber’s VAT obligation onto the drivers by using the

31, 2015), available at <https://www.businessinsider.com/uber-tax-in-europe-2015-7> (last visited Nov. 22, 2018).

81. Value Added Tax Act 1994, c. 23, § 7A(2) (UK).

82. *Id.* § 7A(5).

83. *Id.* at sch. 4A(1)(2)(1) (UK); see also *id.* § 7A(5) (UK).

84. *Id.* § 7A(2) (UK).

85. Value Added Tax Act 1994, c. 23, sch. 4A(1)(2)(1) (UK).

86. *Id.*; see also *The VAT Treatment of Passenger Transport (VAT Notice 744A)*, Gov.UK (Dec. 24, 2009), available at <https://www.gov.uk/guidance/the-vat-treatment-of-passenger-transport-notice-744a> (last visited Nov. 22, 2018).

87. *The VAT Treatment of Passenger Transport (VAT Notice 744A)*, *supra* note 86.

88. *Id.*; see also Value Added Tax Act 1994, c. 23, § 2(1) (UK).

89. Value Added Tax Act 1994, c. 23, § 3(1) (UK).

reverse charge).⁹⁰ However, I find that Uber's argument falters. My contention is that Uber is the employer of its drivers, meaning Uber cannot label the drivers as taxable persons because they are employees of Uber. Consequently, Uber is the taxable person as the employer of its drivers and cannot take advantage of the reverse charge.

1. Reverse Charge

VAT legislation includes a concept called the "reverse charge." The reverse charge eliminates a supplier's obligation to register for VAT in the Member State where they supply their services in a B2B transaction.⁹¹ It applies to transactions involving two businesses, where one business, located outside of the UK, supplies a good/service ("Supplier Business") to the other business ("Buyer Business"), located inside the UK.⁹² Usually, the responsibility falls upon the Supplier Business to report VAT on a transaction.⁹³ However, when a Supplier Business applies the reverse charge to a transaction, the obligation to report the VAT shifts from the Supplier Business to the Buyer Business.⁹⁴ The Buyer Business reports both its purchase and the supplier's sale on its VAT return; as a result, the two entries cancel each other.⁹⁵ In the end, the VAT reverse charge allows businesses to sell goods and services to other businesses located in other EU countries without paying VAT, simplifying trade within the EU Single Market.⁹⁶

Uber implements the reverse charge method in its transactions with each Uber driver.⁹⁷ Application of the reverse charge can only occur in

90. Tom Bergin, *Exclusive-Loophole Allows Uber to Avoid UK Tax, Undercut Rivals*, REUTERS (June 7, 2017), available at <https://uk.reuters.com/article/uk-uber-tax-britain/exclusive-loophole-allows-uber-to-avoid-uk-tax-undercut-rivals-idUK-KBN18Y1Z6> (last visited Nov. 22, 2018) (noting that Uber uses the "reverse charge" by treating the drivers as independent contractors and billing the drivers across EU borders from one of its Dutch subsidiaries).

91. See Value Added Tax Act 1994, c. 23, § 8 (UK); see also *Place of Supply of Services (VAT Notice 741A)*, Gov.UK, (Feb. 24, 2010), available at <https://www.gov.uk/guidance/vat-place-of-supply-of-services-notice-741a#sec5> (last visited Dec. 2, 2018).

92. Value Added Tax Act 1994, c. 23, § 8(1) (UK); see also *Reverse Charge on EU VAT*, AVALARA, available at <https://www.vatlive.com/eu-vat-rules/eu-vat-returns/reverse-charge-on-eu-vat/> (last visited Nov. 20, 2018).

93. See *Reverse Charge on EU VAT*, *supra* note 92.

94. *Id.*

95. *Id.*

96. Bergin, *supra* note 90; see also *The Reverse Charge Mechanism*, VATGLOBAL, available at <https://www.vatglobal.com/reporting-obligations-vat-guides/the-reverse-charge-mechanism> (last visited Nov. 22, 2018).

97. Bergin, *supra* note 90.

a transaction between two businesses that are registered for VAT. Uber labels each driver as an independent contractor, meaning Uber treats each driver as a separate business.⁹⁸ Uber shifts the responsibility to register and report VAT to each individual driver, treating them as a Buyer Business using its app.⁹⁹ The drivers cannot register, charge, or report VAT because most Uber drivers generate less than the required £85,000 or more in revenue a year and do not qualify for VAT.¹⁰⁰ Therefore, Uber does not charge VAT on the billions of pounds in Uber-trip sales. The UK introduced the VAT reverse charge to combat fraud, but instead it seems to enable fraud.¹⁰¹ Uber, and other sharing economy powerhouses such as Google and Facebook, manipulate this provision.¹⁰² Laurent Lattman, a VAT partner with Taxand, said that the reverse charge “was not intended to allow companies to escape VAT altogether.”¹⁰³

2. *Uber is an Employer (Taxable Person)*

Uber should not be utilizing the reverse charge because it is the employer of the drivers (employees) and the drivers are not separate businesses. As an employer, Uber is a taxable person with a VAT taxable revenue of more than £85,000 and is obliged to charge the 20 percent VAT rate on every booking in the UK. Article 9(1) of the EU VAT Directive defines a taxable person as “any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.”¹⁰⁴ To establish whether Uber is a taxable person under the EU VAT Directive, Uber must carry out an economic activity, and must do so independently.¹⁰⁵

98. *Id.*

99. *See id.*; *see also The Reverse Charge Mechanism, supra* note 96.

100. Bergin, *supra* note 90.

101. *Legislative Train Schedule: VAT Reverse Mechanism*, EUR. PARLIAMENT, available at <http://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-taxation/file-vat-reverse-mechanism> (last visited Nov. 25, 2018).

102. Bergin, *supra* note 90.

103. *Id.*

104. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU). “For the purposes of this [UK VAT] Act a person is a relevant business person in relation to a supply of services if the person—(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC.” Value Added Tax Act 1994, c. 23, § 7A(4)(a) (UK).

105. Value Added Tax Committee, *Working Paper No. 878: Question Concerning the Application of EU VAT Provisions*, taxud.c.1(2015)4370160–EN (Sept. 22, 2015), available at <https://circabc.europa.eu/sd/a/878e0591-80c9-4c58-baf3-b9fda1094338/878%20-%20VAT%20treatment%20of%20sharing%20economy.pdf> (last visited Nov. 22,

a. Uber Carries Out an Economic Activity

Article 9(1) of the EU VAT Directive defines an economic activity as “any activity of producers, traders, or persons supplying services, including mining and agricultural activities and activities of the professions.”¹⁰⁶ In particular, an economic activity, “exploit[s] [] tangible or intangible property for the purpose of obtaining income . . . on a continuing basis.”¹⁰⁷ The “exploitation of tangible or intangible property” must be for some form of consideration, and, generally, must be done on a continuing basis.¹⁰⁸

i. Uber Supplies Service for Consideration

Settled EU case law concludes that for consideration to exist in such circumstances “there must be a direct link between the supply of goods or services made and the consideration received.”¹⁰⁹ There is a direct link if a legal relationship exists between the provider and the recipient.¹¹⁰

Pursuant to Uber’s “UK Terms and Conditions” (“Contract”), “[y]our [passenger] access and use of the Services constitutes your [passenger] agreement to be bound by the Terms, which establishes a contractual relationship between you [passenger] and Uber.”¹¹¹ The Contract further explains that the services will only be supplied in exchange for compensation.¹¹² According to the Contract, “[a]fter you have received services or goods obtained through your use of the Services, Uber will facilitate your payment of the applicable Charges.”¹¹³ This Contract represents a legal relationship between Uber and the passengers. A passenger can schedule a ride through the Uber app, but Uber will only fulfill the booking if the passenger pays Uber the predetermined amount as compensation; otherwise, Uber will not schedule the booking and no driver will arrive to transport the passenger. Uber receives its revenue by first collecting a percentage of the booking fee and then dispersing the remaining funds to the driver. As a result, Uber supplies this transportation service for the purpose of obtaining revenue, where Uber (the

2018); *see also* *VAT Taxable Person Manual*, Gov.UK, available at <https://www.gov.uk/hmrc-internal-manuals/vat-taxable-person/vtaxper33000> (last visited Nov. 25, 2018).

106. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

107. *Id.*; *see also* Value Added Tax Committee, *supra* note 105, at 5.

108. Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

109. Value Added Tax Committee, *supra* note 105, at 9.

110. *Id.*

111. *Legal: Terms and Conditions (UK)*, *supra* note 61.

112. *Id.*

113. *Id.*

provider) provides its service to passengers (the recipients) in exchange for consideration through the existence of a legal relationship.

ii. Uber Supplies Service on a Continuing Basis

Generally, “joining a sharing economy platform through which goods or services are provided in return for remuneration, implies some continuity. The activities in question would therefore meet the requirements for inclusion in the concept of “economic activity” as set out in Article 9(1) of the [EU] VAT Directive.”¹¹⁴ Uber provides transportation services in return for money and, thus, continuity is implied. In conclusion, the transportation services Uber provides to passengers is an economic activity under Article 9(1) of the EU VAT Directive.

b. Uber Carries Out the Economic Activity Independently

According to Article 10 of the EU VAT Directive, the taxable person must conduct the economic activity “independently,” which “exclude[s] employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration, and the employer’s liability.”¹¹⁵ The question of employment status is a question of fact evidenced by a contract or similar legal document.¹¹⁶

i. The Drivers are Bound to Uber by an Employment Contract

A recent court decision ruled that Uber drivers are Uber’s “workers”—not independent contractors.¹¹⁷ In response to earning less than minimum wage and knowing that Uber pockets a large portion of each booking fee, Uber drivers protested around the world.¹¹⁸ Two former Uber drivers took things even further and sued Uber so that it would classify them as workers instead of self-employed independent contractors.¹¹⁹ On November 10, 2017, the Employment Appeal Tribunal (“EAT”) upheld a decision that classifies Uber drivers as workers when they (1) switch on the app (2) in territory where they are authorized to work and

114. Value Added Tax Committee, *supra* note 105, at 6.

115. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU).

116. JUDITH FREEDMAN, EMPLOYED OR SELF-EMPLOYED?: TAX CLASSIFICATION OF WORKERS AND THE CHANGING LABOUR MARKET 36 (2001).

117. Uber B.V. v. Aslam, Appeal No. UKEAT/0056/17/DA ¶ 3.

118. Bergin, *supra* note 90; see also Mark Harris, *Uber: Why the World’s Biggest Ride-Sharing Company Has No Drivers*, THE GUARDIAN (Nov. 16, 2015), available at <https://www.theguardian.com/technology/2015/nov/16/uber-worlds-biggest-ride-sharing-company-no-drivers> (last visited Nov. 22, 2018).

119. Uber B.V., UKEAT/0056/17/DA ¶¶ 3, 6.

(3) are “able and willing to accept assignments;” therefore entitling them to certain employment rights.¹²⁰

a) Switch on the App

Drivers must switch on the Uber app to commence “working time.”¹²¹ The EAT acknowledged that once the driver turns on the app, the driver enters into a legally binding “worker[‘s] contract.”¹²² In October 2015, Uber issued a New Partner-Driver Agreement (“New Agreement”) which states that “[an Uber driver is] an independent company in the business of providing Transportation Services . . . [that provides] passenger transportation services to Users via the Uber Services in the Territory by [the] Customer and its Drivers using the vehicles.”¹²³ Uber interprets this provision as representing an agency relationship, where Uber acts as the drivers’ agent in supplying transportation services to passengers.¹²⁴ Rejecting the agency-relationship language that Uber uses in its contracts with its drivers, the EAT determined that the relationship finds its basis in the “reality of the situation.”¹²⁵ The court articulated that the drivers are Uber’s workers, incorporated into Uber’s business of providing transportation services and undertaking work for Uber by entering into a contractual relationship with each passenger on Uber’s behalf when the drivers switch on the app and accept trips.¹²⁶

b) Authorized Territory

Drivers must be in territory in which they are authorized to work.¹²⁷ Territory is presumed to be all the cities in which Uber is active.¹²⁸ Importantly, Uber holds that its drivers perform “unmeasured work” when they return home after completing a trip outside the territory.¹²⁹ Therefore, the drivers participate in “working time” once they switch on the app in the territory in which Uber authorizes them to work.

120. *Id.* ¶ 103.

121. *Id.* ¶ 126.

122. *Id.* ¶ 122.

123. *Id.* ¶¶ 45-46.

124. Uber B.V., UKEAT/0056/17/DA ¶ 83.

125. *Id.* ¶ 99.

126. *Id.*

127. *Id.* ¶ 65.

128. *See generally id.* ¶ 65.

129. Uber B.V., UKEAT/0056/17/DA ¶ 78.

c) *Able and Willing to Accept Assignments*

Drivers must be “on-duty,” meaning they are “able and willing to accept assignments.”¹³⁰ The EAT emphasized that going “on duty” means that each driver is able and willing “to accept trip requests,” defined in Uber’s “Welcome Packet.”¹³¹ Even when the Uber driver does not carry a passenger in the vehicle, the driver remains “on duty” so long as the driver satisfies the three aforementioned conditions.¹³² In the capacity of being “on duty,” the drivers are at Uber’s disposal.¹³³ Therefore, an Uber driver who (1) switches on the app (2) in the territory in which the driver is authorized to work and (3) is “able and willing to accept trips” is a worker of Uber and bound by its worker contract with Uber.¹³⁴

ii. *A Court Will Find that the Drivers are Employees for VAT Purposes*

The recent EAT decision concludes that Uber drivers are workers for purposes of employment rights, which entitles them to: (1) the guaranteed minimum wage; (2) holiday pay; (3) minimum length of rest breaks; (4) protections against unlawful deductions from wages; (5) unlawful discrimination; and (6) whistleblowing.¹³⁵ Qualifying as a worker for purposes of employment law does not automatically assume the individual is a worker or employee for VAT purposes. This case is persuasive but not binding in a court deciding employment status for VAT purposes, and it remains unclear whether a court would agree.

Articles 9 and 10 of the EU VAT Directive explain that employees are not taxable persons in regards to VAT, due to the fact that they are “bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration, and the employer’s liability.”¹³⁶ To determine whether there is an employer-employee relationship between Uber and its drivers, a court must look at the nature of the relationship in light of the valid contracts and then consider whether the relationship concluded by the contracts is false, based on the economic reality of the

130. *Id.* ¶ 115.

131. *Id.*

132. *Id.* ¶ 124.

133. *Id.* ¶ 124.

134. Uber B.V., UKEAT/0056/17/DA ¶ 126.

135. *See id.* ¶¶ 3 & 126; *see also Employment Status*, Gov.UK, available at <https://www.gov.uk/employment-status/worker> (last visited Nov. 22, 2018).

136. Council Directive 2006/112, art. 9 & 10, 2006 O.J. (L 347) 1, 11 (EU).

relationship considering the relevant facts.¹³⁷ Courts stress that every case must be decided on its own particular facts.¹³⁸

Analysis of the contract begins with the “contract of service” test, which states that a contract of service implies employment and a contract for services implies self-employment.¹³⁹ When interpreting a contract, the court must consider the language used, the provisions of the agreement, the surrounding circumstances known to both parties, and common sense.¹⁴⁰ The Contract contains language that identifies the rights and obligations of the drivers, which makes it possible to conclude whether the Contract constitutes a contract of service or a contract for services.¹⁴¹ Below is an analysis of the main factors a court would examine to decipher whether Uber drivers are employees or independent contractors under the Contract.

a) Uber Requires the Drivers to Work Regularly and Complete a Minimum Number of Hours

Uber requires employees to work regularly and complete a minimum number of hours, and, in exchange, the employees receive compensation.¹⁴² Uber drivers enjoy a flexible schedule, but they must complete at least one ride every 30 days to continue working for Uber.¹⁴³ Uber drivers expect compensation for the trips they complete. Thus, a court would find that this factor weighs in favor of an employer-employee relationship.

137. See Comm'n for HM Revenue & Customs v. Secret Hotels2 Ltd. [2014] UKSC 16, [11]-[12] (appeal taken from EWCA (Civ)).

138. Walls v. Sinnett [1987] BTC 206.

139. See *Employment Status Manual: Massey v Crown Life Insurance Company*, Gov.UK (Mar. 7, 2016), available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7055> (last visited Nov. 22, 2018) (stating that a “contract of service” is coterminous with “employment”); see also *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, Gov.UK (Mar. 7, 2016), available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7040> (last visited Nov. 22, 2018) (defining employment as being “under a contract of service”).

140. Secret Hotels2 Ltd. [2014] UKSC 16, [32].

141. The Contract was last updated on March 14, 2018. See generally *Legal: Terms and Conditions (UK)*, *supra* note 61.

142. *Employment Status*, Gov.UK, available at <https://www.gov.uk/employment-status/employee> (last visited Nov. 22, 2018).

143. Avery Hartmans, *10 Ways Uber Drivers Can Get Kicked Off the App*, BUS. INSIDER (July 23, 2017), available at <https://www.businessinsider.com/how-uber-drivers-get-deactivated-2017-7?r=UK&IR=T> (last visited Nov. 22, 2018).

b) *A Manager is Responsible for the Drivers' Workload*

Responsibility falls onto managers to maintain the Uber drivers' workload, as well as how and when work should be done.¹⁴⁴ This factor mirrors "mutuality of obligation," meaning that the employer bears the obligation to provide work to the employee, and the employee must complete the work that comes "down the pipe."¹⁴⁵ This represents a fundamental distinction between defining an individual as an employee or contractor.¹⁴⁶

Uber has the responsibility for the drivers' workload because it delegates ride requests to them. The Contract states, "[i]f you are consistently not confirming trips sent to you through the app you may temporarily be logged out of the app for a limited period of time as Uber will assume that you are not available to take trips at that time."¹⁴⁷ Uber drivers are inclined to take the requests that are sent to them on the app, and if they do not accept a few in a row they are "disciplined" and lose access to the app.¹⁴⁸ Uber directs how drivers will complete trips by mapping out the route in the navigation system in the Uber app.¹⁴⁹ The Uber app records every trip and sends passengers a map of the route.¹⁵⁰ Therefore, a court would find that this factor weighs in favor of an employer-employee relationship.

c) *Substitutes Cannot Perform the Drivers' Work*

An employee cannot send a substitute to do his or her work, and the same is true for Uber drivers.¹⁵¹ Each Uber driver in the UK must obtain a Private Hire Driver's License, attend an onboarding session, own or lease a vehicle, and have proof of both vehicle registration and vehicle

144. *Employment Status*, *supra* note 142.

145. *IR35 Explained: 'Contract of Service' and 'Contract for Services,'* CONTRACTOR CALCULATOR (Oct. 23, 2017), available at https://www.contractor-calculator.co.uk/difference_contract_for_services_of_services_ir35.aspx (last visited Nov. 22, 2018).

146. *Id.*

147. *Uber Community Guidelines*, UBER, available at <https://www.uber.com/legal/community-guidelines/uk-en/> (last visited Oct. 19, 2018).

148. *Id.*

149. Jordan Golson, *Uber Rebuilt Its Navigation App With Drivers in Mind*, THE VERGE (Mar. 16, 2017), available at <https://www.theverge.com/2017/3/16/14940886/uber-driver-navigation-app-maps-ride-pickup> (last visited Nov. 22, 2018).

150. Ashitha Nagesh, *What to Do If You Think Your Uber Has Taken You on the Wrong Route*, METRO (Mar. 1, 2017), available at <https://metro.co.uk/2017/03/01/what-to-do-if-you-think-your-uber-has-taken-you-on-the-wrong-route-6481482/> (last visited Nov. 22, 2018).

151. *Employment Status*, *supra* note 142.

insurance.¹⁵² Uber drivers cannot designate their work to others since Uber hires drivers based on their individual qualifications and specifically sends certain requests to certain drivers. The Contract explicitly states, “[y]ou [the Uber Driver], may not authorize third parties to use your Account . . . [and] [y]ou may not assign or otherwise transfer your Account to any other person or entity.”¹⁵³ Due to Uber’s selective process, the drivers are not allowed to assign their work to anyone. A court would find that this factor favors an employer-employee relationship.

d) Drivers Have Statutory Rights

The employer gives the employee holiday pay, sick pay, and maternity or paternity pay.¹⁵⁴ As explained in Section III(C)(2)(b)(2), Uber drivers recently received worker status, which gave Uber drivers: (1) the guaranteed minimum wage; (2) holiday pay; (3) minimum length of rest breaks; (4) protections against unlawful deductions from wages; (5) unlawful discrimination; and (6) whistleblowing.¹⁵⁵ Uber gives drivers more statutory rights than the those necessary to establish that the drivers are employees. Thus, a court would find that this factor weighs in favor of an employer-employee relationship.

e) Uber's Disciplinary and Grievance Procedures Apply to the Drivers

Uber drivers are subject to Uber’s disciplinary and grievance procedures.¹⁵⁶ Uber maintains the authority to temporarily or permanently deactivate an Uber driver’s account, specifically when a driver’s rating falls below 4.6 out of 5, when the driver consistently does not confirm trips, and when the driver cancels rides too often.¹⁵⁷ If a driver’s rating falls below 4.6, the driver will lose access to his or her account and will only

152. *Partner-Driver Requirements: How to Drive on the Uber APP*, UBER, available at <https://www.uber.com/en-GB/drive/requirements/> (last visited Nov. 22, 2018); see also *How to Upload Documents*, UBER, available at <https://www.uber.com/en-GB/drive/resources/how-to-upload-documents/> (last visited Nov. 22, 2018).

153. *Legal: Terms and Conditions (UK)*, *supra* note 61; see also *Express & Echo Publ’n Ltd. v. Tanton* [1999] EWCA (Civ) 949, [19] (Eng.) (ruling that a limited right of substitution in the contract is compatible with an employment contract). In this case, a clause of the contract stated that a substitute could only be used when the employer had expressly agreed to it. The court said, “[t]he AA [employer] did not want any competent tester [position], it wanted Mr. Bessell [employee].” *Id.*

154. *Employment Status*, *supra* note 142.

155. See *id.*; see generally *Uber B.V. v. Aslam*, Appeal No. UKEAT/0056/17/DA at ¶¶ 3 & 126.

156. *Employment Status*, *supra* note 142.

157. *Hartmans*, *supra* note 143.

regain access after completing one of Uber's quality improvement courses.¹⁵⁸ The Contract also contains multiple grievance procedures in regard to respecting riders and other drivers, physical or abusive contact with riders, and abiding by safety regulations (including following the speed limit, not texting while driving, using a phone mount, and not driving under the influence of alcohol or drugs).¹⁵⁹ Uber encourages riders to send feedback or complaints about his or her ride and driver. If Uber receives a complaint about an Uber driver, it will open an investigation and decide whether to temporarily or permanently deactivate that driver's account. Consequently, a court would find that this factor is in favor of an employer-employee relationship.

f) Drivers Complete Work at Uber's Premises or Address

In most cases, work is completed at the employer's premises or at an address specified by the business.¹⁶⁰ However, an Uber driver does not complete his or her work at the employer's premises, but rather at any location in which Uber is authorized to operate and where the app is accessible. Uber never discloses drivers' personal addresses, only its own business locations. Therefore, a court would find that this factor is in favor of an employer-employee relationship.

g) Uber Provides Materials, Tools, and Equipment

The employer provides materials, tools, and equipment for the employee's job.¹⁶¹ Uber does not provide the vehicle or vehicle accessories for its drivers to use in their day-to-day operation. However, Uber does provide the app technology that drivers use—the software used on the job which, when turned on, signifies that drivers are “working.” Thus, a court would find this factor neutral.

h) The Contract Uses the Terms “Employer” and “Employee”

An employment contract that uses terms such as “employer” and “employee” signifies an employer-employee relationship.¹⁶² In this circumstance, the Contract does not use these terms and instead uses

158. *Legal: Uber Community Guidelines (UK)*, UBER, available at <https://www.uber.com/legal/community-guidelines/uk-en/> (last visited Nov. 22, 2018); see also *Quality Improvement Classes*, UBER, available at <https://www.uber.com/drive/orange-county/resources/quality-course/> (last visited Nov. 22, 2018).

159. *Legal: Uber Community Guidelines (UK)*, *supra* note 158.

160. *Employment Status*, *supra* note 142.

161. *Id.*

162. *Id.*

“Partner/Principal” and “Agent.”¹⁶³ The EAT already dismissed the use of these titles in the Contract, ruling that titles are not determinative and the relationship between Uber and its drivers is one like an employer-employee relationship.¹⁶⁴ The labels assigned to the parties in a contract to describe the relationship are not conclusive and hold little weight.¹⁶⁵ Therefore, this factor favors an employer-employee relationship.

Based on this balancing test of factors, a court deciding the employment status of Uber drivers for VAT purposes would most likely rule that the Contract constitutes a contract of services, coterminous with employment—not the superficial partnership Uber contends, as it disguises its employees as “partners.”

Next, a court must assess whether the employer-employee relationship concluded by the Contract is vitiated by the economic reality of the relationship in light of the relevant facts, including: (1) working conditions; (2) remuneration; (3) employer's liability; (4) who supplies the service to the customer; and (5) control.¹⁶⁶ Precedent holds that the mutual-ity of obligation discussed above and the requirement of control by the employer remain the irreducible minimum for a contract of service to exist.¹⁶⁷ The focus turns on whether the Uber driver performs his or her service as a person in business on his or her own account.¹⁶⁸

163. *Legal: Terms and Conditions (UK)*, *supra* note 61.

164. *Uber B.V. v. Aslam*, Appeal No. UKEAT/0056/17/DA ¶ 3.

165. *Comm'n for HM Revenue & Customs v. Secret Hotels2 Ltd.* [2014] UKSC 16, [10] (appeal taken from EWCA (Civ)).

166. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU); *see also* *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and Nat'l Ins.* [1968] QB 497, (Eng.) (deciding that a contract of service exists if three conditions are fulfilled: 1) remuneration in return for personal service; 2) employer has right of control; and 3) the other provisions of the contract are consistent with its being a contract of service.); *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, *supra* note 139 (reasoning that “control” is not a decisive factor and introducing the “in business on own account” test that asks whether the individual in question is performing the services as a person in business on his or her own account. No exhaustive list has been compiled of the considerations that are relevant in determining whether there is a contract of employment and there are no strict rules as to the weight of each of the factors. Other factors that are of importance include whether the person has his own equipment, whether he hires his own helpers, and the degree of financial risk that he takes.)

167. *Employment Status Manual: Nethermere (St. Neots) Ltd. v Gardiner and Taverna*, GOV.UK, available at <https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm7110> (last visited Nov. 22, 2018).

168. *Employment Status Manual: Market Investigations Ltd v Minister of Social Security*, *supra* note 139.

1) *Working Conditions*

Regarding working conditions, Uber drivers do not have a designated address or office; technically, their vehicles are their offices. However, the drivers complete their work only at locations where Uber retains authorization to operate and where customers may access the app. Uber provides its contact information—including its address—in place of that of its drivers'. Working conditions also include the app that drivers must activate to begin and end working time. Drivers activate the app through their own cellular devices. The app is their “virtual office” and Uber maintains and updates all content on the app. This situation equates to employees who use their own laptops to work remotely and access a remote desktop. Although the drivers maintain the working conditions of their physical place of work (i.e. their cars), Uber is responsible for the working conditions of the Uber app where the drivers conduct all their business virtually.

2) *Remuneration*

For a contract of employment—or just a contract in general—to exist, there must be consideration, specifically in the form of a wage or other remuneration.¹⁶⁹ All transactions between drivers and passengers are conducted through the Uber app. Uber's business structure, discussed in Section I(D), describes how Uber first receives the fare, keeps its percentage, and then pays the drivers. In the UK, Uber deducts 20 percent of each ride and pays the remainder back to the driver.¹⁷⁰ Thus, Uber pays the drivers remuneration for all trips they complete.

3) *Employer's Liability*

According to the Contract, there is no provision that states that Uber claims or disclaims liability for its drivers.¹⁷¹ Despite this lack of information in the Contract, on June 1, 2018, Uber launched “Partner Protection Insurance with AXA” (“Insurance”) in the UK.¹⁷² This Insurance protects eligible drivers from the “financial cost of life-changing events with insurance from AXA... events like injury, sickness, or having a baby don't have to come with all of the additional financial stress.”¹⁷³ Uber automatically insures its drivers through the Insurance, which covers,

169. *Employment Status Manual: Nethermere (St. Neots) Ltd. v. Gardiner and Taverna*, *supra* note 167.

170. O'Keefe & Jones, *supra* note 52.

171. *Legal: Terms and Conditions (UK)*, *supra* note 61.

172. *Partner Protection Insurance With AXA*, UBER, available at <https://www.uber.com/en-GB/drive/insurance/> (last visited Nov. 22, 2018).

173. *Id.*

subject to limits: medical expenses, death, permanent disability, hospitalization and injuries, maternity/paternity leave, and jury service.¹⁷⁴ The Insurance covers events that happen during “working time” and events that happen not during “working time.”¹⁷⁵ This is persuasive evidence that Uber claims liability as an employer for its employees.

4) *Supplier of Service*

Uber attempts to argue that it does not provide a transportation service, but that the drivers provide a transportation service. The Contract states that “Uber UK is not a Transportation Provider and does not provide transportation services. Transportation services are provided to you under a contract (the “Transportation Contract”) between you and the Transportation Provider [driver] that is identified to you in the booking confirmation provided by Uber UK.”¹⁷⁶ Despite Uber's efforts, it has already been determined that plain titles are not determinative and a court will look at the economic reality of the relationship.¹⁷⁷ As concluded in Section III(A), Uber provides a transportation service (Uber app), because a transportation service includes any service inherently linked to the physical act of transporting persons from one place to another and that is an integral part of the overall service.¹⁷⁸ Therefore, Uber provides the transportation service.

5) *Control*

In assessing whether an employer-employee relationship exists, one must establish control, which is vital in VAT cases.¹⁷⁹ Passengers pay for their rides and drivers receive payment through the Uber app. Uber sets the rate per ride and may increase the rate with “surge pricing.” Uber triggers surge pricing when there is high demand from customers, coupled with low supply of rides, such as on Friday and Saturday nights from 12-3 A.M. The Employment Tribunal in the UK stated that “[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common “platform” is to our minds faintly ridiculous . . . But drivers do

174. *Id.*

175. *Id.*

176. *Legal: Terms and Conditions (UK)*, *supra* note 61.

177. *Uber B.V. v. Aslam*, Appeal No. UKEAT/0056/17/DA ¶ 99; *see also* *Comm'n for HM Revenue & Customs v. Secret Hotels2 Ltd.* [2014] UKSC 16, [10] (appeal taken from EWCA (Civ)).

178. *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, 2017 EUR-Lex CELEX LEXIS 981.

179. FREEDMAN, *supra* note 116, at 31.

not and cannot negotiate with passengers . . . they are offered and accept trips strictly on Uber's terms."¹⁸⁰ According to the Contract,

Uber may, in Uber's sole discretion, create promotional codes that may be redeemed for Account credit, or other features or benefits related to the Services. [A]ll Charges . . . and payment will be [enabled] . . . by Uber using the preferred payment method . . . [and] Uber reserves the right to establish, remove and/or revise Charges for any or all services or goods obtained through the use of the Services at any time in Uber's sole discretion.¹⁸¹

Uber receives the full fare amount before it allocates an amount to the drivers and reserves the right to issue promotional offers and discounts. Uber dictates the fare that the passenger is charged and the amount the driver receives.¹⁸² Drivers carry no voice when it comes to pricing or when surge pricing is activated—Uber maintains sole discretion.

Uber not only enjoys the sole discretion of governing fare prices, but also the hiring and terminating of drivers, and temporarily or permanently disabling drivers' accounts. Uber may disable a driver's account for various reasons, including, but not limited to: failing a background check; receiving an average driver rating lower than 4.6; giving away free rides; frequently cancelling rides; and not completing at least one ride per month.¹⁸³ Uber acts as an employer, where temporarily disabling a driver's account qualifies as "probation" and permanently disabling one's account qualifies as "termination." Without access to the app, the driver cannot access passengers and complete the trips.

In conclusion, it remains apparent that the Contract exists as a contract of service and the economic reality proves that Uber is the employer of the drivers, who constitute employees. Uber is therefore a taxable person who carries out, independently, an economic activity.¹⁸⁴

iii. Uber Exceeds the Threshold

Uber is "a taxable person for the purposes of this Act [UK VAT Act]... [and] is required to be, registered under this Act [UK VAT Act]."¹⁸⁵ Uber is the supplier of the services since it is the employer, and the reverse charge is inapplicable. Uber is obliged to register, charge, and

180. Uber B.V. v. Aslam, Appeal No. UKEAT/0056/17/DA ¶ 28.

181. *Legal: Terms and Conditions (UK)*, *supra* note 61.

182. *Id.*

183. *Id.*; *see also* Hartmans, *supra* note 143.

184. Value Added Tax Committee, *supra* note 105; *see also* VAT Taxable Person Manual, *supra* note 105; Council Directive 2006/112, art. 9(1), 2006 O.J. (L 347) 1, 11 (EU).

185. Value Added Tax Act 1994, c. 23, § 3(1) (UK).

report VAT on its bookings in the UK, as it meets all the requirements to be registered under the UK VAT Act.

The VAT threshold to register is measured by a business's total VAT taxable revenue ("VAT Revenue") of everything it sells or supplies in a 12-month period.¹⁸⁶ If a business's VAT Revenue is £85,000 or more per year, it must charge the 20 percent VAT rate in the UK.¹⁸⁷ Uber is a billion-dollar technology powerhouse with revenue clearly exceeding the threshold; therefore, it must charge the 20 percent VAT rate on each ride.

D. The Impact on the UK's Economy

Introducing a new entity into a market naturally increases competition, but regulatory laws, such as tax laws, level the playing field. The EU VAT Directive establishes a blanket tax law and requires all EU countries to enact it. However, Uber asserts that it represents an exception to this law and is not required to charge VAT on each ride. This negatively impacts the UK economy in two ways: (1) it disadvantages businesses that wish to claim the expense of an Uber ride on their VAT returns; and (2) it leads to unfair competition and an uproar in the taxicab industry.

1. Person/Entity's Reclamation of Uber Journey on VAT Return

Jolyon Maugham QC ("Maugham"), a barrister at Devereux Chambers, paid for an Uber to drive him from his office to meet with a client.¹⁸⁸ Uber did not provide him with a VAT receipt and, thus, he was unable to claim the money back from HMRC.¹⁸⁹

In retaliation, Maugham chose to pursue a lawsuit through the Good Law Project (the "Project").¹⁹⁰ The Project gained funding to prosecute and issue proceedings against Uber in the High Court of London (the "Court").¹⁹¹ Maugham argues that Uber is obliged to provide him with a VAT receipt because Uber provided him with a service when Maugham

186. *Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018*, *supra* note 70.

187. *Id.*

188. Barney Thompson & Vanessa Houlder, *Uber Faces New Pressure from Crowdfunded VAT Case*, *FIN. TIMES* (June 28, 2017), available at <https://www.ft.com/content/19c1afe8-5a8f-11e7-b553-e2df1b0c3220> (last visited Nov. 21, 2018).

189. *Id.*

190. Joel Hills, *Call for Whitehall to Boycott Uber as the Company Is Accused of Tax Avoidance and Sued for Unpaid VAT*, *ITV* (Feb. 20, 2017), available at <http://www.itv.com/news/2017-02-20/call-for-whitehall-to-boycott-uber-as-the-company-is-accused-of-tax-avoidance-and-sued-for-unpaid-vat/> (last visited Nov. 25, 2018).

191. *Uber Case*, GOOD LAW PROJECT, available at <https://goodlawproject.org/uber-case/> (last visited Nov. 21, 2018).

took a ride from his office to meet a client.¹⁹² Maugham demands a VAT receipt of £56.¹⁹³ Additionally, Maugham alleges that Uber “gam[es] the [EU] tax system” in a way which “gives it an unfair advantage over its rivals and at a cost to the taxpayer.”¹⁹⁴ Furthermore, Maugham states that “Uber undoubtedly has arranged its business model to minimi[z]e its tax liability, to dodge taxes... and to minimi[z]e the workers’ rights that it has to offer to its drivers.”¹⁹⁵ This case is a part of a larger effort to address complaints and “understand whether HMRC treats these big [U.S.] multinationals[,] including Uber[,] with kid gloves.”¹⁹⁶ If Maugham succeeds in this case, Uber may suffer a hit with a much higher tax bill.¹⁹⁷ The Court may require Uber to pay hundreds of millions in backdated VAT,¹⁹⁸ demolishing the company’s lucrative business model.

2. Unfair Competition

In the UK, Uber charges less per ride than its competitors because all of its competitors’ fares include the 20 percent VAT on their booking fees.¹⁹⁹ By classifying itself as a technology platform, misrepresenting its place of supply, and treating each Uber driver as an independent contractor, Uber exploits EU VAT legislation by offering cheaper fares and depriving HMRC of approximately £40 million in VAT per year.²⁰⁰

Uber’s business model is labeled an “unfair business practice” that constitutes “unfair competition.”²⁰¹ This led to revocation of licenses and a partial or complete ban of Uber in many EU countries.²⁰² For example,

192. *Id.*

193. *Id.*

194. Hills, *supra* note 190.

195. *Id.*

196. *Uber Case*, *supra* note 191.

197. See John Stevens, *Does Uber Owe the Taxman Hundreds of Millions in VAT?*, DAILY MAIL (Mar. 27, 2017), available at <https://www.dailymail.co.uk/news/article-4358770/Does-Uber-owe-taxman-hundreds-millions-VAT.html> (last visited Nov. 25, 2018).

198. *Id.*

199. Bergin, *supra* note 90.

200. James Salmon & Katherine Rushton, *Revealed, Uber’s £40m Tax Loophole: Taxi Firm Registers Each of Its Drivers as a Separate Business to Avoid Paying VAT on Booking Fees*, DAILY MAIL (June 7, 2017), available at <http://www.dailymail.co.uk/news/article-4583044/Revealed-Uber-s-40m-tax-loophole-avoid-paying-VAT.html> (last visited Nov. 22, 2018).

201. Anna Rhodes, *Uber: Which Countries Have Banned the Controversial Taxi App*, THE INDEP. (Sept. 22, 2017), available at <http://www.independent.co.uk/travel/news-and-advice/uber-ban-countries-where-world-taxi-app-europe-taxi-us-states-china-asia-legal-a7707436.html> (last visited Nov. 22, 2018).

202. *Id.*

Uber officially launched in London in 2012 and claims to be 23 percent cheaper than Green Tomato Cars, a minicab rival in the city.²⁰³ However, Transport for London (“TfL”) rejected Uber’s application to renew its London license to operate in the city on the basis that it was “not a “fit and proper” private car hire operator” and that “Uber’s approach and conduct demonstrate a lack of corporate responsibility.”²⁰⁴

Uber’s unfair business practices prevent funds from re-entering the UK economy, resulting in lack of support for the UK community. By charging less per ride, Uber takes business away from its competitors who pay the VAT. When an individual purchases an Uber ride, the total fare goes directly to Uber; but if an individual buys a taxi ride that does not participate in the sharing economy, 20 percent of the fare will go back into the UK’s economy in the form of VAT. The increased usage of Uber deducts from the UK tax amount needed to support public commodities.

VAT represents the third largest tax in terms of receipts,²⁰⁵ therefore making it one of the main sources of income for HMRC. Further, VAT consists of one of the major sources of revenue for the EU, as it raised over £1 trillion in 2015, equivalent to seven percent of EU GDP.²⁰⁶ Conclusively, this will negatively impact the UK because the budget for government expenditures such as education, security, infrastructure, hospitals, and transportation will decrease with less VAT being collected.²⁰⁷

III. ARGUMENT

The EC needs to address this tax scheme in the VAT system, which is exploited by many multi-national companies—such as Google,

203. Hills, *supra* note 190.

204. Sarah Butler & Gwyn Topham, *Uber Stripped of London Licence Due to Lack of Corporate Responsibility*, THE GUARDIAN (Sept. 22, 2017), available at <https://www.theguardian.com/technology/2017/sep/22/uber-licence-transport-for-london-tfl> (last visited Nov. 25, 2018).

205. Phillip Inman, *Where Does the UK Government Get Its Money, and What Does It Spend It All On?*, THE GUARDIAN (Nov. 22, 2017), available at <https://www.theguardian.com/uk-news/ng-interactive/2017/nov/22/where-does-the-uk-government-get-its-money-and-what-does-it-spend-it-all-on> (last visited Nov. 22, 2018).

206. European Commission Press Release IP/17/4946, *Fair Taxation: Commission Proposes New Tools to Combat VAT Fraud* (Nov. 30, 2017), available at http://europa.eu/rapid/press-release_IP-17-4946_en.htm (last visited Nov. 22, 2018).

207. Cormac O’Sullivan, *The Making of ‘Where Does Your Tax Go?’*, PUB. POL’Y IE (Oct. 10, 2013), available at <http://www.publicpolicy.ie/making-tax-go/> (last visited Nov. 22, 2018).

Facebook, and Uber.²⁰⁸ Permitting these multi-billion-dollar companies to continue this type of tax evasion is both impracticable for business and counter to public interest. Proponents of the sharing economy may applaud Uber's tax scheme and perceive it as a well-constructed tax plan to avoid taxes across borders. However, by refusing to charge VAT in the UK, Uber's tactics go beyond manipulating a tax loophole—it is committing tax evasion. This Section asserts three points: (1) the UK VAT Act applies to Uber; (2) Uber's refusal to charge VAT is tax evasion; and (3) an examination of the UK's implementation of the Digital Single Market shows that it needs an EU task force to prevent tax evasion of VAT.

A. Traditional Law Does Apply

Uber presumes to have found a “gray area” in the UK VAT Act regulatory framework, but a simple application of the UK VAT Act establishes that Uber is no anomaly. Under the traditional rule of the UK VAT Act, taxable persons or entities who supply goods and services (even electronically) with a place of supply in the UK and have a VAT Revenue of £85,000 or more must charge VAT.²⁰⁹ As set out in detail above, Uber constitutes a taxable person that supplies a transportation service with a place of supply in the UK, and it has a VAT Revenue of more than £85,000.²¹⁰ Therefore, the traditional UK VAT Act applies to the bookings made through the transportation service (Uber app) by passengers in the UK.²¹¹

Proponents of Uber and the ride-sharing industry might excuse Uber from the current UK VAT Act because it does not strictly state “digital services” or “e-commerce;” but this simply holds no truth. The EC published Working Paper 878 (the “Paper”), which represents the most comprehensive guidance for the application of the existing VAT provisions to the sharing economy.²¹² In the Paper, the EC answers questions and applies guidelines concerning the existing VAT provisions to the sharing economy.²¹³ The Paper reiterates that services provided by sharing

208. Bergin, *supra* note 90.

209. Value Added Tax Act 1994, c. 23, § 1 (UK); *see also* Policy Paper VAT: Maintain Thresholds for 2 Years From 1 April 2018, *supra* note 70.

210. *See infra*, Section III.

211. *See* Value Added Tax Act 1994, c. 23, § 4(1) (UK); *see also* I. Grlica, *European Union-How the Sharing Economy Is Challenging the EU VAT System*, 28 INT'L VAT MONITOR 124, 126 (Mar. 14, 2017).

212. Value Added Tax Committee, *supra* note 105.

213. *Id.*

economy platforms to their users constitute taxable transactions and are subject to VAT.²¹⁴

The Paper focuses on businesses that supply services through sharing economy platforms via mobile applications/websites, which may include a financial service for consumers to make payments.²¹⁵ Under the section titled “Services provided by online sharing economy platforms,” the EC explains that services provided by online sharing economy platforms are subject to VAT where those online platforms supply services for consideration.²¹⁶ The Paper recognizes that the relationship between a sharing economy platform and an individual may resemble an employer-employee relationship.²¹⁷ The EC states that:

[i]f the actual relationship between the sharing economy platform and an individual goods or services provider resembles that of an employer and employee, the situation must be treated accordingly and the issue as to whether economic activity is conducted independently carefully analysed.²¹⁸

The EC does not provide instruction on how to handle VAT in the situation described above, and leaves the floor open for each Member State to administer its own legislation. UK VAT guidance cites to Article 10 of the EU VAT Directive that states that:

[t]he condition in Article 9(1) that the economic activity be conducted ‘independently’ shall exclude employed and other persons from VAT in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer’s liability.²¹⁹

It is evident that employees acting on behalf of their employers are not taxable persons.²²⁰ This long-standing rule is explicit on how Uber, as the employer, is required to charge VAT.²²¹ Based on the EU and UK legislation, Uber falls within the scope of VAT and it is obliged to charge

214. *See generally id.*

215. *Id.* at 11.

216. *Id.* at 10.

217. Value Added Tax Committee, *supra* note 105, at 7.

218. *Id.* (stating in footnote 22 that “in the United States several government bodies ruled that Uber drivers are employees, not independent contractors while others issued rulings that classify Uber drivers as independent contractors.”)

219. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU); *see also VAT Taxable Person Manual*, Gov.UK (Apr. 12, 2016), available at <https://www.gov.uk/hmrc-internal-manuals/vat-taxable-person/vtaxper23000> (last visited Nov. 25, 2018).

220. Council Directive 2006/112, art. 10, 2006 O.J. (L 347) 1, 11 (EU).

221. *See generally* Value Added Tax Committee, *supra* note 105.

VAT. The EC states, “VAT treatment of services provided by online sharing economy platforms . . . [is] straightforward.”²²² In the future, a digital platform may exceed the borders of the EU VAT Directive and UK VAT Act, but, currently, Uber is not it.

B. VAT Fraud is Tax Evasion

Today, Uber heads down a dead-end road as calculations conclude that Uber owes HMRC approximately £40 million in VAT per year.²²³ Nearly £20 million in VAT comes from London alone, and this amount only accounts for 2015.²²⁴ Uber’s complex global tax scheme might be regarded as “top-performing,” but this is not just tax avoidance—it is tax evasion.

Tax avoidance is the legitimate minimization of taxes by use of methods in the UK’s Tax Code.²²⁵ Businesses and individuals avoid paying taxes by taking legitimate deductions, such as donating money to an approved charity, and sheltering income through a tax deferral plan, such as an IRA or 401(k) plan.²²⁶ A tax loophole “allows a person or business to avoid the scope of a law or restriction without directly violating the law.”²²⁷ Tax avoidance and taking advantage of a tax loophole are legal.²²⁸ However, tax evasion, also known as tax fraud, is the illegal practice of intentionally avoiding to pay the full amount of tax an individual or entity owes.²²⁹ The European Parliament defines tax evasion as not declaring income consumption or production for taxation, despite the fact that the income is taxable.²³⁰ VAT fraud is a type of tax evasion that occurs when a business does not charge VAT when it should, or charges

222. *Id.* at 11.

223. Salmon & Rushton, *supra* note 200; *see also* Bergin, *supra* note 90.

224. Shona Ghosh, *Uber Is Being Sued in the UK for at Least £20 Million in VAT*, BUS. INSIDER NORDIC, available at <https://nordic.businessinsider.com/uber-is-being-sued-for-at-least-20-million-in-vat-2017-2/> (last visited Nov. 22, 2018).

225. Jean Murray, *What Is the Difference Between Tax Avoidance and Tax Evasion?*, THE BALANCE (Oct. 28, 2018), available at <https://www.the-balance.com/tax-avoidance-vs-evasion-397671> (last visited Nov. 22, 2018).

226. *Id.*

227. *Loophole*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/l/loophole.asp> (last visited Nov. 22, 2018).

228. Murray, *supra* note 225.

229. *Tax Evasion*, INVESTOPEDIA, available at <https://www.investopedia.com/terms/t/taxevasion.asp> (last visited Nov. 25, 2018).

230. Cécile Remeur, *Tax Policy in the EU, Issues and Challenges*, EPRS (Feb. 2015), available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549001/EPRS_IDA%282015%29549001_EN.pdf (last visited Nov. 22, 2018).

VAT to an individual but does not pay it to HMRC.²³¹ For example, a business commits VAT fraud, and therefore tax evasion, if it fails to register for VAT when it is obliged to under the UK VAT Act.²³²

Precedent, and the in-depth analysis in Section III(C)(2), proves that Uber drivers are workers and not self-employed contractors, and a court will likely find that the drivers fall under the definition of employees for VAT purposes. Uber can no longer manipulate the reverse charge to impose the obligation to register and report VAT onto Uber drivers. Uber's net worth is \$70 billion (over £50 billion),²³³ which certainly exceeds the £85,000 threshold. Accordingly, Uber has the duty to register and charge VAT on each and every booking in the UK. Since Uber is not registered for VAT as it should be, Uber is committing VAT fraud, and thus, tax evasion, in the UK. No "gray area" exists here.

At a day-long summit in Estonia, leaders from EU countries argued "that tech giants have used low-tax regimes to cut out billions of euros that they should have paid in the EU."²³⁴ EU leaders acknowledged that these "low-tax regimes" eliminate the VAT that should have been paid to the EU.²³⁵ Furthermore, on November 30, 2017, the European Commissioner for Economic and Financial Affairs, Taxation, and Customs stated at an EC conference in Brussels that information on business and cross-border sales overwhelms the manual processing of information, and this fast-moving criminal activity remains "not currently tracked [or] tackled quickly enough."²³⁶

The National Audit Office ("NAO") deserted the laissez-faire demeanor of HMRC and conducted an investigation on online sellers who do not charge VAT on their goods and services located in the UK and sold to UK customers.²³⁷ In the NAO's investigation, HMRC estimates

231. *Report VAT Fraud*, Gov.UK, available at <https://www.gov.uk/report-vat-fraud> (last visited Nov. 22, 2018).

232. *Id.*

233. Avery Hartmans & Rob Price, *The Rise and Fall of Travis Kalanick, Uber's Embattled Billionaire Founder Who Just Resigned as CEO*, BUS. INSIDER (June 21, 2017), available at <http://www.businessinsider.com/uber-ceo-travis-kalanick-life-rise-and-fall-photos-resigned-2017-6> (last visited Nov. 22, 2018).

234. Catherine Stupp, *Tax Fight Draws Divisions at EU Digital Summit*, EURACTIV (Sept. 29, 2017), available at <http://www.euractiv.com/section/economy-jobs/news/tax-fight-draws-divisions-at-eu-digital-summit/> (last visited Nov. 22, 2018).

235. *See id.*

236. European Commission Press Release IP/17/4946, *supra* note 206.

237. *Investigation Into Overseas Sellers Failing to Charge VAT on Online Sales*, NAT'L AUDIT OFF. (Apr. 19, 2017), available at <https://www.nao.org.uk/report/investigation-into-overseas-sellers-failing-to-charge-vat-on-online-sales/> (last

“that [there was] online VAT fraud and error cost between £1 billion and £1.5 billion in lost tax revenue in 2015-16.”²³⁸ This estimate enlarges the EU tax gap and represents tax money not contributed to the EU economy. The Chancellor’s budget for 2018 states that tax money will be used for public transport (creating new rail lines and widening roads), education (building new schools), defense (military budget), housing (increased building), and social protection (housing and disability benefits).²³⁹ The approximately £20 million (in London alone) in VAT that Uber failed to pay in 2015 is part of the £1-1.5 billion in lost tax revenue that impacts the EU’s economy and citizens.²⁴⁰ Contribution of that money to the Chancellor’s budget would increase growth and the general welfare of the community; instead, Uber profits off tax money that belongs to the citizens of the EU.

C. Digital Single Market for VAT

The sharing economy is growing at an incredible rate and shaping advanced business structures, agreements, organizations, kinds of exchange, and employment strategies. Evidently, the traditional VAT regulatory framework presents confusion to businesses in the sharing economy. EU legislators should amend the EU VAT Directive to include provisions that make clear that it directly applies to the sharing economy. However, “correcting the tax treatment of sharing economy businesses will not be as easy as announcing a rule change[;] rules for registration and compliance must change too.”²⁴¹

1. EC Proposes the Digital Single Market

In May 2015, the EC, in conjunction with the Organization for Economic Co-operation and Development (“OECD”), proposed legislation on modernizing VAT for cross-border digital trade and to prevent tax evasion concerning VAT in the EU.²⁴² This package of legislation will

visited Nov. 22, 2018); *see also* Madison Marriage & Madhumita Murgia, *Taxman Under Fire for Failing to Probe Uber Stance on VAT*, FIN. TIMES (Oct. 26, 2017), available at <https://www.ft.com/content/7ca2f852-b5b5-11e7-a398-73d59db9e399> (last visited Oct. 12, 2018).

238. Marriage & Murgia, *supra* note 237.

239. Inman, *supra* note 205.

240. Ghosh, *supra* note 224.

241. *Sharing Economy Shows Up Outdated Tax Rules*, FIN. TIMES (Jan. 3, 2017), available at <https://www.google.com/amp/s/amp.ft.com/content/56567f7a-d1cc-11e6-9341-7393bb2e1b51> (last visited Nov. 22, 2018).

242. *See* Mercedes Samavi & Trevor James, *EU Digital Market VAT Reform*, LEXOLOGY (Apr. 30, 2018), available at <https://www.lexology.com/library/detail.aspx?g=2d582e24-cccc-4ab8-bcdf-9b825e73abe8> (last visited Nov. 25, 2018); *see also* *Economic and Financial Affairs*, EUR. COUNCIL (May 12, 2017), available

be in full effect in 2021 and outlines the Digital Single Market, introducing the first EU-wide VAT online marketplace for companies operating online.²⁴³ Businesses that sell goods and services online will be able to access the “One Stop Shop” (“OSS”), the digital online portal.²⁴⁴ The Digital Single Market unifies all EU countries and modernizes the VAT process and clarifies the already-established law that businesses in the sharing economy are not exempt from the traditional VAT legislation.

2. *The Digital Single Market Simplifies Registration*

The Digital Single Market strategy has 16 “Key Actions.” Specifically, Key Action 8 targets the application of VAT rules on the trade of digital goods and services.²⁴⁵ Currently, businesses that sell e-services are able to sell to consumers in other Member States, but must register for VAT in each EU Member State in which they sell.²⁴⁶ This adds additional complexity, costs, and burdens that will diminish once there is a move to the Digital Single Market.²⁴⁷ The Digital Single Market extends the already in-use EU-wide portal called OSS to companies that sell goods and services online.²⁴⁸ The Digital Single Market allows businesses to account for all VAT in a single quarterly return through the online portal hosted by their home tax administration.²⁴⁹ The VAT Revenue apportioned to the Supplier Business’s home tax administration will then be transferred to the relevant Member State in which the business sold e-services to consumers.²⁵⁰ Overall, businesses located outside of the UK will generate £2.3 billion in savings.²⁵¹

The new legislation also provides a more straight-forward “place of supply standard.” The VAT rate charged on these e-commerce sales will have a place of supply determined by the Member State where the consumer lives, regardless of the location of the online retailer.²⁵² This uniform standard will make it easier for businesses participating in cross-

at <http://www.consilium.europa.eu/en/meetings/ecofin/2017/12/05/> (last visited Nov. 25, 2018).

243. Samavi & James, *supra* note 242.

244. European Commission Press Release MEMO/16/3746, *Modernising VAT for E-Commerce: Question and Answer* (December 5, 2017).

245. Samavi & James, *supra* note 242.

246. European Commission Press Release MEMO/16/3746, *supra* note 244.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. European Commission Press Release 734/17, *VAT on Electronic Commerce: New Rules Adopted* (December 5, 2017).

252. European Commission Press Release MEMO/16/3746, *supra* note 244.

border transactions to identify the VAT rate and determine how much to charge.²⁵³

3. *Strict Compliance*

For the Digital Single Market to be successful, tax authorities must enforce compliance of the Digital Single Market to all domestic and international businesses. Meg Hillier, Labour MP, stated that the “HMRC needs to be much more adept at working out how working practices are changing and . . . has been slow to react to new business models.”²⁵⁴ Surprisingly, with the litany of legal disputes involving Uber, the UK tax authority never opened a formal investigation into Uber’s approach to VAT until last year (2017).²⁵⁵ Margaret Hodge, Labour MP, stated that HMRC’s “persistent reluctance to test the questionable financial practices of some companies in the courts . . . was a scandal of the UK tax system.”²⁵⁶

HMRC created the Fraud Investigations Service Unit (“FIS”) in 2015, due to political pressure to increase the number of successful tax prosecutions in the UK.²⁵⁷ FIS conducts civil and criminal investigations to combat tax fraud across all taxes that HMRC is responsible for overseeing.²⁵⁸ Each Member State controls its own task force to combat VAT fraud, but to investigate multi-national companies operating in multiple Member States, I recommend that the EU establish one organization (“Task Force”) responsible for civil and criminal investigations regarding VAT fraud. The EC is mid-way through implementing the Digital Single Market and it should also establish a Task Force to mirror its goal of uniformity. The Task Force would guarantee strict compliance with the Digital Single Market and is impertinent to its success.

253. *Id.*

254. Marriage & Murgia, *supra* note 237.

255. *Id.*; see also *Investigation Into Overseas Sellers Failing to Charge VAT on Online Sales*, *supra* note 237.

256. Marriage & Murgia, *supra* note 237.

257. Emanuela Hawker, *HMRC Fraud Investigation Team Collected £5.47bn in Extra Tax Equaling 7% Rise on Last Year*, ACCOUNTANCYAGE (Sept. 11, 2018), available at <https://www.accountancyage.com/hmrc-fsi-team-up-by-7-in-last-year-collecting-5-47-in-extra-tax/> (last visited Nov. 20, 2018).

258. *Who Are the HMRC Fraud Investigations Service Unit and What Do They Do?*, MAZARS, available at <https://www.mazars.co.uk/Home/Services/Tax/Tax-investigations/Who-are-the-HMRC-Fraud-Investigations-Service-Unit> (last visited Nov. 20, 2018).

IV. CONCLUSION

The UK VAT Act applies to Uber's business model. Uber argues that the UK VAT Act does not apply to it because it is not a taxable person (entity), as it implements the reverse charge and classifies the drivers as independent contractors, who offers a service with a place of supply in the UK. However, the Uber app constitutes a service with its place of supply in the UK and Uber is a taxable person, as an employer, who exceeds the VAT Revenue threshold of £85,000. By refusing to register and charge VAT under the UK VAT Act, Uber is committing VAT fraud, and thus tax evasion. EU and UK legislation clearly state that services provided by sharing economy platforms to their users shall constitute taxable transactions and are subjected to VAT.²⁵⁹ The EC clarified the application of the UK VAT Act to businesses in the sharing economy; yet, Uber still refuses to play by the rules.

The EC and OECD proposed legislation to modernize the VAT system. The implementation of the Digital Single Market will create a more fair and uniform method in the EU's business industry between domestic sales and cross-border transactions.²⁶⁰ It is explicitly stated that all goods and services bought online will be subject to VAT, in line with current EU sales practices.²⁶¹ The EC stated that:

evidence of abuse of the existing intra-EU [VAT system] . . . [that] involve[s] sellers taking advantage of differentials in VAT rates between Member States . . . or indeed not charging any VAT at all. These sellers exploit the lack of cooperation between Member States which harms citizens in terms of tax [pounds needed] to fund public services and businesses in terms of their competitiveness.²⁶²

However, by using the Digital Single Market, VAT compliance will need to be strictly enforced by one Task Force to reduce the kind of VAT fraud utilized by Uber.²⁶³

Uber's self-proclaimed status as a technology platform, its use of the reverse charge with its drivers as independent contractors, and its belief that its Dutch subsidiary controls the VAT rate shields Uber from not

259. See generally Value Added Tax Committee, *supra* note 105.

260. See generally European Commission Press Release MEMO/16/3746, *supra* note 244.

261. *Id.*

262. *Id.*

263. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe, COM (2015) 192 final (May 6, 2015).

charging VAT. Despite Uber's arguments, under the EU VAT Directive, UK VAT Act, and other precedent Uber's claims are incorrect and, as a result, Uber is committing tax fraud on the international level. Uber will soon be smelling burning rubber as it is left in the smoke to reap the consequences of its illegal tax practices.